IN THE SUPREME COURT OF FLORIDA

Case No. SC15-1893
(Second DCA Case No. 2D14-3450)

AMBER EDWARDS,

Petitioner,

v.

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

Respondent.
_____/

INITIAL BRIEF OF PETITIONER, AMBER EDWARDS

On Discretionary Review of a Decision of the
Second District Court of Appeal

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Introduction

This Court must decide whether external hospital peer review documents are discoverable pursuant to Article X, Section 25 of the Florida Constitution ("Amendment 7").[1] Edwards maintains that these documents are discoverable consistent with the will of Florida's voters in adopting Amendment 7 and this Court's decision in *Buster* confirming the intent of Amendment 7 to remove barriers to patient access of adverse medical incident reporting. In order to reach a decision in agreement with Edwards' position, this Court must consider and conclude the following: 1) Items #15, #16, and #20 on Privilege Log B constitute adverse medical incident reporting; 2) the items were made in the course of Bartow's business; 3) to the extent that the items contain work-product, Amendment 7 trumps this protection (as to both fact and opinion work product, to the extent applicable); and 4) to the extent that the items contain attorney-client privileged materials, Amendment 7 also trumps this protection, at least under the circumstances of this case.

[1] In this brief, Respondent, Bartow HMA, LLC d/b/a Bartow Medical Center, will be referred to as "Bartow." Petitioner, Amber Edwards, will be referred to as "Edwards." The Appendix to this Brief will be cited as [App. __, p. ___].

Statement of the Facts

Edwards was diagnosed with gallstones, and a laparoscopic cholecystectomy was scheduled at Bartow. [App. B, p. 3]. Bartow assigned Dr. Thomas to perform the surgery. [App. B, p. 3]. Dr. 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 Dr. 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].

Statement of the Case

Edwards sued Bartow and Dr. Thomas for medical negligence, including negligent hiring and retention, under Chapters 766 and 768 of the Florida Statutes. [App. B, pp. 1, 9].

Edwards served a Request to Produce on Bartow in support of her medical negligence action. [App. C]. Edwards sought various documents regarding Dr. 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 then filed a Petition for Writ of Common Law Certiorari in the Second District Court of Appeal. [App. Q]. Bartow maintained that despite Amendment 7, documents remain protected from discovery when they are opinion work product or protected by the attorney-client privilege. [App. Q, pp. 7-10]. Bartow also asserted that Items #15, #16, and #20 on Privilege Log B were not made or received in the course of its business and were protected by the attorney-client privilege or as opinion work product. [App. Q, pp. 10-14].

In Response, Edwards contended that the threshold requirements for discovery under Amendment 7, adverse medical incidents and course of business, were met in the instance of the external peer review documents. [App. R, pp. 7-12]. Further, Edwards maintained that any work product was fact work product

that was discoverable, but that even if it were opinion work product it should also be discoverable. [App. R, pp. 12-19]. Finally, Edwards asserted that even if the documents contained attorney-client privileged information they should still be discoverable under the circumstances of the case. [App. R, pp. 19-23].

Disposition in the Second DCA

By opinion dated July 10, 2015, the Second District Court of Appeal 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 Amendment 7. [App. S]; *Bartow HMA, LLC v. Edwards*, 175 So. 3d 820 (Fla. 2d DCA 2015). 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. [App. S, pp. 5-7]. 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. [App. S, pp. 7-9].

In response, Edwards sought to invoke this Court's discretionary jurisdiction. [App. T]. Edwards contended that the Second District erroneously construed Article X, Section 25 of the Florida Constitution to place external peer review reports outside the ambit of Amendment 7. [App. T, pp. 5-8]. Further,

Edwards maintained that the Second District's decision expressly and directly conflicted with the Fifth District Court of Appeal's decision in *Florida Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009). [App. T, pp. 8-10]. The *Florida Eye* court determined that reports prepared for litigation are within the ambit of Amendment 7. [App. T, pp. 8-10]. This Court accepted jurisdiction by Order dated October 10, 2016. [App. U].

