

IN THE SUPREME COURT OF FLORIDA
Case No. SC15-1893

(Second DCA Case No. 2D14-3450)

AMBER EDWARDS,

Petitioner,

vs.

BARTOW HMA, LLC d/b/a
BARTOW REGIONAL
MEDICAL CENTER,

Respondent.

_____ /

APPENDIX TO EDWARDS' INITIAL BRIEF

KARA BERARD ROCKENBACH, ESQ.

Florida Bar No. 0044903

KRISTI BERGEMANN ROTHELL, ESQ.

Florida Bar No. 0632538

METHE & ROCKENBACH, P.A.

Appellate Counsel for EDWARDS

1555 Palm Beach Lakes Blvd., Suite 301

West Palm Beach, FL 33401

(561) 727-3600 telephone

(561) 727-3601 facsimile

kbrock@flacivillaw.com

krothell@flacivillaw.com

tbermudez@flacivillaw.com

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via email this 28th day of November, 2016 to: **Karen E. Terry, Esq.**, Searcy Denney Scarola Barnhart & Shipley, P.A., (Counsel for EDWARDS), 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409, Email: terryteam@searcylaw.com; ket@searcylaw.com; mks@searcylaw.com; and aje@searcylaw.com; **Scott B. Albee, Esq.**, Fulmer LeRoy & Albee, PLLC, 605 S. Boulevard, Tampa, FL 33606; Email: sAlbee@fulmerleroy.com; sSchaefer@fulmerleroy.com; and eservicetpa@fulmerleroy.com; **Amy L. Dilday, Esq.**, and **Andrew R. McCumber, Esq.**, McCumber, Daniels, Buntz, Hartig & Puig, P.A., (Appellate Counsel for BARTOW), 4401 W. Kennedy Blvd., Suite 20, Tampa, FL 33609-2058, Emails: adilday@mccumberdaniels.com; amiles@mccumberdaniels.com and amccumber@mccumberdaniels.com; and **Holly B. Platter, Esq.**, Graziano & Rice, P.A., (Counsel for THOMAS, M.D.), 101 East Kennedy Blvd., Suite 1700, Tampa, FL 33602, Email: eserve@bgrplaw.com; and tdomi@bgrplaw.com.

METHE & ROCKENBACH, P.A.
Appellate Counsel for EDWARDS
1555 Palm Beach Lakes Blvd., Suite 301
West Palm Beach, FL 33401
(561) 727-3600 telephone
(561) 727-3601 facsimile
PE: kbrock@flacivillaw.com
2E: krothell@flacivillaw.com
2E: tbermudez@flacivillaw.com

By: /s/ Kara Berard Rockenbach
KARA BERARD ROCKENBACH, ESQ.
Florida Bar Number: 0044903

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

AMBER EDWARDS,

Plaintiff,

vs.

Case No. 53-2012CA-002611

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

Defendants

ORDER FOLLOWING IN CAMERA INSPECTION - JUNE, 2014

THIS MATTER was before the Court for an *in camera* inspection of medical records delivered to the office of the presiding judge on June 16, 2014, and on June 19, 2014, in response to *Plaintiff's Request to Produce to Defendant BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER*, dated July 30, 2013, and in response to this Court's order of June 4, 2014. The production referred to various patients of the Defendant, Larry D. Thomas, M.D., (hereinafter "Defendant Physician"), and the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, (hereinafter "Defendant Hospital"). On June 16, 2014, the Defendant Hospital delivered two privilege logs, titled "Privilege Log A" and "Privilege Log B", four boxes of documents, each box marked with a number, one through four. On June 19, 2014, the Defendant Hospital delivered an additional stack of documents that the Court has identified as the "Supplemental Packet." The Court finds as follows:

- A. Privilege Log A is four pages in length and lists 153 items. The pages of Privilege Log A are not numbered; the items listed on the pages of Privilege Log A are likewise unnumbered. Privilege Log B is one page and lists 21 numbered items. When delivered, the boxes were named but the items in the boxes were not tabbed or numbered. In fact, most of the items delivered in the boxes were not stacked in order to correspond to the listed items on the privilege logs, such that one item may be found in Box 1 but the next listed item may be found in Box 3. Further, various items throughout the four boxes were duplicates. Some of the items were not adequately titled such that the Court was required to analyze how the documents were bound (e.g., clipped or stapled) to identify which item on the written log referenced the physical item observed. The Court was reduced to counting pages to determine if a stack of documents matched the description set forth on the privilege log. In some cases, the Court wrote the page number on the corner of the page in blue ink. As the Court reviewed the documents, the Court affixed a yellow note to each item for ease in identifying the items.
- B. No additional information was provided to assist the Court in identifying relevant documents. The Defendant Hospital has not provided the Court with any identifying reference of the Plaintiff or the Defendant Physician other than the given name of each party. After a



significant time, the Court, on its own, located a document that identified the Defendant Physician as ID#2031.

- C. In reviewing each item separately after the item was identified on one of the logs, the Court determined whether the documents should be provided to the Plaintiff. Specifically, a document should be provided to the Plaintiff if it has been identified as pertaining to the Plaintiff's Request to Produce and also identified as "an adverse medical incident" as defined by Florida Statutes.
- D. The Court has numbered each item on Privilege Log A. This Order will refer to the items in order such that the first item listed will be referred to as Item #1, etc. The Court has made the following findings as to Privilege Log A:

1. (Box 1) Page one of this four-page item should be provided to the Plaintiff after redacting the identifying information of physicians that are irrelevant to the Defendant Physician, a/k/a #2031. This document is also identified as "Focused Review Laparoscopic to Open Procedures June 1, 2009-February 28, 2010 (discharge data)."
2. (Box 1) Page three of this seven-page item should be provided after redacting the identifying information of physicians that are irrelevant to the Defendant Physician, a/k/a #2031. This document is also identified as "BRMC Peer March 18, 2010 Review Meeting."
3. No documents were reviewed as this item was not provided.
4. (Box 1) Two pages identified as Item #4 should be provided to the Plaintiff after redacting identifying information of other physicians irrelevant to the Defendant Physician, a/k/a #2031.
5. (Box 1) Six pages identified as Item #5, also identified as "Chart Review Materials of January 25, 2010 and January 26, 2010" should be provided after redacting identifying information of patients and physicians that are irrelevant to the parties herein.
- 6.-7. (Box 1) No documents were identified as discoverable.
8. No documents were reviewed as this item was not provided.
9. (Box 1) No documents were identified as discoverable.
10. (Box 1) Page three of the four-page item should be provided after redacting identifying information of physicians that are irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "BRMC Peer Review Meeting Notes March 18, 2010".
11. (Box 1) No documents were identified as discoverable.
12. (Box 1) The first two of the three pages identified as Item #12 should be provided after redacting a portion of the second page that refers to physicians other than the Defendant Physician, a/k/a #2031. This item is also identified as "BRMC Peer Review document Re: miscellaneous cases - Undated."
13. (Box 1) No documents were identified as discoverable.
14. (Box 1) The single page identified as Item #14 should be provided after redacting identifying information of physicians irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "Miscellaneous document Re: surgery cases June 2009-February 2010."
15. No documents were reviewed as this item was not provided.
- 16.-17. (Box 1) No items were identified as discoverable.
18. (Box 1) Item #18 should be provided after redacting identifying information of physicians irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "Focused Review Laparoscopic - Open Procedure June 1, 2009-February 28, 2010."

- 62 (Box 1) This item should be produced after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "October 19, 2011 Peer Review Meeting Minutes."
- 63 (Box 1) The item should be provided after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "August 17, 2011 Peer Review Committee Meeting."
- 64.-67 (Box 1) No documents were identified as discoverable
68. (Box 1) This item should be provided after redacting the identifying patient and physician information irrelevant to the parties. The item is also identified as "December 21, 2011 Peer Review Meeting Minutes "
- 69 (Box 1) No documents were identified as discoverable.
- 70 (Box 3) A sixty-one-page document was located with a similar title as that referenced as item #70 on Privilege Log A. However, Privilege Log A identifies item #70 as a 163-page document. Page fifty-five of this sixty-one page document should be provided after redacting the identifying physician information other than the Defendant Physician, #2031. This item is also identified as "Medical Executive Committee meeting materials April 2010."
- 71.-77 (Box 1) No documents were identified as discoverable.
- 78.-81 (Box 3) No documents were identified as discoverable.
82. (Box 3) Page eleven of this thirty-six-page item should be provided after redacting identifying physician information not relevant to the Defendant Physician, a/k/a #2031.
- 83.-85. (Box 3) No documents were identified as discoverable.
86. No documents were reviewed as the item was not provided
- 87 -88. (Box 1) No documents were identified as discoverable
- 89 -98. No documents were reviewed as the item was not provided.
99. (Supplemental Packet) No documents were identified as discoverable.
- 100 No documents were reviewed as the item was not provided.
101. (Box 4) No documents were identified as discoverable.
- 102 (Supplemental Packet) No documents identified as discoverable.
103. No documents were reviewed as the item was not provided
- 104.-112. (Box 2) No documents were identified as discoverable
- 113.-120 (Box 2) No documents were identified as discoverable
121. No documents were reviewed as the item was not provided.
122. (Box 2) Page fifteen and sixteen of the twenty-page item should be produced after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "Surgical Committee Meeting documents February 3, 2010."
123. (Box 2) No documents were identified as discoverable.
- 124 (Box 2) Privilege Log A identifies a four-page record of a meeting on 12/12/10. The four-page record references a meeting on 12/01/10. The Court presumes the date is a typographical error. There were no documents identified as discoverable
- 125.-133. (Box 2) No documents were identified as discoverable.
134. (Box 2) This two-page item should be provided after redacting the identifying information of other physicians irrelevant to the Defendant Physician, a/k/a #2031. This item is also identified as "Peer Review Committee April 15, 2010."
- 135 (Box 2) This one-page item should be provided after redacting the identifying information of physicians irrelevant to the Defendant Physician, a/k/a #2031. This item is also identified as "Focused Review Laparoscopic to Open Procedures June 1, 2009-February 28, 2010 (discharge data)."
- 136 -147. (Box 2) No documents were identified as discoverable.

- 148 (Box 2) No documents were identified as discoverable. This 15-page item was identified from combining a three-page, four-page and eight-page document. Note that the Defendant Hospital delivered this item to the Court with a large yellow note that read "2 3 pages 8 pages." No other identifying information was provided.
- 149 (Box 2) No documents were identified as discoverable.
- 150 (Box 2) A seventy-five-page item was identified with a title, similar to that referenced on Privilege Log A. However, Privilege Log A references this item as eighteen pages. An eighteen-page document was not identified. Nevertheless, no documents in the seventy-five-page item that the Court has identified as Item #150 were identified as discoverable. This item is also identified as "Performance Improvement Committee meeting notes (November 22, 2010)."
- 151 -152 No documents were reviewed as the item was not provided.
- 153 (Box 2) On Privilege Log A, Item 153 is identified as a 17-page report. This report is only ten pages not seventeen. Nevertheless, no documents were identified as discoverable.

E The Court has made the following findings as to Privilege Log B:

1. (Box 3) The 429-page item should be provided after redacting identifying patient and physician information irrelevant to the parties in this matter. This item is also identified as "MR#267579."
2. (Box 3) The 471-page item should be provided after redacting identifying patient and physician information irrelevant to the parties in this matter. This item is also identified as "MR#358058."
3. (Box 2) The 1665-page item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "MR#258053." Note that a duplicate of this item was delivered in Box 4.
4. (Box 4) This item should be provided after redacting identifying patient and physician information that is irrelevant to the parties. This item is also identified as "6/11/10 BRMC Medical Records 872 pp MR#144356."
5. (Box 3) The 244-page item should be provided after redacting identifying patient and physician information that is irrelevant to the parties. This item is also identified as "MR#359080."
6. (Box 1) This 695-page item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "MR#132958."
7. (Box 3) The 149-page item should be provided after redacting identifying patient and physician information irrelevant to the parties herein. This item is also identified as "MR#120733."
8. (Box 4) This item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "BRMC medical records 35 pp. MR#174716."
9. (Box 1) No documents were identified as discoverable.
10. (Box 3) The 82-page item should be provided after redacting patient and physician information that is irrelevant to the parties. This item is also identified as "MR#365424."
11. (Box 2) The 116-page item should be provided after redacting patient and physician information that is irrelevant to the parties. This item is also identified as "MR#370204."

12. (Box 4) The 39-page item should be provided after redacting identifying patient and physician information that is irrelevant to the parties. This item is also identified as MR#365424.
13. (Box 1) The 323-page item should be provided after redacting identifying information of the patient and physicians that are not the parties herein. This item is also identified as "10/12/11 BRMC medical records 323 pp MR# 227307."
14. (Supplemental Packet) This 181-page item should be provided after redacting identifying information of the patient and physicians irrelevant to the parties. This item is also identified as "9/5/12 BRMC medical records 181 pp. MR#346755."
15. (Box 4) This fifty-seven-page item refers to July 2010 on Privilege Log B; however, the documents bound together include September 2010. Only the first 23 pages of this item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "07/2010 Correspondence, reports and miscellaneous items relating to attorney requested external peer review."
16. (Box 4) This item refers to November 2011 on Privilege Log B; however, the documents bound together include December 2011 and 2012 documents. This item should be provided after redacting identifying patient/physician information irrelevant to the parties. This item is also identified as "11/2011 Correspondence, reports, and miscellaneous items relating to attorney requested peer review."
17. No documents have been reviewed as Item #17, as described on Privilege Log B, has not been provided.
18. No documents have been reviewed as Item #18, as described on Privilege Log B, has not been provided. However, see the reference below in Paragraph F regarding the unidentifiable documents found in Box #4.
19. (Box 4) This item is referenced on Privilege Log B as 135 pages. However, there were 122 pages identified as Item #19. No documents were identified as discoverable.
20. (Box 4) This six-page item should be provided after redacting identifying patient/physician information that is irrelevant to the parties. This item is also identified as "Correspondence, reports and miscellaneous items relating to attorney requested external peer review re. MR# 5276712."
21. (Box 4) No documents were identified as discoverable or as pertaining to the Defendant Physician.

F. There were various documents found within the boxes and the supplemental packet that were not identifiable as an item produced pursuant to Privilege Log A or Privilege Log B. These documents are described based on pages that were bound together. These documents were not reviewed. The description of these documents is provided below:

- Box 1: a) one-page document titled "Restricted Antimicrobial Form."
b) seven pages regarding "June 15, 2011, BRMC Peer Review Committee."
c) sixty-three pages regarding "Medical Executive Committee April 21, 2009."
- Box 2: a) thirty-two pages regarding "Performance Improvement November 2009."
b) five pages regarding "Performance Improvement Quarter 2 2009."
c) ten pages regarding "BRMC Performance Improvement Committee 2/22/10."
d) thirty-four pages re "BRMC Performance Improvement Plan - 2010. (These pages are not the item referred to on Privilege Log A as Item #113 as that item has been identified separately as a nine-page item in Box 2).
- Box 3: less than 100 pages, one of which having the title "BRMC Medical Executive Committee January 26, 2010."

Box 4: over 100 pages of loose unbound documents, one page having a light yellow note affixed that reads "credential file." The Court suspects that somewhere in these pages, there is a twenty-eight-page credentialing file that is referenced as Item #18 on Privilege Log B. However, if the Court counts twenty-eight pages from the page note, (i.e., the noted page being page one, etc.), the Court finds the 28th page to be Page Two of a six-page medical record. This stack of over 100 pages cannot be identified as the twenty-eight-page item referenced as Item #18 on Privilege Log B as "Credentialing file, Larry D. Thomas, M.D. 28pp."

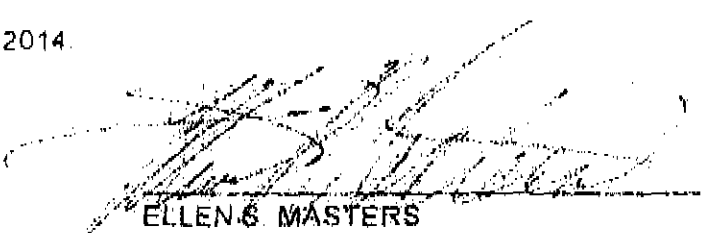
Supplemental Packet:

- a) seven pages regarding "MD Review, Peer Review Report."
- b) two handwritten pages, with a reference, "2 issues."
- c) one handwritten page, with a reference, "New list."
- d) four handwritten pages, with a reference, "Jan.-early December."

Based on the above findings, it is **ORDERED**.

1. The Defendant Hospital shall produce, within ten days, those items identified in the findings above, after redacting identifying patient and physician information that is irrelevant to the parties in this action.
2. The Defendant Hospital shall also provide an explanation, within ten days, as to each of the items, specifically identified on Privilege Log A and Privilege Log B that were not delivered to the Court for the *in camera* inspection.
3. In the event of a need for a further *in camera* inspection, the Defendant Hospital shall schedule a hearing to discuss whether the Court should appoint a medical expert to assist in identifying relevant and discoverable medical records, after being directed by an order of the Court as to the requirements of confidentiality and the statutory definition of "adverse medical incident". At such hearing, the parties should be prepared to discuss (1) the authority of the Court to appoint such an expert; (2) the expense required for organizing documents to prepare for an *in camera* inspection, specifically considering that the presiding judge is not a medical expert and therefore has a limited ability to decipher the names of medical procedures, terminology and handwriting; and (3) the amount of time and resources anticipated for any further *in camera* inspection in this cause.

ORDERED this 25th day of June, 2014.



ELLEN S. MASTERS

Circuit Judge

Copies to:

Matthew Schwencke, Esquire, Counsel for Plaintiff
Paul Buckley, Esquire, Counsel for Defendant

COPY

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT, IN AND FOR
POLK COUNTY, FLORIDA.

CASE NO.:

AMBER EDWARDS,

53-20 12-CA-00 2611 -0000-00

Plaintiff,

Sec 4

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

Defendants.

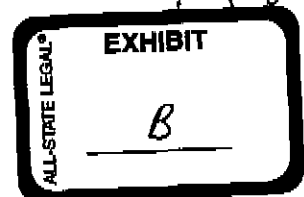
COMPLAINT

COMES NOW, the Plaintiff, AMBER EDWARDS, and hereby sues the
Defendants, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER
(hereinafter referred to as "BARTOW REGIONAL") and LARRY D. THOMAS, M.D.
(hereinafter referred to as "THOMAS, M.D.", and alleges:

GENERAL ALLEGATIONS COMMON TO ALL COUNTS

1. This is an action arising from medical negligence which is being brought
pursuant to Chapters §766 and §768, Florida Statutes, and Florida Rule of Civil
Procedure 1.650, for damages exceeding Fifteen Thousand (\$15,000.00) Dollars,
exclusive of interest and costs.

2. At all times material hereto, Plaintiff, AMBER EDWARDS, was and is a
resident of Chesapeake, Virginia.



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3. At all times material hereto, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, was and is a Florida Corporation authorized to do business in the State of Florida, and in Polk County, Florida.

4. At all times material hereto Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER was a Florida Corporation duly licensed, organized and existing under the laws of the State of Florida, and operated a medical facility providing medical and health care services in Polk County, Florida.

5. At all times material hereto Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, acted individually and by and through its agents, apparent agents, servants, and/or employees, including but not limited to the Defendant, LARRY D. THOMAS, M.D., who were acting within the course and scope of his agency, apparent agency and/or employment in furtherance of Defendant, BARTOW REGIONAL.

6. At all times material hereto, Defendant, LARRY D. THOMAS, M.D., was a duly licensed general surgeon engaged in the practice of medicine in Polk County, Florida.

7. At all times material hereto Defendant, LARRY D. THOMAS, M.D., held himself out to the public as being well-qualified in the field of general surgery, and further held himself out to the public and possessing the same level of skill and expertise in the field of medicine as any other well-qualified surgeon practicing in Polk County, Florida, or any other similar medical community.

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8. A pre-suit investigation was performed pursuant to Florida Statute §766.203 and a Notice of Intent to Initiate Litigation against the Defendants, named herein, was given in accordance with the requirements of Florida Statute §766.106. All conditions precedent to Chapter 766 have been performed to bring this action.

FACTS GIVING RISE TO CAUSE OF ACTION

9. While in Florida, Amber Edwards developed stomach pain. She was diagnosed as having gallstones. A laparoscopic cholecystectomy was scheduled to occur at BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER on May 9, 2011. BARTOW REGIONAL assigned Defendant, LARRY D. THOMAS, M.D. to perform the surgery. Defendant, LARRY D. THOMAS, M.D. failed to identify the Plaintiff's common bile duct, cut her common bile duct during the surgery, and afterwards failed to timely recognize that he did so.

10. Plaintiff, AMBER EDWARDS suffered in tremendous pain for five (5) days. The nurses at BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER ignored the Plaintiff's cries for help.

11. Plaintiff, AMBER EDWARDS was prematurely discharged from BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER. Plaintiff continued to suffer tremendous pain and her stomach grew in size. Plaintiff became severely dehydrated and returned to the emergency room at BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER where it was finally discovered that Defendant, LARRY D. THOMAS, M.D. had cut Plaintiff's common bile duct. Ultimately, Plaintiff, AMBER EDWARDS travelled in an ambulance for corrective surgery at Tampa General Hospital.

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12. Plaintiff, AMBER EDWARDS underwent an emergency hepaticojejunostomy and jejunostomy on May 14, 2011 at Tampa General Hospital.

COUNT I – NEGLIGENCE CLAIM FOR AGENCY AGAINST DEFENDANT, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER

13. Plaintiff hereby re-alleges and incorporates by reference each and every allegation as set forth in Paragraphs 1 through 5, and 8 through 12, as though fully set forth herein.

14. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, controlled the actions and/or had the right to control the actions of Defendant, LARRY D. THOMAS, M.D., by controlling his salary, work scope, work hours, and/or work conditions. The Medical Staff Bylaws and/or Articles of Incorporation set forth the level of control that BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER had over LARRY D. THOMAS.

15. Beginning on or about May 9, 2011, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER by and through its agents, servants and/or employees, including but not limited to the Defendant, LARRY D. THOMAS, M.D., owed a duty to Plaintiff, AMBER EDWARDS, to provide proper medical care and treatment in accordance with the prevailing professional standards of care for physicians and/or similar health care providers in light of all the relevant circumstances. Notwithstanding the duty undertaken, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, did or failed to do one or more of the following acts,

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any or all of which were departures from the acceptable professional standards of care in Polk County, Florida, or any similar medical community:

- a) Cutting the common bile duct and failing to timely recognize it at the time of surgery and thereafter;
- b) Failing to timely recognize that the common bile duct had been cut and that AMBER EDWARDS was suffering complications as a result; and
- c) Failing to provide that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar healthcare providers.

16. As a direct and proximate result of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's negligence and failure to timely treat and evaluate the Plaintiff, AMBER EDWARDS, and had they not performed the negligent acts described above, Plaintiff, AMBER EDWARDS would not have sustained permanent injuries.

17. As a result of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's negligence, Plaintiff, AMBER EDWARDS, suffered permanent bodily injury, disability, physical pain and suffering, mental pain and suffering, impairment, disfigurement, inconvenience, and is physically and mentally impaired. Plaintiff claims the reasonable value of expense of hospitalization, and medical and nursing care, and treatment necessarily or reasonably obtained by her in the past and future. Plaintiff, AMBER EDWARDS has incurred past medical expenses and care, lost the capacity to enjoy life in the past and future, has past, present and future mental pain and suffering, mental anguish, and has suffered bodily and

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permanent disability. She suffered an aggravation of pre-existing conditions and permanent disfigurement. All of these losses are permanent and continuing in nature.

WHEREFORE, Plaintiff, AMBER EDWARDS, demands judgment against the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, for damages exceeding \$15,000.00, exclusive of interest and costs, and further demands trial by jury on all issues so triable.

**COUNT II – NEGLIGENCE CLAIM FOR APPARENT AGENCY AGAINST
DEFENDANT, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER**

18. Plaintiff hereby re-alleges and incorporates by reference each and every allegation as set forth in Paragraphs 1 through 5 and 8 through 12, as though fully set forth herein.

19. On or about May 9, 2011, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER acknowledged and represented that Defendant, LARRY D. THOMAS, M.D., would act on behalf of Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER. The Plaintiff relied on Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's representations. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER created the appearance of an apparent agency relationship with its Defendant physician, LARRY D. THOMAS, M.D. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's actions and words caused or allowed the Plaintiff to believe that Defendant, LARRY D. THOMAS, M.D. was an apparent agent of Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER. The

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Plaintiff justifiably relied upon that belief and changed its position in dealing with Defendant, LARRY D. THOMAS, M.D., as an apparent agent of Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER.

20. Beginning on or about May 9, 2011, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, individually, and by and through its agents, apparent agents, servants and/or employees, including but not limited to the Defendant, LARRY D. THOMAS, M.D., owed a duty to Plaintiff, AMBER EDWARDS, to provide proper medical care and treatment in accordance with the prevailing professional standards of care for physicians and/or similar health care providers in light of all the relevant circumstances. Notwithstanding the duty undertaken, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, did or failed to do one or more of the following acts, any or all of which were departures from the acceptable professional standards of care in Polk County, Florida, or any similar medical community:

- a) Cutting the common bile duct and failing to timely recognize it at the time of surgery and thereafter;
- b) Failing to timely recognize that the common bile duct had been cut and that Amber Edwards was suffering complications as a result; and
- c) Failing to provide that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar healthcare providers.

21. As a direct and proximate result of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's negligence and failure to timely treat

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and evaluate the Plaintiff, AMBER EDWARDS, and had they not performed the negligent acts described above, Plaintiff, AMBER EDWARDS would not have sustained permanent injuries.

22. As a result of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's negligence, Plaintiff, AMBER EDWARDS, suffered permanent bodily injury, disability, physical pain and suffering, mental pain and suffering, impairment, disfigurement, inconvenience, and is physically and mentally impaired. Plaintiff claims the reasonable value of expense of hospitalization, and medical and nursing care, and treatment necessarily or reasonably obtained by her in the past and future. Plaintiff, AMBER EDWARDS has incurred past medical expenses and care, lost the capacity to enjoy life in the past and future, has past, present and future mental pain and suffering, mental anguish, and has suffered bodily and permanent disability. She suffered an aggravation of pre-existing conditions and permanent disfigurement. All of these losses are permanent and continuing in nature.

WHEREFORE, Plaintiff, AMBER EDWARDS, demands judgment against the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, for damages exceeding \$15,000.00, exclusive of interest and costs, and further demands trial by jury on all issues so triable.

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**COUNT III – NEGLIGENT HIRING, CREDENTIALING, SUPERVISION,
TRAINING, RETENTION, AND/OR ENTRUSTMENT AND FLORIDA STATUTE
§766.110 AGAINST DEFENDANT, BARTOW HMA, LLC d/b/a
BARTOW REGIONAL MEDICAL CENTER**

23. Plaintiff hereby re-alleges and incorporates by reference each and every allegation as set forth in Paragraphs 1 through 5 and 8 through 12, as though fully set forth herein.

24. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER owed a duty to Plaintiff, AMBER EDWARDS, to assure that the issuance of medical staff privileges to Defendant, LARRY D. THOMAS, M.D., was such that Defendant, LARRY D. THOMAS, M.D., was competent to perform the services to his patients, such as Plaintiff, AMBER EDWARDS, while providing medical care and treatment to his patients at BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER.

25. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER failed to select and retain competent medical staff members by granting unlimited staff privileges to Defendant, LARRY D. THOMAS, M.D., when it knew or should have known that Defendant, LARRY D. THOMAS, M.D. was not a competent physician capable of providing medical care and treatment to patients such as Plaintiff, AMBER EDWARDS.

26. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER failed to select and retain competent medical staff members by granting unlimited staff privileges to Defendant, LARRY D. THOMAS, M.D. as a general surgeon

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without requiring proctoring, monitoring, or supervision of a properly credentialed physician in the treatment of surgical patients such as Plaintiff, AMBER EDWARDS.

27. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER failed to select and retain competent medical staff members by granting unlimited staff privileges to Defendant, LARRY D. THOMAS, M.D. as a general surgeon by granting renewed privileges to Defendant, LARRY D. THOMAS, M.D. as a surgeon without the results of the required initial monitoring and the information concerning his professional performance, judgment, and clinical or technical skills that are derived from this process.

28. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER had a duty to assure comprehensive risk management and the competence of Defendant, LARRY D. THOMAS, M.D., through careful selection and review, under Florida Statute §766.110(1). Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER had a duty to:

- a) Adopt written procedures for the selection of staff members and periodically review the medical care and treatment rendered to patients like Plaintiff, AMBER EDWARDS;
- b) Adopt a comprehensive risk management program which fully complied with §395.0197; and
- c) Initiate and diligently administrate a medical review and risk management process including supervising the Defendant, LARRY D. THOMAS, M.D., to the extent necessary to ensure that such medical review and risk management process were being diligently carried out.

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29. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER had a duty and responsibility to conduct background investigations of Defendant, LARRY D. THOMAS, M.D., to determine his suitability for treating patients like Plaintiff, AMBER EDWARDS. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER failed to perform such investigations or performed them negligently.

30. An appropriate investigation by Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER would have revealed the unsuitability of Defendant, LARRY D. THOMAS, M.D.

31. It was unreasonable for Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER to hire Defendant, LARRY D. THOMAS, M.D., in light of the information that Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER knew or should have known.

32. Once Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER received actual or constructive notice of problems with Defendant, LARRY D. THOMAS, M.D., it was unreasonable for Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER not to investigate or take corrective action such as discharge or reassignment.

33. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER had a duty to supervise the work of Defendant, LARRY D. THOMAS, M.D., and ensure that medical review and risk management process were being diligently carried out.

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34. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER knew or should have known that Defendant, LARRY D. THOMAS, M.D., failed to possess the required training, skill, and/or judgment to properly and safely treat patients such as Plaintiff, AMBER EDWARDS.

35. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER did or failed to do one or more of the following acts, any or all of which were departures from the acceptable professional standards of care in Polk County, Florida, or any similar medical community:

- a) Failing to assure that Defendant, LARRY D. THOMAS, M.D., was competent in caring for Plaintiff, AMBER EDWARDS, or any other similar surgical patients;
- b) Failing to supervise and/or train Defendant, LARRY D. THOMAS, M.D., to the extent necessary to care for Plaintiff, AMBER EDWARDS;
- c) Failing to perform a background investigation of Defendant, LARRY D. THOMAS, M.D., prior to hiring and/or retaining them; and
- d) Negligently entrusting and/or retaining Defendant, LARRY D. THOMAS, M.D., which would foreseeably permit him to treat patients like Plaintiff, AMBER EDWARDS.

36. As a direct and proximate result of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's negligence and failure to timely treat and evaluate the Plaintiff, AMBER EDWARDS, and had it not performed the negligent acts described above, Plaintiff, AMBER EDWARDS would not have sustained permanent injuries.

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37. As a result of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's negligence, Plaintiff, AMBER EDWARDS, suffered permanent bodily injury, disability, physical pain and suffering, mental pain and suffering, impairment, disfigurement, inconvenience, and is physically and mentally impaired. Plaintiff claims the reasonable value of expense of hospitalization, and medical and nursing care, and treatment necessarily or reasonably obtained by her in the past and future. Plaintiff, AMBER EDWARDS has incurred past medical expenses and care, lost the capacity to enjoy life in the past and future, has past, present and future mental pain and suffering, mental anguish, and has suffered bodily and permanent disability. She suffered an aggravation of pre-existing conditions and permanent disfigurement. All of these losses are permanent and continuing in nature.

WHEREFORE, Plaintiff, AMBER EDWARDS, demands judgment against the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, for damages exceeding \$15,000.00, exclusive of interest and costs, and further demands trial by jury on all issues so triable.

COUNT IV – NEGLIGENCE OF DEFENDANT, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER FOR NON-DELEGABLE DUTY

38. Plaintiff hereby re-alleges and incorporates by reference each and every allegation as set forth in Paragraphs 1 through 5 and 8 through 12 , as though fully set forth herein.

39. At all times material hereto, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, had a non-delegable duty to Plaintiff,

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AMBER EDWARDS, to provide non-negligent medical services to her pursuant to its contract, Florida Statutes, Florida Regulations, and Federal Regulations.

40. At all times material hereto, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, undertook a duty to treat the Plaintiff, AMBER EDWARDS, for a charge, and furnished these aforementioned services to render that treatment. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER approved the personnel who would be providing the services to the Plaintiff, AMBER EDWARDS, and employed, granted staff privileges to, and/or paid the Defendant, LARRY D. THOMAS, M.D., to perform said services. The statutory, regulatory, contractual and common law duties assumed by and/or imposed upon the Defendant, LARRY D. THOMAS, M.D., included providing surgical and pre-surgical services which are non-delegable and, as a matter of law, impose direct liability upon the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, for the negligent performance of such duties.

41. As a Medicare provider, i.e., a hospital accepting Medicare from the Federal government, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, was subject to the rules and regulations promulgated under 42 CFR 482, which govern the conditions of participation for hospitals and impose a non-delegable duty on those participating hospitals.

42. Specifically, pursuant to 42 CFR 482.12(e), Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, is responsible for the safe and

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effective delivery of services furnished in the hospital, even if furnished under contracts with those labeled independent contractors.

43. The non-delegable duty imposed by 42 CFR 482 applies to services and encompasses the acts or omissions of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER and LARRY D. THOMAS, M.D., and other hospital personnel. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER breached its statutory non-delegable duty to the Plaintiff, AMBER EDWARDS.

44. Florida hospital licensing and regulation statutes and rules (§§ 395.001, 395.1055, Fla. Stat.; FAC 59A-3.2085(3)) imposed a non-delegable duty upon Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER to provide these medical services to the Plaintiff, AMBER EDWARDS.

45. The contract between the Plaintiff, AMBER EDWARDS and the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER imposed a non-delegable duty on Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER to provide these services to the Plaintiff, AMBER EDWARDS.

46. As a direct and proximate result of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's negligence and failure to timely treat and evaluate the Plaintiff, AMBER EDWARDS, and had it not performed the negligent acts described above, Plaintiff, AMBER EDWARDS would not have sustained permanent injuries.

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47. As a result of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's negligence, Plaintiff, AMBER EDWARDS, suffered permanent bodily injury, disability, physical pain and suffering, mental pain and suffering, impairment, disfigurement, inconvenience, and is physically and mentally impaired. Plaintiff claims the reasonable value of expense of hospitalization, and medical and nursing care, and treatment necessarily or reasonably obtained by her in the past and future. Plaintiff, AMBER EDWARDS has incurred past medical expenses and care, lost the capacity to enjoy life in the past and future, has past, present and future mental pain and suffering, mental anguish, and has suffered bodily and permanent disability. She suffered an aggravation of pre-existing conditions and permanent disfigurement. All of these losses are permanent and continuing in nature.

WHEREFORE, Plaintiff, AMBER EDWARDS, demands judgment against the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, for damages exceeding \$15,000.00, exclusive of interest and costs, and further demands trial by jury on all issues so triable.

**COUNT V – VICARIOUS LIABILITY CLAIM AGAINST DEFENDANT,
BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER**

48. Plaintiff hereby re-alleges and incorporates by reference each and every allegation as set forth in Paragraphs 1 through 5 and 8 through 12, as though fully set forth herein.

49. Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER is vicariously liable for the negligence of its agents, apparent agents, servants

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and employees including but not limited to its nurses, and the Defendant, LARRY D.

THOMAS, M.D., in that:

- a) Cutting the common bile duct and failing to timely recognize it at the time of surgery and thereafter;
- b) Failing to timely recognize that the common bile duct had been cut and that AMBER EDWARDS was suffering complications as a result; and
- c) Failing to provide that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar healthcare providers.

50. As a direct and proximate result of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's negligence and failure to timely treat and evaluate the Plaintiff, AMBER EDWARDS, and had they not performed the negligent acts described above, Plaintiff, AMBER EDWARDS would not have sustained permanent injuries.

51. As a result of the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER's negligence, Plaintiff, AMBER EDWARDS, suffered permanent bodily injury, disability, physical pain and suffering, mental pain and suffering, impairment, disfigurement, inconvenience, and is physically and mentally impaired. Plaintiff claims the reasonable value of expense of hospitalization, and medical and nursing care, and treatment necessarily or reasonably obtained by her in the past and future. Plaintiff, AMBER EDWARDS has incurred past medical expenses and care, lost the capacity to enjoy life in the past and future, has past, present and future mental pain and suffering, mental anguish, and has suffered bodily and

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permanent disability. She suffered an aggravation of pre-existing conditions and permanent disfigurement. All of these losses are permanent and continuing in nature.

WHEREFORE, Plaintiff, AMBER EDWARDS, demands judgment against the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, for damages exceeding \$15,000.00, exclusive of interest and costs, and further demands trial by jury on all issues so triable.

**COUNT VI – NEGLIGENCE CLAIM AGAINST DEFENDANT,
LARRY D. THOMAS, M.D.**

52. Plaintiff hereby re-alleges and incorporates by reference each and every allegation as set forth in Paragraphs 1 through 2, and 6 through 12, as though fully set forth herein.

53. Beginning on or about May 9, 2011, Defendant, LARRY D. THOMAS, M.D., had a duty to administer care in accordance with the prevailing professional standard of care for general surgeons in Polk County, or any other similar medical community. Notwithstanding the duties undertaken, Defendant, LARRY D. THOMAS, M.D., did or failed to do one or more of the following acts, any of which were departures from the accepted standards of care in Polk County, Florida, or any other similar medical community:

- a) Cutting the common bile duct and failing to timely recognize it at the time of surgery and thereafter;
- b) Failing to timely recognize that the common bile duct had been cut and that AMBER EDWARDS was suffering complications as a result; and

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- c) Failing to provide that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar healthcare providers.

54. As a direct and proximate result of the Defendant LARRY D. THOMAS', negligence and failure to timely treat and evaluate the Plaintiff, AMBER EDWARDS, and had he not performed the negligent acts described above, Plaintiff, AMBER EDWARDS would not have sustained permanent injuries.

55. As a result of the Defendant LARRY D. THOMAS', negligence, Plaintiff, AMBER EDWARDS, suffered permanent bodily injury, disability, physical pain and suffering, mental pain and suffering, impairment, disfigurement, inconvenience, and is physically and mentally impaired. Plaintiff claims the reasonable value of expense of hospitalization, and medical and nursing care, and treatment necessarily or reasonably obtained by her in the past and future. Plaintiff, AMBER EDWARDS has incurred past medical expenses and care, lost the capacity to enjoy life in the past and future, has past, present and future mental pain and suffering, mental anguish, and has suffered bodily and permanent disability. She suffered an aggravation of pre-existing conditions and permanent disfigurement. All of these losses are permanent and continuing in nature.

WHEREFORE, Plaintiff, AMBER EDWARDS, demands judgment against the Defendant, LARRY D. THOMAS, M.D., for damages exceeding \$15,000.00, exclusive of interest and costs, and further demands trial by jury on all issues so triable.

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COMPLIANCE WITH FLORIDA STATUTE §766.106

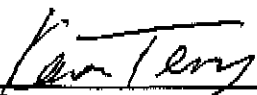
As reflected in Paragraph 8, a pre-suit investigation was performed pursuant to Florida Statute §766.203 and a Notice of Intent to Initiate Litigation against the Defendants, in accordance with the requirements of Florida Statute §766.106. All conditions precedent under Chapter 766 have been performed to bring this action.

DEMAND FOR JURY TRIAL

Plaintiff, AMBER EDWARDS, hereby demands trial by jury on all issues so triable.

CERTIFICATE OF SERVICE

Pursuant to Florida Statute §766.203, the undersigned attorneys of record do hereby certify that a reasonable investigation has been conducted as to the matters alleged herein, and it has been determined that there are grounds for a good faith belief that there has been negligence in the care and treatment of Plaintiff, AMBER EDWARDS, and that grounds exist for the filing of this action against the Defendants named herein.



Karen E. Terry
Florida Bar No.: 45780
Matthew K. Schwencke
Florida Bar No.: 57132
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone: (561) 686-6300
Fax: (561) 383-9441
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT, IN AND FOR
POLK COUNTY, FLORIDA.

AMBER EDWARDS,

Plaintiff,

CASE NO.: 53-2012-CA-002611-0000-00,
Section 4

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

Defendants,

**PLAINTIFF'S REQUEST TO PRODUCE TO DEFENDANT BARTOW HMA, LLC
d/b/a BARTOW REGIONAL MEDICAL CENTER**

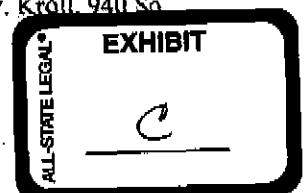
Pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER and LARRY D. THOMAS, M.D., is hereby requested to produce to the Plaintiff's Counsel at the LAW FIRM OF SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409, within thirty (30) days, the following documents or things on the attached numbered list.

REQUEST TO PRODUCE

1. Each and every document created five (5) years prior to May 8, 2011 that in any way relates to the hospital's investigation or review of the care and treatment of any patient of LARRY D. THOMAS, M.D. This is a request pursuant to Amendment 7 and this request excludes documents generated by attorneys¹.
2. Each and every document created five (5) years prior to May 8, 2011, relating to any and all medical incidents, medical negligence, neglect, or default of LARRY D. THOMAS, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys².

¹ Before any objection is made or privilege claimed for documents or things related to peer review or risk management activities, please see: West Florida Regional Medical Center, Inc. v. See, 18 So. 3d 676 (Fla. 1st DCA 2009); Florida Hosp. Waterman v. Buster, 984 So. 2d 478 (Fla. 2008); and N. Broward Hosp. Dist. v. Kroll, 940 So. 2d 1281 (Fla. 4th DCA 2006), etc.

² See footnote 1



3. Each and every document created five (5) years prior to May 8, 2011, related to the credentialing and re-credentialing process for LARRY D. THOMAS, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys³.
4. Each and every document created five (5) years prior to May 8, 2011, related to LARRY D. THOMAS, M.D. in which you investigated an incident of medical negligence; or history of acts, neglects, or defaults which injured or could have injured a patient and caused or could have caused the death of a patient. This request is being made pursuant to Amendment 7 and his request excludes documents generated by attorneys⁴.
5. Each and every document created five (5) years prior to May 8, 2011, relating to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys⁵.
6. For five (5) years prior to May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee or peer review committee in which any aspect of the clinical evaluation of was LARRY D. THOMAS, M.D. discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys⁶.
7. All minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which any aspect of the evaluation of plaintiff's treatment was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys⁷.
8. Each and every document that in any way relates to the defendant hospital's investigation or review of the care and treatment of the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys⁸.
9. Each and every document in the hospital's possession relating to the termination and/or resignation of LARRY D. THOMAS, M.D. This request is being made

³ See footnote 1

⁴ See footnote 1

⁵ See footnote 1

⁶ See footnote 1

⁷ See footnote 1

⁸ See footnote 1

pursuant to Amendment 7 and this request excludes documents generated by attorneys⁹

10. Any and all incident reports relating to the care and treatment of the Plaintiff. Please do not provide a response indicating that you have already provided us with the documentation for this request. If you have provided it to us, we are unable to locate it and we ask that you provide it again. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.¹⁰
11. Each and every document relating to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys¹¹.
12. After May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which was discussed any aspect of the clinical evaluation of LARRY D. THOMAS, MD was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.¹²
13. Any records for LARRY D. THOMAS, MD made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that **caused** injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than the Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.¹³

⁹ See footnote 1

¹⁰ See footnote 1

¹¹ See footnote 1

¹² See footnote 1

¹³ See footnote 1

14. Any records for LARRY D. THOMAS, MD made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that **could have caused** injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.¹⁴
15. A non-redacted copy of the hospital's on call schedule for the month of May, 2011.
16. Copies of any and all documents indicating the number of hours that LARRY D. THOMAS, MD was providing care and treatment to patients at the Defendant Hospital for the six (6) month period prior to May 8, 2011.
17. Non-redacted copies of the hospital's on call schedule for the months of January-May, 2011.
18. A non-redacted copy of the hospital's on call schedule for unassigned patients for the month of May, 2011.
19. A non-redacted copy of the hospital's on call schedule for general surgery for the month of May, 2011.
20. A non-redacted copy of the check request for Larry Thomas, MD prepared on 6/1/2011.
21. A non-redacted copy of the 6/1/2011 invoice (52091) for Larry Thomas, MD for the May call x 7.

¹⁴ See footnote 1

22. Any and all orientation and/or training materials of the Defendant Hospital that were provided to:
 - a) Anju Thomas, RN,
 - b) Felicia Pagan, RN,
 - c) Michelle Webb, RN,
 - d) Judy Pittman, RN,
 - e) Hillari Bankhead Vaca, RN and
 - f) Barbara Johnson, RN

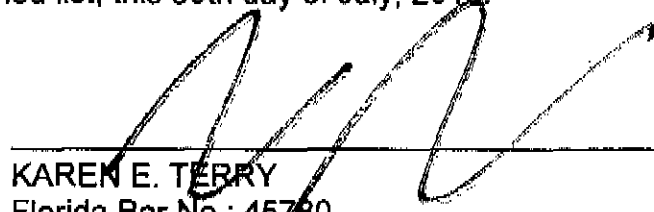
23. 2011 Policies and Procedures in effect at the time of the Plaintiff's admission as follows:
 - a. 1156 Assessment-Reassessment
 - b. 586 Assigned Roles for Staff
 - c. 1322 Assignment to Treatment Area
 - d. 1352 Auditing and Monitoring
 - e. 576 Backup Communications
 - f. 582 Authority for Emergencies
 - g. 1924 Block Scheduling in the OR
 - h. 1542 Call Reports-Preliminary Reports
 - i. 2009 Callback of RC Personnel
 - j. 1152 Chain of Command
 - k. 1925 Circulating RN Responsibilities
 - l. 1225 Collaborative Care Team – Nursing
 - m. 588 Communication of Patient Information
 - n. 1710 Communication Interdepartmental
 - o. 577 Communications Plan
 - p. 1979 Competency Validation
 - q. 1853 Conflict Management for Leadership
 - r. 1711 Consultation Between Disciplines
 - s. 2077 Continuity of Patient Care
 - t. 1868 Criteria for Notifying Anesthesiologist and or Attending Physician
 - u. 1712 Continuing Education C9
 - v. 1714 Description of Professional Scope of Practice
 - w. 1869 Discharge Criteria and Planning
 - x. 1977 Discharge Planning Interdisciplinary
 - y. 2080 Discharge Planning Statement
 - z. 1361 Discharge Reconciliation and Chart Retrieval Process
 - aa. 1540 Documentation
 - bb. 1930 Documentation of Operative Procedures
 - cc. 1330 Follow Up Care
 - dd. 1917 Hand Off Communication

ee. 2083 Hospital Home Bound Education for Hospital
ff. 1312 House Supervisor Role
gg. 1041 Informed Consent
hh. 1209 Informing Physician of Event Rpt-Complaints
ii. 2227 Initial Assessment and Prioritization
jj. 2229 Interdisciplinary Patient Care Plan
kk. 2136 Medication Orders
ll. 2t98 Moderate Sedation
mm. 1963 Operating Room Guidelines
nn. 1725 Pain Assessment Reassessment Plan P2- Rehab Services
oo. 2140 Pain Management
pp. 2234 Patient and Family Education
qq. 1862 Patient Assessment
rr. 1675 Patients Rights and Responsibilities Policy
ss. 660 Peer Review Process (this is an Amendment 7 Request)
tt. 1293 Physician Supervision Process
uu. 1884 Physician Visits
vv. 2202 Plan for Providing Patient Care
ww. 1983 Policies and Procedures and Documentation Requirements
xx. 1870 Post Operative Evaluation
yy. 1871 Post Procedure Care
zz. 1727 Professional Credentials (this is an Amendment 7 Request)
aaa. 1337 Qualified Medical Personnel – QMP Screening (Amendment 7 Request)
bbb. 1563 Quality Improvement-Schedule of Quality Control (Amendment 7 Request)
ccc. 2091 Readmission Policy
ddd. 1625 Risk Assessment Plan EC1.10.4 (Amendment 7 Request)
eee. 158 Risk Management Education (Amendment 7 Request)
fff. 161 Risk Management Policy Statement (Amendment 7 Request)
ggg. 2094 RM Role and Relationship with Physician and Staff
hhh. 1797 Scope of Patient Assessment
iii. 1052 Sentinel and Adverse Events (Amendment 7 Request)
jjj. 212 Sentinel and Averse Events Identification and Intense Analyst (Amendment 7 Request)
kkk. 1948 Surgery Requirements
lll. 2130 Table of Contents Nursing
mmm. 1948 Table of Contents OR Dept
nnn. 1695 Train-education Ec7.10.A
ooo. 1147 Transfers
ppp. 2154 Verbal and Telephone Orders Policy
qqq. 2068 Verbal and Telephone Orders, Guidelines

24. Any and all incident reports relating to the care and treatment provided by LARRY D. THOMAS, MD to any patient where medical negligence, intentional misconduct, and any other act, neglect, or default that caused, or could have caused, injury to or death of a patient. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys¹⁵.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 30th day of July, 2013.



KAREN E. TERRY
Florida Bar No.: 45780
MATTHEW K. SCHWENCKE
Florida Bar No.: 057132
Primary E-mail: ket@searcylaw.com
Secondary E-mail(s): mks@searcylaw.com; and
aje@searcylaw.com
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone: (561) 686-6300
Fax: (561) 383-9441
Attorney for Plaintiff

¹⁵ See footnote 1

COUNSEL LIST

Holly B. Platter, Esquire
eserve@bgrplaw.com;tdomi@bgrplaw.com;
om;
Bush Graziano Rice & Platter, P.A.
101 E Kennedy Boulevard, Suite 1700
Tampa, FL 33601
Phone: (813)-228-7000
Fax: (813)-273-0091
Attorneys for Larry D. Thomas MD

Michael A. Petruccelli, Esquire
Pbuckley@fplawyers.com;
Tmartin@fplawyers.com
Fann & Petruccelli, P.A.
5100 North Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Phone: (954)-771-4118
Fax: (954)-771-4119
Attorneys for Bartow Regional Medical
Center

IN THE CIRCUIT COURT OF THE
10th JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA

CASE NO.: 53-2012 CA-002611-0000-00
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER
and LARRY D. THOMAS, M.D.,

Defendants.

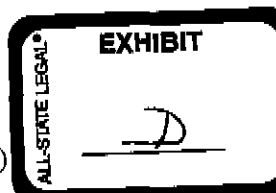
**DEFENDANT, BARTOW HMA, LLC d/b/a
BARTOW REGIONAL MEDICAL CENTER'S RESPONSE TO PLAINTIFF'S
REQUEST TO PRODUCE DATED JULY 30, 2013**

Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER,
by and through undersigned counsel, hereby files its Response to Plaintiff's Request to Produce
dated July 30, 2013, and pursuant to Florida Rules of Civil Procedure 1.350, states as follows:

GENERAL OBJECTIONS

To the extent that this Request seeks "each and every"/"any and all" discovery of Amendment 7 related materials, Defendant objects and moves for protective order. To begin with, the Request, consisting of 24 numbered requests and 75 subparts, is overly broad, vague, ambiguous, burdensome, harassing, abusive, immaterial and irrelevant. The Request is not reasonably calculated to lead to the discovery of admissible evidence. Defendant requests intervention and protection from this Court to narrow and limit the extent of this Request to Produce, and to determine the amount of reasonable costs and fees for Defendant to review materials and respond to any appropriate requests.

Florida law protects against the discovery of records considered by medical review committees that function within a hospital, as well as records generated by, or received by, a hospital's risk management department. Specifically, § 395.0191(8), Fla. Stat., protects the investigations, proceedings, and records of a hospital in considering and acting upon an



application for staff membership or clinical privileges. § 395.0193(8), Fla. Stat., protects the investigations, proceedings, and records of a hospital's peer review panels, disciplinary boards or committees acting in their peer review or disciplinary function. § 395.0197(4), Fla. Stat., states that "incident reports are part of the workpapers of the attorney defending the licensed facility." § 766.101(5), Fla. Stat., protects the investigations, proceedings, and records of hospital committees formed to evaluate and improve the quality of health care rendered by providers of health service, to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care, or that the cost of health care rendered was considered reasonable by the providers of professional health services in the area. ^{1 2}

This Request could be interpreted to include incident reports from Bartow Regional Medical Center without reference to whether the incident report(s) relates to an adverse medical incident. Prior to the passage of Amendment 7, no records or information within the scope of this Request were discoverable or admissible for any purpose in a civil action. While Amendment 7 provides patients access to certain formerly privileged records, the scope of that access is limited by the Amendment's terms: Amendment 7 only provides patients a right to access to records made or received in the course of business by a health care facility or a health care provider relating to adverse medical incidents.

Certain records within the scope of the Request do not relate to adverse medical incidents and therefore are not subject to Amendment 7. *See Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 827 (Fla. 2d DCA 2007); *see also W. Fla. Reg'l Med. Ctr. v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009). Any privileged records which are not subject to Amendment 7 remain privileged. *Id.*

The *See* court explained the limits of the term "adverse medical incident" in Amendment 7. Specifically, "the word 'incident' itself indicates an isolated event." *See*, 18 So. 3d at 690. The phrase "adverse medical incident" can only mean "a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient." *Id.* (citing *Shahbas*, 960 So. 2d at 827). The court explained that while an adverse medical incident may be a negligent act or omission, that "act or omission must be connected with a patient and must be the cause or near-cause of an injury or death." *See*, 18 So. 3d at 690. Accordingly, for a record to fall within the scope of Amendment 7, the record must relate to a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient.

Where a party seeks discovery of privileged materials pursuant to an exception to the privilege, it is the party's burden to demonstrate that the exception applies. *See Eight*

¹ This Defendant acknowledges *W. Fla. Reg'l Med. Ctr. v. See*, 2012 WL 87282 (Fla. Jan 12 2012) holding that a physician's blank application for hospital privileges is discoverable when a claim of negligent credentialing is at issue. The *See* Court however, unambiguously held that sections 395.0191 and 766.101 are still valid. Furthermore, the court held that a completed application remains privileged.

² To the extent that Plaintiff might rely on *Lower Keys Medical Center v. Windsch*, 29 So. 3d 351 (Fla. 3d DCA 2010), while the Third District held that issues raised by petitioner in that case contravened the Court's decision in *Buster* and were consequently frivolous, the case lacks precedential value because precedent is only created by the precise points discussed in an appellate opinion. *See, e.g., Adelman Steel Corp. v. Winter*, 610 So. 2d 494, 501 (Fla. 1st DCA 1992); *see also Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st DCA 2005); *Scottsdale Ins. Co. v. Haynes*, 793 So. 2d 1006 (Fla. 5th DCA 2001); 20 Am. Jur. 2d Courts § 133. Because the *Windsch* decision does not address any legal issues specifically, it lacks precedential value.

Hundred, Inc. v. Fla. Dep't of Revenue, 837 So. 2d 574, 576 (Fla. 1st DCA 2003) (quoting *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 183 n. 9, 184 (Fla. 1st DCA 2001) (determining that "[j]ust as the proponent of the privilege has the burden of proof as to facts which give rise to the privilege, the party seeking to abrogate the privilege has the burden to prove facts which would make an exception to the privilege applicable" by "a preponderance of the evidence.")); *Shell Oil Co. v. Par Four P'ship*, 638 So. 2d 1050, 1050 (Fla. 5th DCA 1994) (holding that "[w]hen communications appear on their face to be privileged, the party seeking disclosure bears the burden of proving that they are not."); see also *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004) (finding that where a beneficiary sought attorney client privileged or work product protected records of trustee's attorneys, the "beneficiary would have to prove the existence of some exception to overcome the privilege.").

The court in *See* explained that the privilege at issue was "still in effect to the extent that it does not prohibit the production of records relating to adverse medical incidents under Amendment 7." *See*, 18 So. 3d at 689. Accordingly, where records and information are protected under §§ 395.0191(8), 395.0193(8), 395.0197(4), and/or 766.101(5), Fla. Stat., it is Plaintiff's burden to establish that the requested records and information fall within the scope of Amendment 7 to overcome the statutory privileges. Although Bartow Regional Medical Center maintains that Plaintiff has not established that the subject records and information fall within the scope of Amendment 7, it acknowledges the First District's ruling that a health care provider cannot be "the final arbiter in determining whether a medical incident . . . was 'adverse.'" *See Baldwin v. Shands Teaching Hosp. and Clinics, Inc.*, 45 So. 3d 118 (Fla. 1st DCA 2010). The court in *Baldwin* continued, "[s]uch ultimately is the court's decision upon a proper consideration of the nature of the records requested and the broad coverage of Amendment 7." *Id.* Without any showing that the records responsive to this Request are within the scope of records of adverse medical incidents under Amendment 7, the records remain privileged, and the discovery request should be denied.

Furthermore, a hospital is only obligated to produce records that were "made or received in the course of business." *See* Art. X, sect 25(a), Fla. Const.; *Benjamin v. Tandem Healthcare, Inc.*, 998 So. 2d at 566, 570 (Fla. 2008) ("In interpreting a constitutional amendment, we begin with the amendment's plain language."). While records created routinely as part of a hospital's efforts in providing care and treatment to patients or in following state and federal reporting or documentation requirements may be made or received in the course of business, records outside of such practice are not and thus would fall outside the scope of Amendment 7. Courts have uniformly held the business of a hospital is the care and treatment of patients. *See, e.g., Cooks v. O'Brien Properties, Inc.*, 710 A.2d 788, 795 (Conn. App. Ct. 1998) ("the business of a hospital is treating patients") (citation omitted); *Williams v. Alexander*, 129 N.E.2d 417, 419 (NY Ct. App. 1955) ("The business of a hospital, it is self-evident, is to diagnose and treat its patients' ailments.").

Conversely, it is expressly not the business of a hospital to make records for use in subsequent litigation. *See, e.g., Temple v. F. W. Woolworth Co.*, 356 A.2d 880, 882 (Conn. 1975) ("it is not the business of a hospital to collect and preserve information for use in litigation"); *Bauer v. Veith*, 130 N.W.2d 897, 900 (Mich. 1964) (cannot be "claimed that it was 'the regular course of such [hospital] business to make such memorandum or record'")

(citation omitted, alteration in original); *Green v. City of Cleveland*, 444, 83 N.E.2d 63, 65 (Ohio 1948) (“it was the business of the hospital to diagnose plaintiff’s condition and to treat her for her ailments, not to record a statement describing the cause of the accident in which plaintiff’s injuries were sustained”). Thus, to the extent that a record was made not for the purpose of care and treatment, such a record would typically not fall within the scope of Amendment 7.

Furthermore, the only records involving investigation of an unusual incident that are made in the course of business are those records required to be created in response to an unusual incident pursuant to some regulatory reporting or documentation requirement such as incident reports or other documentation required to be created under section 395.0197, Florida Statutes. *Cf. Yisrael v. State*, 993 So. 2d 952, 958 (Fla. 2008) (noting that records kept according to a statutorily mandated duty are kept in the course of business). By contrast, a record created for purposes of investigation of an unusual event for potential future litigation that is not similarly mandated is not made “in the course of business.” *Cf. Brown v. International Paper Co.*, 710 So. 2d 666, 668 (Fla. 2d DCA 1998) (letter from Federal Express and handwriting analyst’s report created as part of investigation of forged purchase order not made in the course of business); *Simmons v. State*, 697 S. 2d 985, 986 (Fla. 4th DCA 1997) (list itemizing stolen items not demonstrated to be made in course of business).

Thus, records that are not made in response to a federal or state reporting or documentation requirement, and are not made as part of the care or treatment of a patient are not made or received in the course of business as required to be discoverable under Amendment 7. Consequently, these documents remain privileged.

Further, to the extent that this Request includes attorney-client privileged communications, Florida law is clear that “included within the attorney-client privilege are communications the insured makes to the insurer for its use to fulfill its obligation to defend on the insured’s behalf.” *See Reynolds v. State*, 963 So. 2d 908, 911 (Fla. 2d DCA 2007); *Staton v. Allied Chain Link Fence Company*, 418 So. 2d 404, 405-06 (Fla. 2d DCA 1982); *Grand Union Company v. Patrick*, 247 So. 2d 474, 475 (Fla. 3d DCA 1971); *see also 17A Lee R. Russ, et al., Couch on Insurance* 3d § 250:19 (2000) (describing the majority view that the “attorney-client privilege applies to communications between an insured and its liability or indemnity insurer as to an incident possibly giving rise to liability.”). Furthermore, where a client makes notes memorializing an event to consult an attorney for the purposes of defense in impending litigation, those notes are protected by the attorney client privilege. *See Lemonik v. Eastern Airlines, Inc.*, 632 So. 2d 239 (Fla. 3d DCA 1994); and *Merlin v. Boca Raton Community Hosp., Inc.*, 479 So. 2d 236 (Fla. 4th DCA 1985).

No appellate court has held that Amendment 7 alters the longstanding privilege attached to attorney client communications. As a threshold matter, attorney client privileged materials are not “made or received in the course of business,” as required to be discoverable under Amendment 7. *See* Article X, section 25(a).

The Second District in *Lakeland Regional Medical Center v. Neely*, 8 So. 3d 1268 (Fla.

2d DCA 2009), cautioned that it did not address attorney-client communications because the defendant did not argue that the documents were prepared or produced at the attorney's request for use in litigation. Thus, the opinion did not address the impact of Amendment 7 on the attorney-client privilege.

