SUPREME COURT OF FLORIDA
Case No.: SC05-1864

BRANDON REGIONAL HOSPITAL,

Petitioner,

vs.

MARIA MURRAY and
DANIEL S. MURRAY, et. al.

Respondents.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT
CASE NO. 2D05-937

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The Murrays ask this Court to read sections 766.101(5) and 395.0191(8), Fla. Stat. (2001), narrowly based on their view that a hospital's clinical credentials lists, although prepared and endorsed by a peer review committee, are not constitutive of the peer review process. To follow the Murray's logic, one must conclude the Legislature intended to exempt the credentials records at issue in this case from other records of the credentials committee, and to allow discovery and use of those records against a healthcare provider arising in an action out of the credentials decision reflected in the discovery documents. Nothing in the peer review statutes admits to such a strained interpretation.

Delineations of clinical credentials are a direct comment on a peer review committee's "decision-making process." The endorsement of credentials stems from the candid and conscientious evaluation of the applicant's competence, character and ethical qualifications. Hospital committee records which reveal the credentials that were approved and denied, the staff privileges requested by the physician, and the names of participants in the credentialing process are tempting to the malpractice attorney, for they may contain admissions by the defendant. There is a legitimate concern that reports prepared by medical review committees not be allowed to serve as a source of information to be used in litigation against the physician or hospital, a concern recognized by the Florida Legislature when the peer review privilege was enacted. Efforts to discover peer review records will curtail the candid deliberations of hospital committees

because of a fear of the discovery process, and eventually erode the benefits of committee review and self-policing. The decision under review should be quashed.

ARGUMENT

WHETHER THE PEER REVIEW PRIVILEGE CODIFIED IN SECTIONS 766.101(5) AND 395.0191(8), FLORIDA STATUTES (2001), APPLIES TO DELINEATIONS OF APPROVED CLINICAL CREDENTIALS PREPARED BY A HOSPITAL'S CREDENTIALS COMMITTEE IN FURTHERANCE OF THE HOSPITAL'S INTERNAL PEER REVIEW RESPONSIBILITIES AND QUALITY ASSURANCE STANDARDS.

The Respondents, Maria and Daniel Murray, want this court to recognize a jurisprudential niche for a peer review committee's delineations of approved clinical credentials for staff physicians. As authority for doing so, the Murrays focus on a single line from this court's decision in *Cruger v. Love*, 599 So.2d 111 (Fla. 1992), which reads: "The privilege provided in §766.101(5) and §395.011(9), Florida Statutes, protects any document considered by the committee or board as part of its decision-making process." *Id.*, at 114. Delineations of clinical credentials, so the Murrays have argued, fall outside peer review's "decision-making process" and thus should be discoverable. Their reasoning is specious, for not only does it ignore the legislative policy behind the peer review statutes, which is to encourage confidential participation and ensure "full, frank medical peer evaluation," *Holly v. Auld*, 450 So.2d 217, 220 (Fla. 1992), it also ignores *Cruger*'s purposeful amplification of the statutory protections. The discovery privilege most certainly applies to documents created in committee review by the committee in the exercise of peer review.

A. THE PEER REVIEW STATUTES ARE TO BE BROADLY INTERPRETED

Cruger is not well-cited by the Murrays as authority for a narrow, restrictive interpretation of the peer review statutes. *Cruger* expressly extended the scope of protection to include a document (*i.e.*, a physician's staff privileges application) that was generated externally, and not merely to those documents "created by the board or committee." *Cruger*, 599 So.2d at 114. This interpretation promotes the public policy of confidential peer review intended by the Legislature. *Id.*, at 115. A document drafted by the credentials review committee to indicate which clinical credentials were applied for, then approved or denied, is a document the committee has, quite literally, considered. Such a record is not created outside the peer review process.