Standard of Review

Generally, the permissible scope of discovery is "within the wide discretion of the trial court." *Burroughs Corp. v. White Lumber Sales, Inc.*, 372 So. 2d 122, 122 (Fla. 4th DCA 1979); *see also Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855, 857 (Fla. 1994)(recognizing that "[a] trial court possesses broad discretion in overseeing discovery"). As such, "[a]ffirmance is required except in those cases where an abuse of discretion has been shown so as to constitute a departure from the essential requirements of law which cannot be remedied on appeal. The trial court's resolution of discovery problems should not be disturbed absent a clear abuse of discretion." *Id.* (citations omitted); *see also Orlowitz v. Orlowitz*, 199 So. 2d 97, 98 (Fla. 1967)(recognizing that only an abuse of discretion constitutes fatal error in the realm of discovery in which the trial court possesses broad discretion).

Here, the trial court correctly concluded within its discretion that Items #15, #16, and #20 on Privilege Log B were discoverable as falling within the ambit of

Amendment 7. The trial court's order was not a departure from the essential requirements of the law, despite Bartow's flawed and overreaching contentions of privilege and protection. Therefore, the Second District should not have quashed the trial court's astute order, which was not an abuse of discretion, by granting Bartow's Petition for Writ of Common Law Certiorari. This Court must reverse the Second District's decision and reinstate and uphold that of the trial court permitting Edwards to discover Bartow's external peer review reports regarding adverse medical incidents as Florida's voters intended.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal's decision granting Bartow's Petition for Writ of Common Law Certiorari and quashing the trial court's order requiring the production of Items #15, #16, and #20 on Privilege Log B pursuant to Amendment 7 must be reversed. [App. A]. Amendment 7, as adopted by Florida's voters, was intended to eliminate limitations on discovery of adverse medical incident reporting. The contested external peer review 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 if attorney-client privileged materials under the circumstances of this case.

ARGUMENT

I. The Clear Intent of Amendment 7 is to Eliminate Limitations on Discovery of Adverse Medical Incident Reporting Consistent With the Will of the People

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.). The critical term "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, the other critical term, "course of business," is not defined by the amendment.

It is clear, based on the body of Florida law to date, that Amendment 7 is intended to eliminate limitations on discovery related to "adverse medical incidents." The purpose of Amendment 7 is 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, this Court has previously 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*, 880 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).

II. Items #15, #16, and #20 on Privilege Log B 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*). Therefore, whether documents constitute adverse medical incident reporting is a critical threshold requirement in determining whether they are discoverable under Amendment 7.

In its Petition below, Bartow characterizes the records contained within Items #15, #16, and #20 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." [App. Q, pp. 2, 3]. The title of the contested documents is "Peer Review Report." [App. S, pp. 5, 8-9]. Nonetheless, Bartow conceded that at least some of the documents

chronicle adverse medical incidents, rather focusing its challenge to discoverability on whether the documents arose in the course of business. [App. Q, p. 11].

Despite recognizing that Items #15, #16, and #20 are denominated "Peer Review Report," the Second District concluded that "[w]e cannot agree that M.D. Review functions as the equivalent of a health care facility peer review." [App. S, p. 8]. The appellate court further commented that although the substance of the reports admittedly addressed adverse medical incidents, the reports contained expert opinions requested by counsel rather than a record of the routine function of reviewing adverse medical incidents by a hospital. [App. S, p. 9]. Finally, the Second District concluded that "[t]he limited record before us does not suggest that the reports were obtained as part of the Hospital's regular peer review process." [App. S, p. 9].

Edwards respectfully disagrees with the Second District's conclusion regarding the "adverse medical incident" prong for Amendment 7 discoverability. 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 should be considered a similar committee. Bartow should not be permitted to outsource the peer review process to cloak it

with protection from discovery under Amendment 7. Although Bartow may have conducted the statutorily-required internal peer review as well, the Second District's decision provides a blueprint to hospitals approving them conducting a bare minimum internal review and then having an external third-party conduct a more thorough review to shield the most egregious evidence from discovery. This is not what Florida's voters wanted or intended, as this Court has previously recognized.

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 medical incident discovery, particularly where such discovery is intended to be broad and unlimited by statutory discovery protections and federal preemption. *Id.* Bartow has not claimed that the contested documents relate to general policies and procedures and the documents uncontestably contain information about adverse medical incidents, as admitted by Bartow and as

recognized by the Second District. Therefore, the Amendment 7 discovery threshold of adverse medical incident reporting has been met.