The distinction in *Neely* is supported by other authorities. The Florida Supreme Court in its advisory opinion explains that Amendment 7 "does not expressly affect . . . the attorney-client privilege, and there is no evidence of any intent to do so." Advisory Opinion to the Att'y General Regarding Patients' Right to Know About Adverse Medical Incidents, 880 So. 2d 617, 621 (Fla. 2004). In a follow up to the advisory opinion, questions set forth by Justice Cantero and responses by counsel for the Buster Respondents in the Florida Supreme Court suggest that attorney client privilege remains absolute. See Transcript of Oral Argument in *Buster*, 43, 56-57 (attached as Exhibit I) (questioning that Amendment 7 could affect attorney client privilege and counsel arguing that it did not). The Fifth District in *Gmach* noted support for this argument, stating: "[s]ince the supreme court's opinion in *Buster*, several circuit courts have weighed in on this issue, with the bulk of them concluding that the [attorney client] privilege still exists." *Florida Eye Clinic v. Gmach*, 14 So. 3d 1044, 1047 (Fla. 5th DCA 2009).

Additionally, although the Florida Supreme Court in its advisory opinion stated that nothing in Amendment 7 would affect the work product privilege, the courts in *Lakeland Regional Medical Center v. Neely*, 8 So. 3d 1268 (Fla. 2nd DCA 2009), and *Florida Eye Clinic v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009), held that Amendment 7 supersedes any protection by the fact work product privilege of incident reports.

The district courts, however, expressly did not conclude that Amendment 7 supersedes protection of opinion work product. The Fifth District specified: "[w]e do not read amendment 7 as evincing an intent from the voters to eliminate the privilege of opinion work product." *Gmach*, 14 So. 3d at 1050 (emphasis in original).

Furthermore, though the court in *Gmach* erroneously narrowed the scope of opinion work product to only attorney-created work product, Florida Rule of Civil Procedure 1.280(b)(3) expressly protects the mental impressions, conclusions and opinions of an attorney "or other representative of a party." See also *Surf Drugs v. Vermette*, 236 So. 2d 108, 113 (Fla. 1970) ("the work product of the litigant, his attorney or agent, cannot be examined, absent rare and exceptional circumstances"); *Colonial Penn Ins. Co. v. Blair*, 380 So. 2d 1305, 1306 (Fla. 5th DCA 1980) ("To bring something within the 'work product' ambit, there must be some indication of personal thought, views, knowledge, or evaluation by the attorney, litigant, or agent"); *Alachua County Hosp. v. Zimmer, USA, Inc.*, 403 So. 2d 1087 (Fla. 1st DCA 1981) ("[C]ommunications, reports, memoranda, etc., prepared in anticipation of litigation and passing between a client and his attorney, and/or their employed investigators, are work product").

Here, the scope of the Request includes records and information which contain or constitute the mental impressions, conclusions and opinions of representatives of Bartow Regional Medical Center. Even if this Court were to conclude that Amendment 7 has done

away with fact work product protection, Bartow Regional Medical Center's opinion work product remains protected in light of Amendment 7.

Furthermore, the Code of Federal Regulations protects the Hospital from being required to disclose attorney work-product. 45 C.F.R. § 164.524(a)(1)(ii) ("an individual has a right of access to inspect and obtain a copy of protected health information about the individual. . . except for: . . . [i]nformation compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding."). Moreover, federal regulations provide that any state law that is contrary to its provisions is preempted unless the state law is more stringent by providing greater confidentiality to protected health information. "State law" is defined to include the State Constitution. See 45 C.F.R. § 160.202.

In addition, the Florida Statutes have long imposed privileges on credentialing files. Florida Statutes §§ 395.0191(8), 766.101(5). Section §395.0191(8) protects the investigations, proceedings, and records of as hospital in considering and acting upon an application for staff membership or clinical privileges. Section 766.101(5) also mandates that the "investigations, proceedings, and records" of a credentialing committee "shall not be subject to discovery."

The Supreme Court in *W. Fla. Reg'l Med. Ctr. v. See*, 2012 WL 87282 (Fla. Jan. 12, 2012) recently and unambiguously held that Sections 395.0191 and 766.101 are still valid and protect the exact category of documents that you are seeking to be disclosed here. The *See* Court was called upon to determine whether a medical malpractice plaintiff's request for a blank application for hospital privileges was protected from discovery under the statutes. The Court held that where a claim for negligent credentialing is pending, a blank application is discoverable because it is not a part of the hospital decision-making process, and is also evidence of an "adverse incident" under Amendment 7 because the act of negligently credentialing a medical provider constitutes an adverse incident.

In holding that a blank application is not a part of the decision-making process that is protected under the statutes, the Supreme Court expressly distinguished completed applications, such as those requested here.

Without waiving said objections, a blank application for staff privileges is not contained within Dr. Larry Thomas' credentialing file.

This holding is fully in accord with the longstanding law of the Supreme Court, which recognized in *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992), that these statutory privileges are to be construed broadly in order to encourage full candor in peer review proceedings. See also *Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 827 (Fla. 2d DCA 2007) (holding that documents relating to the credentialing and re-credentialing process for a physician are not within the scope of Amendment 7); *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008) (doctor's credentialing file was statutorily protected pursuant to sections 395.0191(8) and 766.101(5)); *Columbia Park Med. Ctr., Inc. v. Gibbs*, 728 So. 2d 373 (Fla. 5th DCA 1999) (applications for clinical privileges were protected from

discovery under sections 766.101(5) and 395.0191(8)); *Boca Raton Community Hospital v. Jones*, 584 So. 2d 221 (Fla. 4th DCA 1991) (reports of peer review committee are privileged).

Additionally, the identities of individuals involved in peer review, credentialing and quality assurance activities are privileged, confidential and are beyond the scope of Amendment 7. See *Palms of Pasadena Hosp. v. Rutigliano*, 908 So. 2d 594 (Fla. 5th DCA 2004) (names of members of credentialing committee not discoverable); *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 390 2008). As such, the identities of reviewers involved in peer review, credentialing or quality assurance under sections 395.0191, 395.0193 and 766.101 are not discoverable under Amendment 7 and to the extent that this Request seeks such information, it is not discoverable under Amendment 7.

This Defendant objects to producing any documents pursuant to this Request absent an Order requiring Plaintiff to pay the costs of discovery prior to production. Section 381.028(7)(c)(1), Florida Statutes, allows the Hospital to require the Plaintiff to pay the full costs of production before acting on the request. See *Buster*, 984 So.2d at 493-94 (leaving intact the statutory provision allowing pre-payment of costs of production): see also *Columbia Hosp. Corp. of S. Broward v. Fain*, 16 So.3rd 236 (Fla. 4th DCA 2009) (noting that payment is required prior to response to discovery). Therefore, in the event that the Court enters an Order requiring the production of any material that is the subject matter of these objections/Motion for Protective Order, Defendant, Bartow Regional Medical Center, requests that the Court enter an Order requiring the Plaintiff to pay in full the costs of Amendment 7 discovery prior to the Defendant, Bartow Regional Medical Center, acting on the request.

Given that this request is not reasonably limited in scope or time, personnel from Bartow Regional Medical Center would have to locate a staggering amount of incident reports. The reports would then need to be redacted for patient identifiers, the identities of personnel involved in peer review, and opinion work product.

Due to the sensitivity of records and information at issue and based on the fact that Plaintiff has not made payment of the costs that will be incurred by the Hospital in responding to the discovery requests as required by section 381.028(7)(c)1, Florida Statutes, and because Plaintiff's discovery requests exceed the scope of Amendment 7, Defendant, Bartow Regional Medical Center, is not providing a privilege log at this time. While Defendant, Bartow Regional Medical Center, does not believe a privilege log is due at this time, out of an abundance of caution this issue is being brought to the Court's attention. To the extent the Court has a different view, Defendant, Bartow Regional Medical Center, asks that the Court waive any requirement that it do so.

Until the Court rules on the objections to this Request asserted by this Defendant, any preparation of a privilege log is premature. See *Gosman v. Luzinski*, 937 So. 2d 293, 296 (Fla. 4th DCA 2006) (finding that "[b]efore a written objection to a request for production of documents is ruled upon, the documents are not 'otherwise discoverable' and thus the obligation to file a privilege log does not arise."); accord *Royal Caribbean Cruises, Ltd. v. Doe*, 964 So. 2d 713, 718 (Fla. 3d DCA 2007); *Life Care Ctrs. of Am. v. Reese*, 948 So.

2d 830, 833 (Fla. 5th DCA 2007) (holding that “[t]he trial court [i]s required to address the discoverability of the requested documents before ordering [defendants] to review them all for privileged material.”); *Consol. Res. Health Care Fund I, Ltd. v. Ruffini*, 947 So. 2d 1278 (Fla. 4th DCA 2007) (determining that litigant did not waive privilege by failing to respond to discovery requests where court did not first rule on objections as to breadth of requests).

This view has been upheld in *W. Fla. Reg'l Med. Ctr. v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009). The First District Court of Appeal found that where threshold issues exist, the petitioner did not waive the peer review, work product or any other privilege by failing to file a privilege log. In this case, threshold issues clearly exist that have not yet been determined with regards to the breadth of the discovery requests. Until those issues are resolved, any request for a privilege log is as of yet premature.

In *Baptist Health of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008), Plaintiff propounded interrogatories requesting the production of a list of all documents in the doctors' credentialing files at Baptist Hospital as well as a privilege log detailing the dates of the documents, the nature of the documents, the identity of the person who sent or received the documents and anyone copied with the documents. Baptist objected stating that the Plaintiff was seeking descriptions of the contents of the credentialing files which are not discoverable pursuant to Fla. Stat. §§ 395.0191(8) and 766.101(5). The Third District agreed, stating that the production of the privilege log would disclose confidential information that has nothing to do with adverse medical incidents discoverable under Amendment 7. Also see *Nevin v. Palm Beach County School Board*, 958 So.2d 1003 (Fla. 1st DCA 2007) (Waiver for failure to file a privilege log should not apply where assertion of the privilege is not document specific, but category specific and the category itself is plainly protected, citing *Matlock v. Day*, 907 So.2d 577, Fla. 5th DCA 2005)).

Finally, the records pertaining to quality assurance including the accreditation records of the Joint Commission for the Accreditation of Healthcare Organizations (“JCAHO”) and/or any other accrediting bodies are protected under the peer review, credentialing and quality assurance privileges. See Fla. Stat. § 766.101.

Fla. Stat. § 766.101 defines medical review committee as a committee of a hospital or ambulatory surgery center licensed under chapter 395 or a health maintenance organization...which committee is formed to evaluate and improve the quality of health care rendered by providers of health service or to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care. Fla. Stat § 766.101(1)(a). The purpose of the surveys done by JCAHO is to assess a hospital's compliance with the standards set out by the JCAHO. See *Variety Children's Hospital v. Mishler*, 670 So. 2d 184 (Fla. 3rd DCA 1996). *Mishler* went on to state that “in order to give broad effect to the policy and intent of the statute, we must find that any evaluations that a hospital makes on its own or takes part in to improve the standard of care or patient safety and to reduce rates of death and disease is privileged under section 766.10(5)”. Also see *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992) (privilege afforded to peer review committee is intended to prohibit the chilling effect of the potential public disclosure of statements made to or information prepared for and used by the committee in carrying

out its peer review function.). Thus, records considered by the peer review committee to improve the quality of care including quality management policies, records, review and reports as well as JCAHO surveys are privileged.

This Defendant further objects on the basis that the action at hand is not ripe for judicial determination given the fact that a condition precedent has yet to have occurred, namely a determination that co-Defendant, Larry Thomas, M.D. was negligent and such negligence was a legal cause of loss, injury or damage to Plaintiff. *Maksad v. West Boca Medical Center*, 832 So.2d 788 (Fla. 4th DCA 2001, 2002).

Without waiving said objections, the adverse event report pertaining to Amber Edwards, whose care and treatment was provided by Dr. Thomas has been provided to you as referenced in our response to May 7, 2012 Request for Production, number 1b.

1. Each and every document created five (5) years prior to May 8, 2011 that in any way relates to the hospital's investigation or review of the care and treatment of any patient of Larry D. Thomas, M.D. This is a request pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

2. Each and every document created five (5) years prior to May 8, 2011, relating to any and all medical incidents, medical negligence, neglect, or default of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

3. Each and every document created five (5) years prior to May 8, 2011, related to the credentialing and re-credentialing process of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

4. Each and every document created five (5) years prior to May 8, 2011, related to Larry D. Thomas, M.D. in which you investigated an incident of medical negligence; or history of acts, neglects, or defaults which injured or could have injured a patient and caused or could have caused the death of a patient. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. In addition, this request essentially duplicates request number 2.

5. Each and every document created five (5) years prior to May 8, 2011, related to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. We reiterate that this request is not only burdensome and harassing, but it is spacious on its face. We do not understand how an alleged incident of negligence five years ago could injure the Plaintiff five years later.

6. For five (5) years prior to May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee or peer review committee in which any aspect of the clinical evaluation of was Larry D. Thomas, M.D. discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

7. All minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which any aspect of the evaluation of plaintiff's treatment was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

8. Each and every document that in any way relates to the defendant hospital's investigation or review of the care and treatment of the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

9. Each and every document in the hospital's possession relating to the termination and/or resignation of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. We further object to the predicate in this request.

10. Any and all incident reports relating to the care and treatment of the Plaintiff. Please do not provide a response indicating that you have already provided us with the documentation in this request. If you have provided it to us, we are unable to locate it and we ask that you provide it again. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Please see our response to Plaintiff's Request to Produce dated May 7, 2012 (number 1b).

11. Each and every document relating to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

12. After May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which was discussed any aspect of the clinical evaluation of Larry D. Thomas, M.D. was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

13. Any records for Larry D. Thomas, M.D. made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than the Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

14. Any records for Larry D. Thomas, M.D. made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

15. A non-redacted copy of the hospital's on call schedule for the month of May, 2011.

RESPONSE: Please see attached on-call schedule for the month of May 2011. The identities of other physicians listed on the on-call schedule have been redacted.

16. Copies of any and all documents indicating the number of hours that Larry D. Thomas was providing care and treatment to patients at the Defendant Hospital for the six (6) month period prior to May 8, 2011.

RESPONSE: None.

17. Non-redacted copies of the hospital's on call schedule for the months of January-May, 2011.

RESPONSE: Objection; irrelevant and immaterial to any issue in this claim. Without waiving said objection, please see attached copy of the hospital's redacted on-call schedule for the months January through April, 2011. The identities of other physicians listed on the on-call schedule have been redacted. As to the May 2011 on-call schedule, please see response to # 15.

18. A non-redacted copy of the hospital's on call schedule for unassigned patients for the month of May, 2011.

RESPONSE: Please see response to #15 above.

19. A non-redacted copy of the hospital's on call schedule for general surgery for the month of May, 2011.

RESPONSE: Objection. This request is duplicative in nature. Please see response to #15 above. The identities of other physicians listed on the on-call schedule for general surgery have been redacted.

20. A non-redacted copy of the check request for Larry Thomas, M.D. prepared on 6/1/2011.

RESPONSE: Objection. This request is duplicative in nature. Please see Defendant's Response to number 3 of Plaintiff's Request to Produce propounded on April 15, 2013.

21. A non-redacted copy of the 6/1/2011 invoice (52091) for Larry Thomas, M.D. for the May call x 7.

RESPONSE: Attached is a copy of the documents produced in our Better Response to number 2 of Plaintiff's Request for Production propounded on April 15, 2013. Please note the item produced is not an "invoice."

22. Any and all orientation and/or training materials of the Defendant Hospital that were provided to:

- a. Anju Thoams, RN
- b. Felicia Pagan, RN
- c. Michelle Webb, RN
- d. Judy Pittman, RN
- e. Hilari Bankhead Vaca, RN and
- f. Barbara Johnson, RN

RESPONSE: This information has been requested and will be provided if received.

23. 2011 Policies and Procedures in effect at the time of Plaintiff's admission as follows:

- a. 1156 Assessment-Reassessment
- b. 586 Assigned Roles for Staff
- c. 1322 Assignment to Treatment Area
- d. 1352 Auditing and Monitoring
- e. 576 Backup Communications
- f. 582 Authority for Emergencies
- g. 1924 Block Scheduling in the OR
- h. 1542 Call Reports-Preliminary Reports
- i. 2009 Callback of RC Personnel
- j. 1152 Chain of Command
- k. 1925 Circulating RN Responsibilities

- l. 1225 Collaborative Care Team – Nursing
- m. 588 Communication of Patient Information
- n. 1710 Communication Interdepartmental
- o. 577 Communications Plan
- p. 1979 Competency Validation
- q. 1853 Conflict Management for leadership
- r. 1711 Consultation Between Disciplines
- s. 2077 Continuity of Patient Care
- t. 1868 Criteria for Notifying Anesthesiologist and/or Attending Physician
- u. 1712 Continuing Education C9
- v. 1714 Description of Professional Scope of Practice
- w. 1869 Discharge Criteria and Planning
- x. 1977 Discharge Planning Interdisciplinary
- y. 2080 Discharge Planning Statement
- z. 1361 Discharge Reconciliation and Chart Retrieval Process
- aa. 1540 Documentation
- bb. 1930 Documentation of Operative Procedures
- cc. 1330 Follow Up Care
- dd. 1917 Hand Off Communication
- ee. 2083 Hospital Home Bound Education for Hospital
- ff. 1312 House Supervisor Role
- gg. 1041 Informed Consent
- hh. 1209 Informing Physician of Event Rpt-Complaints
- ii. 2227 Initial Assessment and Prioritization
- jj. 2229 Interdisciplinary Patient Care Plan
- kk. 2136 Medication Orders
- ll. 2198 Moderate Sedation
- mm. 1963 Operating Room Guidelines
- nn. 1725 Pain Assessment Reassessment Plan P2-Rehab Services
- oo. 2140 Pain Management
- pp. 2234 Patient and Family Education
- qq. 1862 Patient Assessment
- rr. 1675 Patients Rights and Responsibilities Policy
- ss. 660 Peer Review Process (this is an Amendment 7 Request)
- tt. 1293 Physician Supervision Process
- uu. 1884 Physician Visits
- vv. 2202 Plan for Providing Patient Care
- ww. 1983 Policies and Procedures and Documentation Requirements
- xx. 1870 Post Operative Evaluation
- yy. 1871 Post Procedure Care
- zz. 1727 Professional Credentials (this is an Amendment 7 Request)
- ~~aaa. 1337 Qualified Medical Personnel – QMP Screening (Amendment 7 Request)~~
- bbb. 1563 Quality Improvement-Schedule of Quality Control (Amendment 7 Request)
- ccc. 2091 Readmission Policy

ddd. 1625 Risk Assessment Plan EC1.10.4 (Amendment 7 Request)
eee. 158 Risk Management Education (Amendment 7 Request)
fff. 161 Risk Management Policy Statement (Amendment 7 Request)
ggg. 2094 RM Role and Relationship with Physician and Staff
hhh. 1797 Scope of Patient Assessment
iii. 1050 Sentinel and Adverse Events (Amendment 7 Request)
jjj. 212 Sentinel and Adverse Events Identification and Intense Analyst (Amendment 7 Request)
kkk. 1948 Surgery Requirements
lll. 2130 Table of Contents Nursing
mmm. 1948 Table of Contents OR Dept.
nnn. 1695 Tran-education Ec7.10.A
ooo. 1147 Transfers
ppp. 2154 Verbal and Telephone Orders Policy
qqq. 2068 Verbal and Telephone Order, Guidelines

RESPONSE: Copies have been requested and will be provided if and when received, to the extent they were in existence in 2011.

24. Any and all incident reports relating to the care and treatment provided by Larry D. Thomas, M.D. to any patient where medical negligence, intentional misconduct, and any other act, neglect, or default that caused, or could have caused, injury to or death of a patient. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-mail to: **Karen E. Terry, Esq., Attorneys for Plaintiff**, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409 (ket@searcylaw.com; mks@searcylaw.com; aje@searcylaw.com; lmn@searcylaw.com) and to **Holly B. Platter, Esq.,**

Attorneys for Defendant, Larry D. Thomas, M.D., Bush, Graziano & Rice, P.A., 101 E Kennedy Boulevard, Suite 1700, Tampa, Florida 33602 (eserve@bgrplaw.com; tdomi@bgrplaw.com, this 29th day of August, 2013.

FANN & PETRUCCELLI, P.A.
Attorneys for Defendant, Bartow Regional Medical Center
5100 North Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Telephone: (954) 771-4118
Facsimile: (954) 771-4119
Primary e-mail: PBbuckley@fplawyers.com
Secondary e-mail: TMartin@fplawyers.com

BY:  4/8/11
MICHAEL A. PETRUCCELLI
Florida Bar No.: 717312
 PAUL C. BUCKLEY
Florida Bar No.: 906697

#15

May 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Unassigned	Medicine Referral	Pulmonary	Gastroenterology	Radiology	Orthopedic Surgery	Spine Surgery	General Surgery	Date
1	Sunday									1
2	Monday								Thomas	2
3	Tuesday								Thomas	3
4	Wednesday								Thomas	4
5	Thursday								Thomas	5
6	Friday								Thomas	6
7	Saturday								Thomas	7
8	Sunday								Thomas	8
9	Monday									9
10	Tuesday									10
11	Wednesday									11
12	Thursday									12
13	Friday									13
14	Saturday									14
15	Sunday									15
16	Monday									16
17	Tuesday									17
18	Wednesday									18
19	Thursday									19
20	Friday									20
21	Saturday									21
22	Sunday									22
23	Monday								Thomas	23
24	Tuesday								Thomas	24
25	Wednesday								Thomas	25
26	Thursday								Thomas	26
27	Friday								Thomas	27
28	Saturday								Thomas	28
29	Sunday								Thomas	29
30	Monday									30
31	Tuesday									31

MAY 2011 BRMG CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Cardiology	Urology	Radiology	After Hours Radiology Interventional	Gynecology	ENT	Gynecology	Nephrology	Date
1	Sunday									1
2	Monday									2
3	Tuesday									3
4	Wednesday									4
5	Thursday									5
6	Friday									6
7	Saturday									7
8	Sunday									8
9	Monday									9
10	Tuesday									10
11	Wednesday									11
12	Thursday									12
13	Friday									13
14	Saturday									14
15	Sunday									15
16	Monday									16
17	Tuesday									17
18	Wednesday									18
19	Thursday									19
20	Friday									20
21	Saturday									21
22	Sunday									22
23	Monday									23
24	Tuesday									24
25	Wednesday									25
26	Thursday									26
27	Friday									27
28	Saturday									28
29	Sunday									29
30	Monday									30
31	Tuesday									31

MAY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Vascular	Neurology	Infectious Disease	Oncology Rotation in situ	Unassigned Referral for MVA	Plastic Surgery	Ophthalmology 4 a - 4 p	Pediatrics	Date
1	Sunday									1
2	Monday	Thomas								2
3	Tuesday	Thomas								3
4	Wednesday	Thomas								4
5	Thursday	Thomas								5
6	Friday	Thomas								6
7	Saturday	Thomas								7
8	Sunday	Thomas								8
9	Monday									9
10	Tuesday									10
11	Wednesday									11
12	Thursday									12
13	Friday									13
14	Saturday									14
15	Sunday									15
16	Monday									16
17	Tuesday									17
18	Wednesday									18
19	Thursday									19
20	Friday									20
21	Saturday									21
22	Sunday									22
23	Monday	Thomas								23
24	Tuesday	Thomas								24
25	Wednesday	Thomas								25
26	Thursday	Thomas								26
27	Friday	Thomas								27
28	Saturday	Thomas								28
29	Sunday	Thomas								29
30	Monday									30
31	Tuesday									31

May 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

NAME OF PHYSICIAN	DATES OF UNAVAILABILITY	MESSAGE and/or COVERING PHYSICIAN	INITIALS

1 ORTHOPEDICS HRMC, LRMC, then closest hospital			
2 GEN SURG GASTRO ENT VASCULAR NEUROLOGY PLAST SURG LRMC, then closest hospital			
3 OPHTHALMOLOGY -4 a - 4 p on covered days, otherwise LRMC, then closest hospital			
4 UROLOGY LRMC, then closest hospital			

#17

JANUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Unassigned	Medicine Referral	Pulmonary	Gastroenterology	Podiatry	Orthopedic Surgery	General Surgery	Pediatrics	Date
1	Saturday							Thomas		1
2	Sunday							Thomas		2
3	Monday									3
4	Tuesday									4
5	Wednesday									5
6	Thursday									6
7	Friday									7
8	Saturday									8
9	Sunday									9
10	Monday									10
11	Tuesday									11
12	Wednesday									12
13	Thursday									13
14	Friday									14
15	Saturday									15
16	Sunday									16
17	Monday									17
18	Tuesday									18
19	Wednesday									19
20	Thursday									20
21	Friday									21
22	Saturday									22
23	Sunday									23
24	Monday							Thomas		24
25	Tuesday							Thomas		25
26	Wednesday							Thomas		26
27	Thursday							Thomas		27
28	Friday							Thomas		28
29	Saturday							Thomas		29
30	Sunday							Thomas		30
31	Monday									31

JANUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Cardiology	Urology	Radiology	After Hours Radiology Intervention	Anesthesia	ENT	Gynecology	Nephrology	Date
1	Saturday									1
2	Sunday									2
3	Monday									3
4	Tuesday									4
5	Wednesday									5
6	Thursday									6
7	Friday									7
8	Saturday									8
9	Sunday									9
10	Monday									10
11	Tuesday									11
12	Wednesday									12
13	Thursday									13
14	Friday									14
15	Saturday									15
16	Sunday									16
17	Monday									17
18	Tuesday									18
19	Wednesday									19
20	Thursday									20
21	Friday									21
22	Saturday									22
23	Sunday									23
24	Monday									24
25	Tuesday									25
26	Wednesday									26
27	Thursday									27
28	Friday									28
29	Saturday									29
30	Sunday									30
31	Monday									31

JANUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Vascular	Neurology	Infectious Disease	Oncology Rotation in-situ	Unassigned Referral for MVA	Plastic Surgery	Ophthalmology 7-4 a-4 p	Date
1	Saturday	Thomas							1
2	Sunday	Thomas							2
3	Monday								3
4	Tuesday								4
5	Wednesday								5
6	Thursday								6
7	Friday								7
8	Saturday								8
9	Sunday								9
10	Monday								10
11	Tuesday								11
12	Wednesday								12
13	Thursday								13
14	Friday								14
15	Saturday								15
16	Sunday								16
17	Monday								17
18	Tuesday								18
19	Wednesday								19
20	Thursday								20
21	Friday								21
22	Saturday								22
23	Sunday								23
24	Monday	Thomas							24
25	Tuesday	Thomas							25
26	Wednesday	Thomas							26
27	Thursday	Thomas							27
28	Friday	Thomas							28
29	Saturday	Thomas							29
30	Sunday	Thomas							30
31	Monday								31

4

Page 4 of 4

FEBRUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Unassigned	Medicine Referral	Pulmonary	Gastroenterology/ER	Podiatry	Orthopedic Surgery	Spine Surgery	General Surgery	Date
1	Tuesday									1
2	Wednesday									2
3	Thursday									3
4	Friday									4
5	Saturday									5
6	Sunday									6
7	Monday								Thomas	7
8	Tuesday								Thomas	8
9	Wednesday								Thomas	9
10	Thursday								Thomas	10
11	Friday								Thomas	11
12	Saturday								Thomas	12
13	Sunday								Thomas	13
14	Monday									14
15	Tuesday									15
16	Wednesday									16
17	Thursday									17
18	Friday									18
19	Saturday									19
20	Sunday									20
21	Monday									21
22	Tuesday									22
23	Wednesday									23
24	Thursday									24
25	Friday									25
26	Saturday									26
27	Sunday									27
28	Monday								Thomas	28

FEBRUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Cardiology	Urology	Radiology DAY	After hours Radiology/ Interventional	Anesthesiology	ENT	Gyn	Nephrology	Date
1	Tuesday									1
2	Wednesday									2
3	Thursday									3
4	Friday									4
5	Saturday									5
6	Sunday									6
7	Monday									7
8	Tuesday									8
9	Wednesday									9
10	Thursday									10
11	Friday									11
12	Saturday									12
13	Sunday									13
14	Monday									14
15	Tuesday									15
16	Wednesday									16
17	Thursday									17
18	Friday									18
19	Saturday									19
20	Sunday									20
21	Monday									21
22	Tuesday									22
23	Wednesday									23
24	Thursday									24
25	Friday									25
26	Saturday									26
27	Sunday									27
28	Monday									28

FEBRUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Vascular	Neurology	Infectious Disease	Oncology Rotation in-su	Unassigned Referral for MVA	Plastic Surgery	Ophthalmology	Pediatrics	Day	Date
1	Tuesday									Tuesday	1
2	Wednesday									Wednesday	2
3	Thursday									Thursday	3
4	Friday									Friday	4
5	Saturday									Saturday	5
6	Sunday									Sunday	6
7	Monday	Thomas								Monday	7
8	Tuesday	Thomas								Tuesday	8
9	Wednesday	Thomas								Wednesday	9
10	Thursday	Thomas								Thursday	10
11	Friday	Thomas								Friday	11
12	Saturday	Thomas								Saturday	12
13	Sunday	Thomas								Sunday	13
14	Monday									Monday	14
15	Tuesday									Tuesday	15
16	Wednesday									Wednesday	16
17	Thursday									Thursday	17
18	Friday									Friday	18
19	Saturday									Saturday	19
20	Sunday									Sunday	20
21	Monday									Monday	21
22	Tuesday									Tuesday	22
23	Wednesday									Wednesday	23
24	Thursday									Thursday	24
25	Friday									Friday	25
26	Saturday									Saturday	26
27	Sunday									Sunday	27
28	Monday									Monday	28

NAME OF PHYSICIAN	DATES OF UNAVAILABILITY	MESSAGE and/or COVERING PHYSICIAN	INITIALS
1 ORTHOPEDICS HRMC, LRMC, then closest hospital			
2 GEN SURG GASTRO ENT VASCULAR NEUROLOGY PLAST SURG LRMC, then closest hospital			
3 OPHTHALMOLOGY -4 a - 4 p on covered days, otherwise LRMC, then closest hospital			
4 UROLOGY LRMC, then closest hospital			
*ERCP CALL - If GI on call does not do ERCP, rotate ERCP referrals to			

March 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Unassigned	Medicine Referral	Pulmonary	Gastroenterology ERCP	Podiatry	Spine Surgery	Orthopedic Surgery	General Surgery	Date
1	Tuesday							Okafor	Thomas	1
2	Wednesday								Thomas	2
3	Thursday								Thomas	3
4	Friday								Thomas	4
5	Saturday								Thomas	5
6	Sunday								Thomas	6
7	Monday									7
8	Tuesday									8
9	Wednesday									9
10	Thursday									10
11	Friday									11
12	Saturday									12
13	Sunday									13
14	Monday									14
15	Tuesday									15
16	Wednesday									16
17	Thursday									17
18	Friday									18
19	Saturday									19
20	Sunday									20
21	Monday								Thomas	21
22	Tuesday								Thomas	22
23	Wednesday								Thomas	23
24	Thursday								Thomas	24
25	Friday								Thomas	25
26	Saturday								Thomas	26
27	Sunday								Thomas	27
28	Monday									28
29	Tuesday									29
30	Wednesday									30
31	Thursday									31

Date	Day	Cardiology	Urology	Radiology	After Hours Radiology Intervention	Anesthesia	ENT	Gynecology	Nephrology	Date
1	Tuesday									1
2	Wednesday									2
3	Thursday									3
4	Friday									4
5	Saturday									5
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27	Sunday									27
28	Monday									28
29	Tuesday									29
30	Wednesday									30
31	Thursday									31

March 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Vascular	Neurology	Infectious Disease	Oncology Rotation	Unassigned Referral for MVA	Plastic Surgery	Ophthalmology	Pediatrics	Date
1	Tuesday	Thomas								1
2	Wednesday	Thomas								2
3	Thursday	Thomas								3
4	Friday	Thomas								4
5	Saturday	Thomas								5
6	Sunday	Thomas								6
7	Monday									7
8	Tuesday									8
9	Wednesday									9
10	Thursday									10
11	Friday									11
12	Saturday									12
13	Sunday									13
14	Monday									14
15	Tuesday									15
16	Wednesday									16
17	Thursday									17
18	Friday									18
19	Saturday									19
20	Sunday									20
21	Monday	Thomas								21
22	Tuesday	Thomas								22
23	Wednesday	Thomas								23
24	Thursday	Thomas								24
25	Friday	Thomas								25
26	Saturday	Thomas								26
27	Sunday	Thomas								27
28	Monday									28
29	Tuesday									29
30	Wednesday									30
31	Thursday									31

March 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

NAME OF PHYSICIAN	DATES OF UNAVAILABILITY	MESSAGE and/or COVERING PHYSICIAN	INITIALS
1 ORTHOPEDICS HRMC, LRMC, then closest hospital			
2 GEN SURG GASTRO ENT VASCULAR NEUROLOGY PLAST SURG LRMC, then closest hospital			
3 OPHTHALMOLOGY -4 a - 4 p on covered days, otherwise LRMC, then closest hospital			
4 UROLOGY LRMC, then closest hospital			

April 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Unassigned	Medicine Referral	Pulmonary	Gastroenterology/ERCP	Podiatry	Orthopedic Surgery	Spine Surgery	General Surgery	Date
1	Friday									1
2	Saturday									2
3	Sunday									3
4	Monday								Thomas	4
5	Tuesday								Thomas	5
6	Wednesday								Thomas	6
7	Thursday								Thomas	7
8	Friday								Thomas	8
9	Saturday								Thomas	9
10	Sunday								Thomas	10
11	Monday									11
12	Tuesday									12
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26	Tuesday									26
27	Wednesday									27
28	Thursday									28
29	Friday									29
30	Saturday									30

Date	Day	Cardiology	Urology	Radiology	After Hours Radiology/ Intervention	Anesthesia	ENT	Gynecology	Nephrology	Date
1	Friday									1
2	Saturday									2
3	Sunday									3
4	Monday									4
5	Tuesday									5
6	Wednesday									6
7	Thursday									7
8	Friday									8
9	Saturday									9
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26	Tuesday									26
27	Wednesday									27
28	Thursday									28
29	Friday									29
30	Saturday									30

April 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Days	Vascular	Neurology	Infectious Disease	Oncology Rotation M-Su	Unassigned Referral M-W	Plastic Surgery	Ophthalmology	Pediatrics	Date
1	Friday									1
2	Saturday									2
3	Sunday									3
4	Monday	Thomas								4
5	Tuesday	Thomas								5
6	Wednesday	Thomas								6
7	Thursday	Thomas								7
8	Friday	Thomas								8
9	Saturday	Thomas								9
10	Sunday									10
11	Monday									11
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13	Wednesday									13
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24	Sunday									24
25	Monday									25
26	Tuesday									26
27	Wednesday									27
28	Thursday									28
29	Friday									29
30	Saturday									30

April 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

NAME OF PHYSICIAN	DATES OF UNAVAILABILITY	MESSAGE and/or COVERING PHYSICIAN	INITIALS

1 ORTHOPEDICS HRMC, LRMC, then closest hospital
2 GEN SURG GASTRO ENT VASCULAR NEUROLOGY PLASTY SURG LRMC, then closest hospital
3 OPHTHALMOLOGY -4 a - 4 p on covered days, otherwise LRMC, then closest hospital
4 UROLOGY LRMC, then closest hospital
*ERCP CALL - If GI on call does not do ERCP, rotate ERCP referrals to

#21

52091

TO
THE
ORDER
OF

DATE
JUNE 02, 2011

AMOUNT	
\$	

BALTON REG MOD CTR

HEALTH MANAGEMENT ASSOCIATES, INC.

000002487

52091

[illegible]

CHECK REQUEST

HMA, INC.

FACILITY NAME		<u>BARTOW REGIONAL MEDICAL CEN ID# 818</u>		DATE PREPARED	<u>6/1/2011</u>	DATE NEEDED	
VENDOR NAME				ESTIMATE OF EXPENSES			
<u>Larry Thomas, MD</u>				TRAVEL(AIRPLANE,AUTO,TRAIN)\$			
VENDOR ADDRESS				LODGING(#OF DAYS X RATE)			
<u>575 E. Central Ave</u>				MEALS			
<u>Winter Haven, FL 33880</u>				CAR RENTAL			
				REGISTRATION FEE			
				OTHER(SPECIFY)			
VENDOR#							
ACCOUNT NUMBER		AMOUNT		DESCRIPTION		TOTAL \$	
<u>90070</u>				<u>7 call days for</u>			
				<u>General Surgery Call</u>			
REQUESTED BY				APPROVED BY		DATE	
<u>Medical Staff Coordinator</u>						<u>6/1/11</u>	

6/1/11

4

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT, IN AND FOR POLK
COUNTY, FLORIDA.

CASE NO.: 53-2012-CA-002611-0000-00,
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

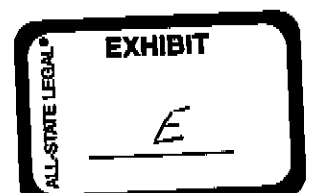
Defendants.

**PLAINTIFF'S MOTION TO COMPEL DEFENDANT BARTOW HMA, LLC D/B/A
BARTOW REGIONAL MEDICAL CENTER TO PROVIDE BETTER RESPONSES TO
THE PLAINTIFF'S REQUEST TO PRODUCE DATED JULY 30, 2013
AND MOTION FOR SANCTIONS**

Plaintiff, AMBER EDWARDS, files this, her Motion to Compel Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER to Provide Better Responses to The Plaintiff's Request to Produce Dated July 30, 2013 and Motion for Sanctions and further states as follows:

1. This is a medical malpractice case against general surgeon, LARRY D. THOMAS, M.D. (hereinafter "DEFENDANT THOMAS", and a hospital BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER (hereinafter "DEFENDANT HOSPITAL").

2. Specifically, Plaintiff presented to the Emergency Room at DEFENDANT HOSPITAL on May 9, 2011 where she was diagnosed as having gall stones. DEFENDANT HOSPITAL assigned DEFENDANT THOMAS to perform surgery to remove Plaintiff's gall bladder. During surgery, DEFENDANT THOMAS failed to identify the Plaintiff's common bile



duct, cut her common bile duct during the surgery, and afterwards failed to timely recognize that he did so.

3. Thereafter, both DEFENDANT THOMAS and nurses at DEFENDANT HOSPITAL failed to appropriately monitor the Plaintiff, and prematurely discharged the Plaintiff despite the fact that she displayed symptoms of suffering from a severed bile duct.

4. Thereafter, Plaintiff continued to suffer tremendous pain and her stomach grew in size. Plaintiff became severely dehydrated and returned to the emergency room at DEFENDANT HOSPITAL where it was finally discovered that Defendant, LARRY D. THOMAS, M.D. had cut Plaintiff's common bile duct. Ultimately, Plaintiff, AMBER EDWARDS travelled in an ambulance for corrective surgery at Tampa General Hospital.

5. On July 30, 2013 Plaintiff served its First Request to Produce to DEFENDANT HOSPITAL. The DEFENDANT HOSPITAL filed a response on August 29, 2013. **Attached hereto as "Exhibit A"**. In addition to boilerplate objections, DEFENDANT HOSPITAL asserted an eight (8) page objection to the Plaintiff's request for Amendment 7 documents.

6. On November 2, 2004 the voters of Florida overwhelmingly approved Amendment 7, known as the "Patient's Right to Know about Adverse Medical Incidents." See Art. X, § 25, Fla. Const. Amendment 7 broadly sets out that "any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident" are subject to discovery. *Id* (emphasis added). Prior to the passage of Amendment 7, health care facilities and providers were clothed with a veil of secrecy and were afforded various privileges, codified across an array of statutes, to ensure open and candid peer review,

credentialing, investigations, quality assurance and risk assessments to improve the quality of health care.

7. In expressing the will of the people of Florida, Amendment 7 lifted the veil of privilege and confidentiality and allowed for “disclosure of information that will allow patients to better determine from who they should seek health care, evaluate the quality and fitness of health care providers currently rendering services to them, and allow them access to information gathered through the self-policing process during the discovery period of litigation filed by injured patients or the estates of deceased patients against their health care providers. See *Florida Hospital vs. Buster*, 984 So.2d 478, 494 (Fla. 2008).

8. The Buster Court further invalidated the constitutionality of section 381.028, Florida Statutes, subsections 3(j) and (5)-(7)(a) because they “contravened the broad rights to access adverse medical incident reports granted by Amendment 7”. *Buster*, 984 So.2d at 492-94. Furthermore, the language of Amendment 7 and the ballot summary make it abundantly clear that the main purpose of Amendment 7 was to do away with the “legislative restrictions on a Florida patient’s access to a medical provider’s history of acts, neglects or defaults’ because such history ‘may be important to a patient’”. *Id* at 488 (citing *Advisory Opinion to the Att’y Gen. re Patients’ Right to Know About Adverse Med. Incidents*, 880 So.2d 617, 618 (Fla. 2004)). Thus, the main focus and clear purpose of Amendment 7 was to “provide access to records that existed but were not accessible due to statutory restrictions.” *Buster*, 984 So.2d at 489.

9. As such, the most recent decisions from the Supreme Court and other appellate courts do call for the discovery of adverse medical incident records, including peer review

documents, risk management documents, quality assurance documents, etc., which were not previously accessible.. *See West Fla. Reg'l Med. Ctrs., Inc., v. See*, 79 So.3d 1, 13 (Fla. 2012)(stating that Amendment 7 provides a patient with the right to access "any records" that relate to "adverse medical incidents" which include "incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance...."); see also *Baldwin v. Shands Teaching Hosp. and Clinics, Inc.*, 45 So.3d 118, 124-126 (Fla. 1st DCA 2010)(granting writ of certiorari and requiring the lower court to order the hospital to produce its risk management incident report and peer review records); *Fla. Eye Clinic, P.A., v. Gmach*, 14 So.3d 1044, 1048 (Fla. 5th DCA 2009) (ordering disclosure of incident reports prepared by the clinic's risk manager in accordance with Amendment 7); *Buster*, 984 So.2d at 481 (concluding Amendment 7 to be self-executing and retroactive and its provisions applying to records existing prior to its package, including documents that were otherwise protected from discovery, such as records that otherwise fell within the purview of sections 395.1091 and 766.101); *Amisub N. Ridge Hosp., Inc. v. Sonaglia*, 995 So.2d 999 (Fla. 4th DCA 2008) (extending Amendment 7 to include production of peer review materials that relate to an adverse medical incident from a non-party hospital in a defamation and tortious interference claim).

10. Therefore, the binding authority from the Supreme Court is clear: **any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident is subject to discovery, regardless of whether or not such documents are peer review documents, risk management documents, quality assurance documents, etc.**

11. Notwithstanding the above, DEFENDANT HOSPITAL's eight (8) page objection completely ignores binding precedent of the Supreme Court, and instead cites to a plethora of inclinable case law in response to requests 1-14 & 24. This Court should overrule the hospital's frivolous objections, and also award sanctions to the Plaintiff pursuant to Fla.R.Civ.P. 1.380(4), because DEFENDANT HOSPITAL has already been ordered to produce this very same discovery by this Court in the case of *Kirkland v. Thomas, MD et al*, Case No. 53-2010CA-009193. In fact, on June 20, 2013, DEFENDANT HOSPITAL was sanctioned \$23,761.00 for its failure to produce Amendment 7 discovery¹. Accordingly, it is abundantly clear that DEFENDANT HOSPITAL already knows that its objections are frivolous and not supported by Florida Law, yet continues to assert those objections anyway.

12. The Court should view DEFENDANT HOSPITAL's objections and behavior as a complete and utter abuse of the discovery process and should award sanctions against DEFENDANT HOSPITAL to punish it for its behavior, as well as to deter it from such conduct in the future.

13. Moreover, DEFENDANT HOSPITAL also failed to provide a response to Request to Produce #15, which requested a non-redacted copy of the hospital's on call schedule for the month of May, 2011. Instead of producing the document as requested, DEFENDANT HOSPITAL provided a redacted copy. Similarly, DEFENDANT HOSPITAL also failed to provide a response to request to Produce #17 #18 and #19, which requested non-redacted copies of the hospital's on call schedule for the months of January-May, 2011, non-redacted copies of

¹ See "Exhibit B", September 21, 2012 order and "Exhibit C", June 20, 2013 order.

the hospital's on call schedule for unassigned patients for the month of May, 2011, and non-redacted copies of the hospitals' on call schedule for general surgery for the month of May, 2011.

14. There is nothing confidential whatsoever about the names or identifies of the other physicians on call. In fact, DEFENDANT HOSPITAL failed to even assert such an objection and just merely redacted what it wanted to. This is improper, and to the extent that DEFENDANT HOSPITAL asserts that the names or identities of other physicians on call are confidential, it has waived that objection.

15. It is important to obtain un-redacted copies of these documents as it is vital for the Plaintiff to identify the other physicians that DEFENDANT HOSPITAL could have assigned to care for the Plaintiff as discovery has revealed DEFENDANT HOSPITAL knew that DEFENDANT THOMAS was not capable of competently performing a laparoscopic cholecystectomy, but assigned him to perform surgery on the Plaintiff anyway.

16. Specifically DEFENDANT HOSPITAL was aware as of December 26, 2009 that DEFENDANT THOMAS had a conversion rate from a laparoscopic cholecystectomy to an open cholecystectomy of over twenty-six (26) percent. This Event Report, "Exhibit D" targeted this conversion rate as a serious problem, because the national average conversion rate is only five (5) percent. That is an alarming statistic as it meant that DEFENDANT THOMAS' conversion rate was greater than five (5) times the national average as he was injuring one (1) in every four (4) patients.

17. As acknowledged by DEFENDANT HOSPITAL's risk manager, Karen Cochrane, this event report documents an adverse medical incident which means "medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient." See Art. X, § 25, Fla. Const². Notwithstanding, rather than terminate, suspend, or otherwise revoke DEFENDANT THOMAS' surgical privileges, DEFENDANT HOSPITAL decided to merely to "track and trend" and review his surgeries, even though his conversion rate was significant³.

18. In fact, prior to the Plaintiff's surgery, DEFENDANT THOMAS and DEFENDANT HOSPITAL were aware of at least ten adverse medical instances regarding failed laparoscopic procedures performed by DEFENDANT THOMAS⁴:

- a) DEFENDANT THOMAS' patient died on May 18, 2008 following a cholecystectomy
- b) DEFENDANT THOMAS converted a laparoscopic cholecystectomy to an open cholecystectomy during surgery on March 17, 2009
- c) DEFENDANT THOMAS converted a laparoscopic cholecystectomy to an open cholecystectomy during surgery on June 2, 2009
- d) DEFENDANT THOMAS converted laparoscopic cholecystectomy to an open cholecystectomy during surgery on June 24, 2009
- e) DEFENDANT THOMAS converted another laparoscopic cholecystectomy to an open cholecystectomy during surgery on June 24, 2009
- f) DEFENDANT THOMAS converted a laparoscopic cholecystectomy to an open cholecystectomy during surgery on August 28, 2009

² See "Exhibit E" deposition of Karen Cochrane taken on January 4, 2013 at P. 44:4-12.

³ See "Exhibit F" January 6, 2010 notation of Judy Passela, DEFENDANT HOSPITAL's Director P.I.

⁴ See "Composite Exhibit G" – corresponding event reports

- g) DEFENDANT THOMAS converted a laparoscopic cholecystectomy to an open cholecystectomy during surgery on September 9, 2009
- h) DEFENDANT THOMAS converted a laparoscopic cholecystectomy to an open cholecystectomy during surgery on November 23, 2009
- i) DEFENDANT THOMAS converted a laparoscopic cholecystectomy to an open cholecystectomy during surgery on January 21, 2010
- j) DEFENDANT THOMAS converted a laparoscopic cholecystectomy to an open cholecystectomy during surgery on January 1, 2011

19. Moreover, also unknown to the Plaintiff, but known to DEFENDANT HOSPITAL was that the nursing staff of DEFENDANT HOSPITAL had concerns regarding DEFENDANT THOMAS. DEFENDANT HOSPITAL's nurse Judy Pittman, RN testified that there was concern about DEFENDANT THOMAS appearing disheveled and unkempt⁵. Additionally, Nurse Pittman testified that there were patients who came back after surgery and the nursing staff was concerned for the patient's well-being because the surgeon for the patient was DEFENDANT THOMAS⁶. Nurse Pittman communicated her concerns to the DEFENDANT HOSPITAL⁷, and went so far as to say she would not allow her own child to be operated on by DEFENDANT THOMAS⁸.

20. Nurse Hillari Bankhead-Vaca was DEFENDANT HOSPITAL's nurse who provided care and treatment to the Plaintiff as well. Nurse Hillari Bankhead-Vaca also was concerned about the surgical capabilities of DEFENDANT THOMAS in May of 2011. She testified that a lot of DEFENDANT THOMAS' surgeries were not coming out well, and that his

⁵ See "Exhibit H" deposition of Judy Pittman, RN at P.47:3-16.

⁶ See "Exhibit H" at P.54:3 – P.55:1

⁷ See "Exhibit H" at P.54:3 – P.55:1

⁸ See "Exhibit H" at P.55:14-P.56:10

patients had longer recovery times. Nurse Bankhead-Vaca reported these concerns to the governing body of DEFENDANT HOSPITAL; the hospital's response to Nurse Bankhead-Vaca was to write down the names and dates of the patients injured by DEFENDANT THOMAS so that the hospital could "show a trend". In fact, Nurse Bankhead-Vaca was so concerned about DEFENDANT THOMAS that she reported her concerns directly to the CEO of the DEFENDANT HOSPITAL. The CEO's response was that DEFENDANT HOSPITAL was "taking care of" the situation⁹.

21. Nurse Bankhead-Vaca was also concerned about DEFENDANT THOMAS' physical appearance as he was getting short of breath, winded, fatigued become difficult to understand and would fall asleep while documenting and dictating. Even more concerning was that this surgeon's hands would often be very shaky¹⁰. In fact, Nurse Bankhead-Vaca was so concerned about DEFENDANT THOMAS' performing a subsequent surgery on the Plaintiff that she took it upon herself and urged the Plaintiff's mother, Patricia Boutwell, to demand the Plaintiff's transfer to Tampa General Hospital because of her belief that the Plaintiff would die if DEFENDANT THOMAS operated on the Plaintiff again¹¹. It is fortunate that Nurse Bankhead-Vaca spoke up and urged Ms. Boutwell to have the Plaintiff transferred to a facility with qualified physicians, as discovery revealed that DEFENDANT THOMAS was

⁹ See "Exhibit I" deposition of Nurse Hillari Bankhead-Vaca at P.13:1 – P.16:22

¹⁰ See "Exhibit I" at P.17:6-18:14.

¹¹ See "Exhibit I" at P.23:22 – P.27:20; see also Exhibit J" deposition of Patricia Boutwell a P.36:1-P.37:5

going to perform an operation on the Plaintiff that he had not performed since residency, some twenty five (25) to thirty (30) years prior¹².

22. Instead of taking action in the face of the **known** danger DEFENDANT THOMAS presented to the lives and safety of patients at DEFENDANT HOSPITAL, both with respect to surgery in general, and specifically patients upon whom he performed laparoscopic cholecystectomies, DEFENDANT HOSPITAL did nothing. It continued to ignore the fact that DEFENDANT THOMAS was incompetent and was injuring one (1) in every four (4) patients. DEFENDANT HOSPITAL's actions in continuing to re-credential DEFENDANT THOMAS and failing to revoke his privileges are unconscionable, not to mention negligent. Not only did it fail to remove DEFENDANT THOMAS' privileges at the hospital, **it scheduled DEFENDANT THOMAS to perform surgery on Plaintiff on May 8, 2011.** And not just any surgery, but a laparoscopic cholecystectomy, the very surgery it had generated repeat event reports documenting his inability to perform that surgery properly.

23. DEFENDANT HOSPITAL also filed perplexing and inappropriate responses to Request for Produce Numbers 20 and 21 which seek non-redacted copies of the checks request for DEFENDANT THOMAS as well as non-redacted copies of the invoice for DEFENDANT THOMAS' May surgical call. DEFENDANT HOSPITAL refuses to provide unreacted copies, without asserting an objection. There is no reason for this practice, and it is an abuse of the discovery process.

¹² See "Exhibit K" deposition of DEFENDANT THOMAS at P.100:11 – P.104:9

24. DEFENDANT HOSPITAL has not provided documentation response to request to produce numbers 22 and 23 at the time that this motion was filed. The Court should order it to do so within ten (10) days.

25. DEFENDANT HOSPITAL also claims that it provided the event report that pertains to DEFENDANT THOMAS' negligent surgical procedure pertaining to the Plaintiff. If DEFENDANT HOSPITAL has done so, the Plaintiff is unable to find it. The Plaintiff requests the Court to order DEFENDANT HOSPITAL to provide the event report pertaining to the Plaintiff. Moreover, Plaintiff's production of this event report also serves as evidence in fact that the DEFENDANT HOSPITAL is aware that its Amendment 7 objections are improper and frivolous.

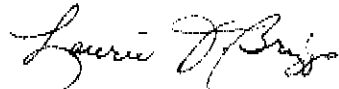
26. Movant hereby certifies that a good faith effort was made to obtain the discovery requested herein without court action¹³.

WHEREFORE, Plaintiff, AMBER EDWARDS respectfully requests that this Honorable Court enters an order GRANTING her Motion to Compel Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER to Provide Better Responses to The Plaintiff's Request to Produce Dated July 30, 2013 and Motion for Sanctions, and any other relief this Court deems necessary and proper.

¹³ See September 3, 2013 letter to counsel, attached hereto as "Exhibit L"

Plaintiff's Motion to Compel Defendant, Bartow HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER to
Provide Better Responses to the Plaintiff's Request to Produce Dated July 30, 2013 and Motion for Sanctions
Edwards vs. Bartow Regional Medical Center, et al.
Case No.: 53-2012-CA-002611-0000-00, Section 4
Page 12 of 13

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve
to all Counsel on the attached list, this 17th day of September, 2013.

 987905

KAREN E. TERRY
FLORIDA BAR NO.: 45780
MATTHEW K. SCHWENCKE
FLORIDA BAR NO.: 057132
Primary E-mail: ket@searcylaw.com
Secondary E-mail(s): mks@searcylaw.com;
aje@searcylaw.com
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone: (561) 686-6300
Fax: (561) 383-9441
Attorney for Plaintiff

COUNSEL LIST

Michael A. Petruccelli, Esquire
Pbuckley@fplawyers.com;
Tmartin@fplawyers.com
Fann & Petruccelli, P.A.
5100 N Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Phone: (954)-771-4118
Fax: (954)-771-4119
Attorneys for BARTOW HMA, LLC d/b/a
BARTOW REGIONAL MEDICAL
CENTER

Holly B. Platter, Esquire
eserve@bgrplaw.com;tdomi@bgrplaw.com;
Bush Graziano Rice & Platter, P.A.
101 E Kennedy Boulevard, Suite 1700
Tampa, FL 33601
Phone: (813)-228-7000
Fax: (813)-273-0091
Attorneys for LARRY D. THOMAS, M.D.

IN THE CIRCUIT COURT OF THE
10th JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA

CASE NO.: 53-2012 CA-002611-0000-00
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER
and LARRY D. THOMAS, M.D.,

Defendants.

DEFENDANT, BARTOW HMA, LLC d/b/a
BARTOW REGIONAL MEDICAL CENTER'S RESPONSE TO PLAINTIFF'S
REQUEST TO PRODUCE DATED JULY 30, 2013

Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER,
by and through undersigned counsel, hereby files its Response to Plaintiff's Request to Produce
dated July 30, 2013, and pursuant to Florida Rules of Civil Procedure 1.350, states as follows:

GENERAL OBJECTIONS

To the extent that this Request seeks "each and every"/"any and all" discovery of Amendment 7 related materials, Defendant objects and moves for protective order. To begin with, the Request, consisting of 24 numbered requests and 75 subparts, is overly broad, vague, ambiguous, burdensome, harassing, abusive, immaterial and irrelevant. The Request is not reasonably calculated to lead to the discovery of admissible evidence. Defendant requests intervention and protection from this Court to narrow and limit the extent of this Request to Produce, and to determine the amount of reasonable costs and fees for Defendant to review materials and respond to any appropriate requests.

Florida law protects against the discovery of records considered by medical review committees that function within a hospital, as well as records generated by, or received by, a hospital's risk management department. Specifically, § 395.0191(8), Fla. Stat., protects the investigations, proceedings, and records of a hospital in considering and acting upon an

application for staff membership or clinical privileges. § 395.0193(8), Fla. Stat., protects the investigations, proceedings, and records of a hospital's peer review panels, disciplinary boards or committees acting in their peer review or disciplinary function. § 395.0197(4), Fla. Stat., states that "incident reports are part of the workpapers of the attorney defending the licensed facility." § 766.101(5), Fla. Stat., protects the investigations, proceedings, and records of hospital committees formed to evaluate and improve the quality of health care rendered by providers of health service, to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care, or that the cost of health care rendered was considered reasonable by the providers of professional health services in the area. 1 2

This Request could be interpreted to include incident reports from Bartow Regional Medical Center without reference to whether the incident report(s) relates to an adverse medical incident. Prior to the passage of Amendment 7, no records or information within the scope of this Request were discoverable or admissible for any purpose in a civil action. While Amendment 7 provides patients access to certain formerly privileged records, the scope of that access is limited by the Amendment's terms: Amendment 7 only provides patients a right to access to records made or received in the course of business by a health care facility or a health care provider relating to adverse medical incidents.

Certain records within the scope of the Request do not relate to adverse medical incidents and therefore are not subject to Amendment 7. *See Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 827 (Fla. 2d DCA 2007); *see also W. Fla. Reg'l Med. Ctr. v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009). Any privileged records which are not subject to Amendment 7 remain privileged. *Id.*

The *See* court explained the limits of the term "adverse medical incident" in Amendment 7. Specifically, "the word 'incident' itself indicates an isolated event." *See*, 18 So. 3d at 690. The phrase "adverse medical incident" can only mean "a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient." *Id.* (citing *Shahbas*, 960 So. 2d at 827). The court explained that while an adverse medical incident may be a negligent act or omission, that "act or omission must be connected with a patient and must be the cause or near-cause of an injury or death." *See*, 18 So. 3d at 690. Accordingly, for a record to fall within the scope of Amendment 7, the record must relate to a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient.

Where a party seeks discovery of privileged materials pursuant to an exception to the privilege, it is the party's burden to demonstrate that the exception applies. *See Eight*

1 This Defendant acknowledges *W. Fla. Reg'l Med. Ctr. v. See*, 2012 WL 87282 (Fla. Jan 12 2012) holding that a physician's blank application for hospital-privileges is discoverable when a claim of negligent-credentialing is at issue. The *See* Court however, unambiguously held that sections 395.0191 and 766.101 are still valid. Furthermore, the court held that a completed application remains privileged.

2 To the extent that Plaintiff might rely on *Lower Keys Medical Center v. Windisch*, 29 So. 3d 351 (Fla. 3d DCA 2010), while the Third District held that issues raised by petitioner in that case contravened the Court's decision in *Buser* and were consequently frivolous, the case lacks precedential value because precedent is only created by the precise points discussed in an appellate opinion. *See, e.g., Adelman Steel Corp. v. Winter*, 610 So. 2d 494, 501 (Fla. 1st DCA 1992); *see also Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st DCA 2005); *Scottsdale Ins. Co. v. Haynes*, 793 So. 2d 1006 (Fla. 5th DCA 2001); 20 Am. Jur. 2d Courts § 133. Because the *Windisch* decision does not address any legal issues specifically, it lacks precedential value.

Hundred, Inc. v. Fla. Dep't of Revenue, 837 So. 2d 574, 576 (Fla. 1st DCA 2003) (quoting *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 183 n. 9, 184 (Fla. 1st DCA 2001) (determining that "[j]ust as the proponent of the privilege has the burden of proof as to facts which give rise to the privilege, the party seeking to abrogate the privilege has the burden to prove facts which would make an exception to the privilege applicable" by "a preponderance of the evidence.")); *Shell Oil Co. v. Par Four P'ship*, 638 So. 2d 1050, 1050 (Fla. 5th DCA 1994) (holding that "[w]hen communications appear on their face to be privileged, the party seeking disclosure bears the burden of proving that they are not."); see also *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004) (finding that where a beneficiary sought attorney client privileged or work product protected records of trustee's attorneys, the "beneficiary would have to prove the existence of some exception to overcome the privilege.").

The court in *See* explained that the privilege at issue was "still in effect to the extent that it does not prohibit the production of records relating to adverse medical incidents under Amendment 7." *See*, 18 So. 3d at 689. Accordingly, where records and information are protected under §§ 395.0191(8), 395.0193(8), 395.0197(4), and/or 766.101(5), Fla. Stat., it is Plaintiff's burden to establish that the requested records and information fall within the scope of Amendment 7 to overcome the statutory privileges. Although Bartow Regional Medical Center maintains that Plaintiff has not established that the subject records and information fall within the scope of Amendment 7, it acknowledges the First District's ruling that a health care provider cannot be "the final arbiter in determining whether a medical incident . . . was 'adverse.'" *See Baldwin v. Shands Teaching Hosp. and Clinics, Inc.*, 45 So. 3d 118 (Fla. 1st DCA 2010). The court in *Baldwin* continued, "[s]uch ultimately is the court's decision upon a proper consideration of the nature of the records requested and the broad coverage of Amendment 7." *Id.* Without any showing that the records responsive to this Request are within the scope of records of adverse medical incidents under Amendment 7, the records remain privileged, and the discovery request should be denied.