Peer review was designed to encourage effective "self-policing" within the medical community by removing the inhibitions that would necessarily follow if those efforts could later be used in medical malpractice cases. *Good Samaritan Hospital Ass'n., Inc. v. Simon*, 370 So.2d 1174, 1176 (Fla. 4th DCA 1979). To that end, the discovery privilege seeks to promote candor among those persons conducting and participating in peer evaluations. *Holly*, 450 So.2d at 220. Credentials review unquestionably constitutes peer review. *Cruger*, 599 So.2d at 112-113; *Paracelus Santa Rosa Medical Ctr. v. Smith*, 732 So.2d 49 (Fla.5th DCA 1999); *Columbia Park Medical Ctr., Inc. v. Gibbs*, 723 So.2d 294 (Fla. 5th DCA 1998). In carrying out its peer review and quality assurance responsibilities, Brandon Hospital's credentials review committee must review applications for staff appointment and decide which credentials to approve and which to

deny. The committee's investigations, proceedings, and records are not subject to public scrutiny. *See* §395.0191(8) and §766.101(5), Fla. Stat. (2001) (exempting peer review records from the provisions of Chapter 119 pertaining to public records).

The Murrays labor to parse the "decision" of the credentials committee from the "decision-making process," but in the context of confidential peer review, this advocates an artificial distinction that is counterintuitive of the statutory language as a whole. *See Exposito v. State*, 891 So.2d 525 (Fla. 2004); *State v. Dugan*, 685 So.2d 1210 (Fla. 1997) (cardinal rule of statutory construction that courts shall follow the plain and ordinary meaning of statutory language). If the Legislature wished to exclude the review committee's final decision from the "records of the committee," it could easily have accomplished that within the text of the statutes. Given the immunity protections the statutes extend to those who participate in peer review, it may be concluded that documents generated in peer review that reflect peer review decisions, findings, recommendations, evaluations, opinions or actions constitute peer review records. *See Bay Medical Ctr. v. Sapp*, 535 So. 2d 308 (Fla. 1st DCA 1998) (holding that plaintiff was not entitled to discovery of final decisions by hospital governing board to grant staff membership or to discipline staff members).

Several cases in Florida have recognized as a matter of public policy alone that peer review evaluations, surveys, and reports which summarize a process of review are immune from discovery, even though the lawsuit is not brought against a healthcare provider and does not directly involve the matters which were the subject of evaluation

and analysis. *See, e.g.*, *Beverly Enterprises – Fla, Inc. v. Ives*, 832 So.2d 161, 164 (Fla. 5th DCA 2002) (self-critical surveys); *Good Samaritan Hospital, Inc. v. American Home Products Corp.*, 569 So.2d. 895 (Fla. 4th DCA 1990) (hospital's committee meeting minutes which identified attendees). Public policy considerations thus favor application of the discovery privilege to the credentials lists in question.

B. THE DISCOVERY PRIVILEGE APPLIES TO DEPOSITION QUESTIONS

The discovery and use privilege afforded by the peer review statutes extends to questioning during a deposition or trial. *See Munroe Regular Med. Center, Inc. v. Rountree*, 721 So.2d 1220 (Fla. 5th DCA 1998) (peer review statutes protect medical malpractice defendant from questions in a deposition concerning the temporary suspension of his medical license following peer review); *Lingle v. Dion*, 776 So.2d 1073 (Fla. 4th DCA 2001) (peer review privilege extends to line of questioning at trial about the suspension of defendant's medical license and the final actions of the peer review board). Brandon Hospital's objections to the Murrays' line of questioning in Dr. Blocker's depositions were proper.

Dr. Blocker, a co-defendant at the time, was asked in his deposition about Brandon Hospital's list of gynecological credentials applied for and approved, which Dr. Blocker had produced to the Murrays in pre-suit discovery. R. 162. Dr. Blocker was then asked specifically whether the list of approved clinical credentials would allow him to perform a sphincteroplasty. R. 164-65. That line of inquiry prompted an objection and motion for protective order, which were the subject of Brandon Hospital's initial petition for

certiorari relief in the Second District Court of Appeal. R. 206-07.

When Dr. Blocker's deposition was reconvened, the Murrays learned that in addition to the delineations of approved credentials in gynecology, Brandon Hospital had granted Dr. Blocker credentials in obstetrics. R. 216-217. When, following the deposition, the trial court overruled the co-defendants' objections to the production of this additional set of clinical credentials, Dr. Blocker produced the list as ordered. R. 66-67. This set the stage for Brandon Hospital's second attempt to obtain certiorari relief on appeal. Given the circumstances in the trial court, the Murrays' characterization of Dr. Blocker's court-ordered production as "voluntary" is a stretch. Resp's Br. at 10.