III. Items #15, #16, and #20 on Privilege Log B Were Made or Received in the Course of Bartow's Business

Although the other critical threshold to Amendment 7 discovery, "course of business," was not defined by Amendment 7, nor has it been interpreted in any Florida case to date, 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. [App. Q, 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. [App. Q, pp. 11-12].

The Second District agreed with Bartow. [App. S, pp. 5-7]. Drawing on the evidence code, the appellate court concluded that "records are kept in the course of a regularly conducted business activity if they are kept pursuant to a statutory mandated duty." [App. S, p. 7]. The Second District then concluded that "[w]hile Florida hospitals are statutorily required to establish internal risk management programs to investigate and respond to adverse incidents, they are not statutorily required to retain external experts to evaluate adverse medical incidents to determine whether the standard of care was met." [App. S, p. 7]. The appellate

court conceded that even in the absence of a statutory duty, other records may be kept in the ordinary course of business, but concluded that documents created by an expert retained for purposes of litigation are not. [App. S, p. 7].

Edwards maintains that Bartow's position and the Second District's adoption of the same are flawed. 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).

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. The Second District's conclusion that they did not arise within Bartow's "course of business" is suspect in light of *Florida Eye's* conclusion that even documents prepared in anticipation of litigation, such as the external peer review reports in this case according to Bartow and the Second District, do fall within a hospital's "course of business."

Further, on a practical note, outsourcing the peer review function to a third-party does not make the peer review reports any less records prepared within the course of business. To hold to the contrary would be like ruling that a CEO's business-related e-mails sent from his personal e-mail address are no longer related to business because they weren't sent through the company's e-mail server. Bartow's argument defies logic and reason. Simply, the reporting and investigation of adverse medical incidents is within the business of Bartow, regardless of whether Bartow performs this function itself or retains a third party to perform the function at its direction or as its agent.

In sum, 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 in anticipation of litigation or not or internally or externally. To treat internal peer review as part

of Bartow's business and external peer review in alleged anticipation of litigation 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 by this Court.

IV. Amendment 7 Trumps Any Work-Product Protection Otherwise Applicable to Items #15, #16, and #20 on Privilege Log B

Because the Second District erroneously concluded that two threshold requirements to Amendment 7 discovery were not met, it did not fully analyze, let alone decide, Edwards' work-product and attorney-client privilege arguments. [App. S, p. 9]. 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 Edwards submits that this Court does not need to make this distinction under the circumstances of this case.

A. Items #15, #16, and #20 on Privilege Log B Are Discoverable to the Extent They Contain Fact Work Product

Bartow conceded below that to the extent the contested documents contain fact work product they should be discoverable by Edwards. [App. Q, p. 8]. Additionally, Bartow conceded that the documents contain at least fact work product. [App. Q, p. 12]. Bartow, and the Second District in its opinion, correctly acknowledged that multiple Florida cases recognize that Amendment 7 trumps protection for fact work product. [App. Q, pp. 8, 9]. *See, e.g., 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 [product] 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.

B. Items #15, #16, and #20 on Privilege Log B Should Be Discoverable Even If They Contain Opinion Work Product

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, the

Second District wrote 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, the Second District 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 the Second District concluded that argument was foreclosed by this Court's opinion in *Buster*. *Id.* at 1269-1270. The Second District 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. The Second District 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 the Second District 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 arguments below undercut its assertion that the contested documents are opinion work product. [App. Q, pp. 8-9].

First, in *Acevedo*, the Third District Court of Appeal 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 *Florida Eye*, 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 of defense counsel. *Id.* at 1050.

Finally, in *Neely*, the Second District 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. The Second District rejected the argument that these reports were not discoverable under Amendment 7, again relying on the broad discovery reasoning of this Court in *Buster*. *Id.* Thus, to the extent that the Second District 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*, *Florida Eye*, and *Neely*, the discovery materials at issue in this case should not be considered opinion work product. Bartow appeared to concede below 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. [App. Q, 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. [App. Q, 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 rendered 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 Florida's voters. Likewise, based on *Florida Eye*, it makes no difference that the peer review reports may have been developed in contemplation of litigation or simply to chronicle Dr. 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 below is not to the contrary. [App. Q, 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 First District 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, even to the extent that they are either fact or opinion work product.