Furthermore, a hospital is only obligated to produce records that were "made or received in the course of business." *See* Art. X, sect 25(a), Fla. Const.; *Benjamin v. Tandem Healthcare, Inc.*, 998 So. 2d at 566, 570 (Fla. 2008) ("In interpreting a constitutional amendment, we begin with the amendment's plain language."). While records created routinely as part of a hospital's efforts in providing care and treatment to patients or in following state and federal reporting or documentation requirements may be made or received in the course of business, records outside of such practice are not and thus would fall outside the scope of Amendment 7. Courts have uniformly held the business of a hospital is the care and treatment of patients. *See, e.g., Cooks v. O'Brien Properties, Inc.*, 710 A.2d 788, 795 (Conn. App. Ct. 1998) ("the business of a hospital is treating patients") (citation omitted); *Williams v. Alexander*, 129 N.E.2d 417, 419 (NY Ct. App. 1955) ("The business of a hospital, it is self-evident, is to diagnose and treat its patients' ailments.").

Conversely, it is expressly not the business of a hospital to make records for use in subsequent litigation. *See, e.g., Temple v. F. W. Woolworth Co.*, 356 A.2d 880, 882 (Conn. 1975) ("it is not the business of a hospital to collect and preserve information for use in litigation"); *Bauer v. Veith*, 130 N.W.2d 897, 900 (Mich. 1964) (cannot be "claimed that it was 'the regular course of such [hospital] business to make such memorandum or record'")

(citation omitted, alteration in original); *Green v. City of Cleveland*, 444, 83 N.E.2d 63, 65 (Ohio 1948) ("it was the business of the hospital to diagnose plaintiff's condition and to treat her for her ailments, not to record a statement describing the cause of the accident in which plaintiff's injuries were sustained"). Thus, to the extent that a record was made not for the purpose of care and treatment, such a record would typically not fall within the scope of Amendment 7.

Furthermore, the only records involving investigation of an unusual incident that are made in the course of business are those records required to be created in response to an unusual incident pursuant to some regulatory reporting or documentation requirement such as incident reports or other documentation required to be created under section 395.0197, Florida Statutes. *Cf. Yisrael v. State*, 993 So. 2d 952, 958 (Fla. 2008) (noting that records kept according to a statutorily mandated duty are kept in the course of business). By contrast, a record created for purposes of investigation of an unusual event for potential future litigation that is not similarly mandated is not made "in the course of business." *Cf. Brown v. International Paper Co.*, 710 So. 2d 666, 668 (Fla. 2d DCA 1998) (letter from Federal Express and handwriting analyst's report created as part of investigation of forged purchase order not made in the course of business); *Simmons v. State*, 697 S. 2d 985, 986 (Fla. 4th DCA 1997) (list itemizing stolen items not demonstrated to be made in course of business).

Thus, records that are not made in response to a federal or state reporting or documentation requirement, and are not made as part of the care or treatment of a patient are not made or received in the course of business as required to be discoverable under Amendment 7. Consequently, these documents remain privileged.

Further, to the extent that this Request includes attorney-client privileged communications, Florida law is clear that "included within the attorney-client privilege are communications the insured makes to the insurer for its use to fulfill its obligation to defend on the insured's behalf." *See Reynolds v. State*, 963 So. 2d 908, 911 (Fla. 2d DCA 2007); *Staton v. Allied Chain Link Fence Company*, 418 So. 2d 404, 405-06 (Fla. 2d DCA 1982); *Grand Union Company v. Patrick*, 247 So. 2d 474, 475 (Fla. 3d DCA 1971); *see also 17A Lee R. Russ, et al., Couch on Insurance* 3d § 250:19 (2000) (describing the majority view that the "attorney-client privilege applies to communications between an insured and its liability or indemnity insurer as to an incident possibly giving rise to liability."). Furthermore, where a client makes notes memorializing an event to consult an attorney for the purposes of defense in impending litigation, those notes are protected by the attorney client privilege. *See Lemonik v. Eastern Airlines, Inc.*, 632 So. 2d 239 (Fla. 3d DCA 1994); and *Merlin v. Boca Raton Community Hosp., Inc.*, 479 So. 2d 236 (Fla. 4th DCA 1985).

No appellate court has held that Amendment 7 alters the longstanding privilege attached to attorney client communications. As a threshold matter, attorney client privileged materials are not "made or received in the course of business," as required to be discoverable under Amendment 7. *See Article X, section 25(a).*

The Second District in *Lakeland Regional Medical Center v. Neely*, 8 So. 3d 1268 (Fla.

2d DCA 2009), cautioned that it did not address attorney-client communications because the defendant did not argue that the documents were prepared or produced at the attorney's request for use in litigation. Thus, the opinion did not address the impact of Amendment 7 on the attorney-client privilege.

The distinction in *Neely* is supported by other authorities. The Florida Supreme Court in its advisory opinion explains that Amendment 7 "does not expressly affect . . . the attorney-client privilege, and there is no evidence of any intent to do so." Advisory Opinion to the Att'y General Regarding Patients' Right to Know About Adverse Medical Incidents, 880 So. 2d 617, 621 (Fla. 2004). In a follow up to the advisory opinion, questions set forth by Justice Cantero and responses by counsel for the Buster Respondents in the Florida Supreme Court suggest that attorney client privilege remains absolute. See Transcript of Oral Argument in *Buster*, 43, 56-57 (attached as Exhibit I) (questioning that Amendment 7 could affect attorney client privilege and counsel arguing that it did not). The Fifth District in *Gmach* noted support for this argument, stating: "[s]ince the supreme court's opinion in *Buster*, several circuit courts have weighed in on this issue, with the bulk of them concluding that the [attorney client] privilege still exists." *Florida Eye Clinic v. Gmach*, 14 So. 3d 1044, 1047 (Fla. 5th DCA 2009).

Additionally, although the Florida Supreme Court in its advisory opinion stated that nothing in Amendment 7 would affect the work product privilege, the courts in *Lakeland Regional Medical Center v. Neely*, 8 So. 3d 1268 (Fla. 2nd DCA 2009), and *Florida Eye Clinic v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009), held that Amendment 7 supersedes any protection by the fact work product privilege of incident reports.

The district courts, however, expressly did not conclude that Amendment 7 supersedes protection of opinion work product. The Fifth District specified: "[w]e do not read amendment 7 as evincing an intent from the voters to eliminate the privilege of opinion work product." *Gmach*, 14 So. 3d at 1050 (emphasis in original).

Furthermore, though the court in *Gmach* erroneously narrowed the scope of opinion work product to only attorney-created work product, Florida Rule of Civil Procedure 1.280(b)(3) expressly protects the mental impressions, conclusions and opinions of an attorney "or other representative of a party." See also *Surf Drugs v. Vermette*, 236 So. 2d 108, 113 (Fla. 1970) ("the work product of the litigant, his attorney or agent, cannot be examined, absent rare and exceptional circumstances"); *Colonial Penn Ins. Co. v. Blair*, 380 So. 2d 1305, 1306 (Fla. 5th DCA 1980) ("To bring something within the 'work product' ambit, there must be some indication of personal thought, views, knowledge, or evaluation by the attorney, litigant, or agent"); *Alachua County Hosp. v. Zimmer, USA, Inc.*, 403 So. 2d 1087 (Fla. 1st DCA 1981) ("[C]ommunications, reports, memoranda, etc., prepared in anticipation of litigation and passing between a client and his attorney, and/or their employed investigators, are work product").

Here, the scope of the Request includes records and information which contain or constitute the mental impressions, conclusions and opinions of representatives of Bartow Regional Medical Center. Even if this Court were to conclude that Amendment 7 has done

away with fact work product protection, Bartow Regional Medical Center's opinion work product remains protected in light of Amendment 7.

Furthermore, the Code of Federal Regulations protects the Hospital from being required to disclose attorney work-product. 45 C.F.R. § 164.524(a)(1)(ii) ("an individual has a right of access to inspect and obtain a copy of protected health information about the individual. . . except for: . . . [i]nformation compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding."). Moreover, federal regulations provide that any state law that is contrary to its provisions is preempted unless the state law is more stringent by providing greater confidentiality to protected health information. "State law" is defined to include the State Constitution. See 45 C.F.R. § 160.202.

In addition, the Florida Statutes have long imposed privileges on credentialing files. Florida Statutes §§ 395.0191(8), 766.101(5). Section §395.0191(8) protects the investigations, proceedings, and records of as hospital in considering and acting upon an application for staff membership or clinical privileges. Section 766.101(5) also mandates that the "investigations, proceedings, and records" of a credentialing committee "shall not be subject to discovery."

The Supreme Court in *W. Fla. Reg'l Med. Ctr. v. See*, 2012 WL 87282 (Fla. Jan. 12, 2012) recently and unambiguously held that Sections 395.0191 and 766.101 are still valid and protect the exact category of documents that you are seeking to be disclosed here. The *See* Court was called upon to determine whether a medical malpractice plaintiff's request for a blank application for hospital privileges was protected from discovery under the statutes. The Court held that where a claim for negligent credentialing is pending, a blank application is discoverable because it is not a part of the hospital decision-making process, and is also evidence of an "adverse incident" under Amendment 7 because the act of negligently credentialing a medical provider constitutes an adverse incident.

In holding that a blank application is not a part of the decision-making process that is protected under the statutes, the Supreme Court expressly distinguished completed applications, such as those requested here.

Without waiving said objections, a blank application for staff privileges is not contained within Dr. Larry Thomas' credentialing file.

This holding is fully in accord with the longstanding law of the Supreme Court, which recognized in *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992), that these statutory privileges are to be construed broadly in order to encourage full candor in peer review proceedings. See also *Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 827 (Fla. 2d DCA 2007) (holding that documents relating to the credentialing and re-credentialing process for a physician are not within the scope of Amendment 7); *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008) (doctor's credentialing file was statutorily protected pursuant to sections 395.0191(8) and 766.101(5)); *Columbia Park Med. Ctr., Inc. v. Gibbs*, 728 So. 2d 373 (Fla. 5th DCA 1999) (applications for clinical privileges were protected from

discovery under sections 766.101(5) and 395.0191(8)); *Boca Raton Community Hospital v. Jones*, 584 So. 2d 221 (Fla. 4th DCA 1991) (reports of peer review committee are privileged).

Additionally, the identities of individuals involved in peer review, credentialing and quality assurance activities are privileged, confidential and are beyond the scope of Amendment 7. See *Palms of Pasadena Hosp. v. Rutigliano*, 908 So. 2d 594 (Fla. 5th DCA 2004) (names of members of credentialing committee not discoverable); *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 390 2008). As such, the identities of reviewers involved in peer review, credentialing or quality assurance under sections 395.0191, 395.0193 and 766.101 are not discoverable under Amendment 7 and to the extent that this Request seeks such information, it is not discoverable under Amendment 7.

This Defendant objects to producing any documents pursuant to this Request absent an Order requiring Plaintiff to pay the costs of discovery prior to production. Section 381.028(7)(c)(1), Florida Statutes, allows the Hospital to require the Plaintiff to pay the full costs of production before acting on the request. See *Buster*, 984 So.2d at 493-94 (leaving intact the statutory provision allowing pre-payment of costs of production); see also *Columbia Hosp. Corp. of S. Broward v. Fain*, 16 So.3rd 236 (Fla. 4th DCA 2009) (noting that payment is required prior to response to discovery). Therefore, in the event that the Court enters an Order requiring the production of any material that is the subject matter of these objections/Motion for Protective Order, Defendant, Bartow Regional Medical Center, requests that the Court enter an Order requiring the Plaintiff to pay in full the costs of Amendment 7 discovery prior to the Defendant, Bartow Regional Medical Center, acting on the request.

Given that this request is not reasonably limited in scope or time, personnel from Bartow Regional Medical Center would have to locate a staggering amount of incident reports. The reports would then need to be redacted for patient identifiers, the identities of personnel involved in peer review, and opinion work product.

Due to the sensitivity of records and information at issue and based on the fact that Plaintiff has not made payment of the costs that will be incurred by the Hospital in responding to the discovery requests as required by section 381.028(7)(c)1, Florida Statutes, and because Plaintiff's discovery requests exceed the scope of Amendment 7, Defendant, Bartow Regional Medical Center, is not providing a privilege log at this time. While Defendant, Bartow Regional Medical Center, does not believe a privilege log is due at this time, out of an abundance of caution this issue is being brought to the Court's attention. To the extent the Court has a different view, Defendant, Bartow Regional Medical Center, asks that the Court waive any requirement that it do so.

Until the Court rules on the objections to this Request asserted by this Defendant, any preparation of a privilege log is premature. See *Gosman v. Luzinski*, 937 So. 2d 293, 296 (Fla. 4th DCA 2006) (finding that "[b]efore a written objection to a request for production of documents is ruled upon, the documents are not 'otherwise discoverable' and thus the obligation to file a privilege log does not arise."); accord *Royal Caribbean Cruises, Ltd. v. Doe*, 964 So. 2d 713, 718 (Fla. 3d DCA 2007); *Life Care Ctrs. of Am. v. Reese*, 948 So.

2d 830, 833 (Fla. 5th DCA 2007) (holding that “[t]he trial court [i]s required to address the discoverability of the requested documents before ordering [defendants] to review them all for privileged material.”); *Consol. Res. Health Care Fund I, Ltd. v. Ruffini*, 947 So. 2d 1278 (Fla. 4th DCA 2007) (determining that litigant did not waive privilege by failing to respond to discovery requests where court did not first rule on objections as to breadth of requests).

This view has been upheld in *W. Fla. Reg'l Med. Ctr. v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009). The First District Court of Appeal found that where threshold issues exist, the petitioner did not waive the peer review, work product or any other privilege by failing to file a privilege log. In this case, threshold issues clearly exist that have not yet been determined with regards to the breadth of the discovery requests. Until those issues are resolved, any request for a privilege log is as of yet premature.

In *Baptist Health of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008), Plaintiff propounded interrogatories requesting the production of a list of all documents in the doctors' credentialing files at Baptist Hospital as well as a privilege log detailing the dates of the documents, the nature of the documents, the identity of the person who sent or received the documents and anyone copied with the documents. Baptist objected stating that the Plaintiff was seeking descriptions of the contents of the credentialing files which are not discoverable pursuant to Fla. Stat. §§ 395.0191(8) and 766.101(5). The Third District agreed, stating that the production of the privilege log would disclose confidential information that has nothing to do with adverse medical incidents discoverable under Amendment 7. Also see *Nevin v. Palm Beach County School Board*, 958 So.2d 1003 (Fla. 1st DCA 2007) (Waiver for failure to file a privilege log should not apply where assertion of the privilege is not document specific, but category specific and the category itself is plainly protected, citing *Matlock v. Day*, 907 So.2d 577, Fla. 5th DCA 2005)).

Finally, the records pertaining to quality assurance including the accreditation records of the Joint Commission for the Accreditation of Healthcare Organizations (“JCAHO”) and/or any other accrediting bodies are protected under the peer review, credentialing and quality assurance privileges. See Fla. Stat. § 766.101.

Fla. Stat. § 766.101 defines medical review committee as a committee of a hospital or ambulatory surgery center licensed under chapter 395 or a health maintenance organization...which committee is formed to evaluate and improve the quality of health care rendered by providers of health service or to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care. Fla. Stat § 766.101(1)(a). The purpose of the surveys done by JCAHO is to assess a hospital's compliance with the standards set out by the JCAHO. See *Variety Children's Hospital v. Mishler*, 670 So. 2d 184 (Fla. 3rd DCA 1996). *Mishler* went on to state that “in order to give broad effect to the policy and intent of the statute, we must find that any evaluations that a hospital makes on its own or takes part in to improve the standard of care or patient safety and to reduce rates of death and disease is privileged under section 766.10(5)”. Also see *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992) (privilege afforded to peer review committee is intended to prohibit the chilling effect of the potential public disclosure of statements made to or information prepared for and used by the committee in carrying

out its peer review function.). Thus, records considered by the peer review committee to improve the quality of care including quality management policies, records, review and reports as well as JCAHO surveys are privileged.

This Defendant further objects on the basis that the action at hand is not ripe for judicial determination given the fact that a condition precedent has yet to have occurred, namely a determination that co-Defendant, Larry Thomas, M.D. was negligent and such negligence was a legal cause of loss, injury or damage to Plaintiff. *Maksad v. West Boca Medical Center*, 832 So.2d 788 (Fla. 4th DCA 2001, 2002).

Without waiving said objections, the adverse event report pertaining to Amber Edwards, whose care and treatment was provided by Dr. Thomas has been provided to you as referenced in our response to May 7, 2012 Request for Production, number 1b.

1. Each and every document created five (5) years prior to May 8, 2011 that in any way relates to the hospital's investigation or review of the care and treatment of any patient of Larry D. Thomas, M.D. This is a request pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

2. Each and every document created five (5) years prior to May 8, 2011, relating to any and all medical incidents, medical negligence, neglect, or default of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

3. Each and every document created five (5) years prior to May 8, 2011, related to the credentialing and re-credentialing process of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

4. Each and every document created five (5) years prior to May 8, 2011, related to Larry D. Thomas, M.D. in which you investigated an incident of medical negligence; or history of acts, neglects, or defaults which injured or could have injured a patient and caused or could have caused the death of a patient. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. In addition, this request essentially duplicates request number 2.

5. Each and every document created five (5) years prior to May 8, 2011, related to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. We reiterate that this request is not only burdensome and harassing, but it is spacious on its face. We do not understand how an alleged incident of negligence five years ago could injure the Plaintiff five years later.

6. For five (5) years prior to May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee or peer review committee in which any aspect of the clinical evaluation of was Larry D. Thomas, M.D. discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

7. All minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which any aspect of the evaluation of plaintiff's treatment was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

8. Each and every document that in any way relates to the defendant hospital's investigation or review of the care and treatment of the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

9. Each and every document in the hospital's possession relating to the termination and/or resignation of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. We further object to the predicate in this request.

10. Any and all incident reports relating to the care and treatment of the Plaintiff. Please do not provide a response indicating that you have already provided us with the documentation in this request. If you have provided it to us, we are unable to locate it and we ask that you provide it again. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Please see our response to Plaintiff's Request to Produce dated May 7, 2012 (number 1b).

11. Each and every document relating to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

12. After May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which was discussed any aspect of the clinical evaluation of Larry D. Thomas, M.D. was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

13. Any records for Larry D. Thomas, M.D. made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than the Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

14. Any records for Larry D. Thomas, M.D. made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

15. A non-redacted copy of the hospital's on call schedule for the month of May, 2011.

RESPONSE: Please see attached on-call schedule for the month of May 2011. The identities of other physicians listed on the on-call schedule have been redacted.

16. Copies of any and all documents indicating the number of hours that Larry D. Thomas was providing care and treatment to patients at the Defendant Hospital for the six (6) month period prior to May 8, 2011.

RESPONSE: None.

17. Non-redacted copies of the hospital's on call schedule for the months of January-May, 2011.

RESPONSE: Objection; irrelevant and immaterial to any issue in this claim. Without waiving said objection, please see attached copy of the hospital's redacted on-call schedule for the months January through April, 2011. The identities of other physicians listed on the on-call schedule have been redacted. As to the May 2011 on-call schedule, please see response to # 15.

18. A non-redacted copy of the hospital's on call schedule for unassigned patients for the month of May, 2011.

RESPONSE: Please see response to #15 above.

19. A non-redacted copy of the hospital's on call schedule for general surgery for the month of May, 2011.

RESPONSE: Objection. This request is duplicative in nature. Please see response to #15 above. The identities of other physicians listed on the on-call schedule for general surgery have been redacted.

20. A non-redacted copy of the check request for Larry Thomas, M.D. prepared on 6/1/2011.

RESPONSE: Objection. This request is duplicative in nature. Please see Defendant's Response to number 3 of Plaintiff's Request to Produce propounded on April 15, 2013.

21. A non-redacted copy of the 6/1/2011 invoice (52091) for Larry Thomas, M.D. for the May call x 7.

RESPONSE: Attached is a copy of the documents produced in our Better Response to number 2 of Plaintiff's Request for Production propounded on April 15, 2013. Please note the item produced is not an "invoice."

22. Any and all orientation and/or training materials of the Defendant Hospital that were provided to:

- a. Anju Thoams, RN
- b. Felicia Pagan, RN
- c. Michelle Webb, RN
- d. Judy Pittman, RN
- e. Hilari Bankhead Vaca, RN and
- f. Barbara Johnson, RN

RESPONSE: This information has been requested and will be provided if received.

23. 2011 Policies and Procedures in effect at the time of Plaintiff's admission as follows:

- a. 1156 Assessment-Reassessment
- b. 586 Assigned Roles for Staff
- c. 1322 Assignment to Treatment Area
- d. 1352 Auditing and Monitoring
- e. 576 Backup Communications
- f. 582 Authority for Emergencies
- g. 1924 Block Scheduling in the OR
- h. 1542 Call Reports-Preliminary Reports
- i. 2009 Callback of RC Personnel
- j. 1152 Chain of Command
- k. 1925 Circulating RN Responsibilities

- l. 1225 Collaborative Care Team – Nursing
- m. 588 Communication of Patient Information
- n. 1710 Communication Interdepartmental
- o. 577 Communications Plan
- p. 1979 Competency Validation
- q. 1853 Conflict Management for leadership
- r. 1711 Consultation Between Disciplines
- s. 2077 Continuity of Patient Care
- t. 1868 Criteria for Notifying Anesthesiologist and/or Attending Physician
- u. 1712 Continuing Education C9
- v. 1714 Description of Professional Scope of Practice
- w. 1869 Discharge Criteria and Planning
- x. 1977 Discharge Planning Interdisciplinary
- y. 2080 Discharge Planning Statement
- z. 1361 Discharge Reconciliation and Chart Retrieval Process
- aa. 1540 Documentation
- bb. 1930 Documentation of Operative Procedures
- cc. 1330 Follow Up Care
- dd. 1917 Hand Off Communication
- ee. 2083 Hospital Home Bound Education for Hospital
- ff. 1312 House Supervisor Role
- gg. 1041 Informed Consent
- hh. 1209 Informing Physician of Event Rpt-Complaints
- ii. 2227 Initial Assessment and Prioritization
- jj. 2229 Interdisciplinary Patient Care Plan
- kk. 2136 Medication Orders
- ll. 2198 Moderate Sedation
- mm. 1963 Operating Room Guidelines
- nn. 1725 Pain Assessment Reassessment Plan P2-Rehab Services
- oo. 2140 Pain Management
- pp. 2234 Patient and Family Education
- qq. 1862 Patient Assessment
- rr. 1675 Patients Rights and Responsibilities Policy
- ss. 660 Peer Review Process (this is an Amendment 7 Request)
- tt. 1293 Physician Supervision Process
- uu. 1884 Physician Visits
- vv. 2202 Plan for Providing Patient Care
- ww. 1983 Policies and Procedures and Documentation Requirements
- xx. 1870 Post Operative Evaluation
- yy. 1871 Post Procedure Care
- zz. 1727 Professional Credentials (this is an Amendment 7 Request)
- ~~aaa. 1337 Qualified Medical Personnel – QMP Screening (Amendment 7 Request)~~
- bbb. 1563 Quality Improvement-Schedule of Quality Control (Amendment 7 Request)
- ccc. 2091 Readmission Policy

ddd. 1625 Risk Assessment Plan EC1.10.4 (Amendment 7 Request)
 eee. 158 Risk Management Education (Amendment 7 Request)
 fff. 161 Risk Management Policy Statement (Amendment 7 Request)
 ggg. 2094 RM Role and Relationship with Physician and Staff
 hhh. 1797 Scope of Patient Assessment
 iii. 1050 Sentinel and Adverse Events (Amendment 7 Request)
 jjj. 212 Sentinel and Adverse Events Identification and Intense Analyst (Amendment 7 Request)
 kkk. 1948 Surgery Requirements
 lll. 2130 Table of Contents Nursing
 mmm. 1948 Table of Contents OR Dept.
 nnn. 1695 Tran-education Ec7.10.A
 ooo. 1147 Transfers
 ppp. 2154 Verbal and Telephone Orders Policy
 qq. 2068 Verbal and Telephone Order, Guidelines

RESPONSE: Copies have been requested and will be provided if and when received, to the extent they were in existence in 2011.

24. Any and all incident reports relating to the care and treatment provided by Larry D. Thomas, M.D. to any patient where medical negligence, intentional misconduct, and any other act, neglect, or default that caused, or could have caused, injury to or death of a patient. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-mail to: **Karen E. Terry, Esq., Attorneys for Plaintiff, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409 (ket@searcylaw.com; mks@searcylaw.com; aje@searcylaw.com; lmn@searcylaw.com)** and to **Holly B. Platter, Esq.,**

Attorneys for Defendant, Larry D. Thomas, M.D., Bush, Graziano & Rice, P.A., 101 E Kennedy Boulevard, Suite 1700, Tampa, Florida 33602 (eserve@bgrplaw.com; tdomi@bgrplaw.com, this 29th day of August, 2013.

FANN & PETRUCCELLI, P.A.
Attorneys for Defendant, Bartow Regional Medical Center
5100 North Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Telephone: (954) 771-4118
Facsimile: (954) 771-4119
Primary e-mail: PBbuckley@fplawyers.com
Secondary e-mail: TMartin@fplawyers.com

BY:

 4/8/11
MICHAEL A. PETRUCCELLI

Florida Bar No.: 717312

 PAUL C. BUCKLEY

Florida Bar No.: 906697

#15

May 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Mass General	Medicine Referral	Pulmonary	Cardiovascular	Neurology	Orthopedic Surgery
1	Sunday						
2	Monday						
3	Tuesday						
4	Wednesday						
5	Thursday						
6	Friday						
7	Saturday						
8	Sunday						
9	Monday						
10	Tuesday						
11	Wednesday						
12	Thursday						
13	Friday						
14	Saturday						
15	Sunday						
16	Monday						
17	Tuesday						
18	Wednesday						
19	Thursday						
20	Friday						
21	Saturday						
22	Sunday						
23	Monday						
24	Tuesday						
25	Wednesday						
26	Thursday						
27	Friday						
28	Saturday						
29	Sunday						
30	Monday						
31	Tuesday						

Date	Day	CAV/1000	1000-1200	1200-1400	1400-1600	1600-1800	1800-2000	2000-2200	2200-2400
1	Sunday								
2	Monday								
3	Tuesday								
4	Wednesday								
5	Thursday								
6	Friday								
7	Saturday								
8	Sunday								
9	Monday								
10	Tuesday								
11	Wednesday								
12	Thursday								
13	Friday								
14	Saturday								
15	Sunday								
16	Monday								
17	Tuesday								
18	Wednesday								
19	Thursday								
20	Friday								
21	Saturday								
22	Sunday								
23	Monday								
24	Tuesday								
25	Wednesday								
26	Thursday								
27	Friday								
28	Saturday								
29	Sunday								
30	Monday								
31	Tuesday								

MAY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Vascular	Neurology	Infectious Disease	Oncology Rotational	Unassigned Randomized MVA	Plastic Surgery	Other
1	Sunday							
2	Monday	Thomas						
3	Tuesday	Thomas						
4	Wednesday	Thomas						
5	Thursday	Thomas						
6	Friday	Thomas						
7	Saturday	Thomas						
8	Sunday	Thomas						
9	Monday							
10	Tuesday							
11	Wednesday							
12	Thursday							
13	Friday							
14	Saturday							
15	Sunday							
16	Monday							
17	Tuesday							
18	Wednesday							
19	Thursday							
20	Friday							
21	Saturday							
22	Sunday							
23	Monday	Thomas						
24	Tuesday	Thomas						
25	Wednesday	Thomas						
26	Thursday	Thomas						
27	Friday	Thomas						
28	Saturday	Thomas						
29	Sunday	Thomas						
30	Monday							
31	Tuesday							

NAME OF PHYSICIAN	DATES OF UNAVAILABILITY	MESSAGE and/or COVERING PHYSICIAN
1 ORTHOPEDICS HRMC, LRMC, then closest hospital		
2 GEN SURG GASTRO ENT VASCULAR NEUROLOGY PLAST SURG LRMC, then closest hospital		
3 OPHTHALMOLOGY -4 a - 4 p on covered days, otherwise LRMC, then closest hospital		
4 UROLOGY LRMC, then closest hospital		

#17

JANUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Unassigned	Medicine Referral	Pulmonary	Gastroenterology	Orthopedics	Surgeons
1	Saturday						
2	Sunday						
3	Monday						
4	Tuesday						
5	Wednesday						
6	Thursday						
7	Friday						
8	Saturday						
9	Sunday						
10	Monday						
11	Tuesday						
12	Wednesday						
13	Thursday						
14	Friday						
15	Saturday						
16	Sunday						
17	Monday						
18	Tuesday						
19	Wednesday						
20	Thursday						
21	Friday						
22	Saturday						
23	Sunday						
24	Monday						
25	Tuesday						
26	Wednesday						
27	Thursday						
28	Friday						
29	Saturday						
30	Sunday						
31	Monday						

JANUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Cardiology	Urology	Radiology	After Hours Radiology/ Intervention	Anesthesiology	ENT	SV
1	Saturday							
2	Sunday							
3	Monday							
4	Tuesday							
5	Wednesday							
6	Thursday							
7	Friday							
8	Saturday							
9	Sunday							
10	Monday							
11	Tuesday							
12	Wednesday							
13	Thursday							
14	Friday							
15	Saturday							
16	Sunday							
17	Monday							
18	Tuesday							
19	Wednesday							
20	Thursday							
21	Friday							
22	Saturday							
23	Sunday							
24	Monday							
25	Tuesday							
26	Wednesday							
27	Thursday							
28	Friday							
29	Saturday							
30	Sunday							
31	Monday							

JANUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Vascular	Neurology	Infectious Disease	Oncology	Unassigned Referral for MVA	Plastic Surgery
1	Saturday	Thomas					
2	Sunday	Thomas					
3	Monday						
4	Tuesday						
5	Wednesday						
6	Thursday						
7	Friday						
8	Saturday						
9	Sunday						
10	Monday						
11	Tuesday						
12	Wednesday						
13	Thursday						
14	Friday						
15	Saturday						
16	Sunday						
17	Monday						
18	Tuesday						
19	Wednesday						
20	Thursday						
21	Friday						
22	Saturday						
23	Sunday						
24	Monday	Thomas					
25	Tuesday	Thomas					
26	Wednesday	Thomas					
27	Thursday	Thomas					
28	Friday	Thomas					
29	Saturday	Thomas					
30	Sunday	Thomas					
31	Monday						

January 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

NAME OF PHYSICIAN	DATES OF UNAVAILABILITY	MESSAGE and/or COVERING PHYSICIAN
Larry Thomas, MD	January 15 – 20, 2011	Unavailable

1 ORTHOPEDICS HRMC, LRMC, then closest hospital
2 GEN SURG GASTRO ENT VASCULAR NEUROLOGY PLAST SURG LRMC, then closest hospital
3 OPHTHALMOLOGY - 4 a - 4 p on covered days, otherwise LRMC, then closest hospital
4 UROLOGY LRMC, then closest hospital

FEBRUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Unassigned	Medicine/Referral	Pulmonary	Neurology	Cardiology	Orthopedic	Surgery
1	Tuesday							
2	Wednesday							
3	Thursday							
4	Friday							
5	Saturday							
6	Sunday							
7	Monday							
8	Tuesday							
9	Wednesday							
10	Thursday							
11	Friday							
12	Saturday							
13	Sunday							
14	Monday							
15	Tuesday							
16	Wednesday							
17	Thursday							
18	Friday							
19	Saturday							
20	Sunday							
21	Monday							
22	Tuesday							
23	Wednesday							
24	Thursday							
25	Friday							
26	Saturday							
27	Sunday							
28	Monday							

FEBRUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Cardiology	Urology	Radiology DAY	After hours Radiology/ Interventional	After hours Urology	After hours Cardiology
1	Tuesday						
2	Wednesday						
3	Thursday						
4	Friday						
5	Saturday						
6	Sunday						
7	Monday						
8	Tuesday						
9	Wednesday						
10	Thursday						
11	Friday						
12	Saturday						
13	Sunday						
14	Monday						
15	Tuesday						
16	Wednesday						
17	Thursday						
18	Friday						
19	Saturday						
20	Sunday						
21	Monday						
22	Tuesday						
23	Wednesday						
24	Thursday						
25	Friday						
26	Saturday						
27	Sunday						
28	Monday						

FEBRUARY 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Vascular	Neurology	Infectious Disease	Oncology Referral	Unassigned Referral	Plastic Surgery	Neurology
1	Tuesday							
2	Wednesday							
3	Thursday							
4	Friday							
6	Saturday							
8	Sunday							
7	Monday	Thomas						
8	Tuesday	Thomas						
9	Wednesday	Thomas						
10	Thursday	Thomas						
11	Friday	Thomas						
12	Saturday	Thomas						
13	Sunday	Thomas						
14	Monday							
15	Tuesday							
16	Wednesday							
17	Thursday							
18	Friday							
19	Saturday							
20	Sunday							
21	Monday							
22	Tuesday							
23	Wednesday							
24	Thursday							
25	Friday							
26	Saturday							
27	Sunday							
28	Monday							

FEBRUARY 2010 BRMC CALL SCHEDULE UPDATED 8/18/2013

NAME OF PHYSICIAN	DATES OF UNAVAILABILITY	MESSAGE and/or COVERING PHYSICIAN
1 ORTHOPEDICS HRMC, LRMC, then closest hospital		
2 GEN SURG GASTRO ENT VASCULAR NEUROLOGY PLAST SURG LRMC, then closest hospital		
3 OPHTHALMOLOGY -4 a – 4 p on covered days, otherwise LRMC, then closest hospital		
4 UROLOGY LRMC, then closest hospital		
*ERCP CALL – If GI on call does not do ERCP, rotate ERCP referrals to		

March 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Day	Day	Neurology	Medicine Referral	Pulmonary	OB/GYN	Urology	Pathology	Other
1	Tuesday							
2	Wednesday							
3	Thursday							
4	Friday							
5	Saturday							
6	Sunday							
7	Monday							
8	Tuesday							
9	Wednesday							
10	Thursday							
11	Friday							
12	Saturday							
13	Sunday							
14	Monday							
15	Tuesday							
16	Wednesday							
17	Thursday							
18	Friday							
19	Saturday							
20	Sunday							
21	Monday							
22	Tuesday							
23	Wednesday							
24	Thursday							
25	Friday							
26	Saturday							
27	Sunday							
28	Monday							
29	Tuesday							
30	Wednesday							
31	Thursday							

Date	Day	Cardiology	Urology	Radiology	Cardiology Intervention	Average	
1	Tuesday						
2	Wednesday						
3	Thursday						
4	Friday						
5	Saturday						
6	Sunday						
7	Monday						
8	Tuesday						
9	Wednesday						
10	Thursday						
11	Friday						
12	Saturday						
13	Sunday						
14	Monday						
15	Tuesday						
16	Wednesday						
17	Thursday						
18	Friday						
19	Saturday						
20	Sunday						
21	Monday						
22	Tuesday						
23	Wednesday						
24	Thursday						
25	Friday						
26	Saturday						
27	Sunday						
28	Monday						
29	Tuesday						
30	Wednesday						
31	Thursday						

Date	Day	Vascular	Neurology	Infectious Disease	Oncology Rotation	Unassigned Referrals	Plastic Surgery	Other
1	Tuesday	Thomas						
2	Wednesday	Thomas						
3	Thursday	Thomas						
4	Friday	Thomas						
5	Saturday	Thomas						
6	Sunday	Thomas						
7	Monday							
8	Tuesday							
9	Wednesday							
10	Thursday							
11	Friday							
12	Saturday							
13	Sunday							
14	Monday							
15	Tuesday							
16	Wednesday							
17	Thursday							
18	Friday							
19	Saturday							
20	Sunday							
21	Monday	Thomas						
22	Tuesday	Thomas						
23	Wednesday	Thomas						
24	Thursday	Thomas						
25	Friday	Thomas						
26	Saturday	Thomas						
27	Sunday	Thomas						
28	Monday							
29	Tuesday							
30	Wednesday							
31	Thursday							

NAME OF PHYSICIAN	DATES OF UNAVAILABILITY	MESSAGE and/or COVERING PHYSICAIN
1 ORTHOPEDICS HRMC, LRMC, then closest hospital		
2 GEN SURG GASTRO ENT VASCULAR NEUROLOGY PLAST SURG LRMC, then closest hospital		
3 OPHTHALMOLOGY -4 a - 4 p on covered days, otherwise LRMC, then closest hospital		
4 UROLOGY LRMC then closest hospital		

April 2011 BRMC CALL SCHEDULE UPDATED 8/18/2013

Date	Day	Unassigned	Medicine Referral	Pulmonary	Cardiothoracic	ENT	Urology	Orthopedic Surgery	
1	Friday								
2	Saturday								
3	Sunday								
4	Monday								
5	Tuesday								
6	Wednesday								
7	Thursday								
8	Friday								
9	Saturday								
10	Sunday								
11	Monday								
12	Tuesday								
13	Wednesday								
14	Thursday								
15	Friday								
16	Saturday								
17	Sunday								
18	Monday								
19	Tuesday								
20	Wednesday								
21	Thursday								
22	Friday								
23	Saturday								
24	Sunday								
25	Monday								
26	Tuesday								
27	Wednesday								
28	Thursday								
29	Friday								
30	Saturday								

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT, IN AND FOR POLK
COUNTY, FLORIDA.

CASE NO.: 53-2012-CA-002611-0000-00,
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

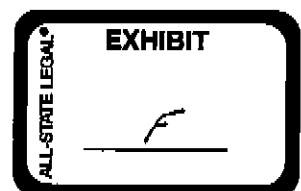
Defendants.

**ORDER ON PLAINTIFF'S MOTION TO COMPEL DEFENDANTS, BARTOW HMA
LLC D/B/A BARTOW REGIONAL MEDICAL CENTER AND LARRY THOMAS, M.D.
TO PROVIDE BETTER RESPONSES TO PLAINTIFF'S REQUEST TO PRODUCE
DATED JULY 30, 2013 AND MOTION FOR SANCTIONS**

THIS CAUSE having come to be considered upon the Plaintiff's Motion to Compel Defendant, Bartow HMA LLC d/b/a Bartow Regional Medical Center and Larry Thomas, M.D. to Provide Better Responses to Plaintiff's Request to Produce dated July 30, 2013 and Motion for Sanctions, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that Plaintiff's Motion to Compel Defendant, Bartow HMA LLC d/b/a Bartow Regional Medical Center and Larry Thomas, M.D. to Provide Better Responses to Plaintiff's Request to produce dated July 30, 2013 and Motion for Sanctions is hereby **GRANTED in part and DENIED in part** as follows:

- 1) As it pertains to requests 1-14, the Defendant's **objections are OVERRULED in part and SUSTAINED in part**. To the extent that there are adverse incidents contained in the records of the credentialing, peer review, quality assurance, risk



management, or any other related committee, the Defendant's objections are **OVERRULED**. To the extent that there are not adverse incidents contained in credentialing, peer review, quality assurance, risk management, or any other related committee, the Defendant's Objections are **SUSTAINED**.

- 2) The Defendant shall provide an un-redacted on-call schedule for the month of May, 2011 in response to request to produce #15, 18 and 19.
- 3) The Defendant shall also provide un-redacted documents in response to request to produce #20 and 21.
- 4) Plaintiff did not pursue a request for sanctions at the hearing and thus the Plaintiff's request for sanctions is **DENIED as moot**.
- 5) The Defendant has thirty (30) days to comply with this order.

DEC 31 2013

DONE AND ORDERED at Bartow, Polk County, Florida, this _____ day of December, 2013.

 Ellen Masters

CIRCUIT JUDGE

Copies have been furnished to:

Matthew K. Schwencke, Esquire
mks@searcylaw.com
Searcy Denney Scarola Barnhart & Shipley PA
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 383-9441
Attorneys for Plaintiff

Michael A. Petruccelli, Esquire
Pbuckley@fplawyers.com; Tmartin@fplawyers.com
Fann & Petruccelli, P.A.
5100 N Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Phone: (954)-771-4118
Fax: (954)-771-4119
Attorneys for Bartow HMA, LLC d/b/a Bartow Regional Medical Center

Order on Plaintiff's Motion to Compel Defendant, Bartow HMA LLC d/b/a Bartow Regional Medical Center and Larry Thomas, M.D. to Provide Better Responses to Plaintiff's Request to Produce dated July 30, 2013 and Motion for Sanctions

Edwards vs. Bartow Regional Medical Center, et al.

Case No.: 53-2012-CA-002611-0000-00, Section 4

Page 3

Holly B. Platter, Esquire

eserve@bgrplaw.com;tdomi@bgrplaw.com;

Bush Graziano Rice & Platter, P.A.

101 E Kennedy Boulevard, Suite 1700

Tampa, FL 33601

Phone: (813)-228-7000

Fax: (813)-273-0091

Attorneys for Larry D. Thomas, M.D.

IN THE CIRCUIT COURT OF THE
10th JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA

CASE NO.: 53-2012 CA-002611-0000-00
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER
and LARRY D. THOMAS, M.D.,

Defendants.

DEFENDANT, BARTOW HMA, LLC d/b/a
BARTOW REGIONAL MEDICAL CENTER'S BETTER RESPONSE
TO NOS. 1 THROUGH 15, 18, 19, 20 & 21 OF PLAINTIFF'S REQUEST TO PRODUCE
DATED JULY 30, 2013, PURSUANT TO COURT ORDER DATED DECEMBER 31, 2013

Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER,
by and through undersigned counsel, hereby files its Better Response to Nos. 1-15, 18, 19, 20 & 21
of Plaintiff's Request to Produce dated July 30, 2013, pursuant to Court Order dated December 31,
2013, and pursuant to Florida Rules of Civil Procedure 1.350, states as follows:

GENERAL OBJECTIONS

To the extent that this Request seeks "each and every"/"any and all" discovery of Amendment 7 related materials, Defendant objects and moves for protective order. To begin with, the Request, consisting of 24 numbered requests and 75 subparts, is overly broad, vague, ambiguous, burdensome, harassing, abusive, immaterial and irrelevant. The Request is not reasonably calculated to lead to the discovery of admissible evidence. Defendant requests intervention and protection from this Court to narrow and limit the extent of this Request to Produce, and to determine the amount of reasonable costs and fees for Defendant to review materials and respond to any appropriate requests.

Florida law protects against the discovery of records considered by medical review committees that function within a hospital, as well as records generated by, or received by, a hospital's risk management department. Specifically, § 395.0191(8), Fla. Stat., protects the

investigations, proceedings, and records of a hospital in considering and acting upon an application for staff membership or clinical privileges. § 395.0193(8), Fla. Stat., protects the investigations, proceedings, and records of a hospital's peer review panels, disciplinary boards or committees acting in their peer review or disciplinary function. § 395.0197(4), Fla. Stat., states that "incident reports are part of the workpapers of the attorney defending the licensed facility." § 766.101(5), Fla. Stat., protects the investigations, proceedings, and records of hospital committees formed to evaluate and improve the quality of health care rendered by providers of health service, to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care, or that the cost of health care rendered was considered reasonable by the providers of professional health services in the area. ^{1 2}

This Request could be interpreted to include incident reports from Bartow Regional Medical Center without reference to whether the incident report(s) relates to an adverse medical incident. Prior to the passage of Amendment 7, no records or information within the scope of this Request were discoverable or admissible for any purpose in a civil action. While Amendment 7 provides patients access to certain formerly privileged records, the scope of that access is limited by the Amendment's terms: Amendment 7 only provides patients a right to access to records made or received in the course of business by a health care facility or a health care provider relating to adverse medical incidents.

Certain records within the scope of the Request do not relate to adverse medical incidents and therefore are not subject to Amendment 7. See Morton Plant Hosp. Ass'n, Inc. v. Shahbas, 960 So. 2d 820, 827 (Fla. 2d DCA 2007); see also W. Fla. Reg'l Med. Ctr. v. See, 18 So. 3d 676 (Fla. 1st DCA 2009). Any privileged records which are not subject to Amendment 7 remain privileged. *Id.*

The *See* court explained the limits of the term "adverse medical incident" in Amendment 7. Specifically, "the word 'incident' itself indicates an isolated event." *See*, 18 So. 3d at 690. The phrase "adverse medical incident" can only mean "a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient." *Id.* (citing *Shahbas*, 960 So. 2d at 827). The court explained that while an adverse medical incident may be a negligent act or omission, that "act or omission must be connected with a patient and must be the cause or near-cause of an injury or death." *See*, 18 So. 3d at 690. Accordingly, for a record to fall within the scope of Amendment 7, the record must relate to a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient.

Where a party seeks discovery of privileged materials pursuant to an exception to the

1. This Defendant acknowledges *W. Fla. Reg'l Med. Ctr. v. See*, 2012 WL 87282 (Fla. Jan 12 2012) holding that a physician's blank application for hospital privileges is discoverable when a claim of negligent credentialing is at issue. The *See* Court however, unambiguously held that sections 395.0191 and 766.101 are still valid. Furthermore, the court held that a completed application remains privileged.

2. To the extent that Plaintiff might rely on *Lower Keys Medical Center v. Windisch*, 29 So. 3d 351 (Fla. 3d DCA 2010), while the Third District held that issues raised by petitioner in that case contravened the Court's decision in *Buster* and were consequently frivolous, the case lacks precedential value because precedent is only created by the precise points discussed in an appellate opinion. *See, e.g., Adelman Steel Corp. V. Winter*, 610 So. 2d 494, 501 (Fla. 1st DCA 1992); *see also Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st DCA 2005); *Scottsdale Ins. Co. V. Haynes*, 793 So. 2d 1006 (Fla. 5th DCA 2001); 20 Am. Jur. 2d Courts § 133. Because the *Windisch* decision does not address any legal issues specifically, it lacks precedential value.

privilege, it is the party's burden to demonstrate that the exception applies. See *Eight Hundred, Inc. v. Fla. Dep't of Revenue*, 837 So. 2d 574, 576 (Fla. 1st DCA 2003) (quoting *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 183 n. 9, 184 (Fla. 1st DCA 2001) (determining that "[j]ust as the proponent of the privilege has the burden of proof as to facts which give rise to the privilege, the party seeking to abrogate the privilege has the burden to prove facts which would make an exception to the privilege applicable" by "a preponderance of the evidence.")); *Shell Oil Co. v. Par Four P'ship*, 638 So. 2d 1050, 1050 (Fla. 5th DCA 1994) (holding that "[w]hen communications appear on their face to be privileged, the party seeking disclosure bears the burden of proving that they are not."); see also *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004) (finding that where a beneficiary sought attorney client privileged or work product protected records of trustee's attorneys, the "beneficiary would have to prove the existence of some exception to overcome the privilege.").

The court in *See* explained that the privilege at issue was "still in effect to the extent that it does not prohibit the production of records relating to adverse medical incidents under Amendment 7." *See*, 18 So. 3d at 689. Accordingly, where records and information are protected under §§ 395.0191(8), 395.0193(8), 395.0197(4), and/or 766.101(5), Fla. Stat., it is Plaintiff's burden to establish that the requested records and information fall within the scope of Amendment 7 to overcome the statutory privileges. Although Bartow Regional Medical Center maintains that Plaintiff has not established that the subject records and information fall within the scope of Amendment 7, it acknowledges the First District's ruling that a health care provider cannot be "the final arbiter in determining whether a medical incident . . . was 'adverse.'" *See Baldwin v. Shands Teaching Hosp. and Clinics, Inc.*, 45 So. 3d 118 (Fla. 1st DCA 2010). The court in *Baldwin* continued, "[s]uch ultimately is the court's decision upon a proper consideration of the nature of the records requested and the broad coverage of Amendment 7." *Id.* Without any showing that the records responsive to this Request are within the scope of records of adverse medical incidents under Amendment 7, the records remain privileged, and the discovery request should be denied.

Furthermore, a hospital is only obligated to produce records that were "made or received in the course of business." See Art. X, sect 25(a), Fla. Const.; *Benjamin v. Tandem Healthcare, Inc.*, 998 So. 2d at 566, 570 (Fla. 2008) ("In interpreting a constitutional amendment, we begin with the amendment's plain language."). While records created routinely as part of a hospital's efforts in providing care and treatment to patients or in following state and federal reporting or documentation requirements may be made or received in the course of business, records outside of such practice are not and thus would fall outside the scope of Amendment 7. Courts have uniformly held the business of a hospital is the care and treatment of patients. See, e.g., *Cooks v. O'Brien Properties, Inc.*, 710 A.2d 788, 795 (Conn. App. Ct. 1998) ("the business of a hospital is treating patients") (citation omitted); *Williams v. Alexander*, 129 N.E.2d 417, 419 (NY Ct. App. 1955) ("The business of a hospital, it is self-evident, is to diagnose and treat its patients' ailments.").

Conversely, it is expressly not the business of a hospital to make records for use in subsequent litigation. See, e.g., *Temple v. F. W. Woolworth Co.*, 356 A.2d 880, 882 (Conn. 1975) ("it is not the business of a hospital to collect and preserve information for use in litigation"); *Bauer v. Veith*, 130 N.W.2d 897, 900 (Mich. 1964) (cannot be "claimed that it

was ‘the regular course of such [hospital] business to make such memorandum or record’”) (citation omitted, alteration in original); *Green v. City of Cleveland*, 444, 83 N.E.2d 63, 65 (Ohio 1948) (“it was the business of the hospital to diagnose plaintiff’s condition and to treat her for her ailments, not to record a statement describing the cause of the accident in which plaintiff’s injuries were sustained”). Thus, to the extent that a record was made not for the purpose of care and treatment, such a record would typically not fall within the scope of Amendment 7.

Furthermore, the only records involving investigation of an unusual incident that are made in the course of business are those records required to be created in response to an unusual incident pursuant to some regulatory reporting or documentation requirement such as incident reports or other documentation required to be created under section 395.0197, Florida Statutes. *Cf. Yisrael v. State*, 993 So. 2d 952, 958 (Fla. 2008) (noting that records kept according to a statutorily mandated duty are kept in the course of business). By contrast, a record created for purposes of investigation of an unusual event for potential future litigation that is not similarly mandated is not made “in the course of business.” *Cf. Brown v. International Paper Co.*, 710 So. 2d 666, 668 (Fla. 2d DCA 1998) (letter from Federal Express and handwriting analyst’s report created as part of investigation of forged purchase order not made in the course of business); *Slimmons v. State*, 697 S. 2d 985, 986 (Fla. 4th DCA 1997) (list itemizing stolen items not demonstrated to be made in course of business).

Thus, records that are not made in response to a federal or state reporting or documentation requirement, and are not made as part of the care or treatment of a patient are not made or received in the course of business as required to be discoverable under Amendment 7. Consequently, these documents remain privileged.

Further, to the extent that this Request includes attorney-client privileged communications, Florida law is clear that “included within the attorney-client privilege are communications the insured makes to the insurer for its use to fulfill its obligation to defend on the insured’s behalf.” *See Reynolds v. State*, 963 So. 2d 908, 911 (Fla. 2d DCA 2007); *Staton v. Allied Chain Link Fence Company*, 418 So. 2d 404, 405-06 (Fla. 2d DCA 1982); *Grand Union Company v. Patrick*, 247 So. 2d 474, 475 (Fla. 3d DCA 1971); *see also 17A Lee R. Russ, et al., Couch on Insurance* 3d § 250:19 (2000) (describing the majority view that the “attorney-client privilege applies to communications between an insured and its liability or indemnity insurer as to an incident possibly giving rise to liability.”). Furthermore, where a client makes notes memorializing an event to consult an attorney for the purposes of defense in impending litigation, those notes are protected by the attorney client privilege. *See Lemonik v. Eastern Airlines, Inc.*, 632 So. 2d 239 (Fla. 3d DCA 1994); and *Merlin v. Boca Raton Community Hosp., Inc.*, 479 So. 2d 236 (Fla. 4th DCA 1985).

No appellate court has held that Amendment 7 alters the longstanding privilege attached to attorney client communications. As a threshold matter, attorney client privileged materials are not “made or received in the course of business,” as required to be discoverable under Amendment 7. *See Article X, section 25(a).*

The Second District in *Lakeland Regional Medical Center v. Neely*, 8 So. 3d 1268 (Fla. 2d DCA 2009), cautioned that it did not address attorney-client communications because the defendant did not argue that the documents were prepared or produced at the attorney's request for use in litigation. Thus, the opinion did not address the impact of Amendment 7 on the attorney-client privilege.

The distinction in *Neely* is supported by other authorities. The Florida Supreme Court in its advisory opinion explains that Amendment 7 "does not expressly affect . . . the attorney-client privilege, and there is no evidence of any intent to do so." Advisory Opinion to the Att'y General Regarding Patients' Right to Know About Adverse Medical Incidents, 880 So. 2d 617, 621 (Fla. 2004). In a follow up to the advisory opinion, questions set forth by Justice Cantero and responses by counsel for the Buster Respondents in the Florida Supreme Court suggest that attorney client privilege remains absolute. See Transcript of Oral Argument in Buster, 43, 56-57 (attached as Exhibit I) (questioning that Amendment 7 could affect attorney client privilege and counsel arguing that it did not). The Fifth District in *Gmach* noted support for this argument, stating: "[s]ince the supreme court's opinion in Buster, several circuit courts have weighed in on this issue, with the bulk of them concluding that the [attorney client] privilege still exists." *Florida Eye Clinic v. Gmach*, 14 So. 3d 1044, 1047 (Fla. 5th DCA 2009).

Additionally, although the Florida Supreme Court in its advisory opinion stated that nothing in Amendment 7 would affect the work product privilege, the courts in *Lakeland Regional Medical Center v. Neely*, 8 So. 3d 1268 (Fla. 2d DCA 2009), and *Florida Eye Clinic v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009), held that Amendment 7 supersedes any protection by the fact work product privilege of incident reports.

The district courts, however, expressly did not conclude that Amendment 7 supersedes protection of opinion work product. The Fifth District specified: "[w]e do not read amendment 7 as evincing an intent from the voters to eliminate the privilege of opinion work product." *Gmach*, 14 So. 3d at 1050 (emphasis in original).

Furthermore, though the court in *Gmach* erroneously narrowed the scope of opinion work product to only attorney-created work product, Florida Rule of Civil Procedure 1.280(b)(3) expressly protects the mental impressions, conclusions and opinions of an attorney "or other representative of a party." See also *Surf Drugs v. Vermette*, 236 So. 2d 108, 113 (Fla. 1970) ("the work product of the litigant, his attorney or agent, cannot be examined, absent rare and exceptional circumstances"); *Colonial Penn Ins. Co. v. Blair*, 380 So. 2d 1305, 1306 (Fla. 5th DCA 1980) ("To bring something within the 'work product' ambit, there must be some indication of personal thought, views, knowledge, or evaluation by the attorney, litigant, or agent"); *Alachua County Hosp. v. Zimmer, USA, Inc.*, 403 So. 2d 1087 (Fla. 1st DCA 1981) ("[C]ommunications, reports, memoranda, etc., prepared in anticipation of litigation and passing between a client and his attorney, and/or their employed investigators, are work product").

Here, the scope of the Request includes records and information which contain or constitute the mental impressions, conclusions and opinions of representatives of Bartow

Regional Medical Center. Even if this Court were to conclude that Amendment 7 has done away with fact work product protection, Bartow Regional Medical Center's opinion work product remains protected in light of Amendment 7.

Furthermore, the Code of Federal Regulations protects the Hospital from being required to disclose attorney work-product. 45 C.F.R. § 164.524(a)(1)(ii) ("an individual has a right of access to inspect and obtain a copy of protected health information about the individual. . . except for: . . . [i]nformation compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding."). Moreover, federal regulations provide that any state law that is contrary to its provisions is preempted unless the state law is more stringent by providing greater confidentiality to protected health information. "State law" is defined to include the State Constitution. See 45 C.F.R. § 160.202.

In addition, the Florida Statutes have long imposed privileges on credentialing files. Florida Statutes §§ 395.0191(8), 766.101(5). Section §395.0191(8) protects the investigations, proceedings, and records of as hospital in considering and acting upon an application for staff membership or clinical privileges. Section 766.101(5) also mandates that the "investigations, proceedings, and records" of a credentialing committee "shall not be subject to discovery."

The Supreme Court in *W. Fla. Reg'l Med. Ctr. v. See*, 2012 WL 87282 (Fla. Jan. 12, 2012) recently and unambiguously held that Sections 395.0191 and 766.101 are still valid and protect the exact category of documents that you are seeking to be disclosed here. The *See* Court was called upon to determine whether a medical malpractice plaintiff's request for a blank application for hospital privileges was protected from discovery under the statutes. The Court held that where a claim for negligent credentialing is pending, a blank application is discoverable because it is not a part of the hospital decision-making process, and is also evidence of an "adverse incident" under Amendment 7 because the act of negligently credentialing a medical provider constitutes an adverse incident.

In holding that a blank application is not a part of the decision-making process that is protected under the statutes, the Supreme Court expressly distinguished completed applications, such as those requested here.

Without waiving said objections, a blank application for staff privileges is not contained within Dr. Larry Thomas' credentialing file.

This holding is fully in accord with the longstanding law of the Supreme Court, which recognized in *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992), that these statutory privileges are to be construed broadly in order to encourage full candor in peer review proceedings. See also *Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 827 (Fla. 2d DCA 2007) (holding that documents relating to the credentialing and re-credentialing process for a physician are not within the scope of Amendment 7); *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008) (doctor's credentialing file was statutorily protected pursuant to sections 395.0191(8) and 766.101(5)); *Columbia Park Med. Ctr., Inc. v. Gibbs*, 728

So. 2d 373 (Fla. 5th DCA 1999) (applications for clinical privileges were protected from discovery under sections 766.101(5) and 395.0191(8)); *Boca Raton Community Hospital v. Jones*, 584 So. 2d 221 (Fla. 4th DCA 1991) (reports of peer review committee are privileged).

Additionally, the identities of individuals involved in peer review, credentialing and quality assurance activities are privileged, confidential and are beyond the scope of Amendment 7. See *Palms of Pasadena Hosp. v. Rutigliano*, 908 So. 2d 594 (Fla. 5th DCA 2004) (names of members of credentialing committee not discoverable); *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 390 2008). As such, the identities of reviewers involved in peer review, credentialing or quality assurance under sections 395.0191, 395.0193 and 766.101 are not discoverable under Amendment 7 and to the extent that this Request seeks such information, it is not discoverable under Amendment 7.

This Defendant objects to producing any documents pursuant to this Request absent an Order requiring Plaintiff to pay the costs of discovery prior to production. Section 381.028(7)(c)(1), Florida Statutes, allows the Hospital to require the Plaintiff to pay the full costs of production before acting on the request. See *Buster*, 984 So.2d at 493-94 (leaving intact the statutory provision allowing pre-payment of costs of production): see also *Columbia Hosp. Corp. of S. Broward v. Fain*, 16 So.3rd 236 (Fla. 4th DCA 2009) (noting that payment is required prior to response to discovery). Therefore, in the event that the Court enters an Order requiring the production of any material that is the subject matter of these objections/Motion for Protective Order, Defendant, Bartow Regional Medical Center, requests that the Court enter an Order requiring the Plaintiff to pay in full the costs of Amendment 7 discovery prior to the Defendant, Bartow Regional Medical Center, acting on the request.

Given that this request is not reasonably limited in scope or time, personnel from Bartow Regional Medical Center would have to locate a staggering amount of incident reports. The reports would then need to be redacted for patient identifiers, the identities of personnel involved in peer review, and opinion work product.

Due to the sensitivity of records and information at issue and based on the fact that Plaintiff has not made payment of the costs that will be incurred by the Hospital in responding to the discovery requests as required by section 381.028(7)(c)1, Florida Statutes, and because Plaintiff's discovery requests exceed the scope of Amendment 7, Defendant, Bartow Regional Medical Center, is not providing a privilege log at this time. While Defendant, Bartow Regional Medical Center, does not believe a privilege log is due at this time, out of an abundance of caution this issue is being brought to the Court's attention. To the extent the Court has a different view, Defendant, Bartow Regional Medical Center, asks that the Court waive any requirement that it do so.

Until the Court rules on the objections to this Request asserted by this Defendant, any preparation of a privilege log is premature. See *Gosman v. Luzinski*, 937 So. 2d 293, 296 (Fla. 4th DCA 2006) (finding that "[b]efore a written objection to a request for production of documents is ruled upon, the documents are not 'otherwise discoverable' and thus the obligation to file a privilege log does not arise."); accord *Royal Caribbean Cruises*,

Ltd. v. Doe, 964 So. 2d 713, 718 (Fla. 3d DCA 2007); *Life Care Ctrs. of Am. v. Reese*, 948 So. 2d 830, 833 (Fla. 5th DCA 2007) (holding that “[t]he trial court [i]s required to address the discoverability of the requested documents before ordering [defendants] to review them all for privileged material.”); *Consol. Res. Health Care Fund I, Ltd. v. Ruffini*, 947 So. 2d 1278 (Fla. 4th DCA 2007) (determining that litigant did not waive privilege by failing to respond to discovery requests where court did not first rule on objections as to breadth of requests).

This view has been upheld in *W. Fla. Reg'l Med. Ctr. v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009). The First District Court of Appeal found that where threshold issues exist, the petitioner did not waive the peer review, work product or any other privilege by failing to file a privilege log. In this case, threshold issues clearly exist that have not yet been determined with regards to the breadth of the discovery requests. Until those issues are resolved, any request for a privilege log is as of yet premature.

In *Baptist Health of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008), Plaintiff propounded interrogatories requesting the production of a list of all documents in the doctors' credentialing files at Baptist Hospital as well as a privilege log detailing the dates of the documents, the nature of the documents, the identity of the person who sent or received the documents and anyone copied with the documents. Baptist objected stating that the Plaintiff was seeking descriptions of the contents of the credentialing files which are not discoverable pursuant to Fla. Stat. §§ 395.0191(8) and 766.101(5). The Third District agreed, stating that the production of the privilege log would disclose confidential information that has nothing to do with adverse medical incidents discoverable under Amendment 7. Also see *Nevin v. Palm Beach County School Board*, 958 So.2d 1003 (Fla. 1st DCA 2007) (Waiver for failure to file a privilege log should not apply where assertion of the privilege is not document specific, but category specific and the category itself is plainly protected, citing *Matlock v. Day*, 907 So.2d 577, Fla. 5th DCA 2005)).

