

SUPREME COURT OF FLORIDA

AMBER EDWARDS,

Petitioner,

CASE NO.: SC15-1893

DCA CASE NO.: 2D14-3450

v.

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

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

Amy L. Dilday, B.C.S.
Florida Bar No.: 18035
McCumber, Daniels, Buntz Hartig
& Puig, P.A.
4401 W. Kennedy Boulevard, Suite 200
Tampa, Florida 33609
813-287-2822 Telephone
813-287-2833 Facsimile
adilday@mccumberdaniels.com
mhicks@mccumberdaniels.com
eservice@mccumberdaniels.com
Attorneys for Respondent

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STATEMENT OF THE CASE AND THE FACTS

In *Bartow HMA, LLC v. Edwards*, the Second District Court of Appeal accurately described in detail the documents that are the subject of the discovery order at issue: “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.’” Case No. 2D12-2647, 5 (Fla. 2d DCA July 10, 2015). The hospital’s counsel requested:

“[T]hat 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.”

Id. (quoting counsel’s request).

The peer review reports were “prepared by a physician, and” referenced separate patients. *Id.* at 6. Each report provided a “Case Overview,” “Findings of Fact,” a “Discussion”—which critiqued “the subject physician’s course of diagnosis and treatment”—and a “‘Conclusion’ indicating whether the reviewing physician believes the standard of care was met.” *Id.* While challenging Petitioner’s request to produce these limited documents, the Hospital produced the “adverse incident reporting and peer review documents” it created. *Id.* at 4, 9.

SUMMARY OF THE ARGUMENT

In *Edwards*, the Second District Court of Appeal construed article X, section 25(a) of the Florida Constitution (“Amendment 7”) to conform to the well-

established understanding of the constitutional language. Petitioner’s objection to the result in *Edwards* is not based on the district court’s construction. Rather, Petitioner objects to how the court applied Amendment 7 to the narrow, specific facts of the case.

The district court’s application of the constitutional provision to the facts of this case—as opposed to its express construction of the provision—does not provide this Court with jurisdiction. *See Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973). Additionally, the *Edwards* opinion does not expressly or directly conflict with the opinion in *Florida Eye Clinic, P.A. v. Gmach* on the same question of law. Accordingly, this Court need not exercise its discretion to review the *Edwards* decision. Respondent, Bartow HMA, LLC (“Hospital”), therefore, respectfully requests this Court deny Petitioner’s request for review.

ARGUMENT

THIS COURT SHOULD ABSTAIN FROM EXERCISING ITS JURISDICTION WHERE PETITIONER’S DISAGREEMENT WITH THE *EDWARDS* RESULT IS IN THE COURT’S APPLICATION OF AMENDMENT 7 TO SPECIFIC, NARROW FACTS AND THERE IS NO CONFLICT WITH *GMACH*. (*Restated*).

Article V, section 3(b)(3) of the Florida Constitution gives this Court discretionary jurisdiction to review a decision of a district court of appeal that “expressly construes a provision of the state or federal constitution, . . . or that expressly and directly conflicts with a decision of another district court of appeal . .

. on the same question of law.” While the Second District Court of Appeal expressly construed Amendment 7 to provide a definition of the term “course of business,” it did so by using the well-established meaning of this unambiguous term. In her Brief on Jurisdiction, while briefly mentioning that Amendment 7 does not provide a definition of “course of business,” Petitioner strenuously argues that the district court erred in applying that and other constitutional terms to the documents at issue. *See* (Petitioner’s Brief at 5-6). The mere application of the constitutional provision to the documents, however, does not provide this Court with a basis to exercise its jurisdiction. *See Rojas*, 288 So. 2d at 236.

Further, this Court does not have conflict jurisdiction because the documents determined discoverable in *Gmach* (incident reports prepared by the healthcare provider’s risk manager), are of an entirely different nature than the documents considered in this case (attorney-requested expert opinions). *Compare* 14 So. 3d 1044, 1048-49 (Fla. 5th DCA 2009) *with Edwards* at 5-6.

A. Petitioner expresses no disagreement with the Second DCA’s construction of “course of business”; Petitioner’s actual contention is that the court erroneously applied it and the term “adverse medical incident” to the documents at issue. (*Restated*).

Article X, section 25(a) provides: “In 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.” Subsection 25(c) defines

several of the provision's terms: "health care facility" and "health care provider," "patient," "adverse medical incident," and "have access to any records." It does not, however, provide a definition for the term "course of business."