The written delineations of Dr. Blocker's credentials in obstetrics reflect the credentials committee's appraisal and comment on the doctor's professional competence and qualifications. His credentials define the scope of his clinical practice at Brandon Hospital. The Murrays concede the disputed obstetrics list identifies members of the hospital's credentials committee, as does the list of gynecological credentials which was the subject of an earlier challenge. Resp.'s Br. at 6. This alone reckons against an interpretation that denies the protections of the discovery privilege to the credentials document in this case. *See Palms of Pasadena Hosp. v. Rutigliano*, 908 So.2d 594 (Fla. 5th DCA 2005) (holding that in a medical malpractice action against a hospital, in which the hospital is accused of negligent credentialing, §§766.101(5) and 395.0191(8) protect the identification of members of the hospital's credentials committee).

C. PRIVATE CIVIL LITIGANTS SUING A HOSPITAL FOR MEDICAL MALPRACTICE DO NOT HAVE ACCESS TO "FINAL REPORTS" OF

MEDICAL REVIEW COMMITTEES

As did the Second District below, the Murrays find salience for their arguments in *Bayfront Medical Ctr., Inc. v. State, Agency for Healthcare Administration*, 741 So.2d 1226 (Fla. 2d DCA 1999). The Second District's reading of *Bayfront Medical* as authority for the conclusion it reached below is mistaken. The Second District in *Bayfront Medical* did not reason that a peer review committee's final disciplinary reports and remedial recommendations fall outside the field of peer review and so are discoverable. Nor does *Bayfront Medical* endorse the result reached here of allowing private civil litigants prosecuting a medical negligence action to have access to confidential peer review documents. To the contrary, *Bayfront Medical* would expressly deny the Murrays the peer review records they seek to use in this case:

> The records obtained [by AHCA] are not available to the public under s. 119.07(1), nor shall they be discoverable or admissible in any civil or administrative action, except in disciplinary proceedings by [AHCA] or the appropriate regulatory board.

Bayfront Medical, at 1229.

Rather, the decision in *Bayfront Medical* permitted a public regulatory body, the Agency for Health Care Administration ("AHCA"), to obtain a portion of peer review-generated material on the basis of AHCA's legislatively bestowed right to that material for purposes of regulatory oversight of healthcare facilities and providers. *See* §395.0193(4), Fla. Stat. (1997) ("All final disciplinary actions taken … shall be reported within 10 working days to the Division of Health Quality Assurance of the [AHCA] in writing and shall specify the disciplinary action taken and the specific grounds therefore");

§395.0197(5), Fla. Stat. (1997) (requiring licensed hospitals to file yearly reports with AHCA summarizing incident reports, together with any disciplinary actions taken, filed during the course of the year). The critical distinction rests in AHCA's regulatory responsibilities. The Murrays lack comparable statutory authority that would permit them access to confidential peer review documents created in furtherance of Brandon Hospital's self-policing and quality assurance objectives.

In short, the discovery privilege provided in §766.101(5) and §395.0191(8) protects the clinical credentials ratified here by committee review. Confidentiality is essential to effective functioning of committee review, which serves to safeguard the public interest in improving the care and treatment of hospital patients. The claims filed against Brandon Hospital in this case arise from the very matters which were the subject of evaluation and review by the Hospital's credentials committee. R. 37-39. The ruling of the trial court allowing the Murrays to obtain discovery of the Hospital's credentials records and refusing the requested protective order concerning those records was a violation of Florida's comprehensive peer review statutes. Accordingly, the opinion of the Second District upholding the trial court's ruling should be quashed.