Finally, the records pertaining to quality assurance including the accreditation records of the Joint Commission for the Accreditation of Healthcare Organizations (“JCAHO”) and/or any other accrediting bodies are protected under the peer review, credentialing and quality assurance privileges. See Fla. Stat. § 766.101.

Fla. Stat. § 766.101 defines medical review committee as a committee of a hospital or ambulatory surgery center licensed under chapter 395 or a health maintenance organization...which committee is formed to evaluate and improve the quality of health care rendered by providers of health service or to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care. Fla. Stat § 766.101(1)(a). The purpose of the surveys done by JCAHO is to assess a hospital's compliance with the standards set out by the JCAHO. See *Variety Children's Hospital v. Mishler*, 670 So. 2d 184 (Fla. 3rd DCA 1996). *Mishler* went on to state that “in order to give broad effect to the policy and intent of the statute, we must find that any evaluations that a hospital makes on its own or takes part in to improve the standard of care or patient safety and to reduce rates of death and disease is privileged under section 766.10(5)”. Also see *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992) (privilege afforded to peer review committee is intended to prohibit the chilling effect of the potential public disclosure

of statements made to or information prepared for and used by the committee in carrying out its peer review function.). Thus, records considered by the peer review committee to improve the quality of care including quality management policies, records, review and reports as well as JCAHO surveys are privileged.

This Defendant further objects on the basis that the action at hand is not ripe for judicial determination given the fact that a condition precedent has yet to have occurred, namely a determination that co-Defendant, Larry Thomas, M.D. was negligent and such negligence was a legal cause of loss, injury or damage to Plaintiff. *Maksad v. West Boca Medical Center*, 832 So.2d 788 (Fla. 4th DCA 2001, 2002).

1. Each and every document created five (5) years prior to May 8, 2011 that in any way relates to the hospital's investigation or review of the care and treatment of any patient of Larry D. Thomas, M.D. This is a request pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

2. Each and every document created five (5) years prior to May 8, 2011, relating to any and all medical incidents, medical negligence, neglect, or default of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

3. Each and every document created five (5) years prior to May 8, 2011, related to the credentialing and re-credentialing process of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

4. Each and every document created five (5) years prior to May 8, 2011, related to Larry D. Thomas, M.D. in which you investigated an incident of medical negligence; or history of acts, neglects, or defaults which injured or could have injured a patient and

caused or could have caused the death of a patient. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. In addition, this request essentially duplicates request number 2. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

5. Each and every document created five (5) years prior to May 8, 2011, related to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. We reiterate that this request is not only burdensome and harassing, but it is spacious on its face. We do not understand how an alleged incident of negligence five years ago could injure the Plaintiff five years later. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

6. For five (5) years prior to May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee or peer review committee in which any aspect of the clinical evaluation of was Larry D. Thomas, M.D. discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

7. All minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which any aspect of the evaluation of plaintiff's treatment was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

8. Each and every document that in any way relates to the defendant hospital's investigation or review of the care and treatment of the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

9. Each and every document in the hospital's possession relating to the termination and/or resignation of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. We further object to the predicate in this request. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

10. Any and all incident reports relating to the care and treatment of the Plaintiff. Please do not provide a response indicating that you have already provided us with the documentation in this request. If you have provided it to us, we are unable to locate it and we ask that you provide it again. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Please see our response to Plaintiff's Request to Produce dated May 7, 2012 (number 1b). Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

11. Each and every document relating to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

12. After May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which was discussed any aspect of the clinical evaluation of Larry D. Thomas, M.D. was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

13. Any records for Larry D. Thomas, M.D. made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than the Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

14. Any records for Larry D. Thomas, M.D. made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

15. A non-redacted copy of the hospital's on call schedule for the month of May, 2011.

RESPONSE: Please see attached on-call schedule for the month of May 2011.

18. A non-redacted copy of the hospital's on call schedule for unassigned patients for the month of May, 2011.

RESPONSE: Please see response to #15 above.

19. A non-redacted copy of the hospital's on call schedule for general surgery for the month of May, 2011.

RESPONSE: Please see response to #15 above.

20. A non-redacted copy of the check request for Larry Thomas, M.D. prepared on 6/1/2011.

RESPONSE: Please see attached.

21. A non-redacted copy of the 6/1/2011 invoice (52091) for Larry Thomas, M.D. for the May call x 7.

RESPONSE: Please see attached.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-File/E-mail to: **Karen E. Terry, Esq., Attorneys for Plaintiff**, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409, ket@searcylaw.com; mks@searcylaw.com; aje@searcylaw.com; lmn@searcylaw.com, and to **Holly B. Platter, Esq., Attorneys for Defendant, Larry D. Thomas, M.D.**, Bush, Graziano & Rice, P.A., 101 E Kennedy Boulevard, Suite 1700, Tampa, Florida 33602, eserve@bgrplaw.com; tdomi@bgrplaw.com, this 30th day of January, 2014.

FANN & PETRUCCELLI, P.A.

Attorneys for Defendant, Bartow Regional Medical Center

1726 East Seventh Avenue, Suite 18

Tampa, FL 33605

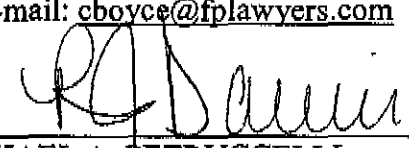
Telephone (813)251-1400

Facsimile (813)251-1412

Primary e-mail: Pbuckley@fplawyers.com

Secondary e-mail: cboyce@fplawyers.com

BY:


MICHAEL A. PETRUCCELLI

Florida Bar No.: 717312

 PAUL C. BUCKLEY

Florida Bar No.: 906697

59082

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT, IN AND FOR POLK
COUNTY, FLORIDA.

CASE NO.: 53-2012-CA-002611-0000-00,
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

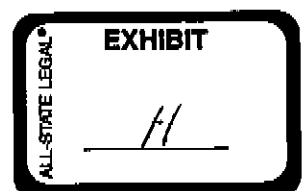
Defendants.

**PLAINTIFF'S MOTION FOR RULE TO SHOW CAUSE OR IN THE ALTERNATIVE
MOTION FOR IN-CAMERA INSPECTION**

Plaintiff, AMBER EDWARDS by and through the undersigned counsel, moves this Court to issue a Rule to the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER (hereinafter "DEFENDANT HOSPITAL"), to show cause as to why it should not be held in contempt of this Court, or in the alternative, Motion for In-Camera Inspection and states in support as follows:

1. The Court entered the attached order on December 31, 2013. See **Exhibit A**. Pursuant to the Order, the Defendant was to provide adverse incidents contained in the credentialing, peer review, quality assurance, risk management, or any other related committee pertaining to the Plaintiff's Request to Produce 1-14. See **Exhibit B**.

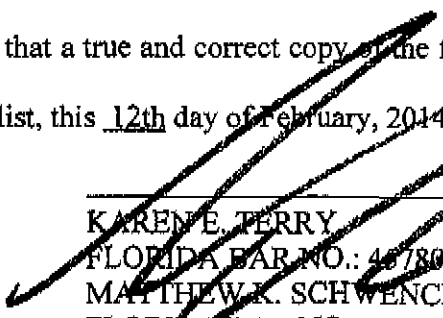
2. The Defendant filed the attached response on January 30, 2014. See **Exhibit C**. The Defendant filed the same objections that it did to the original request to produce that the court has already **OVERRULED**. The Defendant also provided a privilege log. See **Exhibit D**.



3. The Plaintiff has been prejudiced by the Defendant's refusal to comply with this Court's December 31, 2013 order as this matter is set on the Court's April trial docket and there is limited time to complete discovery.

WHEREFORE, Plaintiff moves the Court to issue to the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER a Rule to Show Cause why it should not be held in contempt of this Court for its failure to comply with the Court's December 31, 2013 order, or in the alternative seeks the Court to review the materials contained in the Defendant's privilege log to determine whether or not the Defendant is withholding documents pertaining to adverse incidents.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 12th day of February, 2014.



KAREN E. TERRY
FLORIDA BAR NO.: 48780
MATTHEW K. SCHWENCKE
FLORIDA BAR NO.: 57132
Primary E-Mail: eservice@searcylaw.com
Secondary E-Mail(s): _terryteam@searcylaw.com
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone: (561) 686-6300
Fax: (561) 383-9441
Attorney for Plaintiff

COUNSEL LIST

Michael A. Petruccelli, Esquire
Pbuckley@fplawyers.com;
cboyce@fplawyers.com
Fann & Petruccelli, P.A.
5100 N Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Phone: (954)-771-4118
Fax: (954)-771-4119
Attorneys for Bartow HMA, LLC d/b/a
Bartow Regional Medical Center

Holly B. Platter, Esquire
eserve@bgrplaw.com;tdomi@bgrplaw.com;
Bush Graziano Rice & Platter, P.A.
101 E Kennedy Boulevard, Suite 1700
Tampa, FL 33601
Phone: (813)-228-7000
Fax: (813)-273-0091
Attorneys for Larry D. Thomas M.D.

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT, IN AND FOR POLK
COUNTY, FLORIDA.

CASE NO.: 53-2012-CA-002611-0000-00,
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

Defendants.

**ORDER ON PLAINTIFF'S MOTION TO COMPEL DEFENDANTS, BARTOW HMA
LLC D/B/A BARTOW REGIONAL MEDICAL CENTER AND LARRY THOMAS, M.D.
TO PROVIDE BETTER RESPONSES TO PLAINTIFF'S REQUEST TO PRODUCE
DATED JULY 30, 2013 AND MOTION FOR SANCTIONS**

THIS CAUSE having come to be considered upon the Plaintiff's Motion to Compel Defendant, Bartow HMA LLC d/b/a Bartow Regional Medical Center and Larry Thomas, M.D. to Provide Better Responses to Plaintiff's Request to Produce dated July 30, 2013 and Motion for Sanctions, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that Plaintiff's Motion to Compel Defendant, Bartow HMA LLC d/b/a Bartow Regional Medical Center and Larry Thomas, M.D. to Provide Better Responses to Plaintiff's Request to produce dated July 30, 2013 and Motion for Sanctions is hereby **GRANTED in part and DENIED in part** as follows:

- 1) As it pertains to requests 1-14, the Defendant's objections are **OVERRULED in part and SUSTAINED in part**. To the extent that there are adverse incidents contained in the records of the credentialing, peer review, quality assurance, risk

EXHIBIT "A"

Order on Plaintiff's Motion to Compel Defendant, Bartow HMA LLC d/b/a Bartow Regional Medical Center and Larry Thomas, M.D. to Provide Better Responses to Plaintiff's Request to Produce dated July 30, 2013 and Motion for Sanctions

Edwards vs. Bartow Regional Medical Center, et al.

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management, or any other related committee, the Defendant's objections are **OVERRULED**. To the extent that there are not adverse incidents contained in credentialing, peer review, quality assurance, risk management, or any other related committee, the Defendant's Objections are **SUSTAINED**.

- 2) The Defendant shall provide an un-redacted on-call schedule for the month of May, 2011 in response to request to produce #15, 18 and 19.
- 3) The Defendant shall also provide un-redacted documents in response to request to produce #20 and 21.
- 4) Plaintiff did not pursue a request for sanctions at the hearing and thus the Plaintiff's request for sanctions is **DENIED as moot**.
- 5) The Defendant has thirty (30) days to comply with this order.

DEC 31 2013

DONE AND ORDERED at Bartow, Polk County, Florida, this _____ day of December, 2013.

/s/ Ellen Masters

CIRCUIT JUDGE

Copies have been furnished to:

Matthew K. Schwencke, Esquire
mks@searcylaw.com
Searcy Denney Scarola Barnhart & Shipley PA
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 383-9441
Attorneys for Plaintiff

Michael A. Petruccelli, Esquire
Pbuckley@fplawyers.com; Tmartin@fplawyers.com
Fann & Petruccelli, P.A.
5100 N Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Phone: (954)-771-4118
Fax: (954)-771-4119
Attorneys for Bartow HMA, LLC d/b/a Bartow Regional Medical Center

Order on Plaintiff's Motion to Compel Defendant, Bartow HMA LLC d/b/a Bartow Regional Medical Center and
Larry Thomas, M.D. to Provide Better Responses to Plaintiff's Request to Produce dated July 30, 2013 and Motion
for Sanctions

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Holly B. Platter, Esquire

eserve@bgrplaw.com; tdomi@bgrplaw.com;

Bush Graziano Rice & Platter, P.A.

101 E Kennedy Boulevard, Suite 1700

Tampa, FL 33601

Phone: (813)-228-7000

Fax: (813)-273-0091

Attorneys for Larry D. Thomas, M.D.

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT, IN AND FOR
POLK COUNTY, FLORIDA.

AMBER EDWARDS,

CASE NO.: 53-2012-CA-002611-0000-00,
Section 4

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

Defendants,

**PLAINTIFF'S REQUEST TO PRODUCE TO DEFENDANT BARTOW HMA, LLC
d/b/a BARTOW REGIONAL MEDICAL CENTER**

Pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER and LARRY D. THOMAS, M.D., is hereby requested to produce to the Plaintiff's Counsel at the LAW FIRM OF SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409, within thirty (30) days, the following documents or things on the attached numbered list.

REQUEST TO PRODUCE

1. Each and every document created five (5) years prior to May 8, 2011 that in any way relates to the hospital's investigation or review of the care and treatment of any patient of LARRY D. THOMAS, M.D. This is a request pursuant to Amendment 7 and this request excludes documents generated by attorneys¹.
2. Each and every document created five (5) years prior to May 8, 2011, relating to any and all medical incidents, medical negligence, neglect, or default of LARRY D. THOMAS, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys².

¹ Before any objection is made or privilege claimed for documents or things related to peer review or risk management activities, please see: West Florida Regional Medical Center, Inc. v. Sec, 18 So. 3d 676 (Fla. 1st DCA 2009); Florida Hosp. Waterman v. Buster, 984 So. 2d 478 (Fla. 2008); and N. Broward Hosp. Dist. v. Kroll, 940 So. 2d 1281 (Fla. 4th DCA 2006), etc.

² See footnote 1

EXHIBIT "B"

3. Each and every document created five (5) years prior to May 8, 2011, related to the credentialing and re-credentialing process for LARRY D. THOMAS, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys³.
4. Each and every document created five (5) years prior to May 8, 2011, related to LARRY D. THOMAS, M.D. in which you investigated an incident of medical negligence; or history of acts, neglects, or defaults which injured or could have injured a patient and caused or could have caused the death of a patient. This request is being made pursuant to Amendment 7 and his request excludes documents generated by attorneys⁴.
5. Each and every document created five (5) years prior to May 8, 2011, relating to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys⁵.
6. For five (5) years prior to May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee or peer review committee in which any aspect of the clinical evaluation of was LARRY D. THOMAS, M.D. discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys⁶.
7. All minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which any aspect of the evaluation of plaintiff's treatment was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys⁷.
8. Each and every document that in any way relates to the defendant hospital's investigation or review of the care and treatment of the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys⁸.
9. Each and every document in the hospital's possession relating to the termination and/or resignation of LARRY D. THOMAS, M.D. This request is being made

³ See footnote 1

⁴ See footnote 1

⁵ See footnote 1

⁶ See footnote 1

⁷ See footnote 1

⁸ See footnote 1

pursuant to Amendment 7 and this request excludes documents generated by attorneys⁹

10. Any and all incident reports relating to the care and treatment of the Plaintiff. Please do not provide a response indicating that you have already provided us with the documentation for this request. If you have provided it to us, we are unable to locate it and we ask that you provide it again. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.¹⁰
11. Each and every document relating to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys¹¹.
12. After May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which was discussed any aspect of the clinical evaluation of LARRY D. THOMAS, MD was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.¹²
13. Any records for LARRY D. THOMAS, MD made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than the Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.¹³

⁹ See footnote 1

¹⁰ See footnote 1

¹¹ See footnote 1

¹² See footnote 1

¹³ See footnote 1

14. Any records for LARRY D. THOMAS, MD made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.¹⁴
15. A non-redacted copy of the hospital's on call schedule for the month of May, 2011.
16. Copies of any and all documents indicating the number of hours that LARRY D. THOMAS, MD was providing care and treatment to patients at the Defendant Hospital for the six (6) month period prior to May 8, 2011.
17. Non-redacted copies of the hospital's on call schedule for the months of January-May, 2011.
18. A non-redacted copy of the hospital's on call schedule for unassigned patients for the month of May, 2011.
19. A non-redacted copy of the hospital's on call schedule for general surgery for the month of May, 2011.
20. A non-redacted copy of the check request for Larry Thomas, MD prepared on 6/1/2011.
21. A non-redacted copy of the 6/1/2011 invoice (52091) for Larry Thomas, MD for the May call x 7.

¹⁴ See footnote 1

22. Any and all orientation and/or training materials of the Defendant Hospital that were provided to:
 - a) Anju Thomas, RN,
 - b) Felicia Pagan, RN,
 - c) Michelle Webb, RN,
 - d) Judy Pittman, RN,
 - e) Hillari Bankhead Vaca, RN and
 - f) Barbara Johnson, RN

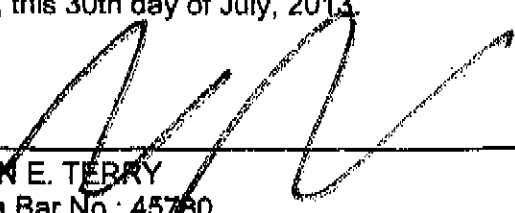
23. 2011 Policies and Procedures in effect at the time of the Plaintiff's admission as follows:
 - a. 1156 Assessment-Reassessment
 - b. 586 Assigned Roles for Staff
 - c. 1322 Assignment to Treatment Area
 - d. 1352 Auditing and Monitoring
 - e. 576 Backup Communications
 - f. 582 Authority for Emergencies
 - g. 1924 Block Scheduling in the OR
 - h. 1542 Call Reports-Preliminary Reports
 - i. 2009 Callback of RC Personnel
 - j. 1152 Chain of Command
 - k. 1925 Circulating RN Responsibilities
 - l. 1225 Collaborative Care Team – Nursing
 - m. 588 Communication of Patient Information
 - n. 1710 Communication Interdepartmental
 - o. 577 Communications Plan
 - p. 1979 Competency Validation
 - q. 1853 Conflict Management for Leadership
 - r. 1711 Consultation Between Disciplines
 - s. 2077 Continuity of Patient Care
 - t. 1868 Criteria for Notifying Anesthesiologist and or Attending Physician
 - u. 1712 Continuing Education C9
 - v. 1714 Description of Professional Scope of Practice
 - w. 1869 Discharge Criteria and Planning
 - x. 1977 Discharge Planning Interdisciplinary
 - y. 2080 Discharge Planning Statement
 - z. 1361 Discharge Reconciliation and Chart Retrieval Process
 - aa. 1540 Documentation
 - bb. 1930 Documentation of Operative Procedures
 - cc. 1330 Follow Up Care
 - dd. 1917 Hand Off Communication

- ee. 2063 Hospital Home Bound Education for Hospital
- ff. 1312 House Supervisor Role
- gg. 1041 Informed Consent
- hh. 1209 Informing Physician of Event Rpt-Complaints
- ii. 2227 Initial Assessment and Prioritization
- jj. 2229 Interdisciplinary Patient Care Plan
- kk. 2136 Medication Orders
- ll. 2198 Moderate Sedation
- mm. 1963 Operating Room Guidelines
- nn. 1725 Pain Assessment Reassessment Plan P2- Rehab Services
- oo. 2140 Pain Management
- pp. 2234 Patient and Family Education
- qq. 1862 Patient Assessment
- rr. 1675 Patients Rights and Responsibilities Policy
- ss. 660 Peer Review Process (this is an Amendment 7 Request)
- tt. 1293 Physician Supervision Process
- uu. 1884 Physician Visits
- vv. 2202 Plan for Providing Patient Care
- ww. 1983 Policies and Procedures and Documentation Requirements
- xx. 1870 Post Operative Evaluation
- yy. 1871 Post Procedure Care
- zz. 1727 Professional Credentials (this is an Amendment 7 Request)
- aaa. 1337 Qualified Medical Personnel – QMP Screening (Amendment 7 Request)
- bbb. 1563 Quality Improvement-Schedule of Quality Control (Amendment 7 Request)
- ccc. 2091 Readmission Policy
- ddd. 1625 Risk Assessment Plan EC1.10.4 (Amendment 7 Request)
- eee. 158 Risk Management Education (Amendment 7 Request)
- fff. 161 Risk Management Policy Statement (Amendment 7 Request)
- ggg. 2094 RM Role and Relationship with Physician and Staff
- hhh. 1797 Scope of Patient Assessment
- iii. 1052 Sentinel and Adverse Events (Amendment 7 Request)
- jjj. 212 Sentinel and Averse Events Identification and Intense Analyst (Amendment 7 Request)
- kkk. 1948 Surgery Requirements
- lll. 2130 Table of Contents Nursing
- mmm. 1948 Table of Contents OR Dept
- nnn. 1695 Train-education Ec7.10.A
- ooo. 1147 Transfers
- ppp. 2154 Verbal and Telephone Orders Policy
- qqq. 2068 Verbal and Telephone Orders, Guidelines

24. Any and all incident reports relating to the care and treatment provided by LARRY D. THOMAS, MD to any patient where medical negligence, intentional misconduct, and any other act, neglect, or default that caused, or could have caused, injury to or death of a patient. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys¹⁵.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 30th day of July, 2013.



KAREN E. TERRY

Florida Bar No.: 45780

MATTHEW K. SCHWENCKE

Florida Bar No.: 057132

Primary E-mail: ket@searcyylaw.com

Secondary E-mail(s): mks@searcyylaw.com; and
aje@searcyylaw.com

Searcy Denney Scarola Barnhart & Shipley, P.A.

2139 Palm Beach Lakes Boulevard

West Palm Beach, Florida 33409

Phone: (561) 686-6300

Fax: (561) 383-9441

Attorney for Plaintiff

¹⁵ See footnote 1

COUNSEL LIST

Holly B. Platter, Esquire
eserve@bgrplaw.com;tdomi@bgrplaw.com;
om;
Bush Graziano Rice & Platter, P.A.
101 E Kennedy Boulevard, Suite 1700
Tampa, FL 33601
Phone: (813)-228-7000
Fax: (813)-273-0091
Attorneys for Larry D. Thomas MD

Michael A. Petruccelli, Esquire
Pbuckley@fplawyers.com;
Tmartin@fplawyers.com
Fann & Petruccelli, P.A.
5100 North Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Phone: (954)-771-4118
Fax: (954)-771-4119
Attorneys for Bartow Regional Medical Center

IN THE CIRCUIT COURT OF THE
10th JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA

CASE NO.: 53-2012 CA-002611-0000-00
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER
and LARRY D. THOMAS, M.D.,

Defendants.

**DEFENDANT, BARTOW HMA, LLC d/b/a
BARTOW REGIONAL MEDICAL CENTER'S BETTER RESPONSE
TO NOS. 1 THROUGH 15, 18, 19, 20 & 21 OF PLAINTIFF'S REQUEST TO PRODUCE
DATED JULY 30, 2013, PURSUANT TO COURT ORDER DATED DECEMBER 31, 2013**

Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER,
by and through undersigned counsel, hereby files its Better Response to Nos. 1-15, 18, 19, 20 & 21
of Plaintiff's Request to Produce dated July 30, 2013, pursuant to Court Order dated December 31,
2013, and pursuant to Florida Rules of Civil Procedure 1.350, states as follows:

GENERAL OBJECTIONS

To the extent that this Request seeks "each and every"/"any and all" discovery of Amendment 7 related materials, Defendant objects and moves for protective order. To begin with, the Request, consisting of 24 numbered requests and 75 subparts, is overly broad, vague, ambiguous, burdensome, harassing, abusive, immaterial and irrelevant. The Request is not reasonably calculated to lead to the discovery of admissible evidence. Defendant requests intervention and protection from this Court to narrow and limit the extent of this Request to Produce, and to determine the amount of reasonable costs and fees for Defendant to review materials and respond to any appropriate requests.

Florida law protects against the discovery of records considered by medical review committees that function within a hospital, as well as records generated by, or received by, a hospital's risk management department. Specifically, § 395.0191(8), Fla. Stat., protects the

investigations, proceedings, and records of a hospital in considering and acting upon an application for staff membership or clinical privileges. § 395.0193(8), Fla. Stat., protects the investigations, proceedings, and records of a hospital's peer review panels, disciplinary boards or committees acting in their peer review or disciplinary function. § 395.0197(4), Fla. Stat., states that "incident reports are part of the workpapers of the attorney defending the licensed facility." § 766.101(5), Fla. Stat., protects the investigations, proceedings, and records of hospital committees formed to evaluate and improve the quality of health care rendered by providers of health service, to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care, or that the cost of health care rendered was considered reasonable by the providers of professional health services in the area. ^{1 2}

This Request could be interpreted to include incident reports from Bartow Regional Medical Center without reference to whether the incident report(s) relates to an adverse medical incident. Prior to the passage of Amendment 7, no records or information within the scope of this Request were discoverable or admissible for any purpose in a civil action. While Amendment 7 provides patients access to certain formerly privileged records, the scope of that access is limited by the Amendment's terms: Amendment 7 only provides patients a right to access to records made or received in the course of business by a health care facility or a health care provider relating to adverse medical incidents.

Certain records within the scope of the Request do not relate to adverse medical incidents and therefore are not subject to Amendment 7. *See Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 827 (Fla. 2d DCA 2007); *see also W. Fla. Reg'l Med. Ctr. v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009). Any privileged records which are not subject to Amendment 7 remain privileged. *Id.*

The *See* court explained the limits of the term "adverse medical incident" in Amendment 7. Specifically, "the word 'incident' itself indicates an isolated event." *See*, 18 So. 3d at 690. The phrase "adverse medical incident" can only mean "a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient." *Id.* (citing *Shahbas*, 960 So. 2d at 827). The court explained that while an adverse medical incident may be a negligent act or omission, that "act or omission must be connected with a patient and must be the cause or near-cause of an injury or death." *See*, 18 So. 3d at 690. Accordingly, for a record to fall within the scope of Amendment 7, the record must relate to a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient.

Where a party seeks discovery of privileged materials pursuant to an exception to the

¹ This Defendant acknowledges *W. Fla. Reg'l Med. Ctr. v. See*, 2012 WL 87282 (Fla. Jan 12 2012) holding that a physician's blank application for hospital privileges is discoverable when a claim of negligent credentialing is at issue. The *See* Court however, unambiguously held that sections 395.0191 and 766.101 are still valid. Furthermore, the court held that a completed application remains privileged.

² To the extent that Plaintiff might rely on *Lower Keys Medical Center v. Windisch*, 29 So. 3d 351 (Fla. 3d DCA 2010), while the Third District held that issues raised by petitioner in that case contravened the Court's decision in *Buster* and were consequently frivolous, the case lacks precedential value because precedent is only created by the precise points discussed in an appellate opinion. *See, e.g., Adelman Steel Corp. V. Winter*, 610 So. 2d 494, 501 (Fla. 1st DCA 1992); *see also Shaw v. Jain*, 914 So. 2d 438, 461 (Fla. 1st DCA 2005); *Scottsdale Ins. Co. V. Hayman*, 793 So. 2d 1006 (Fla. 5th DCA 2001); 20 Am. Jur. 2d Courts § 133. Because the *Windisch* decision does not address any legal issues specifically, it lacks precedential value.

privilege, it is the party's burden to demonstrate that the exception applies. *See Eight Hundred, Inc. v. Fla. Dep't of Revenue*, 837 So. 2d 574, 576 (Fla. 1st DCA 2003) (quoting *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 183 n. 9, 184 (Fla. 1st DCA 2001) (determining that "[j]ust as the proponent of the privilege has the burden of proof as to facts which give rise to the privilege, the party seeking to abrogate the privilege has the burden to prove facts which would make an exception to the privilege applicable" by "a preponderance of the evidence."); *Shell Oil Co. v. Par Four P'ship*, 638 So. 2d 1050, 1050 (Fla. 5th DCA 1994) (holding that "[w]hen communications appear on their face to be privileged, the party seeking disclosure bears the burden of proving that they are not."); *see also Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004) (finding that where a beneficiary sought attorney client privileged or work product protected records of trustee's attorneys, the "beneficiary would have to prove the existence of some exception to overcome the privilege.").

The court in *See* explained that the privilege at issue was "still in effect to the extent that it does not prohibit the production of records relating to adverse medical incidents under Amendment 7." *See*, 18 So. 3d at 689. Accordingly, where records and information are protected under §§ 395.0191(8), 395.0193(8), 395.0197(4), and/or 766.101(5), Fla. Stat., it is Plaintiff's burden to establish that the requested records and information fall within the scope of Amendment 7 to overcome the statutory privileges. Although Bartow Regional Medical Center maintains that Plaintiff has not established that the subject records and information fall within the scope of Amendment 7, it acknowledges the First District's ruling that a health care provider cannot be "the final arbiter in determining whether a medical incident . . . was 'adverse.'" *See Baldwin v. Shands Teaching Hosp. and Clinics, Inc.*, 45 So. 3d 118 (Fla. 1st DCA 2010). The court in *Baldwin* continued, "[s]uch ultimately is the court's decision upon a proper consideration of the nature of the records requested and the broad coverage of Amendment 7." *Id.* Without any showing that the records responsive to this Request are within the scope of records of adverse medical incidents under Amendment 7, the records remain privileged, and the discovery request should be denied.

Furthermore, a hospital is only obligated to produce records that were "made or received in the course of business." *See* Art. X, sect 25(a), Fla. Const.; *Benjamin v. Tandem Healthcare, Inc.*, 998 So. 2d at 566, 570 (Fla. 2008) ("In interpreting a constitutional amendment, we begin with the amendment's plain language."). While records created routinely as part of a hospital's efforts in providing care and treatment to patients or in following state and federal reporting or documentation requirements may be made or received in the course of business, records outside of such practice are not and thus would fall outside the scope of Amendment 7. Courts have uniformly held the business of a hospital is the care and treatment of patients. *See, e.g., Cooks v. O'Brien Properties, Inc.*, 710 A.2d 788, 795 (Conn. App. Ct. 1998) ("the business of a hospital is treating patients") (citation omitted); *Williams v. Alexander*, 129 N.E.2d 417, 419 (NY Ct. App. 1955) ("The business of a hospital, it is self-evident, is to diagnose and treat its patients' ailments.").

Conversely, it is expressly not the business of a hospital to make records for use in subsequent litigation. *See, e.g., Temple v. F. W. Woolworth Co.*, 356 A.2d 880, 882 (Conn. 1975) ("it is not the business of a hospital to collect and preserve information for use in litigation"); *Bauer v. Velth*, 130 N.W.2d 897, 900 (Mich. 1964) (cannot be "claimed that it

was 'the regular course of such [hospital] business to make such memorandum or record'") (citation omitted, alteration in original); *Green v. City of Cleveland*, 444, 83 N.E.2d 63, 65 (Ohio 1948) ("it was the business of the hospital to diagnose plaintiff's condition and to treat her for her ailments, not to record a statement describing the cause of the accident in which plaintiff's injuries were sustained"). Thus, to the extent that a record was made not for the purpose of care and treatment, such a record would typically not fall within the scope of Amendment 7.

Furthermore, the only records involving investigation of an unusual incident that are made in the course of business are those records required to be created in response to an unusual incident pursuant to some regulatory reporting or documentation requirement such as incident reports or other documentation required to be created under section 395.0197, Florida Statutes. *Cf. Yisrael v. State*, 993 So. 2d 952, 958 (Fla. 2008) (noting that records kept according to a statutorily mandated duty are kept in the course of business). By contrast, a record created for purposes of investigation of an unusual event for potential future litigation that is not similarly mandated is not made "in the course of business." *Cf. Brown v. International Paper Co.*, 710 So. 2d 666, 668 (Fla. 2d DCA 1998) (letter from Federal Express and handwriting analyst's report created as part of investigation of forged purchase order not made in the course of business); *Simmons v. State*, 697 S. 2d 985, 986 (Fla. 4th DCA 1997) (list itemizing stolen items not demonstrated to be made in course of business).

Thus, records that are not made in response to a federal or state reporting or documentation requirement, and are not made as part of the care or treatment of a patient are not made or received in the course of business as required to be discoverable under Amendment 7. Consequently, these documents remain privileged.

Further, to the extent that this Request includes attorney-client privileged communications, Florida law is clear that "included within the attorney-client privilege are communications the insured makes to the insurer for its use to fulfill its obligation to defend on the insured's behalf." *See Reynolds v. State*, 963 So. 2d 908, 911 (Fla. 2d DCA 2007); *Staton v. Allied Chain Link Fence Company*, 418 So. 2d 404, 405-06 (Fla. 2d DCA 1982); *Grand Union Company v. Patrick*, 247 So. 2d 474, 475 (Fla. 3d DCA 1971); *see also 17A Lee R. Russ, et al., Couch on Insurance* 3d § 250:19 (2000) (describing the majority view that the "attorney-client privilege applies to communications between an insured and its liability or indemnity insurer as to an incident possibly giving rise to liability."). Furthermore, where a client makes notes memorializing an event to consult an attorney for the purposes of defense in impending litigation, those notes are protected by the attorney client privilege. *See Lemonik v. Eastern Airlines, Inc.*, 632 So. 2d 239 (Fla. 3d DCA 1994); and *Merlin v. Boca Raton Community Hosp., Inc.*, 479 So. 2d 236 (Fla. 4th DCA 1985).

No appellate court has held that Amendment 7 alters the longstanding privilege attached to attorney client communications. As a threshold matter, attorney client privileged materials are not "made or received in the course of business," as required to be discoverable under Amendment 7. *See* Article X, section 25(a).

The Second District in *Lakeland Regional Medical Center v. Neely*, 8 So. 3d 1268 (Fla. 2d DCA 2009), cautioned that it did not address attorney-client communications because the defendant did not argue that the documents were prepared or produced at the attorney's request for use in litigation. Thus, the opinion did not address the impact of Amendment 7 on the attorney-client privilege.

The distinction in *Neely* is supported by other authorities. The Florida Supreme Court in its advisory opinion explains that Amendment 7 "does not expressly affect . . . the attorney-client privilege, and there is no evidence of any intent to do so." Advisory Opinion to the Att'y General Regarding Patients' Right to Know About Adverse Medical Incidents, 880 So. 2d 617, 621 (Fla. 2004). In a follow up to the advisory opinion, questions set forth by Justice Cantero and responses by counsel for the Buster Respondents in the Florida Supreme Court suggest that attorney client privilege remains absolute. See Transcript of Oral Argument in *Buster*, 43, 56-57 (attached as Exhibit I) (questioning that Amendment 7 could affect attorney client privilege and counsel arguing that it did not). The Fifth District in *Gmach* noted support for this argument, stating: "[s]ince the supreme court's opinion in *Buster*, several circuit courts have weighed in on this issue, with the bulk of them concluding that the [attorney client] privilege still exists." *Florida Eye Clinic v. Gmach*, 14 So. 3d 1044, 1047 (Fla. 5th DCA 2009).

Additionally, although the Florida Supreme Court in its advisory opinion stated that nothing in Amendment 7 would affect the work product privilege, the courts in *Lakeland Regional Medical Center v. Neely*, 8 So. 3d 1268 (Fla. 2d DCA 2009), and *Florida Eye Clinic v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009), held that Amendment 7 supersedes any protection by the fact work product privilege of incident reports.

The district courts, however, expressly did not conclude that Amendment 7 supersedes protection of opinion work product. The Fifth District specified: "[w]e do not read amendment 7 as evincing an intent from the voters to eliminate the privilege of opinion work product." *Gmach*, 14 So. 3d at 1050 (emphasis in original).

Furthermore, though the court in *Gmach* erroneously narrowed the scope of opinion work product to only attorney-created work product, Florida Rule of Civil Procedure 1.280(b)(3) expressly protects the mental impressions, conclusions and opinions of an attorney "or other representative of a party." See also *Surf Drugs v. Vermette*, 236 So. 2d 108, 113 (Fla. 1970) ("the work product of the litigant, his attorney or agent, cannot be examined, absent rare and exceptional circumstances"); *Colonial Penn Ins. Co. v. Blair*, 380 So. 2d 1305, 1306 (Fla. 5th DCA 1980) ("To bring something within the 'work product' ambit, there must be some indication of personal thought, views, knowledge, or evaluation by the attorney, litigant, or agent"); *Alachua County Hosp. v. Zimmer, USA, Inc.*, 403 So. 2d 1087 (Fla. 1st DCA 1981) ("[C]ommunications, reports, memoranda, etc., prepared in anticipation of litigation and passing between a client and his attorney, and/or their employed investigators, are work product").

Here, the scope of the Request includes records and information which contain or constitute the mental impressions, conclusions and opinions of representatives of Bartow

Regional Medical Center. Even if this Court were to conclude that Amendment 7 has done away with fact work product protection, Bartow Regional Medical Center's opinion work product remains protected in light of Amendment 7.

Furthermore, the Code of Federal Regulations protects the Hospital from being required to disclose attorney work-product. 45 C.F.R. § 164.524(a)(1)(ii) ("an individual has a right of access to inspect and obtain a copy of protected health information about the individual. . . except for: . . . [i]nformation compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding."). Moreover, federal regulations provide that any state law that is contrary to its provisions is preempted unless the state law is more stringent by providing greater confidentiality to protected health information. "State law" is defined to include the State Constitution. See 45 C.F.R. § 160.202.

In addition, the Florida Statutes have long imposed privileges on credentialing files. Florida Statutes §§ 395.0191(8), 766.101(5). Section §395.0191(8) protects the investigations, proceedings, and records of a hospital in considering and acting upon an application for staff membership or clinical privileges. Section 766.101(5) also mandates that the "investigations, proceedings, and records" of a credentialing committee "shall not be subject to discovery."

The Supreme Court in *W. Fla. Reg'l Med. Ctr. v. See*, 2012 WL 87282 (Fla. Jan. 12, 2012) recently and unambiguously held that Sections 395.0191 and 766.101 are still valid and protect the exact category of documents that you are seeking to be disclosed here. The *See* Court was called upon to determine whether a medical malpractice plaintiff's request for a blank application for hospital privileges was protected from discovery under the statutes. The Court held that where a claim for negligent credentialing is pending, a blank application is discoverable because it is not a part of the hospital decision-making process, and is also evidence of an "adverse incident" under Amendment 7 because the act of negligently credentialing a medical provider constitutes an adverse incident.

In holding that a blank application is not a part of the decision-making process that is protected under the statutes, the Supreme Court expressly distinguished completed applications, such as those requested here.

Without waiving said objections, a blank application for staff privileges is not contained within Dr. Larry Thomas' credentialing file.

This holding is fully in accord with the longstanding law of the Supreme Court, which recognized in *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992), that these statutory privileges are to be construed broadly in order to encourage full candor in peer review proceedings. See also *Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 827 (Fla. 2d DCA 2007) (holding that documents relating to the credentialing and re-credentialing process for a physician are not within the scope of Amendment 7); *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008) (doctor's credentialing file was statutorily protected pursuant to sections 395.0191(8) and 766.101(5)); *Columbia Park Med. Ctr., Inc. v. Gibbs*, 728

So. 2d 373 (Fla. 5th DCA 1999) (applications for clinical privileges were protected from discovery under sections 766.101(5) and 395.0191(8)); *Boca Raton Community Hospital v. Jones*, 584 So. 2d 221 (Fla. 4th DCA 1991) (reports of peer review committee are privileged).

Additionally, the identities of individuals involved in peer review, credentialing and quality assurance activities are privileged, confidential and are beyond the scope of Amendment 7. *See Palms of Pasadena Hosp. v. Rutigliano*, 908 So. 2d 594 (Fla. 5th DCA 2004) (names of members of credentialing committee not discoverable); *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 390 2008). As such, the identities of reviewers involved in peer review, credentialing or quality assurance under sections 395.0191, 395.0193 and 766.101 are not discoverable under Amendment 7 and to the extent that this Request seeks such information, it is not discoverable under Amendment 7.

This Defendant objects to producing any documents pursuant to this Request absent an Order requiring Plaintiff to pay the costs of discovery prior to production. Section 381.028(7)(c)(1), Florida Statutes, allows the Hospital to require the Plaintiff to pay the full costs of production before acting on the request. *See Buster*, 984 So.2d at 493-94 (leaving intact the statutory provision allowing pre-payment of costs of production); *see also Columbia Hosp. Corp. of S. Broward v. Fain*, 16 So.3rd 236 (Fla. 4th DCA 2009) (noting that payment is required prior to response to discovery). Therefore, in the event that the Court enters an Order requiring the production of any material that is the subject matter of these objections/Motion for Protective Order, Defendant, Bartow Regional Medical Center, requests that the Court enter an Order requiring the Plaintiff to pay in full the costs of Amendment 7 discovery prior to the Defendant, Bartow Regional Medical Center, acting on the request.

Given that this request is not reasonably limited in scope or time, personnel from Bartow Regional Medical Center would have to locate a staggering amount of incident reports. The reports would then need to be redacted for patient identifiers, the identities of personnel involved in peer review, and opinion work product.

Due to the sensitivity of records and information at issue and based on the fact that Plaintiff has not made payment of the costs that will be incurred by the Hospital in responding to the discovery requests as required by section 381.028(7)(c)1, Florida Statutes, and because Plaintiff's discovery requests exceed the scope of Amendment 7, Defendant, Bartow Regional Medical Center, is not providing a privilege log at this time. While Defendant, Bartow Regional Medical Center, does not believe a privilege log is due at this time, out of an abundance of caution this issue is being brought to the Court's attention. To the extent the Court has a different view, Defendant, Bartow Regional Medical Center, asks that the Court waive any requirement that it do so.

Until the Court rules on the objections to this Request asserted by this Defendant, any preparation of a privilege log is premature. *See Gosman v. Luzinski*, 937 So. 2d 293, 296 (Fla. 4th DCA 2006) (finding that "[b]efore a written objection to a request for production of documents is ruled upon, the documents are not 'otherwise discoverable' and thus the obligation to file a privilege log does not arise."); accord *Royal Caribbean Cruises*,

Ltd. v. Doe, 964 So. 2d 713, 718 (Fla. 3d DCA 2007); *Life Care Ctrs. of Am. v. Reese*, 948 So. 2d 830, 833 (Fla. 5th DCA 2007) (holding that “[t]he trial court [i]s required to address the discoverability of the requested documents before ordering [defendants] to review them all for privileged material.”); *Consol. Res. Health Care Fund I, Ltd. v. Ruffini*, 947 So. 2d 1278 (Fla. 4th DCA 2007) (determining that litigant did not waive privilege by failing to respond to discovery requests where court did not first rule on objections as to breadth of requests).

This view has been upheld in *W. Fla. Reg'l Med. Ctr. v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009). The First District Court of Appeal found that where threshold issues exist, the petitioner did not waive the peer review, work product or any other privilege by failing to file a privilege log. In this case, threshold issues clearly exist that have not yet been determined with regards to the breadth of the discovery requests. Until those issues are resolved, any request for a privilege log is as of yet premature.

In *Baptist Health of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008), Plaintiff propounded interrogatories requesting the production of a list of all documents in the doctors' credentialing files at Baptist Hospital as well as a privilege log detailing the dates of the documents, the nature of the documents, the identity of the person who sent or received the documents and anyone copied with the documents. Baptist objected stating that the Plaintiff was seeking descriptions of the contents of the credentialing files which are not discoverable pursuant to Fla. Stat. §§ 395.0191(8) and 766.101(5). The Third District agreed, stating that the production of the privilege log would disclose confidential information that has nothing to do with adverse medical incidents discoverable under Amendment 7. Also see *Nevin v. Palm Beach County School Board*, 958 So.2d 1003 (Fla. 1st DCA 2007) (Waiver for failure to file a privilege log should not apply where assertion of the privilege is not document specific, but category specific and the category itself is plainly protected, citing *Matlock v. Day*, 907 So.2d 577, Fla. 5th DCA 2005)).

Finally, the records pertaining to quality assurance including the accreditation records of the Joint Commission for the Accreditation of Healthcare Organizations (“JCAHO”) and/or any other accrediting bodies are protected under the peer review, credentialing and quality assurance privileges. See Fla. Stat. § 766.101.

Fla. Stat. § 766.101 defines medical review committee as a committee of a hospital or ambulatory surgery center licensed under chapter 395 or a health maintenance organization...which committee is formed to evaluate and improve the quality of health care rendered by providers of health service or to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care. Fla. Stat § 766.101(1)(a). The purpose of the surveys done by JCAHO is to assess a hospital's compliance with the standards set out by the JCAHO. See *Variety Children's Hospital v. Mishler*, 670 So. 2d 184 (Fla. 3rd DCA 1996). *Mishler* went on to state that “in order to give broad effect to the policy and intent of the statute, we must find that any evaluations that a hospital makes on its own or takes part in to improve the standard of care or patient safety and to reduce rates of death and disease is privileged under section 766.10(5)”. Also see *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992) (privilege afforded to peer review committee is intended to prohibit the chilling effect of the potential public disclosure

of statements made to or information prepared for and used by the committee in carrying out its peer review function.). Thus, records considered by the peer review committee to improve the quality of care including quality management policies, records, review and reports as well as JCAHO surveys are privileged.

This Defendant further objects on the basis that the action at hand is not ripe for judicial determination given the fact that a condition precedent has yet to have occurred, namely a determination that co-Defendant, Larry Thomas, M.D. was negligent and such negligence was a legal cause of loss, injury or damage to Plaintiff. *Maksad v. West Boca Medical Center*, 832 So.2d 788 (Fla. 4th DCA 2001, 2002).

1. Each and every document created five (5) years prior to May 8, 2011 that in any way relates to the hospital's investigation or review of the care and treatment of any patient of Larry D. Thomas, M.D. This is a request pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

2. Each and every document created five (5) years prior to May 8, 2011, relating to any and all medical incidents, medical negligence, neglect, or default of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

3. Each and every document created five (5) years prior to May 8, 2011, related to the credentialing and re-credentialing process of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

4. Each and every document created five (5) years prior to May 8, 2011, related to Larry D. Thomas, M.D. in which you investigated an incident of medical negligence; or history of acts, neglects, or defaults which injured or could have injured a patient and

caused or could have caused the death of a patient. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. In addition, this request essentially duplicates request number 2. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

5. Each and every document created five (5) years prior to May 8, 2011, related to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. We reiterate that this request is not only burdensome and harassing, but it is spurious on its face. We do not understand how an alleged incident of negligence five years ago could injure the Plaintiff five years later. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

6. For five (5) years prior to May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee or peer review committee in which any aspect of the clinical evaluation of was Larry D. Thomas, M.D. discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

7. All minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which any aspect of the evaluation of plaintiff's treatment was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

8. Each and every document that in any way relates to the defendant hospital's investigation or review of the care and treatment of the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

9. Each and every document in the hospital's possession relating to the termination and/or resignation of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. We further object to the predicate in this request. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

10. Any and all incident reports relating to the care and treatment of the Plaintiff. Please do not provide a response indicating that you have already provided us with the documentation in this request. If you have provided it to us, we are unable to locate it and we ask that you provide it again. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Please see our response to Plaintiff's Request to Produce dated May 7, 2012 (number 1b). Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

11. Each and every document relating to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

12. After May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which was discussed any aspect of the clinical evaluation of Larry D. Thomas, M.D. was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

13. Any records for Larry D. Thomas, M.D. made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than the Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

14. Any records for Larry D. Thomas, M.D. made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. Without waiving any objections, please see attached adverse reports, and Privilege Logs filed in this matter.

15. A non-redacted copy of the hospital's on call schedule for the month of May, 2011.

RESPONSE: Please see attached on-call schedule for the month of May 2011.

18. A non-redacted copy of the hospital's on call schedule for unassigned patients for the month of May, 2011.

RESPONSE: Please see response to #15 above.

19. A non-redacted copy of the hospital's on call schedule for general surgery for the month of May, 2011.

RESPONSE: Please see response to #15 above.

20. A non-redacted copy of the check request for Larry Thomas, M.D. prepared on 6/1/2011.

RESPONSE: Please see attached.

21. A non-redacted copy of the 6/1/2011 invoice (52091) for Larry Thomas, M.D. for the May call x 7.

RESPONSE: Please see attached.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-File/E-mail to: **Karen E. Terry, Esq., Attorneys for Plaintiff**, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409, ket@searcylaw.com; mks@searcylaw.com; aje@searcylaw.com; lmn@searcylaw.com, and to **Holly B. Platter, Esq., Attorneys for Defendant, Larry D. Thomas, M.D.**, Bush, Graziano & Rice, P.A., 101 E Kennedy Boulevard, Suite 1700, Tampa, Florida 33602, eserve@bgrplaw.com; tdomi@bgrplaw.com, this 30th day of January, 2014.

FANN & PETRUCCELLI, P.A.

Attorneys for Defendant, Bartow Regional Medical Center

1726 East Seventh Avenue, Suite 18

Tampa, FL 33605

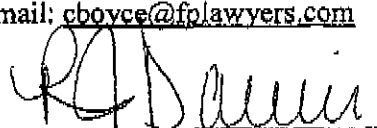
Telephone (813)251-1400

Facsimile (813)251-1412

Primary e-mail: Pbuckley@fplawyers.com

Secondary e-mail: cboyce@fplawyers.com

BY:


MICHAEL A. PETRUCCELLI

Florida Bar No.: 717312

 PAUL C. BUCKLEY

Florida Bar No.: 906697

59082

IN THE CIRCUIT COURT OF THE
10th JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA

CASE NO.: 53-2012 CA-002611-0000-00
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER
and LARRY D. THOMAS, M.D.,

Defendants.

NOTICE OF FILING

COMES NOW, Defendant, BARTOW HMA, LLC a/k/a BARTOW REGIONAL MEDICAL CENTER, by and through undersigned counsel, hereby files this its Notice of Filing, pursuant to Rule 1.720, Florida Rules of Civil Procedure, Privilege Log A and Privilege Log B.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-mail to: **Karen E. Terry, Esq.**, *Attorneys for Plaintiff*, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409 (ket@searcylaw.com; mks@searcylaw.com; aje@searcylaw.com; lmn@searcylaw.com) and to **Holly B. Platter, Esq.**, *Attorneys for Defendant, Larry D. Thomas, M.D.*, Bush, Graziano & Rice, P.A., 101 E Kennedy

Boulevard, Suite 1700, Tampa, Florida 33602 (eserve@bgrplaw.com; tdomi@bgrplaw.com, this
30th day of January, 2014.

FANN & PETRUCCELLI, P.A.

*Attorneys for Defendant, Bartow Regional Medical
Center*

1726 East Seventh Avenue, Suite 18

Tampa, FL 33605

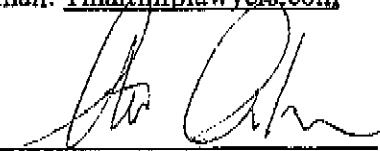
Telephone (813)251-1400

Facsimile (813)251-1412

Primary e-mail: pbuckley@fplawyers.com

Secondary e-mail: Tmartinfplawyers.com

BY:



MICHAEL A. PETRUCCELLI

Florida Bar No.: 717312

PAUL C. BUCKLEY

Florida Bar No.: 906697

PRIVILEGE LOG - A

Plaintiff's Request seeks information which is privileged and confidential as peer review/risk management/quality assurance, work product, credentialing and medical review committee materials pursuant to Florida law and Florida Statutes § 395.0191, § 395.0193, § 395.0197, § 381.028, § 766.101 as well as the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et. seq.* ("HCQIA").

Laparoscopic – Open Procedures Review June 2009	4 pages
BRMC Peer Review Meeting Notes March 2010	7 pages
Peer Review Meeting Notes – (Undated)	4 pages
Laparoscopic – Open Procedure Review June 2009-February 2010	2 pages
Chart Review Materials of January 25, 2010 and January 26, 2010	6 pages
January 28, 2010 Peer Review Meeting Notes	6 pages
BRMC Peer Review Process Policy Materials, Form	7 pages
BRMC Peer Review Materials/Attorney Client Peer Review Documents Re: MR #5276712	6 pages
BRMC Medical Staff Review Agenda/Sign-In Sheet March 18, 2010	2 pages
BRMC Peer Review Meeting Notes March 18, 2010	4 pages
BRMC March 17, 2010 letter Re: Peer Review	1 page
BRMC Peer Review document Re: miscellaneous cases – (Undated)	3 pages
BRMC Peer Review Report Re: MR #:348923	3 pages
Miscellaneous document Re: surgery cases June 2009 – February 2010	1 page
Peer Review Committee Note February 18, 2010	1 page
April 2010 BRMC Peer Review Committee Attendance forms and Case Review List	3 pages
BRMC Peer Review Meeting Notes April 15, 2010	2 pages
Laparoscopic – Open Procedure June 2009 – February 2010	1 page
March 19, 2010 E-mail and attachment Re: Laparoscopic Procedures	2 pages
BRMC Peer Review Committee Notes August 18, 2010	3 pages
BRMC Peer Review Case List – (Undated)	4 pages
BRMC Peer Review Agenda/Attendance Sheet	2 pages
BRMC Peer Review Committee Meeting Notes October 20, 2010	2 pages
Peer Review Log October 20, 2010	1 page
Miscellaneous Case Review – (Undated)	2 pages
Miscellaneous Case Review – (Undated)	1 page
December 21, 2011 BRMC Peer Review Attendance Form	1 page
December 15, 2010 Peer Review Agenda/List	2 pages
BRMC December 15, 2010 Peer Review Attendance List/Meeting Notes, Miscellaneous Materials	7 pages
Medical Records Re: MR #:242292	3 pages
Miscellaneous Medical Records (Undated)	8 pages
Miscellaneous Medical Records (Undated)	5 pages
Undated Mortality Criteria Note	1 page
Joint Commission Standards Booster Pak for Focused Professional Practice Evaluation- (Undated)	37 pages
February 2011 Peer Review Attendant's Form and Agenda	2 pages
December 15, 2010 Peer Review Meeting Notes and Attachments	5 pages

Miscellaneous Medical Records- (Undated)	2 pages
Miscellaneous Medical Record Review (Undated)	1 page
December 2010 Miscellaneous Patient Review	1 page
April 20, 2010 Peer Review Attendance Form	1 page
BRMC Peer Review Meeting Notes and Attachments	4 pages
Risk Management Report to Peer Review December 2010	1 page
BRMC February 16, 2011 Peer Review Committee Meeting notes	2 pages
BRMC August 17, 2011 Peer Review Committee Attendance Form and Meeting Notes	5 pages
BRMC Peer Review Committee Meeting August 17, 2011 Notes	3 pages
BRMC Peer Review Committee Meeting August 17, 2011	
Chairman Executive Summary	1 page
BRMC August 17, 2011 Peer Review Meeting Minutes	6 pages
BRMC MEC Report August 25, 2011	1 page
BRMC Peer Review Committee Meeting Notes April 20, 2011	2 pages
BRMC Peer Review Committee Meeting Notes June 15, 2011	1 page
Miscellaneous Chart Review June 4, 2011	3 pages
Miscellaneous Chart Review June 24, 2011	2 pages
Miscellaneous Chart Review June 25, 2011	1 page
Miscellaneous Chart Review July 27, 2011	1 page
Miscellaneous Chart Review August 2, 2011	1 page
August 2011 Peer Review Chart Form	2 pages
July 8, 2011 Memo to Quality Assurance Department	
Re: Pathology Dept.	1 page
August – July 2011 Peer Review Chart Audit	1 page
October 19, 2011 Peer Review Attendance and Chief Executive Summary Report	2 pages
August 17, 2011 Peer Review Committee Meeting Summary	1 page
October 19, 2011 Peer Review Committee Meeting Notes	3 pages
October 19, 2011 Peer Review Meeting Minutes	3 pages
August 17, 2011 Peer Review Committee Meeting Notes	3 pages
Miscellaneous Medical Records	4 pages
FPPE Chart Review	1 page
OPPE Chart Review August 2011	1 page
October 19, 2011 Peer Review Meeting Notes	2 pages
December 21, 2011 Peer Review Meeting Minutes	2 pages
Medical Executive Committee meeting materials	March 2009 140 pages
Medical Executive Committee meeting materials	April 2010 163 pages
Medical Executive Committee meeting materials	December 2009 78 pages
Medical Executive Committee meeting materials	November 2009 42 pages
Medical Executive Committee meeting materials	October 2009 74 pages
Medical Executive Committee meeting materials	August 2009 40 pages
Medical Executive Committee meeting materials	July 2009 56 pages
Medical Executive Committee meeting materials	May 2009 31 pages
Medical Executive Committee meeting materials	June 2009 55 pages
Medical Executive Committee meeting materials	March 2010 71 pages
Medical Executive Committee meeting materials	February 2010 76 pages
Medical Executive Committee meeting materials	December 2010 98 pages
Medical Executive Committee meeting materials	November 2010 44 pages

Medical Executive Committee meeting materials	October 2010	36 pages
Medical Executive Committee meeting materials	September 2010	75 pages
Medical Executive Committee meeting materials	August 2010	78 pages
Medical Executive Committee meeting materials	June 2010	67 pages
Medical Executive Committee meeting materials	January 2009	99 pages
Medical Executive Committee meeting materials	February 2009	102 pages
Medical Executive Committee meeting materials	September 2009	79 pages
BRMC Peer Review Committee document	(January 28, 2010)	1 page
BRMC Peer Review Committee meeting notes	(December 15, 2009)	6 pages
BRMC Peer Review letter	(December 21, 2009)	2 pages
BRMC Peer Review memo		1 page
Miscellaneous Chart review RE: MR#0117415		3 pages
Miscellaneous medical records RE: MR#0117415	January 5, 2009	3 pages
Miscellaneous medical records RE: MR#0348923		6 pages
Peer Review note (undated)		1 page
Peer Review Committee meeting notes	(date not legible)	1 page
Peer Review Committee handwritten notes (undated)		2 pages
Policy and Procedure re: Practitioner	(February 2008)	6 pages
Handwritten Committee notes (undated)		4 pages
Miscellaneous note re: BRMC Peer Review meeting	June 17, 2010	1 pp.
Miscellaneous note and email regarding June 2010 Peer Review meeting		4 pp.
BRMC Peer Review Committee meeting note (December 21, 2011)		1 pp.
Performance Improvement Meeting records (March 19, 2009)		66 pp.
Performance Improvement Meeting records (April 17, 2009)		89 pp.
Performance Improvement Meeting records (July 16, 2009)		23 pp.
Performance Improvement Meeting records (August 20, 2009)		42 pp.
Performance Improvement Meeting records (September 17, 2009)		23 pp.
Performance Improvement Plan documents (November 2009)		27 pp.
Performance Improvement Committee documents (November 19, 2009)		52 pp.
Performance Improvement Plan documents (December 2009)		20 pp.
Plan of Correction Data documents (undated)		102 pp.
Performance Improvement Plan documents 2010		9 pp.
Performance Improvement Plan documents 2012		9 pp.
Performance Improvement Plan documents 2011		15 pp.
Performance Improvement Plan documents 2009		23 pp.
Performance Improvement Plan documents 2004		23 pp.
Performance Improvement Plan documents 2005		30 pp.
Performance Improvement Plan documents 2006		20 pp.
Performance Improvement Plan documents 2007		19 pp.
Performance Improvement Plan documents 2008		pp.
Surgical Committee Meeting documents	February 3, 2010	pp.
Surgical Committee Meeting documents	November 19, 2009	pp.
Surgical Committee Meeting documents	December 12, 2010	4 pp.
Surgical Section Meeting documents	October 6, 2010	3 pp.
Surgical Section Meeting documents	July 7, 2010	5 pp.
Surgical Section Meeting documents	April 7, 2010	4 pp.
Surgical Section Meeting documents	April 7, 2010	13 pp.
Surgical Section Meeting documents	February 3, 2010	4 pp.

Surgical Section Meeting documents November 19, 2009 3 pp.
Surgical Section Meeting documents August 19, 2009 4 pp.
Surgical Section Meeting documents May 20, 2009 4 pp.
Surgical Section Meeting documents February 18, 2009 6 pp.
Peer Review Meeting notes April 15, 2010 2 pp.
Focused review February 28, 2010 1 pp.
Performance Improvement Committee meeting notes (January 20, 2010) 10 pp.
Performance Improvement Committee meeting notes (March 3, 2010) 8 pp.
Performance Improvement Committee meeting notes (March 18, 2010) 6 pp.
Performance Improvement Committee meeting notes (April 15, 2010) 3 pp.
Performance Improvement Committee meeting notes (May 20, 2010) 5 pp.
Performance Improvement Committee meeting notes (June 17, 2010) 5 pp.
Performance Improvement Committee meeting notes (July 21, 2010) 4 pp.
Performance Improvement Committee meeting notes (August 18, 2010) 4 pp.
Performance Improvement Committee meeting notes (September 22, 2010) 7 pp.
Performance Improvement Committee meeting notes (October 20, 2010) 5 pp.
Performance Improvement Committee meeting notes (November 22, 2010) 5 pp.
Performance Improvement Committee meeting notes (December 15, 2010) 4 pp.
Action Plan Committee meeting documents (2010) 15 pp.
Performance Improvement Committee documents (December 15, 2010) 13 pp.
Performance Improvement Committee meeting notes (November 22, 2010) 18 pp.
Performance Improvement Committee meeting notes (October 20, 2010) 17 pp.
Performance Improvement Committee meeting notes (September 22, 2010) 22 pp.
Performance Improvement Committee meeting notes (February 22, 2010) 17 pp.