To determine whether the documents at issue fell within the ambit of Amendment 7, the Second DCA first resolved the question of whether they were made or received in the Hospital's "course of business." *Edwards* at 6-7. In doing so, the court recognized that the constitutional language was "clear and unambiguous," and had "a plain and obvious meaning." *Id.* at 6. The court, therefore, limited its construction to the well-established legal meaning of the term "course of business." *Id.* at 6-7 (citing § 90.803(6); *Yisrael v. State*, 993 So. 2d 952 (Fla. 2008); *Bank of NY v. Calloway*, 157 So. 3d 1071 (Fla. 4th DCA 2015); *Brown v. Int'l Paper Co.*, 710 So. 2d 666 (Fla. 2d DCA 1998)). In **applying** the well-established meaning, the Second DCA considered who prepared the documents and for what purpose (external experts at the request of counsel as opposed to employees who were fulfilling the Hospital's regular duties). *See Edwards* at 7.

In her brief, Petitioner very briefly acknowledges that "course of business" is not defined by Amendment 7's text and concludes that the Second DCA's construction of that term was erroneous. *See* (Petitioner's Brief at 5-8). In support, Petitioner cites to this Court's determination, in *Buster*, that Amendment 7 permitted access to "all records" of adverse medical incidents. *Id.* at 8. In *Buster*,

however, there was no question as to whether the documents at issue met the “course of business” or “adverse medical incident” criterion set by Amendment 7. Rather, this Court determined only whether Amendment 7 applied retroactively to permit the discovery of records that existed and had been considered privileged prior to the provision’s effective date. *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 481, 484-85 (Fla. 2008). Considering the parties’ requests for records of the hospitals’ investigations and physician selection, retention, and termination documents, this Court held that Amendment 7 applies to “all records, including existing records.” *Id.* at 489. The *Buster* opinion, however, did not open Amendment 7 discovery to attorney-requested expert opinions such as the documents at issue here.

The Second District Court of Appeal’s construction of the straightforward and obvious constitutional provision used the well-established meaning of “course of business.” Thus, it did not conflict with this Court’s decision in *Buster*, and it made no substantial impact on the law of this state. This construction also conforms to the apparent intent of the public in enacting Amendment 7. As written and enacted, the Amendment included specific definitions of seemingly unambiguous terms (“health care facility” and “health care provider,” “patient,” and “have access to any records”), but it did not define “course of business.” *See*

Art. X § 25(c). Accordingly, the public was satisfied that the ordinary and established meaning of this term, already in use by the courts, would control.

In contrast to “course of business,” Amendment 7 expressly defines the term “adverse medical incident.” *See id.* at § 25(c)(3). Because the constitution provided this definition, the district court did not construe its meaning. *Edwards* at 7-9. Rather, it applied the constitutional definition to determine whether to accept Petitioner’s argument that the external peer review company was a health care facility “similar committee” within the constitutional meaning of “adverse medical incident.” *Id.* at 8-9.

Petitioner’s constitutional construction argument actually addresses the Second DCA’s application of the constitution to the documents at issue. *See* (Petitioner’s Brief at 6, 8) (“[T]he external peer review process can easily be considered a similar committee”). A court’s application of “a recognized, clear-cut provision of the Constitution” to “the facts of a particular case,” does not invoke this Court’s discretionary jurisdiction. *See Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958), *abrogated on other grounds by Kirk v. Baker*, 224 So. 2d 311 (Fla. 1969), *abrogation receded from by Ogle v. Pepin*, 273 So. 2d 391 (Fla. 1973). This Court has stated, “Applying is not synonymous with Construing; the former is NOT a basis for our jurisdiction, while the Express construction of a constitutional

provision is.” *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973) (defining constitutional construction).

This Court should deny Petitioner’s request for review for two reasons. First, the Second DCA’s express construction of the term “course of business” used definitions well-established in Florida’s jurisprudence and did not substantially affect established law. Second, Petitioner’s basis for invoking this Court’s discretionary jurisdiction is actually based on her disagreement with the district court’s application of Amendment 7 to the documents, which does not provide this Court with a basis for jurisdiction.

B. This Court has no conflict jurisdiction because the *Edwards* decision does not conflict with the Fifth DCA’s *Gmach* decision. (Restated).

This Court’s conflict jurisdiction can arise in various circumstances. *See Wallace v. Dean*, 3 So. 3d 1035, 1039 (Fla. 2009). Here, Petitioner is seeking to invoke conflict jurisdiction based on the Second DCA’s application of a rule of law that purportedly produced “a different result in a case that involves substantially similar controlling facts as a prior case disposed of by . . . another district court.” *Id.* at n.4 (citing *Neilsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960)). If, however, “the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise.” *Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962).

The documents at issue here are materially different from those that were determined to be discoverable in *Gmach*. As the Second DCA accurately described, the documents at issue were prepared by an external physician review company at the request of the Hospital’s counsel. *Edwards*, at 5-6. Despite the fact that each document was entitled “Peer Review Report,” the substance of the documents was an expert opinion on whether the standard of care had been met. *Id.* at 6, 8; *see also* (Petitioner’s Brief at 9) (noting that the documents “were created by an expert retained for” litigation).

