

**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

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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.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Brief of
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