ATTORNEY CLIENT/PEER REVIEW MATERIALS
PRIVILEGE LOG -B

Attorney client work product and peer review documents requested by and commissioned by the undersigned BRMC counsel, privileged and protected from disclosure pursuant to Florida and Federal law.

Plaintiff's Request seeks information which is privileged and confidential and to which Defendant objects and asserts attorney client privileges, and work product, opinion work product, peer review/risk management and quality assurance, credentialing and medical committee review privileges pursuant to Florida Law and Florida Statutes § 395.0191, § 395.0193, § 395.0197, § 381.028, § 766.101 as well as the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et. seq.* ("HCQIA").

1. 12/10/09 BRMC medical records 429 pp. MR#267579
2. 4/6/10 BRMC medical records 471 pp. MR# 358058
3. 6/3/10 BRMC medical records 1665 pp. MR# 258053
4. 6/11/10 BRMC medical records 872 pp. MR# 144356
5. 7/15/10 BRMC medical records 244 pp. MR# 359080
6. 12/1/10 BRMC medical records 695 pp. MR# 132958
7. 5/8/11 BRMC medical records 149 pp. MR# 120733
8. 5/27/11 BRMC medical records 35 pp. MR# 174716
9. 6/1/11 Letter to BRMC from Fla Dept of Health w/subpoena
For records 6 pp. MR# 132958
10. 6/6/11 BRMC medical records 82 pp. MR# 365424
11. 6/6/11 BRMC medical records 116 pp. MR# 370204
12. 6/23/11 BRMC medical records 39 pp. MR#365424
13. 10/12/11 BRMC medical records 323 pp. MR#227307
14. 9/5/12 BRMC medical records 181 pp. MR#346755
15. 07/2010 Correspondence, reports and miscellaneous items relating to attorney
requested external peer review re: MR# 359080; MR# 358058;
MR# 267579; MR# 258053; MR# 144356 57 pp.
16. 11/2011 Correspondence, reports, and miscellaneous items relating to attorney
requested external peer review re: MR#365424; MR# 174716;
MR# 120733; MR# 132958; MR# 370204; MR# 227307 79 pp.
17. Bartow Regional Staff Rules and Regulations 76 pp.
18. Credentialing file, Larry D. Thomas, M.D. 28 pp.
19. Miscellaneous e-mails and correspondence among F&P, BRMC and
corporate clients 135 pp.
20. Correspondence, reports and miscellaneous items relating to attorney
requested external peer review re: MR#5276712 6 pp.
21. Correspondence, reports and miscellaneous items relating to attorney
requested external peer review re: MR#5267456 and MR#5267139 and
MR#5276712 12 pages

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT, IN AND FOR POLK
COUNTY, FLORIDA.

CASE NO.: 53-2012-CA-002611-0000-00,
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

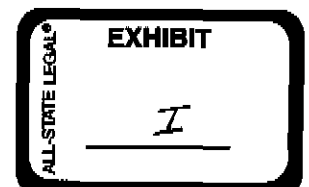
Defendants.

**PLAINTIFF'S MOTION TO COMPEL DEFENDANT, BARTOW HMA, LLC d/b/a
BARTOW REGIONAL MEDICAL CENTER TO PROVIDE BETTER RESPONSES TO
REQUEST TO PRODUCE DATED JULY 30, 2013**

The Plaintiff, AMBER EDWARDS, by and through the undersigned attorneys, moves this Honorable Court to enter an order compelling Defendants, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER to Provide Better Responses to Request to Produce Dated July 30, 2013 and states in support as follows:

1. This is a medical malpractice case against general surgeon, LARRY D. THOMAS, MD (hereinafter "DEFENDANT THOMAS", and a hospital BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER (hereinafter "DEFENDANT HOSPITAL").

2. Specifically, Plaintiff presented to the Emergency Room at DEFENDANT HOSPITAL on May 9, 2011 where she was diagnosed as having gall stones. DEFENDANT HOSPITAL assigned DEFENDANT THOMAS to perform surgery to remove Plaintiff's gall bladder. During surgery, DEFENDANT THOMAS failed to identify the Plaintiff's common bile



duct, cut her common bile duct during the surgery, and afterwards failed to timely recognize that he did so.

3. Thereafter, both DEFENDANT THOMAS and nurses at DEFENDANT HOSPITAL failed to appropriately monitor the Plaintiff, and prematurely discharged the Plaintiff despite the fact that she displayed symptoms of suffering from a severed bile duct.

4. Thereafter, Plaintiff continued to suffer tremendous pain and her stomach grew in size. Plaintiff became severely dehydrated and returned to the emergency room at DEFENDANT HOSPITAL where it was finally discovered that Defendant, LARRY D. THOMAS, M.D. had cut Plaintiff's common bile duct. Ultimately, Plaintiff, AMBER EDWARDS travelled in an ambulance for corrective surgery at Tampa General Hospital.

5. The Defendant filed responses to the Plaintiff's Request to Produce dated July 30, 2013. **Attached hereto as "Exhibit A".** Defendant Hospital advised that it would provide responses to request #22 and 23, but has never done so.

6. Despite numerous requests, and Paul Buckley Esquire's email dated February 18, 2014 advising that the materials would be provided to the Plaintiff, the Defendant Hospital has never provided responses. The undersigned followed up on February 25, 2014 and March 6, 2014 to no avail, requiring the instant Motion to Compel. **Attached hereto as "Exhibit B"**

7. The Defendant should be compelled to provide the responses to requests 22 and 23 immediately.

8. The Defendant should be sanctioned for its conduct as it has continued to delay and thwart the discovery process throughout this entire litigation.

9. Movant's counsel certifies a good faith effort to resolve these issues prior to judicial intervention.

WHEREFORE, the Plaintiff, AMBER EDWARDS respectfully requests that this Honorable Court enter an Order GRANTING the Plaintiff's Motion to the Compel the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER to Provide Better Responses to Request to Produce Dated July 30, 2013 as well as sanctions in the form of attorney's fees and costs.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 6th day of March, 2014.

KAREN E. TERRY
FLORIDA BAR NO.: 45780
MATTHEW K. SCHWENCKE
FLORIDA BAR NO.: 057132
Primary E-Mail: eservice@searcylaw.com
Secondary E-Mail(s): _terryteam@searcylaw.com
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone: (561) 686-6300
Fax: (561) 383-9441
Attorney for Plaintiff

COUNSEL LIST

Michael A. Petruccelli, Esquire
Paul Buckley, Esquire
[Pbuckley@fplawyers.com](mailto:pbuckley@fplawyers.com)
choyce@fplawyers.com
Fann & Petruccelli, P.A.
5100 N Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Phone: (954)-771-4118
Fax: (954)-771-4119
Attorneys for Bartow HMA, LLC d/b/a
Bartow Regional Medical Center

Holly B. Platter, Esquire
eserve@bgrplaw.com; tdomi@bgrplaw.com;
Bush Graziano Rice & Platter, P.A.
101 E Kennedy Boulevard, Suite 1700
Tampa, FL 33601
Phone: (813)-228-7000
Fax: (813)-273-0091
Attorneys for Larry D. Thomas, M.D.

IN THE CIRCUIT COURT OF THE
10th JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA

CASE NO.: 53-2012 CA-002611-0000-00
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER
and LARRY D. THOMAS, M.D.,

Defendants.

DEFENDANT, BARTOW HMA, LLC d/b/a
BARTOW REGIONAL MEDICAL CENTER'S RESPONSE TO PLAINTIFF'S
REQUEST TO PRODUCE DATED JULY 30, 2013

Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER,
by and through undersigned counsel, hereby files its Response to Plaintiff's Request to Produce
dated July 30, 2013, and pursuant to Florida Rules of Civil Procedure 1.350, states as follows:

GENERAL OBJECTIONS

To the extent that this Request seeks "each and every"/"any and all" discovery of Amendment 7 related materials, Defendant objects and moves for protective order. To begin with, the Request, consisting of 24 numbered requests and 75 subparts, is overly broad, vague, ambiguous, burdensome, harassing, abusive, immaterial and irrelevant. The Request is not reasonably calculated to lead to the discovery of admissible evidence. Defendant requests intervention and protection from this Court to narrow and limit the extent of this Request to Produce, and to determine the amount of reasonable costs and fees for Defendant to review materials and respond to any appropriate requests.

Florida law protects against the discovery of records considered by medical review committees that function within a hospital, as well as records generated by, or received by, a hospital's risk management department. Specifically, § 395.0191(8), Fla. Stat., protects the investigations, proceedings, and records of a hospital in considering and acting upon an

application for staff membership or clinical privileges. § 395.0193(8), Fla. Stat., protects the investigations, proceedings, and records of a hospital's peer review panels, disciplinary boards or committees acting in their peer review or disciplinary function. § 395.0197(4), Fla. Stat., states that "incident reports are part of the workpapers of the attorney defending the licensed facility." § 766.101(5), Fla. Stat., protects the investigations, proceedings, and records of hospital committees formed to evaluate and improve the quality of health care rendered by providers of health service, to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care, or that the cost of health care rendered was considered reasonable by the providers of professional health services in the area. 1 2

This Request could be interpreted to include incident reports from Bartow Regional Medical Center without reference to whether the incident report(s) relates to an adverse medical incident. Prior to the passage of Amendment 7, no records or information within the scope of this Request were discoverable or admissible for any purpose in a civil action. While Amendment 7 provides patients access to certain formerly privileged records, the scope of that access is limited by the Amendment's terms: Amendment 7 only provides patients a right to access to records made or received in the course of business by a health care facility or a health care provider relating to adverse medical incidents.

Certain records within the scope of the Request do not relate to adverse medical incidents and therefore are not subject to Amendment 7. See Morton Plant Hosp. Ass'n, Inc. v. Shahbas, 960 So. 2d 820, 827 (Fla. 2d DCA 2007); see also W. Fla. Reg'l Med. Ctr. v. See, 18 So. 3d 676 (Fla. 1st DCA 2009). Any privileged records which are not subject to Amendment 7 remain privileged. *Id.*

The *See* court explained the limits of the term "adverse medical incident" in Amendment 7. Specifically, "the word 'incident' itself indicates an isolated event." *See*, 18 So. 3d at 690. The phrase "adverse medical incident" can only mean "a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient." *Id.* (citing *Shahbas*, 960 So. 2d at 827). The court explained that while an adverse medical incident may be a negligent act or omission, that "act or omission must be connected with a patient and must be the cause or near-cause of an injury or death." *See*, 18 So. 3d at 690. Accordingly, for a record to fall within the scope of Amendment 7, the record must relate to a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient.

Where a party seeks discovery of privileged materials pursuant to an exception to the privilege, it is the party's burden to demonstrate that the exception applies. See Eight

1 This Defendant acknowledges *W. Fla. Reg'l Med. Ctr. v. See*, 2012 WL 87282 (Fla. Jan. 12, 2012) holding that a physician's blank application for hospital privileges is discoverable when a claim of negligent credentialing is at issue. The *See* Court, however, unambiguously held that sections 395.0191 and 766.101 are still valid. Furthermore, the court held that a completed application remains privileged.

2 To the extent that Plaintiff might rely on *Lower Keys Medical Center v. Windisch*, 29 So. 3d 351 (Fla. 3d DCA 2010), while the Third District held that issues raised by petitioner in that case contravened the Court's decision in *Buster* and were consequently frivolous, the case lacks precedential value because precedent is only created by the precise points discussed in an appellate opinion. *See, e.g., Adelman Steel Corp. v. Winter*, 610 So. 2d 494, 501 (Fla. 1st DCA 1992); *see also Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st DCA 2005); *Scottsdale Ins. Co. v. Haynes*, 793 So. 2d 1006 (Fla. 5th DCA 2001); 20 Am. Jur. 2d Courts § 133. Because the *Windisch* decision does not address any legal issues specifically, it lacks precedential value.

Hundred, Inc. v. Fla. Dep't of Revenue, 837 So. 2d 574, 576 (Fla. 1st DCA 2003) (quoting *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 183 n. 9, 184 (Fla. 1st DCA 2001) (determining that "[j]ust as the proponent of the privilege has the burden of proof as to facts which give rise to the privilege, the party seeking to abrogate the privilege has the burden to prove facts which would make an exception to the privilege applicable" by "a preponderance of the evidence.")); *Shell Oil Co. v. Par Four P'ship*, 638 So. 2d 1050, 1050 (Fla. 5th DCA 1994) (holding that "[w]hen communications appear on their face to be privileged, the party seeking disclosure bears the burden of proving that they are not."); see also *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004) (finding that where a beneficiary sought attorney client privileged or work product protected records of trustee's attorneys, the "beneficiary would have to prove the existence of some exception to overcome the privilege.").

The court in *See* explained that the privilege at issue was "still in effect to the extent that it does not prohibit the production of records relating to adverse medical incidents under Amendment 7." *See*, 18 So. 3d at 689. Accordingly, where records and information are protected under §§ 395.0191(8), 395.0193(8), 395.0197(4), and/or 766.101(5), Fla. Stat., it is Plaintiff's burden to establish that the requested records and information fall within the scope of Amendment 7 to overcome the statutory privileges. Although Bartow Regional Medical Center maintains that Plaintiff has not established that the subject records and information fall within the scope of Amendment 7, it acknowledges the First District's ruling that a health care provider cannot be "the final arbiter in determining whether a medical incident . . . was 'adverse.'" *See Baldwin v. Shands Teaching Hosp. and Clinics, Inc.*, 45 So. 3d 118 (Fla. 1st DCA 2010). The court in *Baldwin* continued, "[s]uch ultimately is the court's decision upon a proper consideration of the nature of the records requested and the broad coverage of Amendment 7." *Id.* Without any showing that the records responsive to this Request are within the scope of records of adverse medical incidents under Amendment 7, the records remain privileged, and the discovery request should be denied.

Furthermore, a hospital is only obligated to produce records that were "made or received in the course of business." *See* Art. X, sect 25(a), Fla. Const.; *Benjamin v. Tandem Healthcare, Inc.*, 998 So. 2d at 566, 570 (Fla. 2008) ("In interpreting a constitutional amendment, we begin with the amendment's plain language."). While records created routinely as part of a hospital's efforts in providing care and treatment to patients or in following state and federal reporting or documentation requirements may be made or received in the course of business, records outside of such practice are not and thus would fall outside the scope of Amendment 7. Courts have uniformly held the business of a hospital is the care and treatment of patients. *See, e.g., Cooks v. O'Brien Properties, Inc.*, 710 A.2d 788, 795 (Conn. App. Ct. 1998) ("the business of a hospital is treating patients") (citation omitted); *Williams v. Alexander*, 129 N.E.2d 417, 419 (NY Ct. App. 1955) ("The business of a hospital, it is self-evident, is to diagnose and treat its patients' ailments.").

Conversely, it is expressly not the business of a hospital to make records for use in subsequent litigation. *See, e.g., Temple v. F. W. Woolworth Co.*, 356 A.2d 880, 882 (Conn. 1975) ("it is not the business of a hospital to collect and preserve information for use in litigation"); *Bauer v. Veith*, 130 N.W.2d 897, 900 (Mich. 1964) (cannot be "claimed that it was 'the regular course of such [hospital] business to make such memorandum or record'")

(citation omitted, alteration in original); *Green v. City of Cleveland*, 444, 83 N.E.2d 63, 65 (Ohio 1948) ("it was the business of the hospital to diagnose plaintiff's condition and to treat her for her ailments, not to record a statement describing the cause of the accident in which plaintiff's injuries were sustained"). Thus, to the extent that a record was made not for the purpose of care and treatment, such a record would typically not fall within the scope of Amendment 7.

Furthermore, the only records involving investigation of an unusual incident that are made in the course of business are those records required to be created in response to an unusual incident pursuant to some regulatory reporting or documentation requirement such as incident reports or other documentation required to be created under section 395.0197, Florida Statutes. *Cf. Yisrael v. State*, 993 So. 2d 952, 958 (Fla. 2008) (noting that records kept according to a statutorily mandated duty are kept in the course of business). By contrast, a record created for purposes of investigation of an unusual event for potential future litigation that is not similarly mandated is not made "in the course of business." *Cf. Brown v. International Paper Co.*, 710 So. 2d 666, 668 (Fla. 2d DCA 1998) (letter from Federal Express and handwriting analyst's report created as part of investigation of forged purchase order not made in the course of business); *Simmons v. State*, 697 S. 2d 985, 986 (Fla. 4th DCA 1997) (list itemizing stolen items not demonstrated to be made in course of business).

Thus, records that are not made in response to a federal or state reporting or documentation requirement, and are not made as part of the care or treatment of a patient are not made or received in the course of business as required to be discoverable under Amendment 7. Consequently, these documents remain privileged.

Further, to the extent that this Request includes attorney-client privileged communications, Florida law is clear that "included within the attorney-client privilege are communications the insured makes to the insurer for its use to fulfill its obligation to defend on the insured's behalf." *See Reynolds v. State*, 963 So. 2d 908, 911 (Fla. 2d DCA 2007); *Staton v. Allied Chain Link Fence Company*, 418 So. 2d 404, 405-06 (Fla. 2d DCA 1982); *Grand Union Company v. Patrick*, 247 So. 2d 474, 475 (Fla. 3d DCA 1971); *see also 17A Lee R. Russ, et al., Couch on Insurance* 3d § 250:19 (2000) (describing the majority view that the "attorney-client privilege applies to communications between an insured and its liability or indemnity insurer as to an incident possibly giving rise to liability."). Furthermore, where a client makes notes memorializing an event to consult an attorney for the purposes of defense in impending litigation, those notes are protected by the attorney client privilege. *See Lemonik v. Eastern Airlines, Inc.*, 632 So. 2d 239 (Fla. 3d DCA 1994); and *Merlin v. Boca Raton Community Hosp., Inc.*, 479 So. 2d 236 (Fla. 4th DCA 1985).

No appellate court has held that Amendment 7 alters the longstanding privilege attached to attorney client communications. As a threshold matter, attorney client privileged materials are not "made or received in the course of business," as required to be discoverable under Amendment 7. *See Article X, section 25(a).*

The Second District in *Lakeland Regional Medical Center v. Neely*, 8 So. 3d 1268 (Fla.

2d DCA 2009), cautioned that it did not address attorney-client communications because the defendant did not argue that the documents were prepared or produced at the attorney's request for use in litigation. Thus, the opinion did not address the impact of Amendment 7 on the attorney-client privilege.

The distinction in *Neely* is supported by other authorities. The Florida Supreme Court in its advisory opinion explains that Amendment 7 "does not expressly affect . . . the attorney-client privilege, and there is no evidence of any intent to do so." Advisory Opinion to the Att'y General Regarding Patients' Right to Know About Adverse Medical Incidents, 880 So. 2d 617, 621 (Fla. 2004). In a follow up to the advisory opinion, questions set forth by Justice Cantero and responses by counsel for the Buster Respondents in the Florida Supreme Court suggest that attorney client privilege remains absolute. See Transcript of Oral Argument in Buster, 43, 56-57 (attached as Exhibit I) (questioning that Amendment 7 could affect attorney client privilege and counsel arguing that it did not). The Fifth District in *Gmach* noted support for this argument, stating: "[s]ince the supreme court's opinion in Buster, several circuit courts have weighed in on this issue, with the bulk of them concluding that the [attorney client] privilege still exists." *Florida Eye Clinic v. Gmach*, 14 So. 3d 1044, 1047 (Fla. 5th DCA 2009).

Additionally, although the Florida Supreme Court in its advisory opinion stated that nothing in Amendment 7 would affect the work product privilege, the courts in *Lakeland Regional Medical Center v Neely*, 8 So. 3d 1268 (Fla. 2nd DCA 2009), and *Florida Eye Clinic v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009), held that Amendment 7 supersedes any protection by the fact work product privilege of incident reports.

The district courts, however, expressly did not conclude that Amendment 7 supersedes protection of opinion work product. The Fifth District specified: "[w]e do not read amendment 7 as evincing an intent from the voters to eliminate the privilege of opinion work product." *Gmach*, 14 So. 3d at 1050 (emphasis in original).

Furthermore, though the court in *Gmach* erroneously narrowed the scope of opinion work product to only attorney-created work product, Florida Rule of Civil Procedure 1.280(b)(3) expressly protects the mental impressions, conclusions and opinions of an attorney "or other representative of a party." See also *Surf Drugs v. Vermette*, 236 So. 2d 108, 113 (Fla. 1970) ("the work product of the litigant, his attorney or agent, cannot be examined, absent rare and exceptional circumstances"); *Colonial Penn Ins. Co. v. Blair*, 380 So. 2d 1305, 1306 (Fla. 5th DCA 1980) ("To bring something within the 'work product' ambit, there must be some indication of personal thought, views, knowledge, or evaluation by the attorney, litigant, or agent"); *Alachua County Hosp. v. Zimmer, USA, Inc.*, 403 So. 2d 1087 (Fla. 1st DCA 1981) ("[C]ommunications, reports, memoranda, etc., prepared in anticipation of litigation and passing between a client and his attorney, and/or their employed investigators, are work product").

Here, the scope of the Request includes records and information which contain or constitute the mental impressions, conclusions and opinions of representatives of Bartow Regional Medical Center. Even if this Court were to conclude that Amendment 7 has done

away with fact work product protection, Bartow Regional Medical Center's opinion work product remains protected in light of Amendment 7.

Furthermore, the Code of Federal Regulations protects the Hospital from being required to disclose attorney work-product. 45 C.F.R. § 164.524(a)(1)(ii) ("an individual has a right of access to inspect and obtain a copy of protected health information about the individual. . . except for: . . . [i]nformation compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding."). Moreover, federal regulations provide that any state law that is contrary to its provisions is preempted unless the state law is more stringent by providing greater confidentiality to protected health information. "State law" is defined to include the State Constitution. See 45 C.F.R. § 160.202.

In addition, the Florida Statutes have long imposed privileges on credentialing files. Florida Statutes §§ 395.0191(8), 766.101(5). Section §395.0191(8) protects the investigations, proceedings, and records of a hospital in considering and acting upon an application for staff membership or clinical privileges. Section 766.101(5) also mandates that the "investigations, proceedings, and records" of a credentialing committee "shall not be subject to discovery."

The Supreme Court in *W. Fla. Reg'l Med. Ctr. v. See*, 2012 WL 87282 (Fla. Jan. 12, 2012) recently and unambiguously held that Sections 395.0191 and 766.101 are still valid and protect the exact category of documents that you are seeking to be disclosed here. The *See* Court was called upon to determine whether a medical malpractice plaintiff's request for a blank application for hospital privileges was protected from discovery under the statutes. The Court held that where a claim for negligent credentialing is pending, a blank application is discoverable because it is not a part of the hospital decision-making process, and is also evidence of an "adverse incident" under Amendment 7 because the act of negligently credentialing a medical provider constitutes an adverse incident.

In holding that a blank application is not a part of the decision-making process that is protected under the statutes, the Supreme Court expressly distinguished completed applications, such as those requested here.

Without waiving said objections, a blank application for staff privileges is not contained within Dr. Larry Thomas' credentialing file.

This holding is fully in accord with the longstanding law of the Supreme Court, which recognized in *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992), that these statutory privileges are to be construed broadly in order to encourage full candor in peer review proceedings. See also *Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 827 (Fla. 2d DCA 2007) (holding that documents relating to the credentialing and re-credentialing process for a physician are not within the scope of Amendment 7); *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008) (doctor's credentialing file was statutorily protected pursuant to sections 395.0191(8) and 766.101(5)); *Columbia Park Med. Ctr., Inc. v. Gibbs*, 728 So. 2d 373 (Fla. 5th DCA 1999) (applications for clinical privileges were protected from

discovery under sections 766.101(5) and 395.0191(8)); *Boca Raton Community Hospital v. Jones*, 584 So. 2d 221 (Fla. 4th DCA 1991) (reports of peer review committee are privileged).

Additionally, the identities of individuals involved in peer review, credentialing and quality assurance activities are privileged, confidential and are beyond the scope of Amendment 7. See *Palms of Pasadena Hosp. v. Rutigliano*, 908 So. 2d 594 (Fla. 5th DCA 2004) (names of members of credentialing committee not discoverable); *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 390 2008). As such, the identities of reviewers involved in peer review, credentialing or quality assurance under sections 395.0191, 395.0193 and 766.101 are not discoverable under Amendment 7 and to the extent that this Request seeks such information, it is not discoverable under Amendment 7.

This Defendant objects to producing any documents pursuant to this Request absent an Order requiring Plaintiff to pay the costs of discovery prior to production. Section 381.028(7)(c)(1), Florida Statutes, allows the Hospital to require the Plaintiff to pay the full costs of production before acting on the request. See *Buster*, 984 So.2d at 493-94 (leaving intact the statutory provision allowing pre-payment of costs of production): see also *Columbia Hosp. Corp. of S. Broward v. Fain*, 16 So.3rd 236 (Fla. 4th DCA 2009) (noting that payment is required prior to response to discovery). Therefore, in the event that the Court enters an Order requiring the production of any material that is the subject matter of these objections/Motion for Protective Order, Defendant, Bartow Regional Medical Center, requests that the Court enter an Order requiring the Plaintiff to pay in full the costs of Amendment 7 discovery prior to the Defendant, Bartow Regional Medical Center, acting on the request.

Given that this request is not reasonably limited in scope or time, personnel from Bartow Regional Medical Center would have to locate a staggering amount of incident reports. The reports would then need to be redacted for patient identifiers, the identities of personnel involved in peer review, and opinion work product.

Due to the sensitivity of records and information at issue and based on the fact that Plaintiff has not made payment of the costs that will be incurred by the Hospital in responding to the discovery requests as required by section 381.028(7)(c)1, Florida Statutes, and because Plaintiff's discovery requests exceed the scope of Amendment 7, Defendant, Bartow Regional Medical Center, is not providing a privilege log at this time. While Defendant, Bartow Regional Medical Center, does not believe a privilege log is due at this time, out of an abundance of caution this issue is being brought to the Court's attention. To the extent the Court has a different view, Defendant, Bartow Regional Medical Center, asks that the Court waive any requirement that it do so.

Until the Court rules on the objections to this Request asserted by this Defendant, any preparation of a privilege log is premature. See *Gosman v. Luzinski*, 937 So. 2d 293, 296 (Fla. 4th DCA 2006) (finding that "[b]efore a written objection to a request for production of documents is ruled upon, the documents are not 'otherwise discoverable' and thus the obligation to file a privilege log does not arise."); accord *Royal Caribbean Cruises, Ltd. v. Doe*, 964 So. 2d 713, 718 (Fla. 3d DCA 2007); *Life Care Ctrs. of Am. v. Reese*, 948 So.

2d 830, 833 (Fla. 5th DCA 2007) (holding that “[t]he trial court [i]s required to address the discoverability of the requested documents before ordering [defendants] to review them all for privileged material.”); *Consol. Res. Health Care Fund I, Ltd. v. Ruffini*, 947 So. 2d 1278 (Fla. 4th DCA 2007) (determining that litigant did not waive privilege by failing to respond to discovery requests where court did not first rule on objections as to breadth of requests).

This view has been upheld in *W. Fla. Reg'l Med. Ctr. v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009). The First District Court of Appeal found that where threshold issues exist, the petitioner did not waive the peer review, work product or any other privilege by failing to file a privilege log. In this case, threshold issues clearly exist that have not yet been determined with regards to the breadth of the discovery requests. Until those issues are resolved, any request for a privilege log is as of yet premature.

In *Baptist Health of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008), Plaintiff propounded interrogatories requesting the production of a list of all documents in the doctors' credentialing files at Baptist Hospital as well as a privilege log detailing the dates of the documents, the nature of the documents, the identity of the person who sent or received the documents and anyone copied with the documents. Baptist objected stating that the Plaintiff was seeking descriptions of the contents of the credentialing files which are not discoverable pursuant to Fla. Stat. §§ 395.0191(8) and 766.101(5). The Third District agreed, stating that the production of the privilege log would disclose confidential information that has nothing to do with adverse medical incidents discoverable under Amendment 7. Also see *Nevin v. Palm Beach County School Board*, 958 So.2d 1003 (Fla. 1st DCA 2007) (Waiver for failure to file a privilege log should not apply where assertion of the privilege is not document specific, but category specific and the category itself is plainly protected, citing *Matlock v. Day*, 907 So.2d 577, Fla. 5th DCA 2005)).

Finally, the records pertaining to quality assurance including the accreditation records of the Joint Commission for the Accreditation of Healthcare Organizations (“JCAHO”) and/or any other accrediting bodies are protected under the peer review, credentialing and quality assurance privileges. See Fla. Stat. § 766.101.

Fla. Stat. § 766.101 defines medical review committee as a committee of a hospital or ambulatory surgery center licensed under chapter 395 or a health maintenance organization...which committee is formed to evaluate and improve the quality of health care rendered by providers of health service or to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care. Fla. Stat § 766.101(1)(a). The purpose of the surveys done by JCAHO is to assess a hospital's compliance with the standards set out by the JCAHO. See *Variety Children's Hospital v. Mishler*, 670 So. 2d 184 (Fla. 3rd DCA 1996). *Mishler* went on to state that “in order to give broad effect to the policy and intent of the statute, we must find that any evaluations that a hospital makes on its own or takes part in to improve the standard of care or patient safety and to reduce rates of death and disease is privileged under section 766.10(5)”. Also see *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992) (privilege afforded to peer review committee is intended to prohibit the chilling effect of the potential public disclosure of statements made to or information prepared for and used by the committee in carrying

out its peer review function.). Thus, records considered by the peer review committee to improve the quality of care including quality management policies, records, review and reports as well as JCAHO surveys are privileged.

This Defendant further objects on the basis that the action at hand is not ripe for judicial determination given the fact that a condition precedent has yet to have occurred, namely a determination that co-Defendant, Larry Thomas, M.D. was negligent and such negligence was a legal cause of loss, injury or damage to Plaintiff. *Maksad v. West Boca Medical Center*, 832 So.2d 788 (Fla. 4th DCA 2001, 2002).

Without waiving said objections, the adverse event report pertaining to Amber Edwards, whose care and treatment was provided by Dr. Thomas has been provided to you as referenced in our response to May 7, 2012 Request for Production, number 1b.

1. Each and every document created five (5) years prior to May 8, 2011 that in any way relates to the hospital's investigation or review of the care and treatment of any patient of Larry D. Thomas, M.D. This is a request pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

2. Each and every document created five (5) years prior to May 8, 2011, relating to any and all medical incidents, medical negligence, neglect, or default of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

3. Each and every document created five (5) years prior to May 8, 2011, related to the credentialing and re-credentialing process of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

4. Each and every document created five (5) years prior to May 8, 2011, related to Larry D. Thomas, M.D. in which you investigated an incident of medical negligence; or history of acts, neglects, or defaults which injured or could have injured a patient and caused or could have caused the death of a patient. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. In addition, this request essentially duplicates request number 2.

5. Each and every document created five (5) years prior to May 8, 2011, related to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. We reiterate that this request is not only burdensome and harassing, but it is spacious on its face. We do not understand how an alleged incident of negligence five years ago could injure the Plaintiff five years later.

6. For five (5) years prior to May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee or peer review committee in which any aspect of the clinical evaluation of was Larry D. Thomas, M.D. discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

7. All minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which any aspect of the evaluation of plaintiff's treatment was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

8. Each and every document that in any way relates to the defendant hospital's investigation or review of the care and treatment of the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

9. Each and every document in the hospital's possession relating to the termination and/or resignation of Larry D. Thomas, M.D. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein. We further object to the predicate in this request.

10. Any and all incident reports relating to the care and treatment of the Plaintiff. Please do not provide a response indicating that you have already provided us with the documentation in this request. If you have provided it to us, we are unable to locate it and we ask that you provide it again. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Please see our response to Plaintiff's Request to Produce dated May 7, 2012 (number 1b).

11. Each and every document relating to your investigation of incidents of medical negligence; or history of acts, neglects, or defaults which injured or could have injured the Plaintiff. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

12. After May 8, 2011 all minutes of the quality assurance committee, the risk management committee, the credentialing committee and any other similar committee in which was discussed any aspect of the clinical evaluation of Larry D. Thomas, M.D. was discussed. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

13. Any records for Larry D. Thomas, M.D. made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than the Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

14. Any records for Larry D. Thomas, M.D. made or received in the course of business relating to any adverse medical incident including, but not limited to, medical negligence, intentional misconduct, and any other act, neglect, or default that could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility, peer review committee, risk management committee, quality assurance committee, credentials committee, surgical review committee, and medical committee, and any records, reports, or findings generated for or as the result of JCAHO review, Code 15, sentinel event, morbidity and mortality conferences, risk management reviews and reports, HCFA surveys, OR incident reports, competency reviews and reports, human resources reviews and reports, and all reports made to ACHA, JCAHO, and the FDA similar committee, or any representative of any such committees, redacting all patient names other than Plaintiff in order to ensure patient confidentiality. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

15. A non-redacted copy of the hospital's on call schedule for the month of May, 2011.

RESPONSE: Please see attached on-call schedule for the month of May 2011. The identities of other physicians listed on the on-call schedule have been redacted.

16. Copies of any and all documents indicating the number of hours that Larry D. Thomas was providing care and treatment to patients at the Defendant Hospital for the six (6) month period prior to May 8, 2011.

RESPONSE: None.

17. Non-redacted copies of the hospital's on call schedule for the months of January-May, 2011.

RESPONSE: Objection; irrelevant and immaterial to any issue in this claim. Without waiving said objection, please see attached copy of the hospital's redacted on-call schedule for the months January through April, 2011. The identities of other physicians listed on the on-call schedule have been redacted. As to the May 2011 on-call schedule, please see response to # 15.

18. A non-redacted copy of the hospital's on call schedule for unassigned patients for the month of May, 2011.

RESPONSE: Please see response to #15 above.

19. A non-redacted copy of the hospital's on call schedule for general surgery for the month of May, 2011.

RESPONSE: Objection. This request is duplicative in nature. Please see response to #15 above. The identities of other physicians listed on the on-call schedule for general surgery have been redacted.

20. A non-redacted copy of the check request for Larry Thomas, M.D. prepared on 6/1/2011.

RESPONSE: Objection. This request is duplicative in nature. Please see Defendant's Response to number 3 of Plaintiff's Request to Produce propounded on April 15, 2013.

21. A non-redacted copy of the 6/1/2011 invoice (52091) for Larry Thomas, M.D. for the May call x 7.

RESPONSE: Attached is a copy of the documents produced in our Better Response to number 2 of Plaintiff's Request for Production propounded on April 15, 2013. Please note the item produced is not an "invoice."

22. Any and all orientation and/or training materials of the Defendant Hospital that were provided to:

- a. Anju Thoams, RN
- b. Felicia Pagan, RN
- c. Michelle Webb, RN
- d. Judy Pittman, RN
- e. Hilari Bankhead Vaca, RN and
- f. Barbara Johnson, RN

RESPONSE: This information has been requested and will be provided if received.

23. 2011 Policies and Procedures in effect at the time of Plaintiff's admission as follows:

- a. 1156 Assessment-Reassessment
- b. 586 Assigned Roles for Staff
- c. 1322 Assignment to Treatment Area
- d. 1352 Auditing and Monitoring
- e. 576 Backup Communications
- f. 582 Authority for Emergencies
- g. 1924 Block Scheduling in the OR
- h. 1542 Call Reports-Preliminary Reports
- i. 2009 Callback of RC Personnel
- j. 1152 Chain of Command
- k. 1925 Circulating RN Responsibilities

- l. 1225 Collaborative Care Team – Nursing
- m. 588 Communication of Patient Information
- n. 1710 Communication Interdepartmental
- o. 577 Communications Plan
- p. 1979 Competency Validation
- q. 1853 Conflict Management for leadership
- r. 1711 Consultation Between Disciplines
- s. 2077 Continuity of Patient Care
- t. 1868 Criteria for Notifying Anesthesiologist and/or Attending Physician
- u. 1712 Continuing Education C9
- v. 1714 Description of Professional Scope of Practice
- w. 1869 Discharge Criteria and Planning
- x. 1977 Discharge Planning Interdisciplinary
- y. 2080 Discharge Planning Statement
- z. 1361 Discharge Reconciliation and Chart Retrieval Process
- aa. 1540 Documentation
- bb. 1930 Documentation of Operative Procedures
- cc. 1330 Follow Up Care
- dd. 1917 Hand Off Communication
- ee. 2083 Hospital Home Bound Education for Hospital
- ff. 1312 House Supervisor Role
- gg. 1041 Informed Consent
- hh. 1209 Informing Physician of Event Rpt-Complaints
- ii. 2227 Initial Assessment and Prioritization
- jj. 2229 Interdisciplinary Patient Care Plan
- kk. 2136 Medication Orders
- ll. 2198 Moderate Sedation
- mm. 1963 Operating Room Guidelines
- nn. 1725 Pain Assessment Reassessment Plan P2-Rehab Services
- oo. 2140 Pain Management
- pp. 2234 Patient and Family Education
- qq. 1862 Patient Assessment
- rr. 1675 Patients Rights and Responsibilities Policy
- ss. 660 Peer Review Process (this is an Amendment 7 Request)
- tt. 1293 Physician Supervision Process
- uu. 1884 Physician Visits
- vv. 2202 Plan for Providing Patient Care
- ww. 1983 Policies and Procedures and Documentation Requirements
- xx. 1870 Post Operative Evaluation
- yy. 1871 Post Procedure Care
- zz. 1727 Professional Credentials (this is an Amendment 7 Request)
- ~~aaa. 1337 Qualified Medical Personnel – QMP Screening (Amendment 7 Request)~~
- bbb. 1563 Quality Improvement-Schedule of Quality Control (Amendment 7 Request)
- ccc. 2091 Readmission Policy

ddd. 1625 Risk Assessment Plan EC1.10.4 (Amendment 7 Request)
 eee. 158 Risk Management Education (Amendment 7 Request)
 fff. 161 Risk Management Policy Statement (Amendment 7 Request)
 ggg. 2094 RM Role and Relationship with Physician and Staff
 hhh. 1797 Scope of Patient Assessment
 iii. 1050 Sentinel and Adverse Events (Amendment 7 Request)
 jjj. 212 Sentinel and Adverse Events Identification and Intense Analyst (Amendment 7 Request)
 kkk. 1948 Surgery Requirements
 lll. 2130 Table of Contents Nursing
 mmm. 1948 Table of Contents OR Dept.
 nnn. 1695 Tran-education Ec7.10.A
 ooo. 1147 Transfers
 ppp. 2154 Verbal and Telephone Orders Policy
 qq. 2068 Verbal and Telephone Order, Guidelines

RESPONSE: Copies have been requested and will be provided if and when received, to the extent they were in existence in 2011.

24. Any and all incident reports relating to the care and treatment provided by Larry D. Thomas, M.D. to any patient where medical negligence, intentional misconduct, and any other act, neglect, or default that caused, or could have caused, injury to or death of a patient. This request is being made pursuant to Amendment 7 and this request excludes documents generated by attorneys.

RESPONSE: Objection; please see General Objections above which are incorporated herein.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-mail to: **Karen E. Terry, Esq., Attorneys for Plaintiff**, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409 (ket@searcylaw.com; mks@searcylaw.com; aje@searcylaw.com; lmn@searcylaw.com) and to **Holly B. Platter, Esq.**,

Attorneys for Defendant, Larry D. Thomas, M.D., Bush, Graziano & Rice, P.A., 101 E Kennedy Boulevard, Suite 1700, Tampa, Florida 33602 (eserve@bgrplaw.com; tdomi@bgrplaw.com, this 29th day of August, 2013.

FANN & PETRUCCELLI, P.A.
Attorneys for Defendant, Bartow Regional Medical Center
5100 North Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Telephone: (954) 771-4118
Facsimile: (954) 771-4119
Primary e-mail: PBbuckley@fplawyers.com
Secondary e-mail: TMartin@fplawyers.com

BY:

 488611
MICHAEL A. PETRUCCELLI

Florida Bar No.: 717312



PAUL C. BUCKLEY

Florida Bar No.: 906697

Angela J. Eckman

From: Matthew K. Schwencke
Sent: March 06, 2014 10:34 AM
To: 'Paul Buckley'; 'Cheryl Boyce'
Cc: 'Holly Platter'; 'Michael Petruccelli (MPetruccelli@fplawyers.com)'
Subject: RE: Edwards housekeeping

oCaseID: 10204727

Paul

I have given you 3 more weeks. What is going on?

From: Matthew K. Schwencke
Sent: February 25, 2014 6:03 PM
To: 'Paul Buckley'
Subject: RE: Edwards housekeeping

Paul, I still haven't received this.

From: Paul Buckley [<mailto:pbuckley@fplawyers.com>]
Sent: February 18, 2014 5:33 PM
To: Michael Petruccelli; Matthew K. Schwencke
Subject: Re: Edwards housekeeping

Mathew,
I will try to address 22 and 23 tomorrow. Didn't know not provided.
Thanks,
Paul

Paul C. Buckley
Fann & Petruccelli, P.A.
5100 North Federal Highway
Suite 300 B
Fort Lauderdale, Florida 33308
Telephone - (954) 771-4118
Facsimile - (954) 771-4119

PBuckley@FPLawyers.com
www.FPLawyers.com

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From: Michael Petruccelli
Sent: Tuesday, February 18, 2014 5:12 PM
To: 'Matthew K. Schwencke'
Cc: Paul Buckley

EXHIBIT "B"

Subject: RE: Edwards housekeeping

Matthew, Paul can help you out with 22 and 23

Attorney Client Communication
Attorney Work Product Privilege
Confidential Communication

Michael A. Petruccelli
Board Certified Civil Trial Lawyer

Fann & Petruccelli, P.A.
5100 North Federal Highway
Suite 300 B
Fort Lauderdale, Florida 33308
Telephone - (954) 771-4118
Facsimile - (954) 771-4119

Fann & Petruccelli, P.A.
5623 Naples Boulevard
Naples, Florida 34109
Telephone - (239) 330-3670
Facsimile - (239) 330-3680

MPetruccelli@FPLawyers.com
www.FPLawyers.com

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From: Matthew K. Schwencke [mailto:MKS@SearcyLaw.com]
Sent: February 18, 2014 12:47 PM
To: Michael Petruccelli; Paul Buckley; 'Holly Platter'; 'ereynolds@bgrplaw.com'
Cc: Angela J. Eckman; Karen E. Terry; Cheryl Boyce; Linda Altavilla; 'Sandra Albee' (saibee@bgrplaw.com)
Subject: Edwards housekeeping

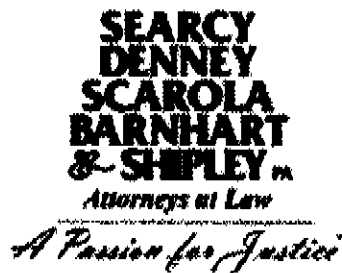
Counselors:

I am almost done with the pre-trial stip. I will send that around for your review and comment in the near future. I also plan on furnishing you with proposed jury instructions and a proposed verdict form soon.

I know my assistant Angela has been asking for deposition dates that you are all available for me to depose Dr. Medalle. I know you are all very busy, but I would appreciate it very much if your assistants would get back to Angela as soon as possible.

Last but not least, team Petruccelli/Buckley: I have not received responses to #22 or #23 despite a response from you on August 29, 2013 that you would provide those materials to me. Again, I know you are all very busy, but 5 months is enough time to get those documents to me. I would rather not file another motion to compel, so please provide those documents to me by Friday at 5pm.

Thank you.



Matthew K. Schwencke, Esq.

2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
(561) 686-6300 phone
(561) 383-9441 fax
mks@searcylaw.com
www.searcylaw.com

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IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT, IN AND FOR POLK
COUNTY, FLORIDA.

CASE NO.: 53-2012-CA-002611-0000-00,
Section 4

AMBER EDWARDS,

Plaintiff,

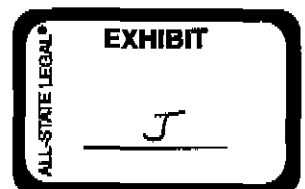
vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

Defendants.

**ORDER ON PLAINTIFF'S MOTION TO COMPEL DEFENDANT, BARTOW HMA,
LLC D/B/A BARTOW REGIONAL MEDICAL CENTER TO PROVIDE BETTER
RESPONSES TO PLAINTIFF'S REQUEST TO PRODUCE DATED JULY 30, 2013**

THIS CAUSE having come to be considered upon the Plaintiff's Motion to Compel Defendant, Bartow HMA, LLC d/b/a Bartow Regional Medical Center to Provide Better Responses to Plaintiff's Request to Produce dated July 30, 2013, and the Court having reviewed the file and being fully advised in the premises, it is hereby ORDERED and ADJUDGED that Plaintiff's Motion to Compel Defendant, Bartow HMA, LLC d/b/a Bartow Regional Medical Center to Provide Better Responses to Plaintiff's Request to Produce dated July 30, 2013 is hereby **GRANTED BY AGREEMENT**. Specifically, Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER shall provide responses to request #22 and #23 within fourteen (14) days of this order.



Order on Plaintiff's Motion to Compel Defendant, Bartow HMA, LLC d/b/a Bartow Regional Medical Center to
Provide Better Responses to Plaintiff's Request to Produce dated July 30, 2013
Edwards vs. Bartow Regional Medical Center, et al.
Case No.: 53-2012-CA-002611-0000-00, Section 4
Page 2

APR 07 2014

DONE AND ORDERED at Bartow, Polk County, Florida, this _____ day of April,
2014.

Allen Masters

CIRCUIT JUDGE

Copies have been furnished to:

Matthew K. Schwencke, Esquire
mks@searcylaw.com
Searcy Denney Scarola Barnhart & Shipley PA
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 383-9441
Attorneys for Plaintiff

Michael A. Petruccelli, Esquire
Pbuckley@fplawyers.com; Tmartin@fplawyers.com
Fann & Petruccelli, P.A.
5100 N Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Phone: (954)-771-4118
Fax: (954)-771-4119
Attorneys for Bartow HMA, LLC d/b/a Bartow Regional Medical Center

Holly B. Platter, Esquire
eserve@bgrplaw.com; tdomi@bgrplaw.com;
Bush Graziano Rice & Platter, P.A.
101 E Kennedy Boulevard, Suite 1700
Tampa, FL 33601
Phone: (813)-228-7000
Fax: (813)-273-0091
Attorneys for Larry D. Thomas, M.D.

IN THE CIRCUIT COURT OF THE
10th JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA

CASE NO.: 53-2012 CA-002611-0000-00
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER
and LARRY D. THOMAS, M.D.,

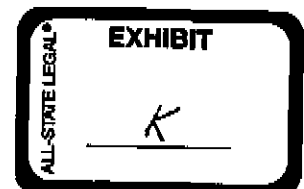
Defendants.

DEFENDANT, BARTOW HMA, LLC d/b/a
BARTOW REGIONAL MEDICAL CENTER'S AMENDED RESPONSE TO #22 AND #23
OF PLAINTIFF'S REQUEST TO PRODUCE DATED JULY 30, 2013

Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER,
by and through undersigned counsel, hereby files its Amended Response to #22 and #23 of
Plaintiff's Request to Produce dated July 30, 2013, and pursuant to Florida Rules of Civil
Procedure 1.350, states as follows:

22. Any and all orientation and/or training materials of the Defendant Hospital that were
provided to:
- a. Anju Thoams, RN
 - b. Felicia Pagan, RN
 - c. Michelle Webb, RN
 - d. Judy Pittman, RN
 - e. Hilari Bankhead Vaca, RN and
 - f. Barbara Johnson, RN

RESPONSE: Please see attached.



1
FANN & PETRUCCELLI, P.A.

1726 East Seventh Avenue Suite 18, Tampa, Florida 33605 • Phone (813) 251-1400 • Fax (813) 251-1412

23. 2011 Policies and Procedures in effect at the time of Plaintiff's admission as follows:

- a. 1156 Assessment-Reassessment
- b. 586 Assigned Roles for Staff
- c. 1322 Assignment to Treatment Area
- d. 1352 Auditing and Monitoring
- e. 576 Backup Communications
- f. 582 Authority for Emergencies
- g. 1924 Block Scheduling in the OR
- h. 1542 Call Reports-Preliminary Reports
- i. 2009 Callback of RC Personnel
- j. 1152 Chain of Command
- k. 1925 Circulating RN Responsibilities
- l. 1225 Collaborative Care Team – Nursing
- m. 588 Communication of Patient Information
- n. 1710 Communication Interdepartmental
- o. 577 Communications Plan
- p. 1979 Competency Validation
- q. 1853 Conflict Management for leadership
- r. 1711 Consultation Between Disciplines
- s. 2077 Continuity of Patient Care
- t. 1868 Criteria for Notifying Anesthesiologist and/or Attending Physician
- u. 1712 Continuing Education C9
- v. 1714 Description of Professional Scope of Practice
- w. 1869 Discharge Criteria and Planning
- x. 1977 Discharge Planning Interdisciplinary
- y. 2080 Discharge Planning Statement
- z. 1361 Discharge Reconciliation and Chart Retrieval Process
- aa. 1540 Documentation
- bb. 1930 Documentation of Operative Procedures
- cc. 1330 Follow Up Care
- dd. 1917 Hand Off Communication
- ee. 2083 Hospital Home Bound Education for Hospital
- ff. 1312 House Supervisor Role
- gg. 1041 Informed Consent
- hh. 1209 Informing Physician of Event Rpt-Complaints
- ii. 2227 Initial Assessment and Prioritization
- jj. 2229 Interdisciplinary Patient Care Plan
- kk. 2136 Medication Orders
- ll. 2198 Moderate Sedation
- mm. 1963 Operating Room Guidelines
- nn. 1725 Pain Assessment Reassessment Plan P2-Rehab Services
- oo. 2140 Pain Management
- pp. 2234 Patient and Family Education
- qq. 1862 Patient Assessment
- rr. 1675 Patients Rights and Responsibilities Policy

ss. 660 Peer Review Process (this is an Amendment 7 Request)
 tt. 1293 Physician Supervision Process
 uu. 1884 Physician Visits
 vv. 2202 Plan for Providing Patient Care
 ww. 1983 Policies and Procedures and Documentation Requirements
 xx. 1870 Post Operative Evaluation
 yy. 1871 Post Procedure Care
 zz. 1727 Professional Credentials (this is an Amendment 7 Request)
 aaa. 1337 Qualified Medical Personnel – QMP Screening (Amendment 7 Request)
 bbb. 1563 Quality Improvement-Schedule of Quality Control (Amendment 7 Request)
 ccc. 2091 Readmission Policy
 ddd. 1625 Risk Assessment Plan EC1.10.4 (Amendment 7 Request)
 eee. 158 Risk Management Education (Amendment 7 Request)
 fff. 161 Risk Management Policy Statement (Amendment 7 Request)
 ggg. 2094 RM Role and Relationship with Physician and Staff
 hhh. 1797 Scope of Patient Assessment
 iii. 1050 Sentinel and Adverse Events (Amendment 7 Request)
 jjj. 212 Sentinel and Adverse Events Identification and Intense Analyst (Amendment 7 Request)
 kkk. 1948 Surgery Requirements
 lll. 2130 Table of Contents Nursing
 mmm. 1948 Table of Contents OR Dept.
 nnn. 1695 Tran-education Ec7.10.A
 ooo. 1147 Transfers
 ppp. 2154 Verbal and Telephone Orders Policy
 qqq. 2068 Verbal and Telephone Order, Guidelines

RESPONSE: Please see attached.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-mail to: **Karen E. Terry, Esq., Attorneys for Plaintiff**, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409 (ket@searcylaw.com; mks@searcylaw.com; aje@searcylaw.com; lmn@searcylaw.com) and to **Holly B. Platter, Esq., Attorneys for Defendant**, **Larry D. Thomas, M.D.**, Bush, Graziano & Rice, P.A., 101 E Kennedy

Boulevard, Suite 1700, Tampa, Florida 33602 (eserve@bgrplaw.com; tdomi@bgrplaw.com, this
1st day of May, 2014.

FANN & PETRUCCELLI, P.A.

*Attorneys for Defendant, Bartow Regional Medical
Center*

1726 East Seventh Avenue, Suite 18

Tampa, FL 33605

Telephone (813)251-1400

Facsimile (813)251-1412

Primary e-mail: Phuckley@fplawyers.com

Secondary e-mail: CBoyce@fplawyers.com

BY: 
MICHAEL A. PETRUCCELLI
Florida Bar No.: 717312
PAUL C. BUCKLEY
Florida Bar No.: 906697

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TOMORROW'S TECHNOLOGY TODAY



1 IN THE CIRCUIT COURT OF THE
2 TENTH JUDICIAL CIRCUIT, IN
AND FOR POLK COUNTY, FLORIDA

3 CASE No.: 53-2012-CA-002611-0000-00,
4 SECTION 4

5
6 AMBER EDWARDS,

7 Plaintiff,

8
9 vs.