In *Gmach*, the Fifth District Court of Appeal considered the discoverability of incident reports that were prepared by an eye clinic’s risk manager to memorialize information concerning the clinic’s internal investigations of infections. 14 So. 3d 1044, 1048-49 (Fla. 5th DCA 2009). The risk manager created the reports “in anticipation of litigation” in order to provide accurate information to “defense counsel in the event that a lawsuit is filed.” *Id.* at 1046, 1049. Defense counsel, however, had not reviewed the incident reports prior to *Gmach*’s lawsuit. *Id.*

The Fifth DCA determined that the internal incident reports were discoverable under Amendment 7’s definition of “adverse medical incident.” *Id.* at 1048. The definition provides that an “adverse medical incident” includes those “incidents that are reported to or reviewed by any health care facility . . . risk

management. . . committee, or any representative of any such committee.” Art. X § 25(3). In addition, the district court concluded that because “counsel had not even been consulted” when the reports were created, “it is clear that the reports did not contain any attorney’s mental impressions, conclusion, opinion, or theories concerning his client’s case.” *Gmach*, 14 So. 3d at 1049-50. Thus, the Fifth DCA held that the risk manager’s incident reports were expressly included in those that are discoverable under Amendment 7. *Id.* at 1050.

The Second DCA expressly distinguished between the documents before it in *Edwards* and incident reports like those considered in *Gmach*. *Edwards* at 8. The court noted that unlike a risk manager, the review company that created the external “Peer Review Reports” does not routinely review incidents for the Hospital when medical negligence occurs. *Id.* “Instead, it provides an expert opinion on the standard of care on sporadic occasions when litigation is imminent.” *Id.* (citing *Lakeland Reg’l Med. Ctr. v. Neely*, 8 So. 3d 1268, 1270 n.2 (Fla. 2d DCA 2009), which distinguished between hospital-created incident reports and “documents prepared or produced at the specific request of the client’s attorney for use in litigation.”). The district court noted that hospitals have no statutory obligation to “retain external experts to evaluate adverse medical incidents to determine whether the standard of care was met.” *Id.* at 7. It further noted that while seeking review of the order requiring these documents to be produced, the

Hospital had “already satisfied [Amendment 7’s] requirements by providing access to numerous documents pertaining to internal adverse incident reporting and peer review.” *Id.* at 9.

The incident reports considered in *Gmach* are materially different from the documents at issue here in how they came to be created, the entity that created them, their substance, and their purpose. Therefore, the Second District’s determination that the external “Peer Review Reports” were not discoverable under Amendment 7 creates no conflict with the *Gmach* decision. Accordingly, this Court has no jurisdiction based on an express conflict between the *Edwards* decision and that of another district court of appeal.

CONCLUSION

The Second District Court of Appeal’s *Edwards* decision does not disrupt the uniformity of Florida’s legal principles in any way. Even if this Court does not agree with the district court’s decision, it has no jurisdiction to disturb that decision where, as in this case, the decision does not create any instability in the law. *See Kyle*, 139 So. 2d at 887; *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734-35 (Fla. 1960). Accordingly, Respondent, Bartow HMA, LLC, respectfully requests this Court deny Petitioner’s request for review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to: kbrock@flacivillaw.com (Kara Berard Rockenbach, Esq., Methe & Rockenbach, P.A., 1555 Palm Beach Lakes Boulevard, Suite 1200, West Palm Beach, FL 33401, Appellate Attorney for Respondent Edwards) and krothell@flacivillaw.com; 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), mks@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, and sAlbee@fulmerleroy.com (Scott B. Albee, Esq., Fulmer LeRoy & Albee, PLLC, 605 S. Boulevard, Tampa, FL 33606), sSchaefer@fulmerleroy.com, and eservicetpa@fulmerleroy.com, this 5 day of November, 2015.

***McCUMBER, DANIELS, BUNTZ
HARTIG & PUIG, P.A.***

/s/ Amy L. Dilday _____

AMY L. DILDAY, B.C.S.

Florida Bar Number 0018035

adilday@mccumberdaniels.com

mhicks@mccumberdaniels.com

eservice@mccumberdaniels.com

4401 West Kennedy Boulevard, Suite 200

Tampa, Florida 33609

(813) 287-2822 telephone

(813) 287-2833 facsimile

Attorneys for Respondent

CERIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the Florida Rules of Appellate Procedure 9.210 and is in Times New Roman, 14 point font.

***McCUMBER, DANIELS, BUNTZ
HARTIG & PUIG, P.A.***

/s/ Amy L. Dilday _____

AMY L. DILDAY, B.C.S.

Florida Bar Number 0018035

adilday@mccumberdaniels.com

mhicks@mccumberdaniels.com

eservice@mccumberdaniels.com

4401 West Kennedy Boulevard, Suite 200

Tampa, Florida 33609

(813) 287-2822 telephone

(813) 287-2833 facsimile

Attorneys for Respondent