V. Amendment 7 Should Trump Any Attorney-Client Privilege Otherwise Applicable to Items #15, #16, and #20 on Privilege Log B Under the Circumstances of this Case

Although Florida courts may have suggested that Amendment 7 does not trump the attorney-client privilege, both Bartow and the Second District recognized that the issue has not been squarely decided by a Florida court. [App. Q, pp. 9, 9-10; App. S, pp. 9-10]. Nonetheless, Amendment 7 should trump the attorney-client privilege, to extent that it even applies, 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, the Second District 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, this 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). This Court also indicated that "any effect on the attorney-client privilege would be speculative," which does not reveal how this Court would decide the issue. *Id.* (citing *Advisory Opinion*, 880 So. 2d at 622).

As an initial matter, it is questionable whether the external peer review reports can properly be classified as attorney-client privileged materials. It is Edwards' understanding that the contested materials are communications between Bartow's outside counsel **and** the third-party peer review company. If this is accurate, they do not meet the definition of attorney-client communications because they are not communications solely between an attorney (outside counsel) and client (hospital), but add an external third-party. *See USAA v. Roth*, 859 So. 2d 1270, 1271 (Fla. 4th DCA 2003)(the attorney-client privilege "covers communications on legal matters between counsel and client"); *Roberts v. Jardine*, 366 So. 2d 124, 126 (Fla. 2d DCA 1979)("The attorney-client privilege is recognized in Florida and exists to protect and keep secret the communications which a client makes to his or her attorney.").

Section 90.502, Florida Statutes, governing the attorney-client privilege for purposes of litigation, presupposes a communication between attorney and client. § 90.502(1)(c), Fla. Stat. ("A communication between lawyer and client is 'confidential'…"); *Provenzano v. Singletary*, 3 F. Supp. 2d 1353, 1366 (M.D. Fla. 1997)(" Section 90.502 of the Florida Statutes defines the contours of the attorney client privilege. Essentially, a client has the privilege to prevent disclosure of confidential communications disclosed during the rendition of legal services. The privilege is only available when all the elements are present, i.e. " '(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection may be waived.'")(internal citations omitted). If the elements are not established, the attorney client privilege does not protect the external peer review reports that are unquestionably discoverable pursuant to Amendment 7.

Nonetheless, to the extent that the contested materials include communications between Bartow and its attorneys, the same can be redacted, allowing the production of any and all non-privileged portions of the external peer review reports regarding adverse medical incidents. *See Young, Stern & Tannenbaum, P.A. v. Smith,* 416 So. 2d 4, 5 (Fla. 3d DCA 1982)("Only those

communications which actually fall under the attorney/client privilege are protected."). Further, to the extent that Bartow's counsel involved itself in the peer review process solely for the purpose of shrouding otherwise discoverable peer review materials in attorney-client privilege, the attorney-client privilege should be deemed waived by this conduct intended to circumvent Amendment 7. *See Gibson v. Fla. Legislative Investigation Comm.*, 108 So. 2d 729, 746 (Fla. 1958)("While we recognize that the attorney-client relationship is one of utmost confidence, we think that the rule of exclusion that protects confidential communications arising out of this relationship cannot be invoked to enable a client to use the office of the attorney to evade or avoid an obligation to the courts or other investigative body which the client himself would be required to recognize."); *Lender Processing Servs., Inc. v. Arch Ins. Co.*, 183 So. 3d 1052, 1064 (Fla. 1st DCA 2015)("However, a party 'may not use the [attorney-client] privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.'")(citation omitted).

Further, to be consistent with this Court's opinion in *Buster* and the Second District's opinion in *Neely*, it seems that the attorney-client privilege can be treated no differently than 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 discovery intended and desired by Florida's voters. *See id.*

Even without reaching this broad issue, Bartow cannot be permitted to cloak otherwise discoverable peer review reports with a attorney-client privilege by having its attorney request them from third parties. To allow this contrived cloaking 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. 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)).

For these reasons, the attorney-client privilege does not exist here to cloak the contested and discoverable documents. The adverse medical incident reports must be produced to Edwards as intended by Florida's voters.

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 adverse medical incidents by providers. Bartow's external 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 should reverse the Second District's decision granting Bartow's Petition for Writ of Common Law Certiorari and quashing the trial court's order, 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via email this 21st 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.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Microsoft Word, Times New Roman 14-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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