10 BARTOW HMA, LLC d/b/a BARTOW
11 REGIONAL MEDICAL CENTER and LARRY
12 D. THOMAS, M.D.,

13 Defendants.
14 _____/

15
16 Transcript of Proceedings
17 Before the Honorable Ellen Masters,
18 Circuit Court Judge

19 DATE TAKEN: June 4, 2014

20 TIME: Commenced at 2:56 p.m.
Concluded at 4:24 p.m.

21 LOCATION: Polk County Courthouse
22 255 North Broadway Avenue
Hearing Room 7D2
23 Bartow, Florida 33830

24 REPORTED BY: Danette V. Lamb,
Court Reporter and Notary Public
25

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EXHIBIT

L

1 APPEARANCES 2 MATTHEW K. SCHWENCKE, ESQUIRE Searcy, Denney, Scarola, Barnhart & Shipley, P.A. 3 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 4 (561)686-6300 Mks@searcylaw.com 5 On behalf of the Plaintiff 6 7 8 PAUL BUCKLEY, ESQUIRE Fann & Petrucelli, P.A. 9 5100 North Federal Highway Suite 300-B 10 Fort Lauderdale, Florida 33308 (954)771-4118 Pbuckley@fplawyers.com 11 On behalf of Bartow HMA, LLC, d/b/a Bartow 12 Regional Medical Center 13 14 HOLLY B. PLATTER, ESQUIRE Bush, Graziano, Rice & Platter, P.A. 15 101 East Kennedy Boulevard Suite 1700 16 Tampa, Florida 33601 (813)228-7000 Cserve@bgplaw.com 17 On behalf of Larry D. Thomas, M.D 18 19 20 21 22 23 24 25	1 provided to you. and on the notice it is -- 2 THE COURT: Yes. 3 MR. SCHWENCKE: -- yes. Number five. 4 THE COURT: All right. 5 MR. SCHWENCKE: And so it's Ms. Platter's 6 objection. 7 If you would like to go first, Ms. Platter, 8 it's okay by me. 9 MS. PLATTER: Sure. 10 Your Honor, we started down this road a few 11 months back at the March hearing. At that point in 12 time -- excuse me -- plaintiff's counsel had 13 propounded an interrogatory asking for the names of 14 medical providers that Dr. Thomas had seen leading 15 up to the events of May 2011. Your Honor, we 16 narrowed that request down to two years before May 17 2011, and pursuant to the Court's order, we 18 provided that to plaintiff's counsel. 19 Not surprisingly, the next thing that came 20 was a notice of production from the nonparties, so 21 attempting to subpoena the records from the two 22 providers that we gave to them. We, of course, 23 filed an objection, which brings us here today. 24 Since the hearing in March, a couple of 25 things have happened. Plaintiffs have propounded
1 PROCEEDINGS 2 THE COURT: All right. We're running a bit 3 behind, so hopefully we'll figure out where we can 4 make up some time. 5 We have several motions scheduled, and we 6 have plaintiff's notice of a special set somewhere. 7 Here it is. 8 MR. SCHWENCKE: Tab one, I believe, Your 9 Honor. 10 THE COURT: All right. Is the idea that we 11 take these in the order they appear? There's eight 12 of them -- 13 MR. SCHWENCKE: Yes. 14 THE COURT: -- on the notice or -- 15 MR. SCHWENCKE: I think we can go out of 16 order. And I think what makes sense is, there is 17 only one issue that involves Dr. Thomas, and that's 18 Tab 9, and that is an objection raised by 19 Dr. Thomas for his medical records. And I think 20 that way, we can handle all the issues with 21 Ms. Platter first and then move on from there, if 22 the Court will permit and proceed in that manner. 23 THE COURT: Okay. And would that be number 24 five on the notice? 25 MR. SCHWENCKE: It's Tab 9 in the binder	1 additional discovery both to Dr. Thomas and to the 2 hospital. Asked to Dr. Thomas, there were 3 questions regarding any kind of a history of 4 alcohol or substance abuse. We did not object to 5 those and actually responded in the negative that 6 there is no history nor has he ever been through 7 rehab or any kind of treatment. 8 The other discovery was to verify or to get 9 documentation, information regarding an alleged 10 leave of absence that occurred sometime prior to 11 May of 2011. A leave of absence on Dr. Thomas' 12 part from Bartow Regional. That same discovery was 13 also propounded on the hospital. Plaintiffs got 14 the same response from both of us. There was never 15 a leave of absence, and that calls into question 16 the reliability of the nurse who testified that he 17 was gone for two months and that somehow his 18 condition was different when he came back. There 19 was never a leave of absence. And so that was the 20 response from Dr. Thomas. The hospital has given 21 the same response. Again, never a leave of 22 absence. 23 So here we are now with plaintiffs looking 24 for the actual medical records, and so we're 25 balancing this history that there's no alcohol or



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6 1 substance abuse and that there was never a leave of 2 absence. And balancing that against an extreme -- 3 potentially an extreme violation of Dr. Thomas' 4 privacy rights per the Florida Constitution. And 5 we don't feel that the plaintiffs have met their 6 burden in terms of asking us to provide those 7 records to him or allowing them to subpoena those 8 records. I'd like to add, too, there's nothing in 9 the medical record that is going to either prove or 10 disprove that there was negligence on the part of 11 Dr. Thomas for Amber Edwards' surgery. And I say 12 that -- I'll give an example. One of the nurses 13 testified that, occasionally, he would slur his 14 speech. Let's assume that that's true, and let's 15 assume that there's a condition that causes that, 16 and that would be contained in a medical record. 17 That doesn't prove that on the day at issue or at 18 the time at issue or during that surgery that that 19 condition somehow caused or contributed to 20 negligence. Their expert is going to say that an 21 injury to a common bile duct is negligence, period. 22 Our experts, when they're deposed, are going to 23 say, No. It's a known complication. It's a known 24 risk of the surgery that occurred. It would seem 25 to me that the best way to get the information as	8 1 this is the order. You permitted me, the 2 plaintiff, to obtain Dr. Thomas' medical records 3 for the two years leading up to the date of the 4 surgery. The order states, quote, if the names of 5 the medical providers reveal some medical content, 6 which Dr. Thomas objects, then Dr. Thomas may bring 7 the matter before the Court. 8 The medical providers that were identified 9 were Orlando Regional Medical Center and Central 10 Florida Internal Medicine. It's just two. It's an 11 internist, and it's a hospital. So I don't believe 12 the names, themselves, have gone afoul of the 13 Court's order at all. And the Court may recall, I 14 actually attached the transcript that Ms. Platter 15 brought the case all up to you; and, yes, there's a 16 constitutional protection to privacy, unless there 17 is good cause shown. 18 On Page 125 of the transcript, on Page 13, 19 the Court states, quote, I'm going to find 20 plaintiff has demonstrated good cause. And the 21 reason the Court stated that was because of the 22 nurses' testimony that Your Honor incorporated in 23 your order granting punitive damages against 24 Dr. Thomas, which was the depositions of the nurses 25 with Dr. Thomas -- became concerned of his health
7 1 to what Dr. Thomas' condition was on the day of 2 surgery is to talk to the people who were in the 3 O.R. on that particular day. Talk to the nurses 4 who were in the O.R. or depose the anesthesiologist 5 or the other physician who was assisting 6 Dr. Thomas. And plaintiff's counsel hasn't done 7 that. So there's other ways for him to get 8 information about what Dr. Thomas' condition was at 9 the relevant time without going on a fishing 10 expedition and looking through medical records. 11 All that being said, if Your Honor is 12 inclined to order the production of those records, 13 I would ask that the Court permit me to get those 14 records and provide them to you for an in camera 15 review of the records as opposed to permitting 16 plaintiff's counsel to seeking those records 17 directly. Thank you. 18 THE COURT: Response? 19 MR. SCHWENCKE: Yes, Your Honor. We were 20 before you previously on -- let me look. I 21 attached it the -- my response is Tab R. I've got 22 the day in the transcript of the hearing here. 23 Bear with me. 24 Well, before you on March 28th, 2014, and you 25 entered a couple of orders on April 11th, 2014 --	9 1 and abilities at the time of the plaintiff's 2 surgery -- specifically at the time. And that they 3 were concerned around that time that the surgery 4 was taking longer to recover, and that the doctor's 5 shortness of breath, dozing off while dictating or 6 documenting, and appearing fatigued and very shaky, 7 and saying things that were difficult to understand 8 were going on. So the Court's already found that 9 there was good cause for the plaintiff to obtain 10 the identity of these providers to subpoena the 11 medical records. Nothing has changed since we were 12 before Your Honor. The deposition testimony is 13 still there. And the Court found correctly that 14 the plaintiff had good cause to at least discover 15 the medical records provided by Dr. Thomas. 16 There's something in there, obviously, and I didn't 17 hear any argument that this was a very sensitive 18 medical condition like HIV or some sort of various 19 sensitive condition. So my assumption being, there 20 is something in there that's going to show that 21 there's a condition that this doctor had that 22 probably led him to be susceptible and not 23 providing capable or competent general surgery. 24 And I think the plaintiff is allowed to have 25 discovery at this point on that issue, and the



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10 1 Court's already found that there was good cause. 2 So I believe that the objection raised -- or that 3 first of all, the actual legal objection raised -- 4 just so Your Honor is aware -- is that he's got the 5 constitutional right to privacy. Nothing has 6 changed since this court ruled that the plaintiff 7 had good cause, and that it was discoverable. And 8 I believe that the plaintiff is entitled to 9 discover these records. Just simply put, you know, 10 nothing has changed. 11 THE COURT: Rebuttal? 12 MS. PLATTER: I would add to that that what 13 has changed is now you've stepped beyond just 14 asking for the names of the providers. Now you're 15 looking for what -- well, I don't know. Now you're 16 looking for medical records, and that is a change. 17 And, again, where there's another remedy available, 18 and that's taking -- sure. It means taking more 19 depositions, but those are the people that were 20 there and can talk about whether they noticed 21 anything about him, and anything different or 22 anything concerning about a condition at the time 23 of the surgery on that day. 24 And in terms of nurses testifying, again, now 25 that we know that there was no leave of absence, it	12 1 MS. PLATTER: I don't know if he was -- he 2 ever asked him about any medical conditions. 3 MR. SCHWENCKE: And I can't remember off the 4 top of my head either, Your Honor. 5 MS. PLATTER: So I can't answer that off the 6 top of my head. 7 MR. SCHWENCKE: I mean -- 8 THE COURT: Well, I am inclined to sustain 9 the objection. Now, this, quite frankly, may be 10 doing nothing more than delaying the inevitable. 11 But I am inclined to sustain the objection until 12 plaintiff has explored through the deposition the 13 condition of Dr. Thomas, as observed by people in a 14 position to know, as to what his condition was at 15 the time of surgery in this case. 16 MR. SCHWENCKE: But didn't the plaintiff do 17 that, and that's how we got this testimony to begin 18 with? They said it was in May of 2011, 19 specifically for the specific symptoms. 20 THE COURT: Well, we have the testimony of 21 one nurse, as Ms. Platter has pointed out. We have 22 one nurse who has basically given the plaintiff the 23 basis to say we've got some evidence to bring in -- 24 was it two witnesses? 25 MR. SCHWENCKE: It was two different
11 1 calls into question the reliability of those 2 nurses. 3 THE COURT: Question. What depositions does 4 plaintiff currently have scheduled? 5 MR. SCHWENCKE: Your Honor, off the top of my 6 head, this issue is actually a pretty important 7 issue. We've held off on expert witness discovery 8 since then because, obviously, of this issue. We 9 are -- we do intend to take the O.R. staffs' 10 depositions. The problem with that is this 11 happened in May of 2011. We're in May 2014 and 12 this is an O.R. staff who's probably had five 13 thousand surgeries since then. So the reason why 14 the records are important is, the records 15 demonstrate what has been recorded and captured in 16 time, rather than rely on somebody's memory from 17 something that happened three years ago. 18 THE COURT: All right. Assuming that 19 Dr. Thomas -- and I can't remember if the 20 deposition testimony that I read previously in the 21 proffer -- some bits and pieces I recall -- but 22 Dr. Thomas has been deposed concerning anything 23 that may have been bothering him at this period of 24 time and denied it all; is that accurate? And 25 denied there was any problems going on?	13 1 witnesses -- 2 THE COURT: Okay. 3 MR. SCHWENCKE: -- who said the same thing. 4 THE COURT: All right. And they were 5 concerned and trying to make the reports and so 6 forth. So that's what caused plaintiff to have a 7 reasonable basis for sufficient showing with regard 8 to the punitive damages issued. But with regard 9 to, again, as Ms. Platter puts it, balancing those 10 constitutional rights to giving up his medical 11 records, it may well fall in plaintiff's lap 12 without plaintiff having to do that, and I don't 13 know. So before I say, Have at it, let's see if it 14 falls in plaintiff's lap. 15 As I said, this may be doing nothing more 16 than delaying the inevitable because, quite 17 frankly, in these depositions, even if they all 18 say, We didn't see anything. Now we've got this 19 issue -- or somebody -- somebody may say, Well, 20 sure. Dr. Thomas shared with me that he went to 21 this internist for this particular condition. And 22 it was related to maybe nothing at all that would 23 affect somebody's ability to be alert and have 24 steady hands. 25 So, in any event, I'm going to require



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14 1 plaintiff to jump through that hoop before we do 2 this. 3 Now. Ms. Platter, would you like to take a 4 stab at drafting the court's order on this one? 5 MS. PLATTER: Absolutely, Your Honor. 6 THE COURT: All right. 7 MR. SCHWENCKE: And so -- I hate 8 hypothetically speaking -- but hypothetically 9 speaking, what if either they don't remember or 10 don't know. Because they weren't in the room with 11 the doctors, so they don't know what Dr. Thomas and 12 the doctors speak about. I mean, that's -- I know 13 what you're saying -- it might be futile -- and I 14 understand the Court's ruling. I'm not trying to 15 get the Court to disturb its ruling -- 16 THE COURT: It's almost one of those least 17 restrictive means analysis that comes from the 18 court. 19 MR. SCHWENCKE: Right. 20 THE COURT: And it may well mean that the 21 least restrictive means for getting the plaintiff 22 what plaintiff is entitled to discover is indeed 23 looking at those medical records. I'm just not 24 convinced it's it yet. Make sense? 25 MR. SCHWENCKE: Exhaust all remedies before	16 1 says, motion to compel the hospital to provide 2 responses to request for admissions in motions for 3 sanctions. This -- Your Honor can probably recall 4 the last time we were here, we had kind of a cool 5 scarley [sic] debate on incident reports, the 6 information contained therein, and the 7 admissibility of the these documents. And I've 8 attached -- actually, it's in the motion -- but 9 actually, on Page 3 of the motion, Paragraph 5, I 10 took out a key part of the transcript from the 11 hearing, which is attached, as well, for the Court. 12 But what the Court found -- and the Court, all it 13 did was follow the Buster case, which says -- and I 14 agreed on the record that the proceedings of an 15 adverse incident or the fact that an adverse 16 incident is contained in a risk management incident 17 report. It's not admissible at trial. 18 Well, what Buster says is that the factual 19 information contained in an adverse incident is. 20 And that if that information is admissible from 21 another source, there's -- there's -- it's now as 22 discoverable like the admissible civil actions. So 23 this whole debate came up when we were -- and 24 actually part of the Court's order that I have 25 punitive damages against, the hospital pertained
15 1 we go there. I'm there. 2 THE COURT: That's pretty much what we're 3 talking about. 4 MR. SCHWENCKE: I'm there. I follow you. 5 THE COURT: Literally sustained without 6 prejudice as long as blah, blah, blah, okay? 7 MS. PLATTER: Absolutely. 8 THE COURT: Good deal. 9 All right. Mr. Schwencke, where are we going 10 now? 11 MR. SCHWENCKE: All right. Now, the hospital 12 filed a motion for the summary judgment on 13 negligent credentialing, which was noticed for 14 hearing today. I spoke about that with Mr. Buckley 15 and I'm not -- I don't know if the hospital is 16 prepared to go forward with that or not. 17 MR. BUCKLEY: Okay. This was not my idea, 18 not my motion, so in an effort to save time, let's 19 put that on the back shelf for now, Judge. 20 THE COURT: Okay. So we expect that to be 21 continued to another day? 22 MR. BUCKLEY: Yes, please. 23 THE COURT: Okay. 24 MR. SCHWENCKE: Then, next I think would be 25 Tab 5, which on the notice would be Number 4. It	17 1 to, I believe, the fact that certain information 2 was contained in incident reports. So what the 3 Court stated after I went through what Buster said 4 and how the information, factual information, 5 concerning an adverse incident is relevant. It's 6 just the context that it's in and a report is 7 inadmissible. The Court said -- and it's on Page 8 4, it'd be at the bottom -- when I say, Look, I'm 9 just going to propound a request for admissions. 10 That's the entire way to get around confusing 11 anyone about this whole issue of incident report, 12 can it come in or not. If I just take the facts 13 from the incident reports and ask the hospital to 14 admit them, then it becomes admissible. And the 15 Court says in the very last page of Page 4, "That's 16 exactly what I was thinking." 17 While these reports are discoverable and 18 certainly form a good-faith basis for the plaintiff 19 to then ask a question at deposition or prepare a 20 request for admission, or whatever. That certainly 21 seemed to me as I was reading these things and the 22 Court is referring to the cases. Another case is 23 where we were in this area of law. And we go down. 24 I hear plaintiff saying I agree we're not going to 25 be doing that, but if what we've learned in that



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18 1 report comes out in some other way that is 2 admissible, then there's no prohibition about the 3 jury knowing what we know, because we've read the 4 report, and they can't throw it into a peer review 5 context proceeding or that it came from a 6 confidential report. So that's exactly what I did. 7 I propounded a request for admissions that asked 8 the hospital to admit the facts that were contained 9 in the report, and the hospital objected. And the 10 grounds for the objection are three Florida 11 statutes and they say that: It's an improper 12 request for admission as any such information or 13 evidence is inadmissible in any civil or 14 administrative action. That goes exactly against 15 basically an hour's worth of our dialogue at the 16 last hearing and what the Buster case says. And we 17 can go through them, you know, one by one; but I 18 believe it's the same objection to all of them. 19 And it's just improper, Your Honor. What I've done 20 is, I've taken the facts that we know to be -- to 21 exist and I've asked the hospital to admit the fact 22 of taking it entirely out of the context of a 23 report or investigation proceeding, and the 24 objection I'm getting back is that it's 25 inadmissible on a civil trial or administrative	20 1 propounded I believe 22. So -- 21. So I don't 2 know why 18, 19, and 20 -- 18, 19, 20, and 21 were 3 not responded to, but they weren't. You know, I 4 believe that they should be admitted in the ruling 5 if they're not responded to, but I just don't know 6 why they weren't responded to. So, in some, I did 7 exactly what we discussed at the last hearing: To 8 take the facts out of the inadmissible context, 9 which was the investigation or report context, and 10 I've put them in a way that makes them admissible. 11 And we know the information is true, because I've 12 just taken the information from the context of how 13 it was discoverable via Amendment Seven, and now 14 I'm trying to obtain that from the other source, 15 which is the hospital, via request for admission 16 just as we discussed. And I'm getting the same 17 objections back, and I'm asking for sanctions on 18 this, Your Honor, because I do believe this is 19 obstructionist at this point, because I've done 20 exactly what the Court found to be proper, and I'm 21 getting the same objections back. They just don't 22 want to admit or provide me with this information 23 that I'm entitled to get from the other source. 24 THE COURT: Well, let me ask you this. I 25 understand that what is discoverable is not
19 1 action. That's just not true. And that's just not 2 what Busters says, and we've gone through this 3 exercise three or four times before. 4 And as it pertains to admissions three 5 through six, I've asked the hospital to admit that 6 the other two surgeons they could have assigned my 7 client to -- I've asked the hospital to admit that 8 they had a conversion rate that was lower than ten 9 percent or lower than five percent for both. It's 10 Dr. Quinones and Dr. Medalle. And the objections 11 for three through six are that it's irrelevant and 12 immaterial regarding a conversion rate of a 13 physician who is not a party to this action. Well, 14 no. That's not true. That's the entire crux of the 15 plaintiff's case is he could have assigned a 16 surgeon to the plaintiff who had a conversion rate 17 and didn't have a problem with this procedure. So 18 three through six, they didn't raise the -- these 19 three statutes that Buster say don't apply to the 20 factual information. They raise -- it looks like a 21 relevancy objection, which I don't even think is 22 proper in the discovery context. 23 And then last but not least, I propounded -- 24 let's see how many -- but they only gave me 17 25 responses to the request for admissions. But I	21 1 necessarily admissible, but I want to ask you an 2 admissibility question. I know you're here for 3 discovery, but are you suggesting, when you say 4 this is the plaintiff's case, that you believe you 5 are going to put on evidence in front of a jury to 6 demonstrate that Dr. Thomas was negligent or that 7 the hospital was negligent for negligent 8 credentialing because other doctors are better than 9 Dr. Thomas? 10 MR. SCHWENCKE: For those -- yes. And for 11 those four request for admissions, 'cause those are 12 just four specific requests for admissions. 13 THE COURT: Well, I, quite frankly, am trying 14 to figure out why would -- or how would a trial 15 Court ever allow plaintiff to put on this type of 16 evidence when it's a negligent case or even 17 negligent credentialing, when it's a matter of 18 comparing worth of doctors as to, does this make a 19 negligent credentialing case because a hospital 20 gave a doctor a job, and this doctor wasn't as good 21 as the other doctors the hospital gave the job to. 22 That -- that seems pretty far out there. So as far 23 as this information about this percentage issue and 24 the comparison between the doctors, how does this 25 lead to admissible evidence? So, in other words,



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22 1 for it to be within the scope of discovery -- and 2 I'm sure I probably just made some of Mr. Buckley's 3 argument for him, so he doesn't have to say that, 4 because I get this part. What is it? What is it 5 about this comparison among these doctors and their 6 percentage rates that is going to lead to something 7 admissible? 8 MR. SCHWENCKE: We -- there's an allegation 9 of direct negligence against the hospital for 10 Dr. Thomas -- 11 THE COURT: Negligent credentialing? 12 MR. SCHWENCKE: For negligent credentialing. 13 And there's also a question of simply the 14 negligence and just simply assigning Dr. Thomas to 15 Ms. Edwards, because we know on the day of her 16 surgery, Dr. Medalle was on staff. We know there 17 was another doctor -- his name starts with a Q -- 18 that was on staff. The hospital has the choice to 19 assign a physician for a procedure, and we believe 20 that the evidence is very strong in this case. And 21 that the hospital knew or should have known that 22 this was a physician who had a problem with a 23 laparoscopic procedure, as we know from going 24 through the ten incident reports that indicate 25 something went wrong with his laparoscopic	24 1 THE COURT: All right. 2 MR. SCHWENCKE: I'm sure I attached it -- 3 should have attached it. I don't know if I 4 attached it. 5 The answer to your question, Your Honor, is, 6 yes. I think I just attached the transcript, but 7 there was an order pertaining to the plaintiff 8 obtaining this information from a separate source, 9 which I can furnish to the Court. But there was an 10 order on this exact issue. I don't know why I 11 didn't attach it, and I attached the court -- the 12 transcript from the hearing instead. But once we 13 had this hearing -- and I can look through it while 14 Mr. Buckley talks and try to find how you phrased 15 the language of the order. There was an order that 16 came out of this, in essence, I believe said, 17 sustained, notwithstanding if the plaintiff is 18 entitled to find out this information from other 19 sources, that the plaintiff can do so. 20 I can't believe I didn't attach it here. 21 THE COURT: Well, I understand procedurally 22 with regard to this issue of -- if some information 23 is in a confidential report, but yet the lawyer is 24 sitting in a deposition or is crafting an 25 interrogatory or request for admission. The lawyer
23 1 procedure and identified his conversion rate at 26 2 percent. And so I think it's -- it's very 3 probative and strong relevance -- it's very 4 relevant to the case. The hospital had a choice. 5 The hospital had a choice. This is a patient who 6 comes in, needs this procedure, and there's two 7 other doctors. I just want to know maybe -- I 8 might be wrong, Your Honor. I don't know, but if 9 they had a conversion rate that was less than 10 Dr. Thomas', I think that's relevant to show when 11 this patient comes in with this complaint and needs 12 this procedure, they have the option to assign 13 different -- they didn't have to assign Dr. Thomas 14 to the patient. They could have assigned someone 15 else to the patient who was capable and qualified 16 to do the work. And that's only a few of the 17 admissions. 18 THE COURT: Have there been any orders 19 entered in this case that deal with this conversion 20 rate even being relevant? 21 MR. SCHWENCKE: Your Honor, let me find the 22 order. Hold on one sec. The last order from the 23 last hearing. 24 THE COURT: There has been -- okay. 25 MR. SCHWENCKE: I'll read it to you.	25 1 is not expected to forget everything he's ever seen 2 in a confidential report. And this information may 3 well become part of his crafted request for 4 admission or interrogatory. But that's not 5 necessarily a ruling on everything in that report 6 then it's good for an interrogatory or an 7 admission. 8 MR. SCHWENCKE: What I would say, then, this 9 is the context of discovery. The objections are 10 objections about admissibility. The information 11 has already been produced. 12 THE COURT: Okay. 13 MR. SCHWENCKE: And if we're going to have an 14 admissibility conversation about this, I 15 respectfully think that's a different conversation 16 for a different day. I believe the hospital would 17 then have to admit what's in their request for 18 admissions, and then if it wants to exclude the 19 item of the basis of it not being admissible, 20 that's a different argument. But since it's still 21 discovery, and request for admissions are 22 discovery, we're putting the cart before the horse 23 by saying this is not admissible. 24 THE COURT: All right. I absolutely agree 25 with that, which is why I indicated I don't want to



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26 1 get discoverability and admissibility mixed up at 2 this stage. 3 So, Mr. Buckley, response. 4 MR. BUCKLEY: Sure. Yeah. There's lots to 5 talk about. I'll try to get right to the point. 6 The information, the documents, the adverse reports 7 have been produced. And I know you've heard this, 8 but it probably is necessary to repeat it. The 9 Amendment Seven in its basic form provides the 10 hospital to provide these documents. Provide the 11 documents. That's it. A specific incident with a 12 specific patient, a specific document. They get to 13 produce those -- or, sorry. They get to receive 14 those documents. And as we've talked about at 15 numerous hearings they -- our position is they 16 can't do anything with them. And you've already 17 entered an order about the admissibility at trial. 18 THE COURT: Except I disagree with one 19 portion of that, which I've just indicated, and I 20 know I've mentioned it before, which is what I 21 think what plaintiff's counsel has been referring 22 to is why he has chosen this route. They may not 23 be able to use them at all because they're 24 confidential; but, again, they've gathered some 25 information, so that if this information is used in	28 1 assurance peer review, different committees to 2 determine what happened in this incident with one 3 specific patient. And that document goes -- may go 4 into, you know, some kind of risk management, or 5 peer review, or quality assurance committee, and 6 the hospital may take action. Change of policy or 7 whatever. 8 Remember an incident report is literally 9 anything that is -- that happens that is not 10 expected. It doesn't mean there's a medical 11 malpractice or negligence by a nurse or a doctor or 12 healthcare provider. If somebody slips and falls 13 in the hospital that's not something that is 14 expected. A report is generated. And that report 15 becomes an incident report. There are different 16 types of incident reports. If a patient is in 17 surgery, and they don't know the sponge count or 18 the needle count, they may have to do an x-ray in 19 surgery to confirm we got all the needles and all 20 the sponges and everything else out that prompts a 21 report, because they didn't plan on an x-ray. So 22 my point is, you can't say, okay, here are the 23 incident report or reports pursuant to Amendment 24 Seven. The patient's right of access to these 25 records is clear from the constitution to Buster to
27 1 crafting an interrogatory or request for admission, 2 then that's not -- I mean, it's not required that 3 they dismiss everything from their mind. 4 MR. BUCKLEY: No. But I was about to say -- 5 and I know you talked about this. There may be 6 exceptions to that admissibility from original 7 sources. 8 Now, here's my basic argument, and I think 9 I'm on good standing, and I can refer you to some 10 of the cases. What Matthew's basically done is 11 taken these -- Amendment Seven reports and saying 12 -- in your ruling saying they're not admissible, 13 and he's taken all the information from those 14 reports and put them into a written form and to a 15 request, or it could be an interrogatory. So, 16 again, they're going around to the back door, what 17 is not admissible in trial or in evidence and 18 according to the statutes in any civil proceedings. 19 So my concern is, okay, we produce whatever. Let's 20 say 25 incident reports and none of those are 21 admissible at trial. But he goes and picks apart 22 all the information that's part of the process of 23 investigating an incident, and documenting an 24 incident, and that document or incident report may 25 be delivered up the chain for a different quality	29 1 some of the other cases. But you can't use that 2 information, and you can't use those documents at 3 trial. 4 So what Matthew has done is, instead of using 5 the documents, he's asking us to admit all of the 6 information that's contained within those 7 documents. That's not from an original source. 8 That's not from the another source. It's from the 9 very same document, so -- 10 THE COURT: Okay. I understand your 11 argument. It is so -- the question is so 12 intertwined with what the confidential report says 13 that it's not -- it's not to be considered a 14 good-faith request. 15 MR. BUCKLEY: Correct -- 16 THE COURT: I understand. 17 MR. BUCKLEY: -- yeah. 18 THE COURT: Let me ask you this -- 19 MR. BUCKLEY: Okay. Sorry. 20 THE COURT: What if the question -- and, 21 again, I have some questions about relevancy, but 22 with regard to what we're dealing with here, what 23 if the request for admissions were -- does the 24 hospital calculate percentages of conversion rates? 25 MR. BUCKLEY: Good question.



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30 1 THE COURT: Or laparoscopic -- I mean, at 2 some point, this legal issue is going to end up 3 there. And trying to sort out exactly where that 4 is, is probably going to fall to the discretion of 5 the court, 'cause I can't imagine us having any 6 real guidance -- 7 MR. BUCKLEY: No -- 8 THE COURT: -- on that that we could have 9 Black Letter rules. Go ahead. 10 MR. BUCKLEY: Well, I think -- and you're 11 right. It is a little bit of a gray area in my 12 experience, but I think the important compelling 13 point of your question is, whatever information the 14 hospital has about conversion rates or some other 15 evaluation of Dr. Thomas or another physician is 16 through quality assurance or peer review committee 17 or investigation or analysis. It's not something 18 from public records. It's not something from some 19 other source. He's asking -- and that's another 20 reason why I objected in pointing out to these 21 statutes -- he's asking, tell me what's going on 22 behind closed doors with these investigations and 23 committees. Didn't they determine that 24 Dr. Quinones has a different conversion rate than 25 someone else. Matthew took the deposition of one	32 1 there is law that Buster pertains, and Amendment 2 Seven pertains to production of documents -- not 3 interrogatory questions or other discovery. So my 4 argument and my feeling is, request for admissions 5 and taking information directly from incident or 6 adverse reports or from a source that would be a 7 product of a hospital review committee is improper, 8 objectionable, and it's not admissible. So where 9 do we draw the line with discovery and 10 admissibility and so on and so forth? He's got the 11 documents. He can take depositions and ask nurses 12 in the operating room, were you ever involved in a 13 procedure in which Dr. Thomas had to convert from 14 laparoscopic to open. They can tell. They can say 15 if they do or don't recall or were involved or not 16 involved and so on. That might be another source 17 or an original source. But to take the very 18 information that's on a document and use that and a 19 request for admission that's not admissible as 20 evidence at trial, I think is improper. 21 THE COURT: Rebuttal? 22 MR. SCHWENCKE: May I respond? Thank you, 23 Your Honor. 24 I -- first of all there -- I've never seen 25 anything, and the defense hasn't presented anything
31 1 of these doctors and asked him about his conversion 2 rate. I couldn't stop him. That's a different -- 3 that's an original source. He talked to 4 Dr. Medalle. 5 My argument is, if he wants to find out about 6 Dr. Thomas and other problems or other procedures 7 or complications, he can and should do so in a 8 deposition. And he had the right to do so in the 9 deposition. That would be an original source. How 10 many times have we had a procedure where you had to 11 change from laparoscopic to open? How many times 12 have you had a problem with this type of surgery or 13 that type of surgery, you know. 14 Again, I don't -- in good faith -- I think I 15 have a responsibility to my client to protect the 16 privileges, to follow the statutes, to follow the 17 law. And all of these cases and we can -- perhaps 18 give you more -- a different legal memorandum, but 19 all these cases talk about production of documents, 20 and none of them say, well, you can take everything 21 out of the document, and that will be admissible. 22 It's production of documents, and there are several 23 cases including some circuit court cases -- I know 24 we circulated some of those that talk about the 25 admissibility of these documents. But there are --	33 1 that says the information has to be limited to a 2 record. And that's -- there's a reason why that 3 is. That is, the Florida Hospital Waterman versus 4 Buster case, which is the Supreme Court case from 5 2008. And I'll read what the Supreme Court says, 6 because I think it's very clear what the Supreme 7 Court says. And on the bottom of Page 15 of the 8 case, which is Page 490. It says: The statutes in 9 question do not actually create a statutory 10 privilege. 11 So any objection based on privilege is out. 12 Supreme Court says it. Statutes do not create a 13 privilege. 14 Then it says: The statutes do not deem 15 relevant materials to be confidential or 16 privileged, okay. Then it is says: They provide 17 the investigation proceeding or records of the 18 respective committees or organizations are not 19 subject to discovery or introduction to evidence. 20 And I agree. That's why I took it outside of the 21 context of the report. 22 Then, here's the most telling part of the 23 Buster case: These statutes provide that if 24 information, documents, or records -- again, so 25 information, documents, or records. All three, not



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34 1 just documents -- are otherwise available from 2 original sources. They are not shielded from 3 discovery or use in trial. In reality, the 4 restrictions are limited to discovery introduction 5 of the proceedings -- again, which is why I took it 6 out of the report into evidence. 7 Last, but not least, and the strongest part 8 of the Buster case and why I did this and I'll wrap 9 all this up. Supreme Court says: Indeed, the 10 actual information regarding the adverse medical 11 incident, itself, has never been cloaked in 12 confidentiality -- and that's the bottom of Page 13 15, which is Page 491 of the case. 14 And here's why this is important: I've got a 15 credentialing expert for the credentialing case. 16 That is very strong about the litany of reports on 17 Dr. Thomas and his conversions. And one of the 18 problems we encountered is, well, what happens at 19 trial in the credentialing phase to talk about all 20 the prior -- what my expert says shows that 21 Dr. Thomas was incompetent. All the prior 22 incompetencies he has that we know is contained 23 factually in the record. 24 Well, if you take the defense's position, the 25 jury can never hear that, because it's contained in	36 1 the way through 21, these are just facts. I'm 2 asking the hospital to admit facts, and I'm asking 3 them the facts so my expert witness can rely on 4 those facts that are from a different context than 5 the incident report, because my problem is at 6 trial, my expert's opinion is his opinion. He's 7 looked at records. He's seen the facts. I'm 8 concerned that the hospital will do exactly what it 9 just did at trial and try to exclude the expert's 10 opinion, because it was based on some sort of 11 incident report or investigation or proceeding. So 12 that's why when Buster says: The actual 13 information regarding the adverse medical incident, 14 itself, has never been cloaked in confidentiality. 15 I'm taking the confidential part of it out. The 16 confidential part being that the fact that it was a 17 report, and just asking the hospital to admit what 18 we already know to be true. That way my expert can 19 rely on it, and that way the credentialing aspect 20 of this case doesn't have a hiccup in the middle of 21 trial. 22 So, I guess, I don't really know what the big 23 deal is, because I am not -- if you look at the 24 admissions -- and let's just not even talk about 25 the first six then. You know what? I'll just --
35 1 an inadmissible report. I think that the expert 2 can rely on the actual information in a report. 3 But just to make it very clean and tight, if 4 you look, for instance, at admission Number 8. 5 "Admit that prior to Larry D. Thomas, M.D., 6 surgical procedure of the plaintiff you were aware 7 that on March 17th, 2009, a surgical patient of 8 Larry D. Thomas, M.D. was converted from a 9 laparoscopic cholecystectomy to an open 10 cholecystectomy." I'm not asking about an 11 investigation or a proceeding, that's a fact. 12 That's a fact from my expert. I got the fact from 13 the report. And that way my expert can say -- 14 instead of saying -- and that's having an issue at 15 trial about whether or not he relied on some 16 document or some source that was inadmissible and 17 yadda, yadda, yadda, you can say, Well -- no the 18 hospital admitted that, yeah, it was aware. And, I 19 mean, we know the hospital's aware, right; because 20 the hospital has a report. I mean, it's -- we 21 can't change facts. Facts are facts. 22 So I'm not too clear. You heard the argument 23 from defense that I'm asking for what occurred in a 24 committee or an investigation. I'm just asking 25 them to admit facts. If you look from seven all	37 1 I'll stipulate for the purposes of the record that 2 I can go talk to Dr. Quinones. I've already talked 3 to Dr. Medalle. I can get -- I can ask him about 4 his conversion rate. 5 So let's just talk about seven through 21. 6 Seven through 21 are facts. They have nothing to 7 do with an investigation or proceeding or anything. 8 That's just a fact. And I learned of the fact 9 through an incident report. And I'm trying to get 10 the hospital to admit that so there's no issues 11 with my expert witness. And I believe that Florida 12 Supreme Court allows me to do it, and I think if 13 Your Honor looks at what occurred, our last hearing 14 on the record and when we had a very lengthy dialog 15 on that, that's what this court understood, as 16 well. 17 THE COURT: All right. Well, I can tell you 18 the objections related to Number -- let's see. 19 Working backwards Number 21 should be overruled, 19 20 should be overruled, and 17 should be overruled. 21 Those are questions that relate to Dr. Thomas' 22 surgical procedure of the plaintiff. 23 And let me see where we are. And the 24 hospital's knowledge and how it relates to the 25 surgical procedure of the plaintiff. Looks like we



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1 have Number 7 falling into that category somewhat,
2 as well. With regard to --

3 **MR. BUCKLEY:** I'm sorry, Your Honor. Number
4 7?

5 **THE COURT:** Yes. Now, that deals with a
6 different surgical patient, but it was prior to the
7 surgical procedure on the plaintiff. With regard
8 to eight, nine, ten, 11, 12, 13, 14, 15, and 16, as
9 well as 18 and 20, those are all questions related
10 to surgical patients where Dr. Thomas converted to
11 an open -- I suppose with regard to those, the
12 objection cited by the defendant should be
13 overruled. However, the Court's ruling should not
14 be construed to mean that the defense is not
15 entitled to raise issues related to this conversion
16 issue being beyond the scope of discovery and not
17 likely to lead to admissible evidence, because I
18 don't know that that question has been answered.

19 Now, it may be; and I may have heard argument
20 before, and there's an order in there. But with
21 regard to the defense argument that the plaintiff
22 is unfairly taking confidential information and
23 converting it to a request for admission, taking
24 out one through six -- because I'm inclined to
25 sustain the objections with regards to one through

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1 six on that basis. With regard to the others, I'm
2 inclined to overrule the objection. But with
3 regard to those that deal with this conversion
4 rate, to make that without prejudice for the
5 defense to raise the issue of relevancy.

6 **MR. BUCKLEY:** Your Honor, I think -- and I
7 don't mean to interrupt, Your Honor -- but I think
8 you said -- earlier you said admissibility, just a
9 moment ago.

10 **THE COURT:** I mean, relevancy. I mean,
11 beyond the scope of discoverable information. That
12 it just won't lead to admissible evidence.

13 **MR. BUCKLEY:** Right, right. And my -- and
14 you're right. I didn't include those words in
15 there. But those statutes that we cited directly
16 spell out: These proceedings, investigations,
17 records are not admissible in any administrative or
18 civil action. So my only --

19 **THE COURT:** Now, that I know, I --

20 **MR. BUCKLEY:** -- point or argument is that
21 those statutory references specifically talk about
22 admissibility. That's all.

23 **THE COURT:** And that I know. I mean, that I
24 remember quite clearly looking at that language.
25 And that was one of the reasons why I ruled the way

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1 I ruled with regard to the plaintiff's motion
2 concerning showing that it can't even be used for
3 that purpose.

4 This issue about the conversion rate
5 obviously still troubles me. But at this point,
6 because the issue of it being outside the scope of
7 discovery has not been raised, I'm not going to
8 rule on it.

9 So I'm going to overrule those objections
10 with regard to those that I referenced. And I am
11 going to deny the motion for sanctions; however,
12 because I think this is such a difficult issue,
13 that I think that the hospital did have a valid
14 legal basis to object and get a clarification with
15 regard to the extent -- and I do also find that
16 whether it's overruling or whether it's the
17 withdrawal of the request of Paragraphs 1 through 6
18 demonstrate that this is not such an easy analysis.
19 I think it's going to have to be on the case -- or
20 a request-by-request or a question-by-question
21 basis.

22 Okay. Plaintiff want to challenge or want
23 to --

24 **MR. SCHWENCKE:** Plaintiff doesn't want to
25 challenge anything in the courtroom.

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1 **THE COURT:** I don't mean challenge. I mean,
2 tackle the order with regard to Number 4 here.

3 **MR. SCHWENCKE:** Sure, sure. Thank you.

4 Okay. I'm trying to think of what would be
5 easiest. I think if we actually go to Tab 3, which
6 is the motion to compel the hospital to provide
7 better responses to supplemental request to produce
8 -- or actually, sorry, Your Honor. It's Tab 2,
9 motion for rule to show cause or the -- oh, wow --
10 or in the alternative motion for in camera
11 inspection. So -- and that's Tab 2. The Court
12 entered an order on December 31st, 2013, attached
13 as Exhibit 2, and it pertains to a request to
14 produce asking for adverse medical incidents, which
15 we know by now are discoverable. The Court ordered
16 in Paragraph 1, as Exhibit A of Tab 2. As it
17 pertains to requests one through 14, the
18 defendants' objections are overruled in part and
19 sustained in part to the extent that there are
20 adverse incidents contained in the records of the
21 credentialing peer review, quality assurance, risk
22 management, or any other related committee, the
23 defendant's objections are overruled to the extent
24 they are not adverse incidents that -- Your Honor
25 sustained the objections. In response, I received



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42 1 Exhibit B -- or Exhibit B as a request to produce 2 Exhibit C as the hospital's response, and the 3 hospital objected to your order -- which I've never 4 seen before. 5 The hospital filed a seven, eight -- eight 6 and a half page objection, and then when it gets to 7 responses one through 14, it raises those 8 objections again and says see adverse reports and a 9 privilege log. And there's a privilege log 10 attached. And I hate to ask the Court to do this, 11 but I have no idea of what's in this privilege log 12 as an adverse incident or not. And there -- it's 13 privilege log A. It look like privilege log B is 14 attorney-client communications, which would not 15 necessitate the Court performing an in camera 16 inspection, because I believe that Mr. Buckley 17 would have identified attorney-client privilege 18 documents, and those aren't discoverable. 19 But privilege log A identifies a ton of 20 records, and I have no idea if they're adverse 21 incidents or not. And I don't know what else to do 22 besides request the Court to perform an in camera 23 inspection to see if any of these documents are 24 adverse incidents. And that what the legislature 25 defines as an adverse incident as is: Medical	44 1 some of the privileges that are attached to some of 2 these investigations, committees, and reports, and 3 so on. We produced the -- we produced, Judge -- I 4 hope it's clear -- we produced the adverse reports. 5 The incident reports, the adverse reports, those 6 were produced. And I think Matthew got those. 7 What we -- the basis of the privilege log is some 8 of these requests are asking for, you know -- 9 number one, documents created in any way or relate 10 to the hospital's investigation or review of any of 11 the care and treatment of any patient. 12 Now, you can say that's an Amendment Seven 13 request, but it's really asking for all these 14 confidential, investigation, and committee records, 15 and reports. So we're basically saying, here are 16 the Amendment Seven reports and also see the 17 privilege log, which articulates and identifies, 18 you know, all of the other committee records. 19 Judge, there are four boxes of records. I 20 went to the hospital and said, get me as much as 21 you can as far as, you know, all these documents 22 that are listed on the privilege log. I went 23 through all of these documents and tried to 24 formulate the privileges and the privilege log, 25 which are identified at the top of these pages on
43 1 negligence, intentional misconduct, and any other 2 act, neglect, or default of a health care facility 3 or a healthcare provider that caused or could have 4 caused injury or death to a patient; including but 5 not limited to, those incidents that are required 6 by State or Federal law to be reported to 7 governmental agency or body. And incidents that 8 are reported to or reviewed by any healthcare 9 facility, peer review, risk management, quality 10 assurance, credentials, or similar committee. 11 So what I would like for the hospital to do 12 is go through this before they provide these 13 documents to you, because it seems to me, there's a 14 lot of documents here. And if there's anything in 15 this privilege log that they can release to me 16 without there being an in camera inspection, I 17 think I would appreciate it, and the Court would. 18 Other than that, I don't know what to do besides 19 ask the Court to review this privilege log, which 20 is -- Your Honor, it looks like it's four or five 21 pages. So I don't know what else to do. 22 MR. BUCKLEY: Judge -- 23 THE COURT: Response? 24 MR. BUCKLEY: Yeah. We tried to comply with 25 the order. We obviously cited some of the law and	45 1 the privilege log. There are statutes that are 2 cited and so on. I went through and tried to 3 identify -- I'm just looking at privilege log A. 4 BRMC -- that's Bartow Regional Medical Center peer 5 review committee notes, August 18th, 2010, three 6 pages. I did my best to try to identify what was 7 privileged and what the documents and the number of 8 pages and so on. That's -- the peer review is part 9 of these -- is part of these protected hospital 10 committees. Peer review, quality assurance, risk 11 management, credentialing. Just because Matthew 12 asked for the credentialing file, and he actually 13 does, doesn't mean by law we're required to provide 14 it or produce it. 15 Number three, each and every document created 16 by the hospital five years prior to May 2011 17 related to the credentialing and recredentialing 18 process of Larry Thomas -- 19 THE COURT: Okay. Here's what I'm not clear 20 on. As I look at the privilege log -- let's take 21 the first one. Laparoscopic, hyphen, open 22 procedures review June 2009, four pages. Does this 23 tell me that there are four pages of this 24 particular confidential document that do not have 25 any adverse incidents, so it's on the privilege



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1 log; or does this tell me that these four pages of
2 this do have adverse incidents and have already
3 been provided to the plaintiff?

4 **MR. BUCKLEY:** These documents on the
5 privilege logs have not been provided to plaintiff.

6 **THE COURT:** And do not contain any adverse
7 incidents?

8 **MR. BUCKLEY:** Judge, that's what I don't
9 know. I'm just telling you as an officer of the
10 court -- I'm saying here -- you know, and, again,
11 it's a gray area. He's requesting all
12 investigation and reports and so on. I'm saying
13 these are part of an investigation of a committee
14 of a peer review, meeting, or group --

15 **THE COURT:** Well, Mr. Buckley, I've ordered
16 that they are privileged. They are. They meet
17 that definition of privileged under the statute.
18 However -- and they're not going to be admissible
19 -- however, they are -- if they meet the statutory
20 definition for adverse incident -- they are
21 discoverable. And you are ordered to disclose
22 them.

23 Now, I can't figure out in looking at this,
24 and it sounds like you can't either at this stage,
25 which portions of each of these line items might be

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1 with most of these same --

2 **THE COURT:** And the appellate Court said,
3 Judge Durrance, do an in camera inspection. And
4 I'm aware of that.

5 **MR. BUCKLEY:** Okay.

6 **THE COURT:** In which case, I will do what I
7 need to do and do an in camera inspection if
8 required.

9 However, to have the defense not at least
10 look at it and say, okay, well, these very
11 definitely are. We agree these are. That's where
12 I'm getting stuck. That's why I asked you if you
13 can look at these and tell me, All right. We
14 concede that, you know, some of these are very
15 definitely adverse incident reports as defined, and
16 those are discoverable. But not this entire
17 privilege log list.

18 **MR. BUCKLEY:** Yeah. Let me just -- may I
19 read something quickly from the appellate decision?

20 **THE COURT:** You certainly may.

21 **MR. BUCKLEY:** "Because we conclude that
22 Ms. Kirkland's requests to produce were not limited
23 to adverse medical incidents, Bartow Regional
24 cannot be faulted for identifying documents in its
25 privilege log that did not necessarily relate to an

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1 inadmissible, because they're privileged. But
2 they're also discoverable, because they meet this
3 definition of adverse incident. In the event you
4 go through each of those, and you make the
5 determination, okay, out of those four pages --
6 again, I'm on the first entry -- there are two
7 pages that are going to -- maybe the majority of
8 those pages be blacked out. But there are adverse
9 incident information that is discoverable, that the
10 plaintiff is entitled to. So two of these pages
11 I'm going to have to give the plaintiff, they're
12 not ever going to be admissible, but they are
13 discoverable. And as to the other two pages, well,
14 they're not; and the plaintiff doesn't ever get to
15 see those two. And I believe plaintiff is then
16 going to say, Judge, will you look at all the ones
17 that he didn't give me and make sure there are no
18 adverse incidents in those.

19 **MR. BUCKLEY:** Well, I -- Judge, respectfully,
20 I think we're already to that second point. You
21 know, I understand your concern. I understand your
22 point. We -- and just to give you a quick
23 background, we had a similar issue in a companion
24 case with Dr. Thomas and Mr. Frost in front of
25 Judge Durrance. We took the very same question

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1 adverse medical incident. In addition, because of
2 the determination of whether a document is
3 discoverable as one relating to an adverse medical
4 incident, it is a threshold question to determine
5 -- determining whether certain privileges apply.
6 The circuit court should have determined whether
7 the documents identified in the privilege log
8 relate to an adverse medical incident within the
9 meeting of Amendment Seven."

10 And Judge Durrance basically said you've got
11 to produce everything. He didn't take -- he didn't
12 have a chance or didn't review the documents. I
13 learned today, he is in the process of reviewing
14 those.

15 I think what I'm hearing the Court say is,
16 Buckley, go back and recheck and double-check, and
17 if there's some or half or many that aren't really
18 privileged or you can redact what's privileged and
19 produce the rest is -- is that what I'm hearing?
20 Before the Court takes on this -- the second DCA
21 basically spelled out the process for the Court to
22 do. I think what I'm hearing is you want me to do
23 it first --

24 **THE COURT:** I understand.

25 **MR. BUCKLEY:** -- before we get to maybe --



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50 1 and I can limit some of these or produce some of 2 these -- 3 THE COURT: Let me say this -- 4 MR. BUCKLEY: Is that what I'm hearing? 5 THE COURT: -- and I want to say this so you 6 understand completely what I'm talking about. 7 As I said, I know I'm doing an in camera 8 inspection. I start every hearing, almost every 9 time, with, counsel -- this is to each side -- are 10 there any stipulations to announce? It is in that 11 spirit that I am asking the question, when you look 12 at the first one, the laparoscopic-open procedures 13 review it is a mirror, four pages. Is there 14 anything in those four pages that defense can say. 15 Yeah, Judge, we concede. This has an adverse 16 incident in it and there's part of this that is 17 going to be discoverable. That's the question. 18 Are there any of those? And I believe what you're 19 telling me is, you haven't gone through any of them 20 so you're not in a position to answer my question 21 as to whether or not there are any concessions on 22 the part of the hospital. If you say, Judge, if 23 you order me to make concessions, I'm going to have 24 a problem with that. To which, I would say, I 25 would never order you to do that.	52 1 THE COURT: Again, I have never ordered a 2 party to settle with another party or concede or 3 arrive at a stipulation. It just assists greatly 4 with regard to narrowing what is truly the 5 controversy in a case. And if there is not a true 6 dispute over some of these pages, then it would be 7 silly of me to take the time to create one or to 8 analyze to see if there is one. 9 So we have another problem with regard to 10 this issue. As I said, I'm familiar with the 11 opinion, and I know this is an issue of an in 12 camera inspection. In fact, I remember in 2006, 13 when I did this work in Sebring. I had a couple of 14 in cameras, as well. And it certainly isn't fun. 15 And it is a -- something you have to literally look 16 at your calendar and see where you can fit it in, 17 much like where you're going to put it in on a 18 motion calendar is when you're going to set aside 19 the time to do this on your calendar. So that is a 20 little tricky. 21 It is now the 4th of June, so in preparing 22 for an in camera inspection, I've got to figure out 23 where on my motion calendar I'm going to do this in 24 camera inspection. As you all know, I rotate out 25 of this division on June 30th, so that's in 26
51 1 MR. BUCKLEY: I have been through every 2 single page -- 3 THE COURT: Okay. 4 MR. BUCKLEY: But it was some time ago. This 5 goes pretty far back. And Judge Durrance has had 6 these boxes in his office for some time -- I don't 7 mean to be critical. But I'm -- we've gone through 8 an appeal, subsequent to the appeal. But my point 9 is, I did go through all these boxes at one time, 10 and I literally brought them to Judge Durrance 11 myself. 12 THE COURT: Are you saying that some of these 13 pages as referenced, here, in this privilege log, 14 is actually upstairs in Judge Durrance's office 15 now? 16 MR. BUCKLEY: Yes. 17 THE COURT: Oh. 18 MR. BUCKLEY: And there's another set -- 19 THE COURT: Okay. 20 MR. BUCKLEY: -- you know, we have a set at 21 our Fort Lauderdale office. I'm working out of 22 Tampa now. But, you know, I go back there. I can 23 go back and -- if I hear your direction, I can go 24 back and see if I can somehow narrow the scope and 25 re-review these.	53 1 days. And then this case becomes assigned to a 2 different judge. So the other difficulty here is 3 which presiding judge should be doing this in 4 camera inspection. I, quite frankly, would prefer 5 to do it myself, because I don't want there to ever 6 be a suggestion that I dumped this thing on my 7 colleague that's coming in after me. But exactly 8 how I get this done when some of these reports, in 9 this case, are similar to the reports in another 10 case, and right now being inspected by another 11 Judge even compounds it, worse. 12 So for a moment, let's explore our options 13 and how much time would it take, Mr. Buckley, for 14 you to get the documents to me for my in camera 15 inspection? 16 MR. BUCKLEY: Well, I think I can get them 17 printed or reprinted or copied or recopied within 18 the next week or so, at the best. I have -- not to 19 bore you with the details, I have to go to Fort 20 Lauderdale this weekend. I mean, I don't think 21 they can be ready by Monday, but I can try to help 22 facilitate. You know, it's an enormous amount of 23 paper, as you might guess, Judge. Some of these 24 are lengthy; some are not. But just the process of 25 printing and -- but I probably can get to you in



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54 1 seven to ten days. 2 THE COURT: From today? 3 MR. BUCKLEY: Yes. 4 THE COURT: Okay. I assume you can also -- 5 if you have pages that you've already reviewed that 6 you know are adverse incident reports, and you know 7 the plaintiff in this case is entitled to them, and 8 they are discoverable, I assume that you will 9 provide me that information. 10 Again, this is not an order or a directive or 11 a command. If you have it and you know it and you 12 concede it, please save some resources, and let me 13 have it. If you don't, then I will review it and 14 see what I can find out. 15 MR. BUCKLEY: Yes, Your Honor. 16 THE COURT: All right. Plaintiff's counsel 17 shall prepare the order with regard to this, which 18 is plaintiff's motion for rule to show cause or in 19 the alternative motion for in camera inspection, 20 obviously, the alternative part is being granted. 21 MR. BUCKLEY: Just to be on the safe side, 22 can I have ten days from today, please? 23 THE COURT: You may. 24 MR. SCHWENCKE: So the defendant shall 25 provide the documents to the Court by -- what's the	56 1 table that for now? 2 MR. SCHWENCKE: Oh. I'm ready. I don't want 3 to be prosecuting a negligent credentialing claim 4 if there's a summary judgment out there on it, when 5 I think it's a legal issue for the Court to decide. 6 THE COURT: Well, I think that the Number 6 7 there on your notice was, that was discussed 8 earlier in this record, that it was being continued 9 another day. 10 MR. SCHWENCKE: Oh. We're going to continue 11 it to another day, okay. 12 Well, then I'll tell you, last but not least, 13 and I think there's one more I'd like for the Court 14 to consider today. You can go home a little early. 15 Let me find it. Tab Number 8, it's the hospital 16 answered some interrogatories I asked. And you 17 heard some -- how this all came up this 18 leave-of-absence thing is when I took -- I believe 19 it was Nurse Pitman's (ph.) deposition. She said 20 she remembered Dr. Thomas taking a leave of 21 absence. He had a medical condition, and once he 22 came back from this medical condition is when he 23 was short of breath, shaky. all the things that 24 we've been talking about acknowledged in here. 25 Bear with me. What I'm trying to ascertain
55 1 date? 2 THE COURT: The 14th is actually a Saturday, 3 so why don't we make it first thing Monday morning 4 June 16th, say by 9:00 a.m.? 5 MR. SCHWENCKE: Okay. 6 MR. BUCKLEY: How about 10:00 a.m., in case I 7 have to review them over in Fort Lauderdale and 8 drive that morning? 9 THE COURT: That's fine. 10 MR. BUCKLEY: That would be -- 11 THE COURT: Certainly, the 13th is a Friday. 12 So, you know, if you get them delivered on Friday 13 then you don't have to worry about it Monday. But 14 you've got that extra cushion if you need it. 15 MR. BUCKLEY: Thank you. 16 MR. SCHWENCKE: So that was June 16th at 17 10:00 a.m.? 18 THE COURT: Uh-huh. 19 MR. SCHWENCKE: Okay. Based on the time, 20 Your Honor, and kind of how some of the Court's 21 rulings have gone so far today, I think it would be 22 best if we just tackle the summary judgment. I'm 23 ready for it. I know it's in there. 24 I don't want to take his argument from him. 25 MR. BUCKLEY: Oh. I thought we decided to	57 1 is, I don't want to be to boxed into calling it a 2 leave of absence. So I got the wrong tab. Let me 3 find which one it is. 4 I asked in the interrogatory, and I'll find 5 it here in a second that basically says, is either 6 produce me with documentation or tell me -- when 7 was -- can you tell me when Dr. Thomas was gone, so 8 I can try to lockdown this time period that Nurse 9 Pitman had testified to. And let me just find the 10 tab. It might be Tab 7. I might have jumped the 11 gun by one tab. Bear with me. 12 THE COURT: Is it: "Please provide the dates 13 that Larry D. Thomas, M.D., requested a leave of 14 absence from the defendant hospital from January 1, 15 2009, through his last day as a member of the 16 medical staff at the defendant hospital." Is that 17 what you're talking about? 18 MR. SCHWENCKE: Are you look at Tab 8? 19 THE COURT: Yes. 20 MR. SCHWENCKE: Yeah. See my -- yes and no. 21 So the response to that is, he never requested a 22 leave of absence, so that's what they're going to 23 say. Instead, I don't want to get boxed in as a 24 leave of absence thing. If you turn to Tab 7, and 25 you look at -- it's a request to produce. And you



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58 1 look at Number 3, I think the best way to do it, 2 instead of having someone look, is provide me with 3 records. So request Number 3 says, "provide any 4 and all records or schedules indicating the 5 duration of Larry D. Thomas, M.D. absence from the 6 medical staff from January 1, '09, to the last day 7 that he was a member of the medical staff." I'm 8 trying to find out when this leave of absence 9 was -- or absence or whenever he was gone from the 10 hospital, because Nurse Pitman remembered it. And 11 so I got an objection and a protective order that I 12 don't understand why. 13 And then it seems that there is -- was some 14 sort of concession made to provide me with 15 documents, but I never got any of these documents 16 that the defendants said they were going to provide 17 me. I think I'm entitled to explore when exactly 18 Dr. Thomas was absent from the hospital. That way 19 I can try to determine when the nurse remembered 20 him being absent and when all these symptoms began 21 to start. So number three, I'd like to know -- I 22 don't want to call it a leave of absence, but just 23 documents that indicate when he was gone from the 24 hospital. And I believe that's discoverable, so I 25 can correlate the time.	60 1 on-call at the hospital; but, again, there's a 2 distinction between what is produced in an on-call 3 schedule. And I know Matthew has the on-call 4 schedules. Even if a doctor is not on-call, he or 5 she still can go to hospital, and follow patients, 6 and see patients, and do rounds and so on. To be 7 on-call means the emergency department has a 8 surgical or cardiac patient, and the surgeon or 9 cardiologist is on-call and has to come into the 10 hospital. That's the schedule they keep for these 11 doctors, the on-call schedules. 12 THE COURT: I am curious as to why the 13 response isn't "none." However, this response is 14 not an answer related to vacation time or on-call 15 schedules. If that's what you're telling me; I 16 can't get a whole lot of meaning out of the 17 response. If you're telling me it's "none," and 18 that's what you intend to communicate to the 19 plaintiff with regard to absence -- again, with the 20 response having nothing to do with vacation time or 21 on-call schedules then that's what your answer 22 would be. So I'm going to order you to respond. 23 If it's "none," it's none. But at this point this 24 is -- what motion is this? What are we -- 25 MR. SCHWENCKE: These are the defendant's
59 1 THE COURT: Response? 2 MR. BUCKLEY: Judge, I think we've answered 3 all these questions. Most of them ask about leave 4 of absence. There was no leave of absence. 5 THE COURT: This just says, absence from the 6 medical staff. The question is, "any and all 7 records or schedules indicating the duration of 8 Larry D. Thomas, M.D.'s absence from the medical 9 staff at the defendant hospital from January 1, 10 2009." 11 MR. BUCKLEY: Any records relating to his 12 absence from the hospital may be part of the 13 credentialing process, but we said if you wanted 14 his on-call schedule, you know, you can request 15 that. I don't know if Matthew -- I don't think 16 Matthew has requested that. You know, the vacation 17 time, I mean, that may be reflected on the on-call 18 schedules. But it's, you know, my understanding as 19 our answer articulates, Judge, from January 1, 20 2009 -- in this answer and the others -- there was 21 no absence from the staff through the last day he 22 was a member of the staff. There's was no leave of 23 absence. If it's asking for vacation days or days 24 he's not on-call, then we can provide on-call 25 schedules, you know, which might reflect he's not	61 1 objections to the plaintiff's supplemental request 2 to produce dated March 12th, 2014, and it's only 3 Number 3. 4 THE COURT: All right. 5 MR. BUCKLEY: May I have 15 days, Judge? 6 THE COURT: You may. 7 MR. BUCKLEY: Thank you. 8 THE COURT: And plaintiff can prepare the 9 order with regard to that objection. It is 10 overruled. Fifteen days is fine. 11 MR. SCHWENCKE: Yes, Your Honor. 12 And, Your Honor, that will do it for the 13 plaintiff's motions if we're not going to address 14 the summary judgment. And I'm handwriting an order 15 right now, and will let Mr. Buckley see it, just on 16 the in camera inspection. I have envelopes here, 17 and I can send in the other orders that aren't as 18 time sensitive. 19 THE COURT: All right. With regard to 20 plaintiff's motion to compel defendant to provide 21 better responses to plaintiff's supplemental 22 request to produce dated February 5th, 2014, and 23 motion for sanctions, that is in your book at Tab 24 3? 25 MR. SCHWENCKE: Yes.



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62 1 THE COURT: And that is being withdrawn? 2 MR. SCHWENCKE: Yes. 3 THE COURT: And the same is true with regard 4 to Tab 2, because I think what I ruled on was Tab 5 4. Where the -- 6 MR. SCHWENCKE: I think it was Tab 2. Tab 4 7 related to the hospital producing a representative. 8 I think after I -- basically, I asked the hospital 9 to produce someone pursuant to a court order to 10 speak to credentialing, and she told me she wasn't 11 the right one, and then three days later she told 12 me she was. So, I mean, the hospital is just going 13 to have to live with that testimony, I guess. So I 14 won't be going forward with that. 15 THE COURT: What are you referring to? 16 MR. SCHWENCKE: Tab 4 is a motion for rule to 17 show cause or an alternative motion to compel. And 18 at the time, I think when I drafted it, Paragraph 1 19 says I was asking for a corporate representative to 20 speak to certain issues, which would include 21 hiring, credentialing, and privileging of 22 Dr. Thomas. 23 If you look at Page 2, the first question I 24 ask, you know, is, are you that person? And the 25 answer I got was, no.	64 1 MR. SCHWENCKE: Let me look, double-check. 2 That was -- yes, Your Honor. Number 4 on the 3 notice, Number 5 in the book. 4 THE COURT: Okay. And plaintiff is preparing 5 that order. And then the other one that you were 6 just referring to that, you were calling Tab 4 -- 7 MR. SCHWENCKE: The one that was withdrawn, 8 Your Honor? 9 THE COURT: Yeah. Okay. That's referenced 10 on the notice that's at Tab 3. Got it. That's 11 withdrawn. 12 And on the notice, Tab 2 is withdrawn? 13 MR. SCHWENCKE: Tab 2 is what you're doing an 14 in camera inspection on. 15 THE COURT: I'm looking at the notice, not 16 the tabs. 17 MR. SCHWENCKE: Oh. Sorry. 18 THE COURT: On the notice that's Number 1. 19 MR. SCHWENCKE: Gotcha. Yep. Number 2 on 20 the notice was withdrawn. 21 THE COURT: Good. As was Number 3 on the 22 notice? 23 MR. SCHWENCKE: Yes. 24 THE COURT: Okay. The only one I do not have 25 any reference to, then, is Number 8. Is that being
63 1 THE COURT: Okay. So Number 4 is withdrawn? 2 MR. SCHWENCKE: Yeah. 3 THE COURT: All right. 4 MR. SCHWENCKE: Because then she came to the 5 deposition, like, three days later and told me she 6 was, so -- 7 THE COURT: All right. So let me take a 8 look, 'cause I asked Ms. Platter to do the order 9 with regard to Tab 5. 10 MS. PLATTER: Yes. 11 THE COURT: However, we had a huge discussion 12 where I went through an exhibit, and I believe it 13 was on Tab 5. And literally went through number by 14 number, overruled, sustained, and that doesn't make 15 sense to me right now. 16 Yeah. This Exhibit A, on Tab 5 -- behind Tab 17 5 I have plaintiff's motion to compel defendant, 18 Bartow HMA, LLC, doing business as Bartow Regional 19 Medical Center, to provide responses to request for 20 admissions and motions for sanctions. So that's 21 actually behind Tab 5 in my book. Where is that on 22 the notice? 23 MR. SCHWENCKE: I think that's the confusion. 24 I think that might have been four. 25 THE COURT: Yeah.	65 1 withdrawn, as well? 2 MR. SCHWENCKE: Yes, Your Honor. 3 THE COURT: All right. Have a lovely 4 afternoon. 5 MR. SCHWENCKE: You too. I have -- 6 Mr. Buckley has reviewed those orders, Your Honor, 7 for the in camera inspection, and I've got 8 envelopes -- 9 MR. BUCKLEY: I reviewed one order. 10 MR. SCHWENCKE: I handwrote four of them, 11 just so the Court didn't have to do it. 12 MR. BUCKLEY: Oh, okay. You mean four of the 13 same one? 14 MR. SCHWENCKE: Yeah. 15 MR. BUCKLEY: Okay. Gotcha. 16 THE COURT: Well, I don't like handwritten 17 orders. 18 MR. SCHWENCKE: My apologies to the Court. 19 Sorry. 20 THE COURT: Just -- I'm going to sign them. 21 MR. SCHWENCKE: Thank you. 22 MR. BUCKLEY: I think I can read his writing. 23 THE COURT: We're in recess. 24 (The proceedings were concluded at 4:24 p.m.) 25



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3 STATE OF FLORIDA:
4 COUNTY OF ORANGE

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6 I, Danette V. Lamb, being a Notary Public and Court
7 Reporter, State of Florida at Large, do hereby certify
8 that I was authorized to and did report the above and
9 foregoing proceedings, and that the transcript, is a true
10 and correct record of my stenographic notes.

11

12 DATED this 5th day of June, 2014, in the City of
13 Bartow, County of Polk, State of Florida.

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16 Danette V. Lamb,
17 Court Reporter and Notary Public
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IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT, IN AND FOR POLK
COUNTY, FLORIDA.

CASE NO.: 53-2012-CA-002611-0000-00,
Section 4

AMBER EDWARDS,

Plaintiff,

Quaried

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

Defendant.

**ORDER ON PLAINTIFF'S MOTION FOR RULE TO SHOW CAUSE OR IN THE
ALTERNATIVE MOTION FOR IN-CAMERA INSPECTION**

THIS CAUSE having come to be considered upon the Plaintiff's Motion for Rule to Show Cause or in the Alternative Motion for In-Camera Inspection, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that Plaintiff's Motion for Rule to Show Cause or in the Alternative Motion for In-Camera Inspection is hereby **GRANTED/DENIED:**

*The Defendant shall provide the
documents identified in its privilege log
by June 16, 2014 at 10:00am for
an in-camera inspection*



Order on Plaintiff's Motion for Rule to Show Cause or in the Alternative Motion for In-Camera Inspection
Edwards vs. Bartow Regional Medical Center, et al.
Case No.: 53-2012-CA-002611-0000-00, Section 4
Page 2

DONE AND ORDERED at Bartow, Polk County, Florida, this 4th day of June,
2014.

/s/ Ellen Masters

CIRCUIT JUDGE

Copies have been furnished to:

Matthew K. Schwencke, Esquire
mks@searcylaw.com
Searcy Denney Scarola Barnhart & Shipley PA
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 383-9441
Attorneys for Plaintiff

Michael A. Petruccelli, Esquire
Pbuckley@fplawyers.com; Tmartin@fplawyers.com
Fann & Petruccelli, P.A.
5100 N Federal Highway, Suite 300-B
Fort Lauderdale, FL 33308
Phone: (954)-771-4118
Fax: (954)-771-4119
Attorneys for Bartow HMA, LLC d/b/a Bartow Regional Medical Center

Holly B. Platter, Esquire
eserve@bgrplaw.com; tdomi@bgrplaw.com;
Bush Graziano Rice & Platter, P.A.
101 E Kennedy Boulevard, Suite 1700
Tampa, FL 33601
Phone: (813)-228-7000
Fax: (813)-273-0091
Attorneys for Larry D. Thomas, M.D.

IN THE CIRCUIT COURT OF THE
10th JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA

CASE NO.: 53-2012 CA-002611-0000-00
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER
and LARRY D. THOMAS, M.D.,

Defendants.

MOTION FOR RECONSIDERATION/MOTION FOR CLARIFICATION

COMES NOW DEFENDANT, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, (hereinafter "Defendant Hospital"), by and through the undersigned counsel and hereby files this its Motion for Reconsideration / Motion for Clarification regarding certain aspects of the Court's ruling on June 25, 2014 regarding production of documents identified by Defendant Hospital on its privilege logs and states:

1. On June 25, 2014, this Honorable Court issued an Order (attached as Exhibit "1") requiring Defendant Hospital to produce certain documents from two privilege logs filed on behalf of Defendant Hospital relating to documents it claims are privileged pursuant to Florida Statutes, and other legal provisions, including opinion work product and attorney/client privilege assertions.

2. These documents are not discoverable because they are privileged and do not fall under Amendment 7 documents. Even if they were considered Amendment 7 materials,

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FANN & PETRUCCELLI, P.A.

1726 East Seventh Avenue Suite 18, Tampa, Florida 33605 • Phone (813) 251-1400 • Fax (813) 2



attorney-client and attorney opinion work product privileges still apply and prevent their discovery. Bartow HMA, LLC v. Kirkland, 93 So.3d 1021, (Fla. 2d DCA 2013).

3. Defendant Hospital is complying with most aspects of the subject Order. However, Defendant Hospital seeks a Motion for Reconsideration and/or Motion for Clarification regarding the Court's ordering Defendant Hospital to produce items contained within privilege log B (specifically, documents from B-15, B-16, B-20 and B-21), and from privilege log A (#8; a copy/duplicate of B-20) which are attorney-client, attorney opinion work product documents and are records relating exclusively to external, independent peer reviews conducted outside of any hospital committees and by and through the direction of Defendant Hospital's outside counsel.

4. Florida's appellate courts have expressly and implicitly held that Amendment 7 does not preempt the common law and statutory attorney/client communications and opinion work product privileges. See Florida Eye Clinic, P.A. v. Gmach, 14 So. 3d 1044 (Fla. 5th DCA 2009); Acevedo v. Doctors Hospital, Inc., 68 So. 3d 949 (Fla. 3d DCA 2011); See W. Fla. Reg'l Med. Ctr., Inc. v. See, 18 So. 3d 676 (Fla. 1st DCA 2009); Columbia Hosp. Corp. of S. Broward v. Fain, 16 So. 3d 236 (Fla. 4th DCA 2009). Accordingly, Defendant Hospital intends in good faith to seek certiorari review of that portion of the Court's rulings.

5. These unvarnished reviews by physicians outside of the setting of Defendant Hospital and unrelated entirely to the business activity of Bartow Regional Medical Center, or any of its medical or quality and peer review committees, are attorney driven investigations and evaluations of patients who received medical treatment at Defendant Hospital.

6. According to the Bartow v. Kirkland appellate decision, Amendment 7 provides that "[i]n addition to any other similar rights provided herein or by general law, patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." Art. X, § 25(a), Fla. Const.

The phrase "adverse medical incident" means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

Art. X, § 25(c)(3), Fla. Const. (emphasis added). *Bartow HMA, LLC v. Kirkland*, 93 So.3d 1021, (Fla. 2d DCA 2013).

7. These documents relate to reviews of medical records which this Court has separately ordered produced in its June 25, 2014 Order. Moreover, the subject materials do not meet the definition of the "Amendment 7" because they were not prepared or received in the ordinary course of any hospital business. These should not be produced as part of an Amendment 7 request.

WHEREFORE, Defendant Hospital respectfully requests this Honorable Court to grant its Motion For Re-Consideration and/or Motion for Clarification to further address the above referenced aspects of the June 25, 2014 Order, and any other and further relief this Honorable Court, and any other and further relief this Honorable deems appropriate and just.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Portal to: **Karen E. Terry, Esq.**, *Attorneys for Plaintiff*, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409 (ket@searcylaw.com; mks@searcylaw.com; aje@searcylaw.com; lmn@searcylaw.com) and to **Holly B. Platter, Esq.**, *Attorneys for Defendant*, **Larry D. Thomas, M.D.**, Bush, Graziano & Rice,

P.A., 101 E Kennedy Boulevard, Suite 1700, Tampa, Florida 33602 (eserve@bgrplaw.com;
tdomi@bgrplaw.com, this 21 day of July, 2014.

FANN & PETRUCCELLI, P.A.

*Attorneys for Defendant, Bartow Regional Medical
Center*

1726 East Seventh Avenue, Suite 18

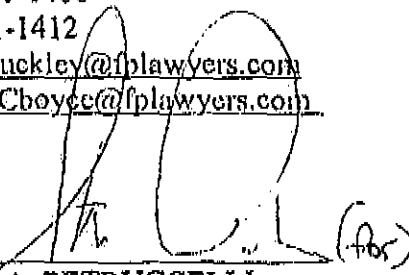
Tampa, FL 33605

Telephone (813)251-1400

Facsimile (813)251-1412

Primary e-mail: pbuckley@fplawyers.com

Secondary e-mail: Cboyce@fplawyers.com

BY:  (for)

MICHAEL A. PETRUCCELLI

Florida Bar No.: 717312

PAUL C. BUCKLEY

Florida Bar No.: 906697

FBN 597521

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

AMBER EDWARDS,

Plaintiff,

vs:

Case No : 53-2012CA-002611

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.,

Defendants.

ORDER FOLLOWING IN CAMERA INSPECTION - JUNE, 2014

THIS MATTER was before the Court for an *in camera* inspection of medical records delivered to the office of the presiding judge on June 16, 2014, and on June 19, 2014, in response to Plaintiff's Request to Produce to Defendant BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, dated July 30, 2013, and in response to this Court's order of June 4, 2014. The production referred to various patients of the Defendant, Larry D. Thomas, M.D. (hereinafter "Defendant Physician"), and the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, (hereinafter "Defendant Hospital"). On June 16, 2014, the Defendant Hospital delivered two privilege logs, titled "Privilege Log A" and "Privilege Log B", four boxes of documents, each box marked with a number, one through four. On June 19, 2014, the Defendant Hospital delivered an additional stack of documents that the Court has identified as the "Supplemental Packet." The Court finds as follows:

- A. Privilege Log A is four pages in length and lists 153 items. The pages of Privilege Log A are not numbered; the items listed on the pages of Privilege Log A are likewise unnumbered. Privilege Log B is one page and lists 21 numbered items. When delivered, the boxes were named but the items in the boxes were not tabbed or numbered. In fact, most of the items delivered in the boxes were not stacked in order to correspond to the listed items on the privilege logs, such that one item may be found in Box 1 but the next listed item may be found in Box 3. Further, various items throughout the four boxes were duplicates. Some of the items were not adequately titled such that the Court was required to analyze how the documents were bound (e.g., clipped or stapled) to identify which item on the written log referenced the physical item observed. The Court was reduced to counting pages to determine if a stack of documents matched the description set forth on the privilege log. In some cases, the Court wrote the page number on the corner of the page in blue ink. As the Court reviewed the documents, the Court affixed a yellow note to each item for ease in identifying the items.
- B. No additional information was provided to assist the Court in identifying relevant documents. The Defendant Hospital has not provided the Court with any identifying reference of the Plaintiff or the Defendant Physician other than the given name of each party. After a

EXHIBIT

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significant time, the Court, on its own, located a document that identified the Defendant Physician as ID#2031.

- C. In reviewing each item separately after the item was identified on one of the logs, the Court determined whether the documents should be provided to the Plaintiff. Specifically, a document should be provided to the Plaintiff if it has been identified as pertaining to the Plaintiff's Request to Produce and also identified as "an adverse medical incident" as defined by Florida Statutes.
- D. The Court has numbered each item on Privilege Log A. This Order will refer to the items in order such that the first item listed will be referred to as Item #1, etc. The Court has made the following findings as to Privilege Log A:

1. (Box 1) Page one of this four-page item should be provided to the Plaintiff after redacting the identifying information of physicians that are irrelevant to the Defendant Physician, a/k/a #2031. This document is also identified as "Focused Review Laparoscopic to Open Procedures June 1, 2009-February 28, 2010 (discharge data)."
2. (Box 1) Page three of this seven-page item should be provided after redacting the identifying information of physicians that are irrelevant to the Defendant Physician, a/k/a #2031. This document is also identified as "BRMC Peer March 18, 2010 Review Meeting."
3. No documents were reviewed as this item was not provided.
4. (Box 1) Two pages identified as Item #4 should be provided to the Plaintiff after redacting identifying information of other physicians irrelevant to the Defendant Physician, a/k/a #2031.
5. (Box 1) Six pages identified as Item #5, also identified as "Chart Review Materials of January 25, 2010 and January 26, 2010" should be provided after redacting identifying information of patients and physicians that are irrelevant to the parties herein.
- 6-7. (Box 1) No documents were identified as discoverable.
8. No documents were reviewed as this item was not provided.
9. (Box 1) No documents were identified as discoverable.
10. (Box 1) Page three of the four-page item should be provided after redacting identifying information of physicians that are irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "BRMC Peer Review Meeting Notes March 18, 2010".
11. (Box 1) No documents were identified as discoverable.
12. (Box 1) The first two of the three pages identified as Item #12 should be provided after redacting a portion of the second page that refers to physicians other than the Defendant Physician, a/k/a #2031. This item is also identified as "BRMC Peer Review document Re: miscellaneous cases ~ Undated."
13. (Box 1) No documents were identified as discoverable.
14. (Box 1) The single page identified as Item #14 should be provided after redacting identifying information of physicians irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "Miscellaneous document Re: surgery cases June 2009-February 2010."
15. No documents were reviewed as this item was not provided.
- 16-17. (Box 1) No items were identified as discoverable.
18. (Box 1) Item #18 should be provided after redacting identifying information of physicians irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "Focused Review Laparoscopic --Open Procedure June 1, 2009-February 28, 2010."

- 19 -20. (Box 1) No items were identified as discoverable.
21. (Box 1) Item #21 should be produced after redacting information that refers to physicians irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "BRMC Peer Review Case List-(Undated)."
- 22.-23. (Box 1) No items were identified as discoverable.
24. (Box 1) This one-page item should be provided after redacting identifying information that refers to physicians irrelevant to the Defendant Physician, #2031. The item is also identified as "Peer Review Log October 20, 2010."
- 25.-26. (Box 1) No items were identified as discoverable.
27. No documents reviewed as this item was not provided.
- 28.-35. (Box 1) No items were identified as discoverable.
36. (Box 1) A four-page document was reviewed that appeared to match the description of the 5-page document referenced on Privilege Log A, that the Court identified as Item #36 (bottom of Page 1 on Privilege Log A). No items were identified as discoverable.
- 37.-40. (Box 1) No documents were identified as discoverable.
41. (Box 1) The last page of the four-page item should be provided after redacting the information related to physicians other than the Defendant Physician, a/k/a #2031. The item is also identified as "BRMC Peer Review Meeting Notes and Attachments."
42. (Box 1) This one-page item should be provided. The item is also identified as "Risk Management Report to Peer Review December 2010."
43. (Box 1) No documents were identified as discoverable.
44. (Box 1) This item was found to be one page not five as identified on Privilege Log A. Nonetheless, no documents were identified as discoverable.
45. (Box 1) This three-page item should be provided after redacting the information related to physicians other than the Defendant, Larry Thomas, M.D., a/k/a #2031. The item is also identified as "BRMC Peer Review Committee Meeting August 17, 2011 Notes."
46. (Box 1) No documents were identified as discoverable.
47. (Box 1) This six-page item should be provided after redacting identifying physician information that is irrelevant to the Defendant Physician, #2031. This item is also identified as "BRMC August 17, 2011 Peer Review Meeting Minutes."
- 48.-50. (Box 1) No documents were identified as discoverable.
51. (Box 1) This three page item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "Miscellaneous Chart Review June 4, 2011."
52. (Box 1) This two-page item should be provided after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "Miscellaneous Chart Review Sept. 24, 2011."
53. No documents were reviewed as this item was not provided.
54. (Box 1) No documents were identified as discoverable.
55. (Box 1) The one-page item should be produced after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "Miscellaneous Chart Review August 2, 2011."
- 56.-57. (Box 1) No documents were identified as discoverable.
58. (Box 1) The one-page item should be provided. The item is also identified as "April - July 2011 Peer Review Chart Audit."
- 59.-60. (Box 1) No documents were identified as discoverable.
61. (Box 1) Page one of the three-page item should be provided after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "October 19, 2011 Peer Review Committee Meeting Notes."

62. (Box 1) This item should be produced after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "October 19, 2011 Peer Review Meeting Minutes."
63. (Box 1) The item should be provided after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "August 17, 2011 Peer Review Committee Meeting."
- 64.-67. (Box 1) No documents were identified as discoverable.
68. (Box 1) This item should be provided after redacting the identifying patient and physician information irrelevant to the parties. The item is also identified as "December 21, 2011 Peer Review Meeting Minutes."
69. (Box 1) No documents were identified as discoverable.
70. (Box 3) A sixty-one-page document was located with a similar title as that referenced as Item #70 on Privilege Log A. However, Privilege Log A identifies Item #70 as a 163-page document. Page fifty-five of this sixty-one page document should be provided after redacting the identifying physician information other than the Defendant Physician, #2031. This item is also identified as "Medical Executive Committee meeting materials April 2010."
- 71.-77. (Box 1) No documents were identified as discoverable.
- 78.-81. (Box 3) No documents were identified as discoverable.
82. (Box 3) Page eleven of this thirty-six-page item should be provided after redacting identifying physician information not relevant to the Defendant Physician, a/k/a #2031.
- 83.-85. (Box 3) No documents were identified as discoverable.
86. No documents were reviewed as the item was not provided.
- 87.-88. (Box 1) No documents were identified as discoverable.
- 89.-98. No documents were reviewed as the item was not provided.
99. (Supplemental Packet) No documents were identified as discoverable.
100. No documents were reviewed as the item was not provided.
101. (Box 4) No documents were identified as discoverable.
102. (Supplemental Packet) No documents identified as discoverable.
103. No documents were reviewed as the item was not provided.
- 104.-112. (Box 2) No documents were identified as discoverable.
- 113.-120. (Box 2) No documents were identified as discoverable.
121. No documents were reviewed as the item was not provided.
122. (Box 2) Page fifteen and sixteen of the twenty-page item should be produced after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "Surgical Committee Meeting documents February 3, 2010."
123. (Box 2) No documents were identified as discoverable.
124. (Box 2) Privilege Log A identifies a four-page record of a meeting on 12/12/10. The four-page record references a meeting on 12/01/10. The Court presumes the date is a typographical error. There were no documents identified as discoverable.
- 125.-133. (Box 2) No documents were identified as discoverable.
134. (Box 2) This two-page item should be provided after redacting the identifying information of other physicians irrelevant to the Defendant Physician, a/k/a #2031. This item is also identified as "Peer Review Committee April 15, 2010."
135. (Box 2) This one-page item should be provided after redacting the identifying information of physicians irrelevant to the Defendant Physician, a/k/a #2031. This item is also identified as "Focused Review: Laparoscopic to Open Procedures June 1, 2009-February 28, 2010 (discharge data)."
- 136.-147. (Box 2) No documents were identified as discoverable.

148. (Box 2) No documents were identified as discoverable. This 15-page item was identified from combining a three-page, four-page and eight-page document. Note that the Defendant Hospital delivered this item to the Court with a large yellow note that read "7 3 pages 8 pages." No other identifying information was provided.
149. (Box 2) No documents were identified as discoverable.
150. (Box 2) A seventy-five-page item was identified with a title, similar to that referenced on Privilege Log A. However, Privilege Log A references this item as eighteen pages. An eighteen-page document was not identified. Nevertheless, no documents in the seventy-five-page item that the Court has identified as Item #150 were identified as discoverable. This item is also identified as "Performance Improvement Committee meeting notes (November 22, 2010)."
- 151-152. No documents were reviewed as the item was not provided.
153. (Box 2) On Privilege Log A, Item 153 is identified as a 17-page report. This report is only ten pages not seventeen. Nevertheless, no documents were identified as discoverable.

E. The Court has made the following findings as to Privilege Log B:

1. (Box 3) The 429-page item should be provided after redacting identifying patient and physician information irrelevant to the parties in this matter. This item is also identified as "MR#267579."
2. (Box 3) The 471-page item should be provided after redacting identifying patient and physician information irrelevant to the parties in this matter. This item is also identified as "MR#358058."
3. (Box 2) The 1665-page item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "MR#258053." Note that a duplicate of this item was delivered in Box 4.
4. (Box 4) This item should be provided after redacting identifying patient and physician information that is irrelevant to the parties. This item is also identified as "6/11/10 BRMC Medical Records 872 pp MR#144066."
5. (Box 3) The 244-page item should be provided after redacting identifying patient and physician information that is irrelevant to the parties. This item is also identified as "MR#359080."
6. (Box 1) This 695-page item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "MR#132958."
7. (Box 3) The 149-page item should be provided after redacting identifying patient and physician information irrelevant to the parties herein. This item is also identified as "MR#120733."
8. (Box 4) This item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "BRMC medical records 36 pp. MR#174716."
9. (Box 1) No documents were identified as discoverable.
10. (Box 3) The 82-page item should be provided after redacting patient and physician information that is irrelevant to the parties. This item is also identified as "MR#365424."
11. (Box 2) The 116-page item should be provided after redacting patient and physician information that is irrelevant to the parties. This item is also identified as "MR#370204."

12. (Box 4) The 39-page item should be provided after redacting identifying patient and physician information that is irrelevant to the parties. This item is also identified as MR#365424.
13. (Box 1) The 323-page item should be provided after redacting identifying information of the patient and physicians that are not the parties herein. This item is also identified as "10/12/11 BRMC medical records 323 pp. MR# 227307."
14. (Supplemental Packet) This 181-page item should be provided after redacting identifying information of the patient and physicians irrelevant to the parties. This item is also identified as "9/5/12 BRMC medical records 181 pp. MR#346755."
15. (Box 4) This fifty-seven-page item refers to July 2010 on Privilege Log B; however, the documents bound together include September 2010. Only the first 23 pages of this item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "07/2010 Correspondence, reports and miscellaneous items relating to attorney requested external peer review."
16. (Box 4) This item refers to November 2011 on Privilege Log B; however, the documents bound together include December 2011 and 2012 documents. This item should be provided after redacting identifying patient/physician information irrelevant to the parties. This item is also identified as "11/2011 Correspondence, reports, and miscellaneous items relating to attorney requested peer review."
17. No documents have been reviewed as Item #17, as described on Privilege Log B, has not been provided.
18. No documents have been reviewed as Item #18, as described on Privilege Log B, has not been provided. However, see the reference below in Paragraph F regarding the unidentifiable documents found in Box #4.
19. (Box 4) This item is referenced on Privilege Log B as 135 pages. However, there were 122 pages identified as Item #19. No documents were identified as discoverable.
20. (Box 4) This six-page item should be provided after redacting identifying patient/physician information that is irrelevant to the parties. This item is also identified as "Correspondence, reports and miscellaneous items relating to attorney requested external peer review re; MR# 5276712."
21. (Box 4) No documents were identified as discoverable or as pertaining to the Defendant Physician.

F. There were various documents found within the boxes and the supplemental packet that were not identifiable as an item produced pursuant to Privilege Log A or Privilege Log B. These documents are described based on pages that were bound together. These documents were not reviewed. The description of these documents is provided below:

- Box 1:
- a) one-page document titled "Restricted Antimicrobial Form."
 - b) seven pages regarding "June 15, 2011, BRMC Peer Review Committee."
 - c) sixty-three pages regarding "Medical Executive Committee April 21, 2009."
- Box 2:
- a) thirty-two pages regarding "Performance Improvement November 2009."
 - b) five pages regarding "Performance Improvement Quarter 2 2009."
 - c) ten pages regarding "BRMC Performance Improvement Committee 2/22/10."
 - d) thirty-four pages re "BRMC Performance Improvement Plan - 2010. (These pages are not the item referred to on Privilege Log A as Item #113 as that item has been identified separately as a nine-page item in Box 2)
- Box 3: less than 100 pages, one of which having the title "BRMC Medical Executive Committee January 26, 2010."

Box 4: over 100 pages of loose unbound documents, one page having a light yellow note affixed that reads "credential file." The Court suspects that somewhere in these pages, there is a twenty-eight-page credentialing file that is referenced as Item #18 on Privilege Log B. However, if the Court counts twenty-eight pages from the page note, (i.e., the noted page being page one, etc.), the Court finds the 28th page to be Page Two of a six-page medical record. This stack of over 100 pages cannot be identified as the twenty-eight-page item referenced as Item #18 on Privilege Log B as "Credentialing file, Larry D. Thomas, M.D. 28pp."

Supplemental Packet:

- a) seven pages regarding "MD Review, Peer Review Report."
- b) two handwritten pages, with a reference, "2 Issues."
- c) one handwritten page, with a reference, "New list."
- d) four handwritten pages, with a reference, "Jan.-early December."

Based on the above findings, it is ORDERED:

1. The Defendant Hospital shall produce, within ten days, those items identified in the findings above, after redacting identifying patient and physician information that is irrelevant to the parties in this action.
2. The Defendant Hospital shall also provide an explanation, within ten days, as to each of the items, specifically identified on Privilege Log A and Privilege Log B that were not delivered to the Court for the *in camera* inspection.
3. In the event of a need for a further *in camera* inspection, the Defendant Hospital shall schedule a hearing to discuss whether the Court should appoint a medical expert to assist in identifying relevant and discoverable medical records, after being directed by an order of the Court as to the requirements of confidentiality and the statutory definition of "adverse medical incident." At such hearing, the parties should be prepared to discuss (1) the authority of the Court to appoint such an expert; (2) the expense required for organizing documents to prepare for an *in camera* inspection, specifically considering that the presiding judge is not a medical expert and therefore has a limited ability to decipher the names of medical procedures, terminology and handwriting; and (3) the amount of time and resources anticipated for any further *in camera* inspection in this cause.

ORDERED this 25th day of June, 2014.


ELLEN G. MASTERS
Circuit Judge

Copies to:
Matthew Schwencke, Esquire, Counsel for Plaintiff
Paul Buckley, Esquire, Counsel for Defendant

COPY

IN THE CIRCUIT COURT OF THE
10th JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA

CASE NO.: 53-2012 CA-002611-0000-00
Section 4

AMBER EDWARDS,

Plaintiff,

vs.

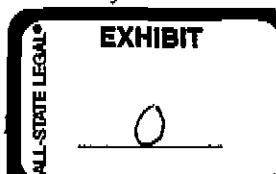
BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER
and LARRY D. THOMAS, M.D.,

Defendants.

**DEFENDANTS' MOTION FOR STAY OF LIMITED PORTIONS OF ORDER
COMPELLING PRODUCTION PENDING CERTIORARI REVIEW**

Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, (hereinafter "Defendant Hospital"), moves this Court to issue an order staying execution of its June 25, 2014 order compelling the production of certain documents on Defendant Hospital's privilege logs pending certiorari review to the Second District Court of Appeal, and as grounds therefore states as follows):

1. On June 25, 2014, the Court ordered Defendant Hospital to produce to Plaintiff within ten days certain documents identified on Defendant Hospital's privilege logs A and B (the Order is attached as Exhibit 1. Specifically, Defendant Hospital is concerned with the Court's ordering of production of the documents identified on privilege log B (#15, #16, #20 and #21) and privilege log A (#8, an apparent duplicate of B#20). These are attorney/client privileged materials. These documents all related to external medical record reviews performed by



physicians outside of the hospital setting and done by and through Defendant Hospital's outside counsel.

2. These documents are not discoverable because they are privileged and do not fall under Amendment 7 documents. Even if they were considered Amendment 7 materials, attorney-client and attorney opinion work product privileges still apply and prevent their discovery. Bartow HMA, LLC v. Kirkland, 93 So.3d 1021, (Fla. 2d DCA 2013).

3. Defendant Hospital has asserted and continues to assert that many of these documents are privileged attorney/client communications, and attorney opinion work product, that do not fall within the disclosure provisions of Amendment 7 (Article X, section 25 of the Florida Constitution).

4. Florida's appellate courts have expressly and implicitly held that Amendment 7 does not preempt the common law and statutory attorney/client communications and opinion work product privileges. See Florida Eye Clinic, P.A. v. Gmach, 14 So. 3d 1044 (Fla. 5th DCA 2009); Acevedo v. Doctors Hospital, Inc., 68 So. 3d 949 (Fla. 3d DCA 2011); See W. Fla. Reg'l Med. Ctr., Inc. v. See, 18 So. 3d 676 (Fla. 1st DCA 2009); Columbia Hosp. Corp. of S. Broward v. Fain, 16 So. 3d 236 (Fla. 4th DCA 2009). Accordingly, Defendant Hospital intends in good faith to seek certiorari review of that portion of the Court's rulings.

5. It is Defendant Hospital's position that these external peer review documents, conducted by and through outside counsel, should not have to be produced, as they are privileged attorney-client and attorney opinion work product materials.

6. According to the Bartow v. Kirkland appellate decision, Amendment 7 provides that "[i]n addition to any other similar rights provided herein or by general law, patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." Art. X, § 25(a), Fla. Const.

The phrase "adverse medical incident" means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

Art. X, § 25(c)(3), Fla. Const. (emphasis added). Bartow HMA, LLC v. Kirkland, 93 So.3d 1021, (Fla. 2d DCA 2013).

7. These documents relate to reviews of medical records which this Court has separately ordered produced in its June 25, 2014 Order. Moreover, the subject materials do not meet the definition of the "Amendment 7" because they were not prepared or received in the ordinary course of any hospital business. These should not be produced as part of an Amendment 7 request.

8. Defendant Hospital submits that there is a high likelihood that the Second District Court of Appeal will exercise its certiorari jurisdiction and hold that a portion of the documents ordered to be disclosed to Plaintiff are not discoverable. However, if the Court does not stay its order compelling the immediate production of the documents, Defendant Hospital will unquestionably suffer irreparable harm that would prevent it from obtaining any meaningful review, even if the Second District were to agree with its arguments. It would mean that the very documents to which Defendant Hospital is claiming privilege will have already been produced to Plaintiff before the Second District had an opportunity to rule.

9. Defendant Hospital has also filed a Motion for Reconsideration/Motion for

Clarification with the trial Court in an effort to avoid an appellate review and to present additional argument and legal authority in support of its position.

9. Accordingly, Defendant Hospital respectfully asks this Court to enter an order staying its June 25, 2014 order compelling disclosure of the documents identified within privilege log A(#8) and privilege log B (#B-15,B-16, B-20 and B-21). Defendant Hospital represents that it will act expeditiously in filing its petition and seeking to have the matter heard by the appellate court.

WHEREFORE, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, respectfully requests that the Court grant its motion to stay its June 25, 2014 Order compelling the disclosure of the above referenced documents at issue pending review in the Second District Court of Appeal.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Portal to: **Karen E. Terry, Esq., Attorneys for Plaintiff**, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409 (ket@searcylaw.com; mks@searcylaw.com; aje@searcylaw.com; lmn@searcylaw.com) and to **Holly B. Platter, Esq., Attorneys for Defendant**, Larry D. Thomas, M.D., Bush, Graziano & Rice, P.A., 101 E Kennedy Boulevard, Suite 1700, Tampa, Florida 33602 (eserve@bgrplaw.com; tdomi@bgrplaw.com), this 7th day of July, 2014.

FANN & PETRUCCELLI, P.A.

Attorneys for Defendant, Bartow Regional Medical Center

1726 East Seventh Avenue, Suite 18

Tampa, FL 33605

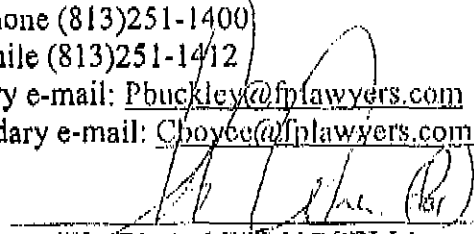
Telephone (813)251-1400

Facsimile (813)251-1412

Primary e-mail: pbuckley@fplawyers.com

Secondary e-mail: choyce@fplawyers.com

BY:

 **MICHAEL A. PETRUCCELLI**

Florida Bar No.: 717312

PAUL C. BUCKLEY

Florida Bar No.: 906697

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

AMBER EDWARDS,

Plaintiff,

vs.

Case No. 53-2012CA-002611

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER and
LARRY D. THOMAS, M.D.

Defendants.

ORDER FOLLOWING IN CAMERA INSPECTION - JUNE, 2014

THIS MATTER was before the Court for an *in camera* inspection of medical records delivered to the office of the presiding judge on June 16, 2014, and on June 19, 2014, in response to Plaintiff's Request to Produce to Defendant BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, dated July 30, 2013, and in response to this Court's order of June 4, 2014. The production referred to various patients of the Defendant, Larry D. Thomas, M.D., (hereinafter "Defendant Physician"), and the Defendant, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, (hereinafter "Defendant Hospital"). On June 16, 2014, the Defendant Hospital delivered two privilege logs, titled "Privilege Log A" and "Privilege Log B", four boxes of documents, each box marked with a number, one through four. On June 19, 2014, the Defendant Hospital delivered an additional stack of documents that the Court has identified as the "Supplemental Packet." The Court finds as follows:

- A. Privilege Log A is four pages in length and lists 153 items. The pages of Privilege Log A are not numbered; the items listed on the pages of Privilege Log A are likewise unnumbered. Privilege Log B is one page and lists 21 numbered items. When delivered, the boxes were named but the items in the boxes were not tabbed or numbered. In fact, most of the items delivered in the boxes were not stacked in order to correspond to the listed items on the privilege logs, such that one item may be found in Box 1 but the next listed item may be found in Box 3. Further, various items throughout the four boxes were duplicates. Some of the items were not adequately titled such that the Court was required to analyze how the documents were bound (e.g., clipped or stapled) to identify which item on the written log referenced the physical item observed. The Court was reduced to counting pages to determine if a stack of documents matched the description set forth on the privilege log. In some cases, the Court wrote the page number on the corner of the page in blue ink. As the Court reviewed the documents, the Court affixed a yellow note to each item for ease in identifying the items.
- B. No additional information was provided to assist the Court in identifying relevant documents. The Defendant Hospital has not provided the Court with any identifying reference of the Plaintiff or the Defendant Physician other than the given name of each party. After a

EXHIBIT

1

- significant time, the Court, on its own, located a document that identified the Defendant Physician as ID#2031.
- C. In reviewing each item separately after the item was identified on one of the logs, the Court determined whether the documents should be provided to the Plaintiff. Specifically, a document should be provided to the Plaintiff if it has been identified as pertaining to the Plaintiff's Request to Produce and also identified as "an adverse medical incident" as defined by Florida Statutes.
- D. The Court has numbered each item on Privilege Log A. This Order will refer to the items in order such that the first item listed will be referred to as Item #1, etc. The Court has made the following findings as to Privilege Log A:
1. (Box 1) Page one of this four-page item should be provided to the Plaintiff after redacting the identifying information of physicians that are irrelevant to the Defendant Physician, a/k/a #2031. This document is also identified as "Focused Review Laparoscopic to Open Procedures June 1, 2009-February 28, 2010 (discharge data)."
 2. (Box 1) Page three of this seven-page item should be provided after redacting the identifying information of physicians that are irrelevant to the Defendant Physician, a/k/a #2031. This document is also identified as "BRMC Peer March 18, 2010 Review Meeting."
 3. No documents were reviewed as this item was not provided.
 4. (Box 1) Two pages identified as Item #4 should be provided to the Plaintiff after redacting identifying information of other physicians irrelevant to the Defendant Physician, a/k/a #2031.
 5. (Box 1) Six pages identified as Item #5, also identified as "Chart Review Materials of January 25, 2010 and January 26, 2010" should be provided after redacting identifying information of patients and physicians that are irrelevant to the parties herein.
 6. 7. (Box 1) No documents were identified as discoverable.
 8. No documents were reviewed as this item was not provided.
 9. (Box 1) No documents were identified as discoverable.
 10. (Box 1) Page three of the four-page item should be provided after redacting identifying information of physicians that are irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "BRMC Peer Review Meeting Notes March 18, 2010"
 11. (Box 1) No documents were identified as discoverable.
 12. (Box 1) The first two of the three pages identified as Item #12 should be provided after redacting a portion of the second page that refers to physicians other than the Defendant Physician, a/k/a #2031. This item is also identified as "BRMC Peer Review document Re: miscellaneous cases - Undated."
 13. (Box 1) No documents were identified as discoverable.
 14. (Box 1) The single page identified as Item #14 should be provided after redacting identifying information of physicians irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "Miscellaneous document Re: surgery cases June 2009-February 2010."
 15. No documents were reviewed as this item was not provided.
 16. 17. (Box 1) No items were identified as discoverable.
 18. (Box 1) Item #18 should be provided after redacting identifying information of physicians irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "Focused Review Laparoscopic - Open Procedure June 1, 2009-February 28, 2010."

- 19-20. (Box 1) No items were identified as discoverable.
21. (Box 1) Item #21 should be produced after redacting information that refers to physicians irrelevant to the Defendant Physician, a/k/a #2031. The item is also identified as "BRMC Peer Review Case List-(Undated)."
- 22.-23. (Box 1) No items were identified as discoverable.
24. (Box 1) This one-page item should be provided after redacting identifying information that refers to physicians irrelevant to the Defendant Physician, #2031. The item is also identified as "Peer Review Log October 20, 2010."
- 25.-26. (Box 1) No items were identified as discoverable.
27. No documents reviewed as this item was not provided.
- 28.-35. (Box 1) No items were identified as discoverable.
36. (Box 1) A four-page document was reviewed that appeared to match the description of the 6-page document referenced on Privilege Log A, that the Court identified as Item #36 (bottom of Page 1 on Privilege Log A). No items were identified as discoverable.
- 37.-40. (Box 1) No documents were identified as discoverable.
41. (Box 1) The last page of the four-page item should be provided after redacting the information related to physicians other than the Defendant Physician, a/k/a #2031. The item is also identified as "BRMC Peer Review Meeting Notes and Attachments."
42. (Box 1) This one-page item should be provided. The item is also identified as "Risk Management Report to Peer Review December 2010."
43. (Box 1) No documents were identified as discoverable.
44. (Box 1) This item was found to be one page not five as identified on Privilege Log A. Nonetheless, no documents were identified as discoverable.
45. (Box 1) This three-page item should be provided after redacting the information related to physicians other than the Defendant, Larry Thomas, M.D., a/k/a #2031. The item is also identified as "BRMC Peer Review Committee Meeting August 17, 2011 Notes."
46. (Box 1) No documents were identified as discoverable.
47. (Box 1) This six-page item should be provided after redacting identifying physician information that is irrelevant to the Defendant Physician, #2031. This item is also identified as "BRMC August 17, 2011 Peer Review Meeting Minutes."
- 48.-50. (Box 1) No documents were identified as discoverable.
51. (Box 1) This three page item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "Miscellaneous Chart Review June 4, 2011."
52. (Box 1) This two-page item should be provided after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "Miscellaneous Chart Review Sept. 24, 2011."
53. No documents were reviewed as this item was not provided.
54. (Box 1) No documents were identified as discoverable.
55. (Box 1) The one-page item should be produced after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "Miscellaneous Chart Review August 2, 2011."
- 56.-57. (Box 1) No documents were identified as discoverable.
58. (Box 1) The one-page item should be provided. The item is also identified as "April - July 2011 Peer Review Chart Audit."
- 59.-60. (Box 1) No documents were identified as discoverable.
61. (Box 1) Page one of the three-page item should be provided after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "October 19, 2011 Peer Review Committee Meeting Notes."

62. (Box 1) This item should be produced after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "October 19, 2011 Peer Review Meeting Minutes."
63. (Box 1) The item should be provided after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "August 17, 2011 Peer Review Committee Meeting."
- 64.-67. (Box 1) No documents were identified as discoverable.
68. (Box 1) This item should be provided after redacting the identifying patient and physician information irrelevant to the parties. The item is also identified as "December 21, 2011 Peer Review Meeting Minutes."
69. (Box 1) No documents were identified as discoverable.
70. (Box 3) A sixty-one-page document was located with a similar title as that referenced as item #70 on Privilege Log A. However, Privilege Log A identifies item #70 as a 163-page document. Page fifty-five of this sixty-one page document should be provided after redacting the identifying physician information other than the Defendant Physician, #2031. This item is also identified as "Medical Executive Committee meeting materials April 2010."
- 71.-77. (Box 1) No documents were identified as discoverable.
- 78.-81. (Box 3) No documents were identified as discoverable.
82. (Box 3) Page eleven of this thirty-six-page item should be provided after redacting identifying physician information not relevant to the Defendant Physician, a/k/a #2031.
- 83.-85. (Box 3) No documents were identified as discoverable.
86. No documents were reviewed as the item was not provided.
- 87.-88. (Box 1) No documents were identified as discoverable.
- 89.-98. No documents were reviewed as the item was not provided.
99. (Supplemental Packet) No documents were identified as discoverable.
100. No documents were reviewed as the item was not provided.
101. (Box 4) No documents were identified as discoverable.
102. (Supplemental Packet) No documents identified as discoverable.
103. No documents were reviewed as the item was not provided.
- 104.-112. (Box 2) No documents were identified as discoverable.
- 113.-120. (Box 2) No documents were identified as discoverable.
121. No documents were reviewed as the item was not provided.
122. (Box 2) Page fifteen and sixteen of the twenty-page item should be produced after redacting identifying patient and physician information irrelevant to the parties. The item is also identified as "Surgical Committee Meeting documents February 3, 2010."
123. (Box 2) No documents were identified as discoverable.
124. (Box 2) Privilege Log A identifies a four-page record of a meeting on 12/12/10. The four-page record references a meeting on 12/01/10. The Court presumes the date is a typographical error. There were no documents identified as discoverable.
- 125.-133. (Box 2) No documents were identified as discoverable.
134. (Box 2) This two-page item should be provided after redacting the identifying information of other physicians irrelevant to the Defendant Physician, a/k/a #2031. This item is also identified as "Peer Review Committee April 15, 2010."
135. (Box 2) This one-page item should be provided after redacting the identifying information of physicians irrelevant to the Defendant Physician, a/k/a #2031. This item is also identified as "Focused Review Laparoscopic to Open Procedures June 1, 2009-February 28, 2010 (discharge data)."
- 136.-147. (Box 2) No documents were identified as discoverable.

148. (Box 2) No documents were identified as discoverable. This 15-page item was identified from combining a three-page, four-page and eight-page document. Note that the Defendant Hospital delivered this item to the Court with a large yellow note that read "3 pages 8 pages." No other identifying information was provided.
149. (Box 2) No documents were identified as discoverable.
150. (Box 2) A seventy-five-page item was identified with a title, similar to that referenced on Privilege Log A. However, Privilege Log A references this item as eighteen pages. An eighteen-page document was not identified. Nevertheless, no documents in the seventy-five-page item that the Court has identified as item #150 were identified as discoverable. This item is also identified as "Performance Improvement Committee meeting notes (November 22, 2010)."
- 151-152. No documents were reviewed as the item was not provided.
153. (Box 2) On Privilege Log A, item 153 is identified as a 17-page report. This report is only ten pages not seventeen. Nevertheless, no documents were identified as discoverable.

E. The Court has made the following findings as to Privilege Log B:

1. (Box 3) The 429-page item should be provided after redacting identifying patient and physician information irrelevant to the parties in this matter. This item is also identified as "MR#267679."
2. (Box 3) The 471-page item should be provided after redacting identifying patient and physician information irrelevant to the parties in this matter. This item is also identified as "MR#358058."
3. (Box 2) The 1665-page item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "MR#258053." Note that a duplicate of this item was delivered in Box 4.
4. (Box 4) This item should be provided after redacting identifying patient and physician information that is irrelevant to the parties. This item is also identified as "6/11/10 BRMC Medical Records 872 pp MR#144066."
5. (Box 3) The 244-page item should be provided after redacting identifying patient and physician information that is irrelevant to the parties. This item is also identified as "MR#359080."
6. (Box 1) This 695-page item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "MR#132958."
7. (Box 3) The 149-page item should be provided after redacting identifying patient and physician information irrelevant to the parties herein. This item is also identified as "MR#120733."
8. (Box 4) This item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "BRMC medical records 36 pp. MR#174716."
9. (Box 1) No documents were identified as discoverable.
10. (Box 3) The 82-page item should be provided after redacting patient and physician information that is irrelevant to the parties. This item is also identified as "MR#365424."
11. (Box 2) The 116-page item should be provided after redacting patient and physician information that is irrelevant to the parties. This item is also identified as "MR#370204."

12. (Box 4) The 39-page item should be provided after redacting identifying patient and physician information that is irrelevant to the parties. This item is also identified as MR#365424.
13. (Box 1) The 323-page item should be provided after redacting identifying information of the patient and physicians that are not the parties herein. This item is also identified as "10/12/11 BRMC medical records 323 pp. MR# 227307."
14. (Supplemental Packet) This 181-page item should be provided after redacting identifying information of the patient and physicians irrelevant to the parties. This item is also identified as "9/5/12 BRMC medical records 181 pp. MR#346755."
15. (Box 4) This fifty-seven-page item refers to July 2010 on Privilege Log B; however, the documents bound together include September 2010. Only the first 23 pages of this item should be provided after redacting identifying patient and physician information irrelevant to the parties. This item is also identified as "07/2010 Correspondence, reports and miscellaneous items relating to attorney requested external peer review."
16. (Box 4) This item refers to November 2011 on Privilege Log B; however, the documents bound together include December 2011 and 2012 documents. This item should be provided after redacting identifying patient/physician information irrelevant to the parties. This item is also identified as "11/2011 Correspondence, reports, and miscellaneous items relating to attorney requested peer review."
17. No documents have been reviewed as Item #17, as described on Privilege Log B, has not been provided.
18. No documents have been reviewed as Item #18, as described on Privilege Log B, has not been provided. However, see the reference below in Paragraph F regarding the unidentifiable documents found in Box #4.
19. (Box 4) This item is referenced on Privilege Log B as 135 pages. However, there were 122 pages identified as Item #19. No documents were identified as discoverable.
20. (Box 4) This six-page item should be provided after redacting identifying patient/physician information that is irrelevant to the parties. This item is also identified as "Correspondence, reports and miscellaneous items relating to attorney requested external peer review re: MR# 5276712."
21. (Box 4) No documents were identified as discoverable or as pertaining to the Defendant Physician.

F. There were various documents found within the boxes and the supplemental packet that were not identifiable as an item produced pursuant to Privilege Log A or Privilege Log B. These documents are described based on pages that were bound together. These documents were not reviewed. The description of these documents is provided below:

- Box 1:
- a) one-page document titled "Restricted Antimicrobial Form."
 - b) seven pages regarding "June 15, 2011, BRMC Peer Review Committee."
 - c) sixty-three pages regarding "Medical Executive Committee April 21, 2009."
- Box 2:
- a) thirty-two pages regarding "Performance Improvement November 2009."
 - b) five pages regarding "Performance Improvement Quarter 2 2009."
 - c) ten pages regarding "BRMC Performance Improvement Committee 2/22/10."
 - d) thirty-four pages re "BRMC Performance Improvement Plan - 2010. (These pages are not the item referred to on Privilege Log A as Item #113 as that item has been identified separately as a nine-page item in Box 2)
- Box 3: less than 100 pages, one of which having the title "BRMC Medical Executive Committee January 26, 2010."

Box 4' over 100 pages of loose unbound documents, one page having a light yellow note affixed that reads "credential file." The Court suspects that somewhere in these pages, there is a twenty-eight-page credentialing file that is referenced as Item #18 on Privilege Log B. However, if the Court counts twenty-eight pages from the page note, (i.e., the noted page being page one, etc.), the Court finds the 28th page to be Page Two of a six-page medical record. This stack of over 100 pages cannot be identified as the twenty-eight-page item referenced as Item #18 on Privilege Log B as "Credentialing file, Larry D. Thomas, M.D. 28pp."

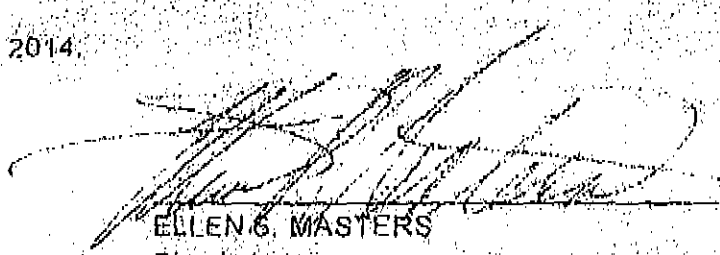
Supplemental Packet:

- a) seven pages regarding "MD Review, Peer Review Report."
- b) two handwritten pages, with a reference, "2 Issues."
- c) one handwritten page, with a reference, "New list."
- d) four handwritten pages, with a reference, "Jan.-early December."

Based on the above findings, it is ORDERED:

1. The Defendant Hospital shall produce, within ten days, those items identified in the findings above, after redacting identifying patient and physician information that is irrelevant to the parties in this action.
2. The Defendant Hospital shall also provide an explanation, within ten days, as to each of the items, specifically identified on Privilege Log A and Privilege Log B that were not delivered to the Court for the *in camera* inspection.
3. In the event of a need for a further *in camera* inspection, the Defendant Hospital shall schedule a hearing to discuss whether the Court should appoint a medical expert to assist in identifying relevant and discoverable medical records, after being directed by an order of the Court as to the requirements of confidentiality and the statutory definition of "adverse medical incident." At such hearing, the parties should be prepared to discuss (1) the authority of the Court to appoint such an expert; (2) the expense required for organizing documents to prepare for an *in camera* inspection, specifically considering that the presiding judge is not a medical expert and therefore has a limited ability to decipher the names of medical procedures, terminology and handwriting; and (3) the amount of time and resources anticipated for any further *in camera* inspection in this cause.

ORDERED this 25th day of June, 2014.


ELLEN G. MASTERS
Circuit Judge

Copies to:

Matthew Schwencke, Esquire, Counsel for Plaintiff
Paul Buckley, Esquire, Counsel for Defendant

COPY

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

AMBER EDWARDS,

Case No.: 2012-CA-002611

Plaintiff,

v.

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER
And LARRY D. THOMAS, M.D.,

Defendants.

**ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION/ MOTION FOR
CLARIFICATION**

THIS MATTER is before the Court on Defendant BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER, *Motion for Reconsideration/Motion for Clarification*, filed July 7, 2014. The Court, having reviewed the Motion, and otherwise being fully informed in the matter, finds as follows:

The Defendant's Motion for Reconsideration/Motion for Clarification, is hereby DENIED.,
DONE AND ORDERED in Bartow, Polk County, Florida, on this 15th day of July, 2014.


ELLEN S. MASTERS, Circuit Judge

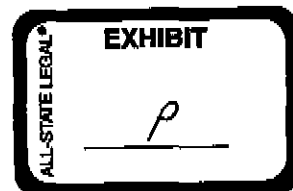
Copies to:

Paul C. Buckley, Fann & Petruccelli, P.A., 1726 East Seventh Avenue, Suite 18, Tampa, FL 33605

Karen E. Terry, Searcy Denney Scarola Barnhart & Shipley, PA, 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409

Holly B. Platter, Esquire, Bush Graziano Rice & Platter, PA, 101 E. Kennedy Blvd Suite 1700, Tampa, FL 33601

COPY



IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BARTOW HMA, LLC d/b/a
BARTOW MEDICAL CENTER,

Petitioners,

CASE NO.:

v.

AMBER EDWARDS and
LARRY THOMAS, MD,

Respondent

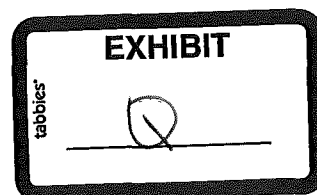
PETITION FOR WRIT OF COMMON LAW CERTIORARI

SEEKING REVIEW OF AN ORDER OF THE TENTH JUDICIAL CIRCUIT
COURT IN AND FOR POLK COUNTY, FLORIDA

LOWER COURT CASE NUMBER 2012-CA-002611

Michael A. Petruccelli, Esq.
Paul C. Buckley, Esq.
Fann & Petruccelli, P.A.
5100 North Federal Highway, Suite 300B
Fort Lauderdale, Florida 33308
954-771-4118 telephone
954-771-4119 facsimile
MPetruccelli@FPLawyers.com
pbuckley@fplawyers.com
Trial Attorneys for Petitioner

Amy L. Miles, B.C.S.
Andrew R. McCumber, Esq.
*McCumber, Daniels, Buntz,
Hartig & Puig, P. A.*
204 South Hoover Boulevard
Suite 130
Tampa, Florida 33609
813-287-2822 telephone
813-287-2833 facsimile
amiles@mccumberdaniels.com
amccumber@mccumberdaniels.com
Appellate Attorneys for Petitioner



PETITION FOR WRIT OF COMMON LAW CERTIORARI

Petitioner/Defendant, Bartow HMA, LLC d/b/a Bartow Regional Medical Center,¹ through its undersigned counsel, files this Petition for a Writ of Certiorari seeking review of an order rendered June 25, 2014. (App:A). The Order Following *In Camera* Inspection – June, 2014 requires the Hospital to produce records the trial court deemed discoverable pursuant to Florida Constitution article X, section 25 (known as “Amendment 7”). *Id.*

Amendment 7 gives patients the right to access records made in the course of a hospital’s business that relate to any adverse medical incident. Art. X, § 25(a), Fla. Const. The documents at issue are external peer review reports commissioned by the Hospital’s outside counsel. Because these external peer review documents were not made in the course of the Hospital’s business and are protected by opinion work-product and the attorney-client privilege, the trial court erred in ordering the Hospital to produce them.

¹ In this Petition, Petitioner, Bartow HMA, LLC d/b/a Bartow Regional Medical Center, will be referred to as “the Hospital.” Respondent, Amber Edwards, will be referred to as “Plaintiff.” Citations to the Appendix to the Petition will be by the letters “App,” followed by the tab letter and the page, paragraph or transcript page numbers(s), i.e., (App.G:6). Citations to the Supplemental Appendix to the Petition, filed as confidential records, will be by the letters “Supp. App.”

NATURE OF RELIEF SOUGHT

Defendants seek a writ of certiorari quashing, in part, the trial court's June 25, 2014 order as it pertains to Privilege Log B item numbers 15, 16, and 20. *See* (App.A:6).

JURISDICTION

Defendants seek to invoke this Court's jurisdiction pursuant to article V, section 4(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(b)(2)(A). As explained below, this Court has jurisdiction to review the trial court's order by certiorari because the order departs from the essential requirements of the law and creates material harm that cannot be remedied on appeal. *See Bartow HMA, LLC v. Kirkland*, 126 So. 3d 1247, 1251-52 (Fla. 2d DCA 2013).

STATEMENT OF THE CASE AND FACTS

On more than one occasion prior to Plaintiff initiating this lawsuit, the Hospital's outside counsel requested an external peer review of the actions of its staff physicians to assist counsel in investigating ongoing and potential claims against the Hospital. *See* (Supp. App. A:24-26) (reflecting one request). Counsel requested "this external peer review investigation to be done on an attorney client, work product and peer review privileged basis." *Id.* at 24.

Plaintiff initiated this medical negligence action against the Hospital and Dr. Larry Thomas pursuant to chapters 766 and 768, Florida Statutes, on or about April 13, 2012. (App.B:¶1). In her Complaint, Plaintiff alleged that she was injured when Dr. Thomas severed her common bile duct while performing a laparoscopic cholecystectomy. *Id.* at ¶¶ 9. Plaintiff alleged that the Hospital was liable for the injuries caused by Dr. Thomas and its nurses pursuant to theories of agency, apparent agency, and vicarious liability, and that the Hospital was directly liable to Plaintiff pursuant to theories of negligent hiring and non-delegable duty, among others. *See generally id.* at pp. 4-18.

On July 30, 2013, Plaintiff served a request to produce, among other things, several categories of documents she deemed discoverable pursuant to Amendment 7. (App.C). On August 29, the Hospital served its response and objections to the request to produce. (App.D). Plaintiff responded with a motion to compel better responses and a motion for sanctions. (App.E). On December 31, 2013, the trial court entered an order granting in part and denying in part Plaintiff's motion to compel. (App.F). In that order, the court sustained the Hospital's objections to the production requests "[t]o the extent that there are not adverse incidents contained in credentialing, peer review, quality assurance, risk management, or any other related committee." *Id.* at ¶ 1.

Pursuant to the December 31 order, on January 30, 2014, the Hospital served its better response. (App.G). In its response, the Hospital maintained its general objections to the production, but produced adverse incident reports accompanied by privilege logs. *Id.* at p. 9-12; (App.H:Exhibit D) (notice of filing privilege logs); (App.L:T.44) (informing the court that the adverse reports and incident reports had been produced). In Privilege Log B, the Hospital informed the court that the documents listed were protected by work-product and attorney-client privileges. (App.H:Exhibit D).

Plaintiff moved for an in camera inspection of the documents on the Hospital's privilege logs. (App:H). On June 4, 2014, after hearing Plaintiff's motion for rule to show cause or in the alternative for in camera inspection, the court ordered an in camera inspection. (App.L:T.41, 50, 52-54); (App.M). After conducting the inspection, the trial court entered the order that is the subject of the Petition for Writ of Certiorari Review. (App.A).

While complying with most of the trial court's order to produce, on July 7, the Hospital sought reconsideration or clarification of the trial court's order as it pertained only to the documents listed in Privilege Log B at 15, 16, 20, and 21. (App.N:¶ 3). (The documents listed in Privilege Log B item 21 were included in the Hospital's motion for reconsideration, but because the trial court had determined they were not discoverable. They are not at issue in this Petition). *See*

(App.A:6). The Hospital informed the court that it intended to seek review in this Court, moving for a stay while doing so. *Id.*; (App.O). The court denied the Hospital's motion for reconsideration on July 15. (App.P). The documents produced for the in camera inspection are contained in the Supplemental Appendix to this Petition, which was filed with a motion for this Court to determine the confidentiality of the documents pursuant to Florida Rule of Judicial Administration 2.420(g).

ARGUMENT

It is well established that appellate courts have certiorari jurisdiction to review trial court orders requiring the production of privileged documents as a departure from the essential requirements of the law. *See Bartow HMA, LLC v. Kirkland*, 126 So. 3d 1247, 1251-52 (Fla. 2d DCA 2013); § 90.502, Fla. Stat. (2013) (protecting the attorney-client privilege). The confidential nature of the privileged information, once disclosed, is destroyed and can not be recovered by a direct appeal. *See Columbia Hosp. Corp. of S. Broward v. Fain*, 16 So. 3d 236, 239 (Fla. 4th DCA 2009). An order compelling production of privileged documents, therefore, departs from the essential requirements of the law and creates a material harm that cannot be remedied on appeal. *Kirkland*, 126 So. 3d at 1251-52; *Lakeland Reg'l Med. Ctr. v. Neely*, 8 So. 3d 1268, 1269 (Fla. 2d DCA 2009).

Article X, section 25(a) of the Florida Constitution, known as “Amendment 7,” provides that “patients have a right to have access to any records made or received in the courses of business by a health care facility or provider relating to any adverse medical incident.” One threshold showing needed to determine whether documents are discoverable under Amendment 7 is whether the documents are related to an adverse medical incident. *See Kirkland*, 126 So. 3d at 1252 (citing *Baldwin v. Shands Teaching Hosp. & Clinics, Inc.*, 45 So. 3d 118, 124 (Fla. 1st DCA 2010)). In addition to the constitutional definition of an “adverse medical incident,” courts have held that it is “a specific incident involving a specific patient.” *W. Fla. Reg’l Med. Ctr., Inc. v. See*, 18 So. 3d 676, 690 (Fla. 1st DCA 2009), *aff’d*, 79 So. 3d 1 (Fla. 2012); *see also* Art. X, § 25(c)(3), Fla. Const. (defining “adverse medical incident”). Neither the constitution nor the courts, however, have commented on the meaning of “made or received in the course of business” for purposes of accessing Amendment 7 records. *See* Art. X, § 25(a), Fla. Const.

I. If the Amendment 7 threshold requirements are met, documents are still protected from discovery as opinion work-product and by the attorney-client privilege.

As long as records meet the Amendment 7 threshold requirements, Florida courts have found very few limits on the information patients can obtain. For instance, the pre-existing statutory protections of peer review, risk management,

credentialing, medical review or quality assurance committee proceedings and reports have been “trumped” by the constitutional provision. *Kirkland*, 126 So. 3d at 1253 (citing §§ 395.0191, 395.0193, 395.0197, and 766.101, Fla. Stat.). Similarly, work-product privilege does not protect documents discoverable under Amendment 7 where the documents contain only fact work-product. *See id.*; *Acevedo v. Doctors Hospital, Inc.*, 68 So. 3d 949, 952-53 (Fla. 3d DCA 2011); *Fla. Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044, 1048 (Fla. 5th DCA 2009). The courts have suggested, however, that documents that do not meet the Amendment 7 threshold requirements are still protected from discovery by statutory protections or common privileges. *See Kirkland*, 126 So. 3d at 1253 (stating that Amendment 7 trumps these statutory protections “to the extent that documents . . . contain reports of adverse medical incidents” (emphasis added)).

Opinion work-product, which contains an attorney’s “mental impressions, conclusion, opinions and theories,” is generally immune from discovery. *Acevedo*, 68 So. 3d at 953; *Gmach*, 14 So. 3d at 1049. “[T]here is nothing in Amendment 7 to suggest the voters intended to create a chilling effect within legal profession by mandating disclosure of opinion work-product.” *Acevedo*, 68 So. 3d at 953; *Kirkland*, 126 So. 3d at 1253 (noting that Amendment 7 “does not preempt application of the work product doctrine with respect to *opinion* work product.”).

Further, the courts have “suggested that Amendment 7 does not affect the attorney-client privilege.” *Id.*

Under these Amendment 7 analyses, incident reports prepared by a health care provider’s risk manager are discoverable under Amendment 7 despite the fact that they would have traditionally been protected by the work-product privilege. *Gmach*, 14 So. 3d at 1048-49 (noting that incident reports were prepared to memorialize information for defense counsel if a lawsuit were filed). In *Gmach*, the appellate court found that the incident reports were fact work-product (if work-product at all) and noted that they had never been reviewed by counsel. *Id.* at 1049. If the reports had contained “the mental impressions, conclusions, opinions, or theories of an attorney’s case,” however, the court speculated that “[a]nother result might have been mandated.” *Id.* at 1050.

This Court came to the same conclusion in *Lakeland Regional Medical Center v. Neely*, 8 So. 2d 1268, 1269 (Fla. 2d DCA 2008). There, while determining that incident reports prepared by a hospital “in anticipation of litigation” were discoverable under Amendment 7, this Court noted that it was not addressing “documents prepared or produced at the specific request of the client’s attorney for use in litigation.” *Id.* at 1270 n.2.

Similar to the opinion work-product privilege, courts have suggested that Amendment 7 would not supersede the attorney-client privilege. When asked to

review the validity of the amendment before it was added to the ballots, the supreme court opined—in the context of whether the amendment affects multiple branches of government—that “the amendment does not expressly affect either rule 1.280(c) or the attorney-client privilege, and there is no evidence of any intent to do so. Any effect on the rule or the privilege is purely speculative.” *In re Advisory Opinion to the Atty. Gen. re Patients’ Right to Know About Adverse Medical Incidents*, 880 So. 2d 617, 621 (Fla. 2004). This Court has cited to that language as an indication that the attorney-client privilege would survive an Amendment 7 records request, but has not squarely decided the issue. *See Morton Plant Hosp. Ass’n, Inc. v. Shahbas*, 960 So. 2d 820, 825 (Fla. 2d DCA 2007) (“[W]e do not need to decide this issue”); *see also Kirkland*, 126 So. 3d at 1253 (noting that in *Shahbas*, the Court “suggested that Amendment 7 does not affect the attorney-client privilege”); *Neely*, 8 So. 3d at 1270 n.2 (noting “this opinion does not address the impact of Amendment 7 and *Buster* on such attorney-client communications”).

II. The documents listed on Privilege Log B, numbers 15, 16, and 20, were not made or received in the course of the Hospital’s business and are protected as opinion work-product and by the attorney-client privilege.

The documents at issue, items 15, 16, and 20, on the Hospital’s Privilege Log B, are reports that were created by an external peer review company at the direction of the Hospital’s outside attorneys. *See* (App.H:Exhibit D at Privilege

Log B); (App.N:¶ 3); *see also* (Supp. App.A:24-26). (Letters similar to the one in Supplemental Appendix A were sent to initiate other investigations that resulted in the documents contained in Supplemental Appendix at B & C; those letters, however, were not included in the trial court's in camera inspection). Although some of these documents may meet Amendment 7's threshold test as relating to "adverse medical incidents," they were not "made or received" by the Hospital "in the course of business," i.e., in either providing patient care and treatment or in following state and federal documentation and reporting requirements. Rather, these documents were made or received in the course of the attorney's representation of the Hospital. Accordingly, they are not discoverable pursuant to Amendment 7. *See* Art. X, § 25(a), Fla. Const. (permitting patients access only to "any records made or received in the course of business").

These documents are also protected by the attorney-client privilege. Having been commissioned by the Hospital's outside counsel, they are classic examples of having been "prepared for and transmitted to the attorney either in contemplation of or during the litigation and kept confidential throughout." *Merlin v. Boca Raton Cmty. Hosp., Inc.*, 479 So. 2d 236, 239 (Fla. 4th DCA 1985) (describing documents that were protected by the attorney-client privilege). They are the exact type of documents this Court mentioned in *Neely*, that should be protected by the

attorney-client privilege because they were “prepared or produced at the specific request of the client’s attorney.” 8 So. 3d at 1269 n.2.

Requiring the production of attorney-client privileged documents would place an unprecedented chill on attorney-client relations and severely restrict the free flow of information between an attorney and his or her client. *See Acevedo*, 68 So. 3d at 953 (noting that nothing in Amendment 7 suggests that “the voters intended to create a chilling effect” on opinion work-product). Accordingly, the trial court erred in ordering the hospital to produce these documents, which were protected by the attorney-client privilege. *See Shahbas*, 960 So. 2d at 825 (recognizing that Amendment 7 may not affect the attorney-client privilege).

The Hospital has already or is in the process of producing to Plaintiff the medical records and the adverse medical incident reports that contain all the information Plaintiff is entitled to under Amendment 7. *See* (App.L:T.44) (representing that the “incident reports, the adverse reports,” were produced); (App.N:¶3). Unlike the adverse incident reports that the Hospital produced, these privileged documents contain more than merely fact work-product. While they may contain a recitation of certain facts, these documents also contain the opinions of external individuals who were asked by the Hospital’s outside attorneys to review certain records and provide their opinion to assist in the attorneys’ investigations. *See* (App.N:¶¶5, 7); *see also* (Supp. App.).

These opinions, of persons external to the hospital and hired by counsel, have historically been protected as opinion work-product. *See* Fla. R. Civ. P. 1.280(b)(3) (protecting the mental impressions, conclusions and opinions of an attorney “or other representative of a party.”); *Alachua Gen. Hosp. v. Zimmer USA, Inc.*, 403 So. 2d 1087, 1088 (Fla. 1st DCA 1981) (including communications, reports, memoranda, etc., of “employed investigators,” in the definition of work product). Because she has all of the records reflecting the factual basis for the adverse medical incidents, Plaintiff is free to obtain independent opinions regarding the significance of those facts without the need to breach the Hospital’s opinion work-product. Therefore, the trial court erred in ordering the Hospital to produce this opinion work-product. *See Neely*, 8 So. 2d at 1270 n.2 (differentiating between fact and opinion work-product); *Gmach*, 14 So. 3d at 1048-49 (speculating that opinion work product is protected in the Amendment 7 context).

The trial court erred in ordering the Hospital to produce the records at items 15, 16, and 20, of Privilege Log B. Those items, prepared by an external source at the request of the Hospital’s outside counsel, do not meet the threshold requirements of Amendment 7 because they were not made or received in the course of the Hospital’s business. The documents are further protected by the attorney-client privilege and as opinion work-product. Accordingly, the trial

court's Order Following *In Camera* Inspection – June 2014, should be quashed, in part, as it pertains to Privilege Log B item numbers 15, 16, and 20.

CONCLUSION

For the reasons stated, Petitioner, Bartow HMA, LLC d/b/a Bartow Regional Medical Center, respectfully requests that this Honorable Court grant its Petition for a Writ of Common Law Certiorari, quashing, in part, the trial court's order as it pertains to Privilege Log B item numbers 15, 16, and 20.

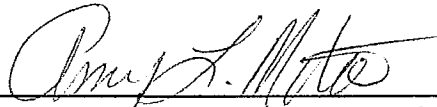
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to: ket@searcylaw.com (Karen E. Terry, Esq., Searcy Denney Scarola Barnhart & Shipley, P.A, 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 34409, Attorney for Respondent Amber Edwards), mka@searcylaw.com; aje@searcylaw.com; lmn@searcylaw.com and hplatter@bgrplaw.com (Holly B. Platter, Esq., Graziano & Rice, P.A., 101 East Kennedy Boulevard, Suite 1700, Tampa, FL 33602 (Attorney for Respondent Larry D. Thomas, MD); eservebgrplaw.com; tdomi@bgrplaw.com this 24th day of July, 2014.

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for a writ of certiorari complies with the font requirements of Florida Rule of Appellate Procedure 9.210 and is in Times New Roman, 14 point font.

***McCUMBER, DANIELS, BUNTZ
HARTIG & PUIG, P.A.***

A handwritten signature in cursive script, appearing to read "Andrew R. McCumber", is written over a horizontal line.

ANDREW R. MCCUMBER, ESQUIRE

Florida Bar Number: 907138

AMY L. MILES, B.C.S.

Florida Bar No. 0018035

204 South Hoover Boulevard, Suite 130

Tampa, Florida 33609

(813) 287-2822 telephone

(813) 287-2833 facsimile

Attorneys for Petitioner

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

BARTOW HMA, LLC d/b/a
BARTOW MEDICAL CENTER,

Petitioner,

vs.

AMBER EDWARDS and
LARRY THOMAS, M.D.,

Respondents.

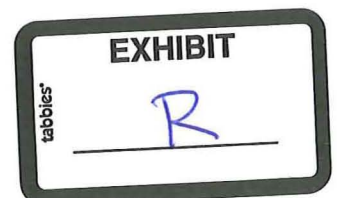
Appellate Case No.: 2D14-3450
LT Case No: 2012-CA-002611
LT Judge: Honorable Ellen S. Masters

**AMBER EDWARDS' RESPONSE TO
PETITION FOR WRIT OF COMMON LAW CERTIORARI**

On Review of an Order of the Circuit Court of the
Tenth Judicial Circuit in and for Polk County, Florida

Kara Berard Rockenbach, Esq.
Kristi Bergemann Rothell, Esq.
METHE & ROCKENBACH, P.A.
Appellate Counsel for Edwards
1555 Palm Beach Lakes Blvd.
Suite 1200
West Palm Beach, Florida 33401
Telephone: (561) 727-3600
Facsimile: (561) 727-3601
kbrock@flacivillaw.com
krothell@flacivillaw.com

Karen E. Terry, Esq.
Matthew K. Schwenke, Esq.
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
Trial Counsel for Edwards
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
ket@searcylaw.com
mks@searcylaw.com



Introduction

Bartow's Petition for Writ of Common Law Certiorari seeking to quash the trial court's order requiring the production of Items #15, #16, and #20 on Privilege Log B pursuant to Amendment 7 must be denied. [App. A].¹ Amendment 7 was intended to eliminate limitations on discovery of adverse medical incident reporting. Bartow has not demonstrated the necessary departure from the essential requirements of the law. *See Tumelaire v. Naples Estates Homeowners Ass'n, Inc.*, 137 So. 3d 596, 598 (Fla. 2d DCA 2014) ("On a petition for writ of certiorari, this court must determine whether the trial court departed from the essential requirements of the law."). The documents are discoverable as memorializing "adverse medical incidents," were made in the "course of business" of Bartow, are discoverable as fact work product, do not constitute opinion work product (but should be discoverable even if they do), and should be discoverable even as attorney-client privileged materials under the circumstances of this case.

Statement of the Case and Facts

Edwards sued Bartow and Thomas for medical negligence, including

¹ In this Response, Petitioner, Bartow HMA, LLC d/b/a Bartow Medical Center, will be referred to as "Bartow." Respondent, Amber Edwards, will be referred to as "Edwards." The Petition for Writ of Common Law Certiorari will be cited as [Petition, p. ____]. The Appendix to the Petition will be cited as [App. __, p. ____].

negligent hiring and retention, under Chapters 766 and 768 of the Florida Statutes. [App. B, pp. 1, 9]. Edwards was diagnosed with gallstones, and a laparoscopic cholecystectomy was scheduled at Bartow. [App. B, p. 3]. Bartow assigned Thomas to perform the surgery. [App. B, p. 3]. Thomas “failed to identify the Plaintiff’s common bile duct, cut her common bile duct during the surgery, and afterwards failed to timely recognize that he did so.” [App. B, p. 3]. Edwards suffered in tremendous pain for days until she finally had to return to Bartow’s emergency room where Thomas’ error was discovered. [App. B, p. 3]. Edwards was forced to undergo emergency corrective surgery at Tampa General Hospital. [App. B, p. 3-4].

Edwards served a Request to Produce on Bartow in support of her medical negligence action. [App. C]. Edwards sought various documents regarding Thomas and adverse medical incidents pursuant to Amendment 7. [App. C, pp. 1-4, 7]. Bartow objected to the requested discovery on multiple grounds. [App. D]. Bartow maintained that certain requested records did not relate to “adverse medical incidents,” were not “made or received in the course of business,” were protected by attorney-client privilege, and were protected as opinion work product. [App. D, pp. 2-5].

Edwards filed a Motion to Compel better responses from Bartow. [App. E].

Edwards maintained that “any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident is subject to discovery, regardless of whether or not such documents are peer review documents, risk management documents, quality assurance documents, etc.” [App. E, p. 4]. Bartow was directed to file a better response by the trial court and “complied” by asserting the same objections and attaching privilege logs. [App. F; App. G; App. H, Ex. A].

Edwards then filed a motion seeking a rule to show cause or an in camera inspection. [App. H]. The trial court ordered an in camera inspection. [App. M].

Following the in camera inspection, the trial court entered an order. [App. A]. The trial court explained that it reviewed the documents to determine whether they pertained to Edwards’ Request to Produce and also identified an “adverse medical incident as defined by statute.” [App. A, p. 2]. Regarding Item #15 on Privilege Log B, the trial court determined that the first twenty-three pages should be produced, after redacting irrelevant identifying patient and physician information, as “[c]orrespondence, reports, and miscellaneous items relating to attorney requested external peer review.” [App. A, p. 6]. For Item #16 on Privilege Log B, the trial court ruled that the documents should be produced, again after redaction, as “[c]orrespondence, reports, and miscellaneous items relating to

attorney requested peer review.” [App. A, p. 6]. Finally, as to Item #20 on Privilege Log B, the trial court found that the six-page item should be produced, after redaction, as “[c]orrespondence, reports, and miscellaneous items relating to attorney requested external peer review re: MR #5276712.” [App. A, p. 6].

Bartow sought reconsideration of the trial court’s in camera inspection rulings regarding Items #15, #16, and #20. [App. N]. The trial court denied the motion. [App. P]. Bartow’s Petition for Writ of Common Law Certiorari followed.

Argument

Bartow is not entitled to a writ of common law certiorari. The Amendment 7 threshold requirements, of adverse medical incident and course of business, are met. To the extent the documents contain fact work product they are discoverable pursuant to existing Florida law. To the extent the documents contain opinion work product, although they do not, they should be discoverable. To the extent the documents contain attorney-client privileged information they should be discoverable under the circumstances of this case.

The Intent of Amendment 7 is to Eliminate Limitations on Discovery

Amendment 7, as codified in Article X, Section 25 of the Florida Constitution, provides that “patients have a right to have access to any records made or received in the course of business by a health care facility or provider

relating to any adverse medical incident.” Fla. Const. Art. X, § 25 (a). “Adverse medical incident” is defined as:

medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

Fla. Const. Art. X, § 25 (c)(3) (e.s.). However, “course of business” is not defined by the amendment.

It is clear, based on Florida law, that Amendment 7 is intended to eliminate limitations on discovery related to “adverse medical incidents.” Amendment 7 is intended to provide an “avenue for patients to get access to records of a health care provider’s adverse medical incidents.” *Baldwin v. Shands Teaching Hosp. & Clinics, Inc.*, 45 So. 3d 118, 121 (Fla. 1st DCA 2010)(citing *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 486 (Fla. 2008)). As such, “[t]he Florida Supreme Court has recognized that this popularly adopted amendment affects, or even abrogates, statutes that previously exempted records of investigations, proceedings, and records of peer review panels from discovery in civil or administrative

actions.” *Id.* at 123 (citing *Buster*, 984 So. 2d at 488-489). In fact, “the purpose of amendment 7 plainly contemplates that its application would provide access to existing records by overriding and supplanting existing statutory provisions that limited access.” *Buster*, 984 So. 2d at 488. The stated purpose of the amendment was “to create a constitutional right for a patient or potential patient to know and have access to records of health care facility’s or provider’s adverse medical incidents.” *Id.* (citing *Advisory Op. to the Att’y Gen. re: Patients’ Right to Know About Adverse Med. Incidents*, 889 So. 2d 617, 618 (Fla. 2004)). “The language of the amendment could hardly have been more specific or articulate in expressing the intent that what was not accessible before would be accessible with the passage of the amendment.” *Id.* at 489. In sum, “[a]s construed in *Waterman*, Amendment 7 removed any barrier to a patient’s discovery of adverse medical incident information.” *Amisub N. Ridge Hosp., Inc. v. Sonaglia*, 995 So. 2d 999, 1001 (Fla. 4th DCA 2008).

The Materials Contain Adverse Medical Incident Reporting

Because of the intended purpose of Amendment 7 to eliminate limitations on discovery:

[a] request for Amendment 7 materials differs significantly from an ordinary discovery request, the latter being subject to objections based on overbreadth,

burdensomeness, or lack of relevance. Unlike the litigant engaging generally in discovery, the party seeking access to records pursuant to the amendment gains a foothold by satisfying the threshold showing of an adverse medical incident.

Baldwin, 45 So. 3d at 124 (internal citations omitted); *see also Bartow HMA, LLC v. Kirkland*, 126 So. 3d 1247, 1252 (Fla. 2d DCA 2013)(citing this passage from *Baldwin*). It is not clear from Bartow's Petition whether it challenges "the threshold showing of an adverse medical incident." Bartow recognized that this is a required threshold showing and commented on the definition of "adverse medical incident." [Petition, p. 7]. Bartow also recognized that "[a]s long as records meet the Amendment 7 threshold requirements, Florida courts have found very few limits on the information patients can obtain." [Petition, p. 7]. Later, Bartow conceded that some of the contested documents may meet the "adverse medical incident" threshold test, without further explanation. [Petition, p. 11]. What is clear is that Bartow never categorically asserted that "the external peer review reports commissioned by the Hospital's outside counsel" are not records of adverse medical incidents. [Petition, p. 2]. Therefore, the adverse medical incidents threshold cannot be a basis on which this Court grants certiorari.

Nonetheless, Edwards maintains that the contested documents do relate to "adverse medical incidents." Bartow characterizes the records as "external peer

review reports commissioned by the Hospital's outside counsel" and claims that "the Hospital's outside counsel requested an external peer review of the actions of its staff physicians to assist counsel in investigating ongoing and potential claims against the Hospital." [Petition, pp. 2, 3]. Significantly, "adverse medical incidents" are not limited to those required to be reported to a governmental agency and encompass those that are reported to or reviewed by a hospital's peer review, risk management, quality assurance, or credentials committee or similar committee. See Fla. Const. Art. X, § 25 (c)(3). The outside peer review process can easily be considered a similar committee. Additionally, "Amendment 7 does not require production of documents relating to general policies and procedures of [health care facility peer review, risk management, quality assurance, credentials, or similar] committees or other documents that do not contain information about particular adverse medical incidents.'" *Kirkland*, 126 So. 3d at 1253 (quoting *Morton Plant Hosp. Ass'n, Inc. v. Shahbas ex rel. Shahbas*, 960 So. 2d 820, 823 (Fla. 2d DCA 2007)). The documents at issue do not fall within these only recognized exceptions to Amendment 7 adverse incident discovery, particularly where such discovery is intended to be broad and unlimited by statutory discovery protections and federal preemption. *Id.* Bartow does not claim that the contested documents relate to general policies and procedures and the documents contain

information about particular adverse medical incidents. Therefore, the Amendment 7 discovery threshold of adverse medical incidents has been met.

The Materials Were Made or Received in the Course of Bartow's Business

It is clear that although “course of business” was not defined by Amendment 7, nor has it been interpreted in any Florida case, Bartow maintains that the external peer review documents were not generated in its course of business, meaning they do not relate to providing patient care and treatment or meeting governmental documentation and reporting requirements. [Petition, pp. 7, 10-14]. Rather, Bartow claims they were made and received in the course of its attorney’s representation of the hospital, so as to constitute work-product or attorney-client privileged documents instead. [Petition, pp. 11-12].

As an initial matter, because there is no authority considering the meaning of “course of business” or limiting its definition to treatment and reporting as Bartow does arbitrarily, Bartow cannot successfully contend that there has been any departure from the essential requirements of the law. *See Wolf Creek Land Dev., Inc. v. Masterpiece Homes, Inc.*, 942 So. 2d 995, 997 (Fla. 5th DCA 2006)(“The statutory issue raised by Wolf Creek in the present case is certainly debatable, but there appears to be no case law on the matter that has been pointed out by either side or that has been disclosed by our own independent research. As the order is

not the subject of a clearly established principle of law, certiorari is not available to review it.”); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 528 (Fla. 1995)(“The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.”)(citation omitted); *Snell v. Mott’s Contracting Servs., Inc.*, 141 So. 3d 605, 608 (Fla. 2d DCA 2014)(“A ‘clearly established law’ can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law.’ Though ‘a misapplication or an erroneous interpretation of the correct law does not rise to the level of a violation of a clearly established principle of law,’ applying the incorrect law certainly does.”).

Nonetheless, the external peer review reports can properly be considered as arising within Bartow’s course of business. Prior to Amendment 7, statutes restricted discovery of peer review records, in part to foster peer review requirements. See *Lakeland Reg’l Med. Ctr. v. Neely*, 8 So. 3d 1268, 1269 (Fla. 2d DCA 2009). Furthermore, Amendment 7 expressly contemplates the discovery of peer review materials, therefore necessarily anticipating that they meet the “course of business” threshold. Additionally, cases analyzing the effect of Amendment 7 on the work-product doctrine have recognized that incident reports prepared by a hospital, even for potential litigation, are the type of reports contemplated as

discoverable by Amendment 7. *See Fla. Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044, 1048-1049 (Fla. 5th DCA 2009).

Like peer review was considered part of the business of a hospital before Amendment 7, it should equally be considered part of the business of a hospital after Amendment 7, regardless of whether it is conducted internally or externally. To treat internal peer review as part of Bartow's business and external peer review as something else would undermine the very purpose of Amendment 7, through which "the people have clearly expressed their preference for freedom of information regarding adverse medical incidents over the privileges that protected the self-policing processes enacted by the Legislature and protected by the courts." *Shahbas*, 960 So. 2d at 824 (quoting *Buster*, 932 So. 2d at 348). To allow hospitals to again cloak records of adverse medical incidents with protection simply by outsourcing peer review functions, historically the business of the hospital, to external third parties and call them outside the "course of business" would turn Amendment 7 on its head and should not be countenanced.

Amendment 7 Trumps Work-Product Protection

Consistent with the recognized spirit and intent of Amendment 7, it should trump work-product protection for adverse medical incident reporting. This should be the case regardless of whether the materials are characterized as fact or opinion

work product, although this Court does not need to decide this issue under the circumstances of this case.

The Documents Are Discoverable to the Extent They Contain Fact Work Product

It appears that Bartow concedes that to the extent the contested documents contain fact work product they should be discoverable by Edwards. [Petition, p. 8]. Additionally, Bartow concedes that the documents contain at least fact work product. [Petition, p. 12]. Bartow correctly acknowledged that multiple Florida cases recognize that Amendment 7 trumps protection for fact work product. [Petition, pp. 8, 9]. *See Kirkland*, 126 So. 3d at 1253 (“Amendment 7 also preempts application of the work product doctrine to the extent it relates to fact work product.”); *Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d 949, 953 (Fla. 3d DCA 2011)(“The plain language of Amendment 7 evinces intent to abrogate any fact work privilege that may have attached to adverse medical incident reports prior to its passage.”); *Gmach*, 14 So. 3d at 1048 (same). Therefore, to the extent the contested materials are fact work product, they are unquestionably and concededly discoverable and should be produced at least in part.

**The Documents Should be Discoverable to the Extent They
Contain Opinion Work Product, Although They Do Not**

To the extent the contested documents contain opinion work product, they should still be discoverable by Edwards. In considering a discovery order in another case involving the alleged medical negligence of Bartow and Thomas, this Court did write that Amendment 7 “does not preempt application of the work product doctrine with respect to opinion work product.” *Kirkland*, 126 So. 3d at 1253. Nonetheless, this Court did not draw any distinction between fact and opinion work product in *Neely*, 8 So. 3d 1268. In that case, the hospital argued that Amendment 7 did not extend to records protected by the common law work product doctrine, and this Court concluded that argument was foreclosed by the Florida Supreme Court’s opinion in *Buster*. *Id.* at 1269-1270. This Court noted that “[a]s broadly construed in *Buster*, Amendment 7 ‘remove[s] any barrier to a patient’s discovery of adverse medical incident information, including the peer review protections provided by the statute.’” *Id.* at 1270. This Court then held:

like the statutory privileges at issue in *Buster*, work product materials are not exempted under the language of Amendment 7. The court summarized Amendment 7 as intended to “do away with existing restrictions on a patient’s right to access a medical provider’s history of adverse medical incidents and to provide a clear path to access those records.” We find no basis to except work

product materials from the reach of Amendment 7 as interpreted in *Buster*.

Id. (internal citation omitted). As such, there is case law from this Court suggesting that there are no exceptions to Amendment 7, including for work product as a whole, whether fact or opinion. Any distinction between fact and opinion work product would be contrary to the purpose and intent of Amendment 7 and should be rejected.

Nonetheless, this Court need not wrestle with the issue of whether Amendment 7 trumps opinion work product protection in this case. The very cases cited by Bartow in support of its work product argument undercut its assertion that the contested documents are opinion work product. [Petition, pp. 8-9].

First, in *Acevedo*, the Third District found that certiorari was appropriate “because the redaction of comments and opinions from the adverse medical incident reports presents an unwarranted interference with petitioners’ constitutional right under Amendment 7.” 68 So. 3d at 951-952. The hospital contended that the redacted portions, consisting of the opinions, conclusions, and impressions of its authorized representatives, constituted opinion work product. *Id.* at 952. The Third District recognized that “opinion work product consists primarily of the attorney’s mental impressions, conclusions, opinions, and theories

concerning litigation.” *Id.* at 953. The court then explained that it had not found any case extending opinion work product protection to the types of comments redacted, because the case law consistently construed opinion work product protection as extending only to “an attorney’s thoughts or mental impressions concerning the litigation at hand.” *Id.* at 954. Furthermore, even though the Third District recognized that Florida Rule of Civil Procedure 1.280(b)(3) encompasses “other representatives of a party concerning the litigation” it declined “to extend the privilege to the comments and findings of hospital personnel routinely contained in adverse medical incident reports,” because to do so would undermine the intended, broad scope of Amendment 7 discovery recognized in *Buster*. *Id.*

Similarly, in *Gmach*, the Fifth District considered documents that were prepared by the provider’s risk manager “so that accurate information will be available to defense counsel in the event that a lawsuit is filed arising out of the wound infection chronicled.” 14 So. 3d at 1048-1049. The Fifth District determined that it did not need to address the distinction between fact and opinion work product based on the documents under consideration. *Id.* at 1049. It was clear that the documents did not contain “any attorney’s mental impressions, conclusions, opinions, or theories concerning his client’s case (i.e., any opinion work product).” *Id.* As such, the reports could not be considered anything more

than fact work product, even if generated in anticipation of litigation, because they did not contain the mental impressions or opinions or defense counsel. *Id.* at 1050.

Finally, in *Neely*, this Court considered whether twelve adverse incident reports prepared by a hospital were protected from disclosure by the common law work product doctrine. 8 So. 3d at 1268-1269. The hospital asserted that some of the reports “in all probability, contain statements, opinions and other information provided by sources who reasonably believed that their identities would not be readily available in litigation except to the lawyers representing [the hospital].” *Id.* at 1270. This Court rejected the argument that these reports were not discoverable under Amendment 7, again relying on the broad discovery reasoning of *Buster*. *Id.* Thus, to the extent that this Court in *Neely* considered a distinction between fact and opinion work product, it found that materials involving third parties, like those at issue in this case, were not protected from Amendment 7 discovery (without considering the issue of attorney-client privilege).

Like the materials in *Acevedo*, *Gmach*, and *Neely*, the discovery materials at issue in this case should not be considered opinion work product. Bartow appears to concede that the materials do not contain the mental impressions, conclusions, opinions, or theories of its counsel by focusing on the extension of the work-product doctrine to agents and representatives. [Petition, pp. 12-13]. As described,

the documents cannot be considered opinion work product because they purportedly “contain the opinions of external individuals who were asked by the Hospital’s outside attorneys to review certain records and provide their opinion to assist in the attorney’s investigations,” and not the opinions of any attorney. [Petition, p. 12]. Based on *Acevedo*, the opinions of hospital personnel, not attorneys, who make findings in adverse incident reports are not opinion work product. Similar opinions reached by external third parties for the same purposes should not be treated any differently, because to do so would insulate Bartow from discovery and undercut the constitutional rights of patients like Edwards. By simply making a crafty business decision to outsource peer review to third parties, hospitals could return Florida to the dark ages prior to Amendment 7 despite its clear intent and purpose as approved by the citizenry. Likewise, based on *Gmach*, it makes no difference that the peer review reports may have been developed in contemplation of litigation or to chronicle Thomas’ problematic history. The contested documents should not be considered opinion work product or protected from Amendment 7 discovery by Edwards.

Finally, the general work product authority cited by Bartow is not to the contrary. [Petition, p. 13]. For example, in *Alachua General Hospital, Inc. v. Zimmer USA, Inc.*, 403 So. 2d 1087 (Fla. 1st DCA 1981), the court did not state

that the work product was opinion work product because it contained the opinions of investigators, rather noting that protection applied to documents passing between attorneys and investigators. *Id.* at 1088. In fact, the court must necessarily have considered the materials to be fact work product, clearly discoverable under Amendment 7, because it applied a need and undue hardship analysis that would not apply to opinion work product. *Id.* at 1088; *Acevedo*, 68 So. 3d at 953 (“Generally, fact work product is susceptible to disclosure based on considerations of need and relevance. Conversely...opinion work product is generally afforded absolute immunity.”)(citations omitted). Here, despite Bartow’s arguments to the contrary, the external peer review documents are not opinion work product and are not protected from Amendment 7 discovery. The contested documents should be produced to Edwards, at least in part, to the extent that they are either fact or opinion work product.

Amendment 7 Trumps the Attorney-Client Privilege Under the Circumstances of this Case

Although courts may have suggested that Amendment 7 does not trump the attorney-client privilege, even Bartow admits that the issue has not been squarely decided by a Florida court. [Petition, pp. 9, 9-10]. As such, the discovery order cannot constitute a departure from the essential requirements of the law where it

presents an issue of first impression. See *Wolf Creek Land Dev., Inc. v. Masterpiece Homes, Inc.*, 942 So. 2d 995, 997 (Fla. 5th DCA 2006)(“The statutory issue raised by Wolf Creek in the present case is certainly debatable, but there appears to be no case law on the matter that has been pointed out by either side or that has been disclosed by our own independent research. As the order is not the subject of a clearly established principle of law, certiorari is not available to review it.”); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 528 (Fla. 1995)(“‘The district courts should exercise this discretion only when there has been a violation of clearly established principle of law resulting in a miscarriage of justice.’”)(citation omitted); *Snell v. Mott’s Contracting Servs., Inc.*, 141 So. 3d 605, 608 (Fla. 2d DCA 2014)(“A ‘clearly established law’ can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law.’ Though ‘a misapplication or an erroneous interpretation of the correct law does not rise to the level of a violation of a clearly established principle of law,’ applying the incorrect law certainly does.”).

Nonetheless, Amendment 7 should trump the attorney-client privilege, at least under the circumstances of this case in which Bartow involved outside counsel to obtain external peer review reports similar to those that it did or could have obtained through internal processes. Admittedly, this Court has suggested

that Amendment 7 has no effect on the attorney-client privilege. *See Kirkland*, 126 So. 3d at 1253 (Fla. 2d DCA 2013)(“It has also been suggested that Amendment 7 does not affect the attorney-client privilege.”). Likewise, on reviewing the proposed constitutional amendment, the Florida Supreme Court noted that the amendment did not expressly affect either the work-product or attorney-client privileges, although it is clear that courts have interpreted it as trumping at least fact work product protection regardless. *See Gmach*, 14 So. 3d at 1047 (citing *Advisory Opinion*, 880 So. 2d at 621). The Supreme Court also indicated that “any effect on the attorney-client privilege would be speculative,” which does not suggest how the court would decide the issue. *Id.* (citing *Advisory Opinion*, 880 So. 2d at 622).

To be consistent with the Florida Supreme Court’s opinion in *Buster* and this Court’s opinion in *Neely*, it seems that the attorney-client privilege can be treated no differently than the work-product privilege. Just as work product materials are not exempted under the language of Amendment 7, attorney-client materials are not exempted under the language of Amendment 7. *See Neely*, 8 So. 3d at 1270. Given the amendment’s purpose to remove limitations on discovery related to adverse medical incidents, there is no reason that the attorney-client privilege should be treated differently than statutory and work-product protections, because

to do so would be to preclude the intended and desired discovery. *See id.* However, even without reaching this broad issue, Bartow cannot be permitted to cloak peer review reports that would otherwise be discoverable in attorney-client privilege by having its attorney request them from third parties,² because to do so would undermine the purpose of Amendment 7:

We believe that Amendment 7 heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality in order to foster disclosure of information that will allow patients to better determine from whom they should seek health care, evaluate the quality and fitness of health care providers currently rendering service to them, and allow them access to information gathered through the self-policing processes during the discovery period of litigation filed by injured patients or the estates of deceased patients against their health care providers.

Buster, 984 So. 2d at 494. For these reasons, attorney-client privilege should not apply to protect the contested documents. They should be produced to Edwards, including to the extent that they are work product documents not falling within the

² This assumes that the challenged documents meet the requirements for attorney-client privilege: “The communication between a lawyer and client is deemed ‘confidential’ if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of legal services to the client and those reasonably necessary for the transmission of the communication. § 90.502(1)(c).” *See Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 458 (Fla. 5th DCA 1999). To the extent that they do not, they should not be protected from Amendment 7 discovery.

attorney-client privilege if this Court agrees with Edwards regarding Amendment 7's effect on work-product protection but not on attorney-client privilege.

Edwards Is Not Proceeding on The Claim that Bartow Waived Any Applicable Privilege

Although Edwards asserted that Bartow waived any applicable privilege in its filings in response to Bartow's confidentiality motion, it is not advancing this position in response to the Petition. There is a difference in opinion between the parties about the procedure that should have been followed regarding confidentiality, and this Court does not need to reach the issue of waiver where no privilege should apply based on the substantive merits of this case.

Conclusion

The spirit and intent of Amendment 7, as approved by Florida's voters, was to permit unfettered access to records documenting the self-policing of medical incidents by providers. Bartow's peer review, even if requested by outside counsel from a third-party vendor, is just the type of self-policing intended to be made transparent to patients such as Edwards. This Court must deny the Petition for Writ of Common Law Certiorari, because the trial court was correct to order the production of Items #15, #16, and #20 on Privilege Log B and uphold the promise and purpose of Amendment 7.

METHE & ROCKENBACH, P.A.
KARA BERARD ROCKENBACH, ESQ.
Florida Bar No. 0044903
KRISTI BERGEMANN ROTHELL, ESQ.
Florida Bar No. 0632538
Appellate Counsel for Amber Edwards
1555 Palm Beach Lakes Blvd., Suite 1200
West Palm Beach, FL 33401
(561) 727-3600 telephone
(561) 727-3601 facsimile
kbrock@flacivillaw.com
krothell@flacivillaw.com
tbermudez@flacivillaw.com

BY: /s/ Kara Berard Rockenbach
KARA BERARD ROCKENBACH, ESQ.
FLORIDA BAR NO.: 0044903
KRISTI BERGEMANN ROTHELL, ESQ.
FLORIDA BAR NO.: 0632538

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Response to
Petition for Writ of Common Law Certiorari was furnished via email this 11th
day of September, 2014 to:

Amy L. Miles, Esq.,
Andrew R. McCumber, Esq.,
MCCUMBER, DANIELS, BUNTZ, HARTIG & PUIG, P.A.
204 South Hoover Boulevard, Suite 130
Tampa, FL 33609
amiles@mccumberdaniels.com
amccumber@mccumberdaniels.com

Michael A. Petruccelli, Esq.
Paul C. Buckley, Esq.
Fann & Petruccelli, P.A.
5100 North Federal Highway, Suite 300B
Fort Lauderdale, FL 33308
MPetruccelli@FPLawyers.com
pbuckley@fplawyers.com

Karen E. Terry, Esq.
Matthew K. Schwenke, Esq.
SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
ket@searcylaw.com
mks@searcylaw.com
aje@searcylaw.com
lmn@searcylaw.com

Holly B. Platter, Esq.
Graziano & Rice, P.A.
101 East Kennedy Boulevard, Suite 1700
Tampa, FL 33602

eserve@bgrplaw.com
tdomi@bgrplaw.com

and via U.S. Mail to:

The Honorable Ellen S. Masters
Polk County Courthouse
255 North Broadway
Bartow, FL 33839

BY: /s/ Kara Berard Rockenbach
KARA BERARD ROCKENBACH, ESQ.
KRISTI BERGEMANN ROTHELL, ESQ.

CERTIFICATE OF TYPE SIZE & STYLE

I certify that the type, size, and style utilized in this Response to Petition for Writ of Common Law Certiorari is 14-point Times New Roman.

BY: /s/ Kara Berard Rockenbach
KARA BERARD ROCKENBACH, ESQ.
KRISTI BERGEMANN ROTHELL, ESQ.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

BARTOW HMA, LLC d/b/a BARTOW
REGIONAL MEDICAL CENTER,

Petitioner,

v.

AMBER EDWARDS and LARRY
THOMAS, M.D.,

Respondents.

Case No. 2D14-3450

Opinion filed July 10, 2015.

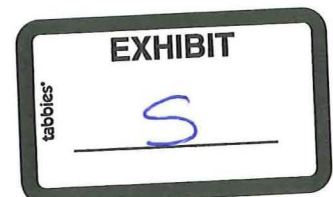
Petition for Writ of Certiorari to the Circuit
Court for Polk County; Ellen S. Masters,
Judge.

Michael A. Petruccelli and Paul C. Buckley
of Fann & Petruccelli, P.A., Fort
Lauderdale, and Amy L. Dilday and Andrew
R. McCumber of McCumber, Daniels,
Buntz, Hartig & Puig, P.A., Tampa, for
Petitioner.

Kara Berard Rockenbach and Kristi
Bergemann Rothell of Methe &
Rockenbach, P.A., West Palm Beach, and
Karen E. Terry and Matthew K. Schwenke
of Searcy Denney Scarola Barnhart &
Shipley, P.A., West Palm Beach, for
Respondent Amber Edwards.

No appearance for Respondent Larry
Thomas, M.D.

- 1 -



SILBERMAN, Judge.

Bartow HMA, LLC, ("the Hospital"), seeks certiorari review of a discovery order entered in a medical negligence lawsuit filed against the Hospital and Larry Thomas, M.D., by Amber Edwards. Findings 15, 16, and 20 of section E of the order require the Hospital to produce reports relating to "attorney requested external peer review" pursuant to article X, section 25, Florida Constitution ("Amendment 7"). We conclude that the order departs from the essential requirements of the law because these reports do not fall within the ambit of Amendment 7 and are privileged. We therefore grant the petition.

I. Facts

In her complaint, Edwards alleged that she was injured when Dr. Thomas severed her common bile duct during gallbladder removal surgery. Edwards alleged that the Hospital was liable for the injuries caused by Dr. Thomas and unnamed nurses and hospital personnel pursuant to theories of agency, apparent agency, and vicarious liability. Edwards also alleged that the Hospital was directly liable to her based on, among other things, theories of negligent hiring and non-delegable duty.

Edwards served the Hospital with a request to produce that included a request for all documents created within the five years before Edwards' surgery relating to the Hospital's investigation or review of Dr. Thomas's care and treatment of any patient. Edwards also requested all documents pertaining to the Hospital's investigation or review of her care and treatment. Edwards cited to Amendment 7 as authorization for this requested discovery.

The Hospital filed a response in which it asserted that "Amendment 7 only provides patients a right to access to records made or received in the course of business by a health care facility or a health care provider relating to adverse medical incidents." The Hospital claimed that some of the requested records did not fall within these parameters and that many of the documents were protected from discovery by applicable privileges. Edwards filed a motion to compel better responses. The court entered an order overruling certain objections and sustaining others.

The Hospital filed further responses which essentially reiterated the same objections and attached privilege logs. In Privilege Log B at 15, 16, and 20, the Hospital challenged specific reports "relating to attorney requested external peer review" and asserted that they were privileged. Edwards responded by filing a motion for rule to show cause or for an in camera inspection.

The court conducted a hearing on the motion at which it clarified its prior ruling on the Hospital's objections. The court explained that it had already determined that the documents in the Hospital's privilege log were privileged. But it had also concluded that Amendment 7 preempted the privileges so that any documents relating to adverse medical incidents were discoverable. The court agreed to conduct an in camera inspection to determine if any of the documents in the privilege logs did not fall within the ambit of Amendment 7.

After the in camera inspection, the court entered the order that is the subject of the Hospital's certiorari petition. In the order, the court required the production of all documents related to the Hospital's peer review of adverse medical incidents involving Dr. Thomas including the external peer review reports listed in

Privilege Log B at 15, 16, and 20. The Hospital provided Edwards the documents relating to the internal peer review process but filed this petition for certiorari challenging the portion of the order requiring production of the external peer review reports.

II. Analysis

In order to be entitled to certiorari review, the Hospital must establish that the circuit court's order (1) causes it material injury for which there is no adequate remedy on direct appeal and (2) departs from the essential requirements of the law. See Bartow HMA, LLC v. Kirkland, 126 So. 3d 1247, 1251-52 (Fla. 2d DCA 2013). The first component is established when a petitioner is ordered to produce documents that are statutorily privileged. See id. at 1252; Lakeland Reg'l Med. Ctr. v. Neely ex rel. Neely, 8 So. 3d 1268, 1269 (Fla. 2d DCA 2009). The issue for our review is whether the circuit court's order departed from the essential requirements of the law.

The dispositive question here is whether the external peer review reports fall within the ambit of Amendment 7. See Kirkland, 126 So. 3d at 1254. If the external peer review reports do not fall within the ambit of Amendment 7, they are protected from discovery because the circuit court has already determined that they are privileged. If the external peer review reports do fall within the ambit of Amendment 7, it will be necessary to determine whether the applicable privileges are preempted by Amendment 7. See id. As discussed below, we conclude that the requested reports are not within the ambit of Amendment 7.

A. History of Amendment 7

Florida law contains statutory privileges that provide for the confidentiality of health care facility or provider peer review as conducted by a medical review

committee or governing board of licensed hospital facilities. See §§ 395.0191(8), 395.0193(8), 766.101(5), Fla. Stat. (2010); W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 9-10 (Fla. 2012). Those provisions protect "any 'document considered by the committee or board as part of its decision-making process.' " W. Fla. Reg'l, 79 So. 3d at 10 (quoting Cruger v. Love, 599 So. 2d 111, 114 (Fla. 1992)).

Amendment 7 was approved by Florida voters after a general election in November 2004. Kirkland, 126 So. 3d at 1252. It preempts the statutory discovery protections for the peer review process, id. at 1253, by providing patients a right of "access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." Art. X, § 25(a). The issue of whether it preempts certain common law privileges is not settled. See Kirkland, 126 So. 3d at 1253.

B. Application of Amendment 7

1. Made or Received in the Course of Business

Among other things, the Hospital argues that the external peer review reports do not fall within the ambit of Amendment 7 because they were not "made or received in the course of business." The documents at issue are each entitled "Peer Review Report." They were generated in response to letters sent by the Hospital's counsel to the director of client services at a business called "M.D. Review." On behalf of the Hospital, counsel requested

that M.D. Review conduct an external peer review concerning the medical care and treatment rendered by one of its physicians [name and specialty], to [number] different patients at the facility. We are requesting this external peer review investigation to be done on an attorney client, work product and peer review privileged basis.

Counsel included medical records from certain specified patients. The Hospital has consistently maintained that counsel requested the reports at issue for purposes of litigation.

Each external peer review report was prepared by a physician, and each report references a separate patient. Each report provides a "Case Overview" in which the reviewing physician describes the patient's complaints and details the course of diagnosis and treatment. The next section is "Findings of Fact" which is a chart noting details regarding each test or treatment administered. Then there is a section entitled "Discussion" in which the reviewing physician conducts an in-depth critique of the subject physician's course of diagnosis and treatment. Each report finishes with a "Conclusion" indicating whether the reviewing physician believes the standard of care was met.

To determine whether these external peer review reports fall within the ambit of Amendment 7, we are guided by some general principles of statutory construction. The polestar of our analysis is legislative intent. W. Fla. Reg., 79 So. 3d at 8. And to discern intent, we must look to "the plain and obvious meaning of the statute's text." Id. at 9. If that language is sufficiently clear and unambiguous to convey an unequivocal meaning, then we will apply that meaning without considering any further rules of statutory construction. Id.

"Course of business" is not defined in Amendment 7, but it has a plain and obvious meaning. Indeed, similar language has been discussed in cases involving section 90.803(6)(a), Florida Statutes (2003), which sets forth a hearsay exception for records "kept in the ordinary course of a regularly conducted business activity." Some

records are kept in the course of a regularly conducted business activity if they are kept pursuant to a statutorily mandated duty. See Yisrael v. State, 993 So. 2d 952, 958 (Fla. 2008). While Florida hospitals are statutorily required to establish internal risk management programs to investigate and respond to adverse incidents,¹ they are not statutorily required to retain external experts to evaluate adverse medical incidents to determine whether the standard of care was met. Here, the external peer review reports were made for purposes of litigation rather than to fulfill a statutory duty.

Other records may be kept in the course of business even in the absence of a statutory duty. See, e.g., Bank of N.Y. v. Calloway, 157 So. 3d 1064, 1071 (Fla. 4th DCA 2015) ("Businesses rely upon their records 'in the conduct of [their] daily affairs' and 'customarily check [them] for correctness during the course of the business activities.' " (quoting Charles W. Ehrhardt, Florida Evidence § 803.6 (2014 ed.))). Records created by an expert retained for purposes of litigation are not kept in the course of regularly conducted business activity. See Brown v. Int'l Paper Co., 710 So. 2d 666, 668 (Fla. 2d DCA 1998) (holding that a handwriting analyst's report created during the investigation of an allegedly forged purchase requisition form was not made in the course of business). Accordingly, the external peer review reports were not "made or received in the course of business" under Amendment 7.

2. Adverse Medical Incident

Unlike the phrase, "made or received in the course of business," the term "adverse medical incident" is defined in Amendment 7.

¹See §§ 395.0193, .0197, Fla. Stat. (2010).

The phrase "adverse medical incident" means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committee.

Art. X, § 25(c)(3) (emphasis added).

Edwards argues that the external peer review reports relate to adverse medical incidents under this definition because they pertain to "incidents that are reported to or reviewed by any health care facility peer review . . . or similar committee." Edwards acknowledges that M.D. Review is not a "committee" but asserts that it functions as the equivalent and notes that the reports are each entitled "Peer Review Report." Edwards claims that the retention of M.D. Review by counsel is an attempt by the Hospital to outsource the peer review process and cloak it with protection from discovery under Amendment 7.

We cannot agree that M.D. Review functions as the equivalent of a health care facility peer review. M.D. Review does not perform the routine function of reviewing incidents for the Hospital when medical negligence or other events occur as specified in Amendment 7. Instead, it provides an expert opinion on the standard of care on sporadic occasions when litigation is imminent. See Neely, 8 So. 3d at 1270 n.2 (discussing Amendment 7 and noting the distinction between incident reports prepared in accordance with Florida Statutes and those "documents prepared or produced at the specific request of the client's attorney for use in litigation"). While the

documents at issue are each entitled "Peer Review Report," it is the substance of the reports and their context that determines whether they are within the ambit of Amendment 7. Although the reports address adverse medical incidents, the reports contain expert opinions requested by counsel. The limited record before us does not suggest that the reports were obtained as part of the Hospital's regular peer review process.

We are also not persuaded that the use of external peer review under these circumstances is an attempt to circumvent the disclosure requirements of Amendment 7. The Hospital has already satisfied those requirements by providing access to numerous documents pertaining to internal adverse incident reporting and peer review. Of course, our result may have been different if the Hospital had not conducted an internal peer review of the incidents in question.

3. Conclusion on the Application of Amendment 7

Thus, we conclude that the external peer review reports do not fall within the ambit of Amendment 7 because they were not "made or received in the course of business." Because the circuit court has already determined that the reports are privileged, they are protected from discovery.

III. Preemption of Common Law Privileges

In light of our conclusion that the reports do not fall within the ambit of Amendment 7, it is not necessary to fully analyze Edwards' alternate argument that Amendment 7 preempts the common law attorney-client and work-product privileges. That said, the law on the issue as it pertains to the common-law work-product and attorney-client privileges is still developing. Florida courts have determined that the

privilege for fact work-product does not survive Amendment 7. See Kirkland, 126 So. 3d at 1253; Neely, 8 So. 3d at 1270; Acevedo v. Doctors Hosp., Inc., 68 So. 3d 949, 953 (Fla. 3d DCA 2011); Fla. Eye Clinic, P.A. v. Gmach, 14 So. 3d 1044, 1048 (Fla. 5th DCA 2009). But courts have distinguished the privilege for opinion work-product and ruled that it is not preempted by Amendment 7. See Kirkland, 126 So. 3d at 1253; Acevedo, 68 So. 3d at 953; Gmach, 14 So. 3d at 1050. And while no appellate court has ruled on the issue of whether Amendment 7 preempts the attorney-client privilege, this court has noted that there has been a suggestion to that effect. See Kirkland, 126 So. 3d at 1253; Morton Plant Hosp. Ass'n, Inc. v. Shahbas ex rel. Shahbas, 960 So. 2d 820, 825 (Fla. 2d DCA 2007).

IV. Conclusion

Because the external peer review reports do not fall within the ambit of Amendment 7 and the circuit court has ruled that they are privileged, it was a departure from the essential requirements of the law to order their production. Accordingly, we grant the Hospital's petition for writ of certiorari and quash findings 15, 16, and 20 of section E of the circuit court's order.

Petition granted; order quashed in part.

KELLY and BLACK, JJ., Concur.

**IN THE SUPREME COURT OF FLORIDA
Case No. SC15-1893**

(Second DCA Case No. 2D14-3450)

AMBER EDWARDS,

Petitioner,

vs.

BARTOW HMA, LLC d/b/a
BARTOW REGIONAL
MEDICAL CENTER,

Respondent.

_____ /

PETITIONER'S BRIEF ON JURISDICTION

KARA BERARD ROCKENBACH, ESQ.

Florida Bar No. 0044903

KRISTI BERGEMANN ROTHELL, ESQ.

Florida Bar No. 0632538

METHE & ROCKENBACH, P.A.

Appellate Counsel for EDWARDS

1555 Palm Beach Lakes Blvd., Suite 1200

West Palm Beach, FL 33401

(561) 727-3600 telephone

(561) 727-3601 facsimile

kbrock@flacivillaw.com

krothell@flacivillaw.com

tbermudez@flacivillaw.com

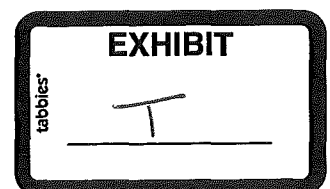


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INTRODUCTION

Edwards urges this Court to accept jurisdiction in this case involving an issue of critical importance to Florida's electorate: the discoverability of peer review reports regarding adverse medical incidents generated by a third-party rather than the healthcare facility itself. In holding that external peer review reports did not fall within the ambit of Amendment 7 because they were not made in the course of Bartow's business, the Second District erroneously construed Article X, Section 25 as adopted by Florida's voters and provided a loophole – never intended by voters – for healthcare facilities and negligent physicians. Further, the Second District's decision expressly and directly conflicts with a Fifth District decision that found similar peer review reports within the ambit of Amendment 7, *Florida Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009). On either basis, this Court should accept jurisdiction and resolve the issue of the discoverability of incident reports.

STATEMENT OF THE CASE AND FACTS

The Lawsuit

Edwards sued Bartow and one of its doctors for medical negligence, including negligent hiring and retention, under Chapters 766 and 768 of the Florida Statutes. Edwards was diagnosed with gallstones, and a laparoscopic cholecystectomy was scheduled at Bartow. The doctor assigned by Bartow to perform the surgery “failed

to identify [Edwards'] common bile duct, cut her common bile duct during the surgery, and afterwards failed to timely recognize that he did so." Edwards suffered in tremendous pain for days until she finally had to return to Bartow's emergency room where the error was discovered. Edwards was forced to undergo emergency corrective surgery at another hospital.

The Discovery Request

Edwards served a Request to Produce on Bartow in support of her medical negligence action. Edwards sought documents regarding the negligent doctor and adverse medical incidents pursuant to Amendment 7. Bartow objected to the requested discovery on multiple grounds. Bartow maintained that external peer review reports prepared by a third party purportedly in anticipation of litigation did not relate to "adverse medical incidents," were not "made or received in the course of business," were protected by attorney-client privilege, and were protected as opinion work product. Ultimately, the trial court entered an order allowing discovery of the external peer review reports. Bartow petitioned for a Writ of Common Law Certiorari.

The Second District's Decision

By opinion dated July 10, 2015, the Second District granted Bartow's Petition for Writ of Common Law Certiorari and quashed the trial court's order permitting Edwards to discover the external peer review reports pursuant to Article X, Section

25 of the Florida Constitution (“Amendment 7”). The Second District determined that the external peer review reports were not “made or received in the course of business” so as to fall within the ambit of Amendment 7. The Second District also rejected Edwards’ argument that Bartow’s use of external peer review reports improperly sidestepped Amendment 7 and shrouded its investigation of adverse medical incidents in a protection not intended by the voters who adopted the amendment. In response, Edwards sought to invoke this Court’s discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

The Second District’s decision in this case both erroneously construes Article X, Section 25 of the Florida Constitution and expressly and directly conflicts with a Fifth District decision properly finding similar incident reports to fall within the ambit of Amendment 7. The Second District wrongly interpreted the constitutional provision requiring incident reports to be made in the course of a healthcare facility’s business to exclude those purportedly made in the course and scope of litigation. The Fifth District decided this issue to the contrary in *Florida Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009). Logically, it was the intention of Florida’s voters for all adverse incident reports to be discoverable in medical malpractice actions when they voted in favor of Amendment 7.

Therefore, this Court should accept jurisdiction and resolve this issue of great public importance.

JURISDICTIONAL STATEMENT

When a decision of a district court of appeal “expressly construes a provision of the state or federal constitution,” this Court has discretionary jurisdiction to review the decision pursuant to Article V, Section 3(b)(3) of the Florida Constitution. *See also* Fla. R. App. P. 9.030(a)(2)(A)(ii).

Additionally, when a decision of a district court of appeal “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law,” this Court has discretionary jurisdiction to review the decision pursuant to Article V, Section 3(b)(3) of the Florida Constitution. *See also* Fla. R. App. P. 9.030(a)(2)(A)(iv).

Edwards seeks review of the Second District’s decision based both on its erroneous construction of Article X, Section 25 of the Florida Constitution and express and direct conflict with *Florida Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009).

ARGUMENT

THIS COURT HAS JURISDICTION TO CORRECT THE SECOND DISTRICT’S ERRONEOUS CONSTRUCTION OF THE FLORIDA CONSTITUTION AND THE EXPRESS AND DIRECT CONFLICT WITH THE FIFTH DISTRICT’S DECISION IN *FLORIDA EYE CLINIC, P.A. V. GMACH*, 14 SO. 3D 1044 (FLA. 5TH DCA 2009), WHICH PROPERLY FOUND THAT INCIDENT REPORTS PREPARED FOR LITIGATION ARE SUBJECT TO AMENDMENT 7 DISCOVERY

A. The Second District Erroneously Construed Article X, Section 25 of the Florida Constitution to Preclude Discovery of External Peer Review Reports as Not Within the Ambit of Amendment 7

The Second District's opinion cloaks external peer review reports in a secrecy both rejected and never intended by Florida's voters. By adoption of Amendment 7, Florida's voters spoke clearly in favor of a strong preference for access to all information regarding adverse medical incidents. Nevertheless, the Second District's opinion narrows this constitutional amendment by providing healthcare providers with a blueprint for effectively circumventing the will of the people expressed in Amendment 7. Simply, the opinion renders the amendment hollow by cloaking peer reviews with external vendor shields in order to evade the constitutional right to discovery of adverse medical incidents.

Amendment 7, as codified in Article X, Section 25 of the Florida Constitution, provides that "patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." Fla. Const. Art. X, § 25 (a) (e.s.). "Course of business" is not defined. However, "adverse medical incident" is defined as:

medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body,

and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

Fla. Const. Art. X, § 25 (c)(3) (e.s.). Based on the plain language of this provision, “adverse medical incidents” are not limited to those required to be reported to a governmental agency and encompass those that are reported to or reviewed by a hospital’s peer review, risk management, quality assurance, or credentials committee or similar committee. See Fla. Const. Art. X, § 25 (c)(3) (e.s.). As such, the external peer review process can easily be considered a similar committee.

Amendment 7 was adopted by the voters of Florida in 2004. *See Baldwin v. Shands Teaching Hosp. & Clinics, Inc.*, 45 So. 3d 118, 121 (Fla. 1st DCA 2010). “Amendment 7...provides an avenue for patients to get access to records of a health care provider’s adverse medical incidents.” *Id.* In fact, “[t]he Florida Supreme Court has recognized that this popularly adopted amendment affects, or even abrogates, statutes that previously exempted records of investigations, proceedings, and records of peer review panels from discovery.” *Id.* at 123. To this end, “[o]ne of the primary purposes of the amendment is to provide a patient contemplating treatment by a medical provider access to that provider’s past history of adverse medical incidents.” *Id.* (citation omitted). The Second District’s opinion unquestionably undermines the intent and purpose of

Amendment 7, as enacted in Article X, Section 25, by endorsing the practice of hiding adverse medical incidents by using a third party as a shield.

Overall, the adoption of Amendment 7 expresses the will of Florida's voters and "their preference for freedom of information regarding adverse medical incidents over the privileges that protect the self-policing process enacted by the Legislature and protected by the courts.'" *Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 824 (Fla. 2d DCA 2007)(citation omitted). In fact, this Court has agreed that Amendment 7 reflects the will of the people and must be strictly upheld:

"We believe that Amendment 7 heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality in order to foster disclosure of information that will allow patients to better determine from whom they should seek health care, evaluate the quality and fitness of health care providers currently rendering service to them, and allow them access to information gathered through the self-policing processes during the discovery period of litigation filed by injured patients or the estates of deceased patients against their health care providers. We have come to this conclusion because we are obliged to interpret and apply Amendment 7 in accord with the intention of the people of this state who enacted it, and we have done so. It is not for us to judge the wisdom of the constitutional amendments enacted or the change in public policy pronounced through those amendments, even in instances where the change involves abrogation of long-standing legislation that establishes and promotes an equally or arguably more compelling public policy."

Buster, 984 So. 2d at 494 (quoting *Florida Hosp. Waterman, Inc. v. Buster*, 932 So. 2d 344, 355-356 (Fla. 5th DCA 2006)).

Against this backdrop, it is evident that the Second District's decision finding that external peer review reports were not "made or received in the course of business," erroneously construes Article X, Section 25 of the Florida Constitution. By condoning the cloaking of adverse medical incident history in external peer review reports, the Second District's opinion undermines the constitutional rights of all Floridians who believed with the adoption of Amendment 7 "that all records...would henceforth be subject to patient review." *Buster*, 984 So. 2d at 489 (e.s.). The voters expressed a preference for freedom of information over permitting healthcare providers to engage in self-policing that lacks transparency, such as outsourcing peer review functions to third parties. As such, this Court should accept jurisdiction and correct the Second District's erroneous construction of Article X, Section 25.

B. The Second District's Decision Expressly and Directly Conflicts with the Fifth District's Decision in *Florida Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009), Which Properly Found Incident Reports Prepared for Litigation to Be Within the Ambit of Amendment 7

In its decision, the Second District determined that the external peer review reports sought by Edwards were made for purposes of litigation rather than to fulfill a statutory duty and were not "made or received in the course of

business” so as to fall within the ambit of Amendment 7, because they were created by an expert retained for purposes of litigation. This holding expressly and directly conflicts with the Fifth District’s decision in *Florida Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009).

In *Florida Eye*, a medical malpractice plaintiff sought discovery of incident reports regarding complaints of infection at a healthcare facility. The incident reports were generated by the facility’s risk manager, who attested that the reports were made in anticipation of litigation to provide accurate information to defense counsel in the event of a lawsuit. The trial court ordered production of the incident reports, and the Fifth District agreed, writing:

Here, the incident reports requested by Gmach were prepared by the risk manager for FEC “in order to make sure that all of the information concerning an investigation of wound infection is memorialized at or near the time of the event occurring, so that accurate information will be available to defense counsel in the event that a lawsuit is filed arising out of the wound infection chronicled.” Given the language of section 25, it seems clear that the incident reports in this case are the type of reports contemplated by amendment 7.

Id. 1048-1049. The Fifth District further explained that “the adverse medical incident reports sought by Gmach are the types of report that appear to be specifically contemplated by the voters’ passage of amendment 7.” *Id.* at 1050.

The only difference between the reports in *Florida Eye* and the reports in this case is insignificant, because regardless they memorialize discoverable

adverse medical incidents: in *Florida Eye*, they were created internally while the reports in this case were created externally. Yet, in both *Florida Eye* and this case, the healthcare facility maintained that the reports were made in anticipation of litigation. In *Florida Eye*, despite this fact, the reports were deemed to fall within the ambit of Amendment 7. However, the Second District concluded to the contrary in this case, finding similar peer review reports to not be made in the course of business because they were created for purposes of litigation. Nonetheless, these peer review reports remain reports of adverse medical incidents intended to be discoverable under Amendment 7 according to Florida's electorate. As a result, this Court should accept jurisdiction of this case to resolve the express and direct conflict between the Second District and Fifth District on the important issue of the discoverability of incident reports purportedly created for litigation.

CONCLUSION

The Second District's decision both erroneously construes Article X, Section 25 of the Florida Constitution and expressly and directly conflicts with the Fifth District's decision in *Florida Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009). Therefore, Edwards urges this Court to accept jurisdiction to resolve an issue of expressed great importance to Florida's voters, the discoverability of external peer review reports in medical malpractice actions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via email this 23rd day of October, 2015 to: **Karen E. Terry, Esq.**, Searcy Denney Scarola Barnhart & Shipley, P.A., (Counsel for EDWARDS), 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409, Email: terryteam@searcylaw.com; ket@searcylaw.com; mks@searcylaw.com; and aje@searcylaw.com; **Scott B. Albee, Esq.**, Fulmer LeRoy & Albee, PLLC, 605 S. Boulevard, Tampa, FL 33606; Email: sAlbee@fulmerleroy.com; sSchaefer@fulmerleroy.com; and eservicetpa@fulmerleroy.com; **Amy L. Dilday, Esq.**, and **Andrew R. McCumber, Esq.**, McCumber, Daniels, Buntz, Hartig & Puig, P.A., (Appellate Counsel for BARTOW), 4401 W. Kennedy Blvd., Suite 20, Tampa, FL 33609-2058, Emails: adilday@mccumberdaniels.com; amiles@mccumberdaniels.com and amccumber@mccumberdaniels.com; and **Holly B. Platter, Esq.**, Graziano & Rice, P.A., (Counsel for THOMAS, M.D.), 101 East Kennedy Blvd., Suite 1700, Tampa, FL 33602, Email: eserve@bgrplaw.com; and tdomi@bgrplaw.com.

METHE & ROCKENBACH, P.A.
Appellate Counsel for EDWARDS
1555 Palm Beach Lakes Blvd., Suite 1200
West Palm Beach, FL 33401
(561) 727-3600 telephone
(561) 727-3601 facsimile
PE: kbrock@flacivillaw.com
2E: krothell@flacivillaw.com

2E: tbermudez@flacivillaw.com

By: /s/ Kara Berard Rockenbach
KARA BERARD ROCKENBACH, ESQ.
Florida Bar Number: 0044903
KRISTI BERGEMANN ROTHELL, ESQ.
Florida Bar Number: 0632538

CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Brief of
Petitioner on Jurisdiction is Times New Roman 14pt.

/s/ Kara Berard Rockenbach
Kara Berard Rockenbach, Esq.
Appellate Counsel for EDWARDS

Supreme Court of Florida

MONDAY, OCTOBER 10, 2016

CASE NO.: SC15-1893

Lower Tribunal No(s).:

2D14-3450;

532012CA002611000000

AMBER EDWARDS

vs. LARRY D. THOMAS, M.D., ET AL.

Petitioner(s)

Respondent(s)

The Court accepts jurisdiction of this case.

Petitioner's initial brief on the merits must be served on or before October 31, 2016; respondent's answer brief on the merits must be served twenty days after service of petitioner's initial brief on the merits; and petitioner's reply brief on the merits must be served twenty days after service of respondent's answer brief on the merits.

The Clerk of the Second District Court of Appeal must file the record which must be properly indexed and paginated on or before December 9, 2016. The Clerk may provide the record in the format as currently maintained at the district court, either paper or electronic.

LABARGA, C.J., and QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

Oral argument will be set by separate order. Counsel for the parties will be notified of the oral argument date approximately sixty days prior to oral argument.

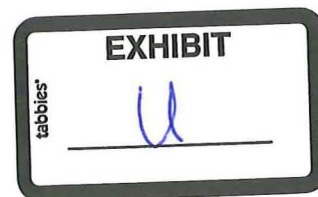
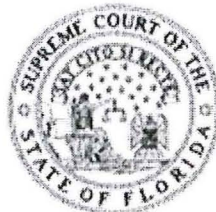
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John A. Tomasino

Clerk, Supreme Court



CASE NO.: SC15-1893

Page Two

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Served:

KAREN ELIZABETH TERRY
KRISTI BERGEMANN ROTHELL
KARA BERARD ROCKENBACH
MICHAEL ANTHONY PETRUCCELLI
HOLLY BIERKAN PLATTER
PAUL C. BUCKLEY
ANDREW R. MCCUMBER
AMY L. DILDAY
HON. MARY BETH KUENZEL, CLERK