D. AMENDMENT 7 DOES NOT APPLY TO THIS CASE

For the first time in the course of this litigation, the Murrays invoke Art. X, § 25(a) of the Florida Constitution, commonly known as "Amendment 7," and assert that Brandon Hospital's petition is moot because Amendment 7 abrogates the privileges of §395.0191 and §766.101, Fla. Stat. Resp. Br. at 18. This argument fails because (1) the

Murrays waived their Amendment 7 grounds for discovery and (2) Amendment 7 would not have required disclosure had it been timely invoked.

1. Respondents waived Amendment 7 as a ground to trump statutory privileges by not raising it in the trial court.

It is well established that a legal argument must be raised initially in the trial court by the presentation of a specific motion or objection at an appropriate stage of the proceedings. The failure to preserve an issue for appellate review constitutes a waiver.

> In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.

Tillman v. State, 471 So.2d 32, 35 (Fla.1985). To the same effect is *Sunset Harbor Condominium Ass'n. v. Robbins*, 914 So.2d 925, 928 (Fla. 2005) (holding that plaintiff waived the right to argue that defendant lacked standing to raise an affirmative defense by failing to raise the argument in the trial court in response to defendant's motion for summary judgment).

The discovery order at issue here was argued and entered January 24, 2005, months after passage of Amendment 7 on November 2, 2004. Plaintiffs never raised any arguments based on this new law in the courts below, despite having had ample opportunity to do so. In fact, the Murrays admit in this Court that "the parties specifically chose not to address [Amendment 7]" in the trial court. Resp. Br. at 18-19. This is an explicit waiver. The Murrays are bound by it.

The Murrays attempt to escape the consequences of their previous inaction by now

asserting that this Court should apply "pipeline" appellate decisions interpreting Amendment 7, citing *Notami Hosp. of Fla., Inc. v. Bowen*, 927 So.2d 139 (Fla. 1st DCA 2006) (pending in this Court on appeal, SC06-912) and *Florida Hospital Waterman, Inc. v. Buster*, 31 Fla. L. Weekly D 763 (Fla. 5th DCA Mar. 10, 2006), *rev. granted*, 926 So.2d 1269 (Fla. 2006). But, in order to claim the benefit of new case law decided during the pendency of appellate review, a party must have raised the underlying issue in the lower court, whether or not the new law was foreseeable:

> … we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Art. I, §§ 9, 16, Fla. Const. *To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review*.

Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992) (footnote omitted) (emphasis added). This rule applies equally to civil cases. *Clay v. Prudential Ins. Co. of America*, 670 So.2d 1153, 1155 (Fla. 4th DCA 1996). The Murrays plainly failed to raise Amendment 7 issues in the courts below. Accordingly, they cannot claim the benefit of new appellate decisions interpreting and applying Amendment 7.

In short, the state of the record does not permit this Court to consider the applicability of §381.028, Fla. Stat. (2005), and Amendment 7 to the discovery document sought in this case. The proper interpretation and constitutional validity of §381.028 and Amendment 7 are now before this Court in *Notami* and *Buster*. This case is not the proper vehicle for an adjudication of those issues. This Court should decline the

Murrays' invitation to take up an Amendment 7 claim that they intentionally bypassed in the lower courts.

2. Amendment 7 provides "access" only to records relating to adverse medical incidents and does not apply retroactively.

Amendment 7 provides that " … patients have the 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 Murrays have never asserted, much less established, that the document at issue (a delineation of physician credentials) is in fact a record "relating to any adverse medical incident."

Even if the document qualified as an Amendment 7 record of an adverse medical incident, it was created before and pertains to an alleged event (in the year 2001) preceding the effective date of Amendment 7. The statute implementing Amendment 7 declares Amendment 7 to be prospective only, *i.e.*, to give access to documents created or incidents occurring after November 2, 2004. §381.028(5), Fla. Stat. (2005).

Apart from the statute, Amendment 7 is not by its terms retroactive and cannot validly be applied retroactively to require disclosure of documents created prior to its adoption. Hospitals and physicians had a long-established, vested interest in the confidentiality of those documents. *Buster*, 31 Fla. L. Weekly D 763, 765-66. Fairness also counsels against retroactivity:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. (citation note omitted) Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to

> conform their conduct accordingly; settled expectations should not be lightly disrupted.

Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994). The validity of retroactive application of Amendment 7 is pending before this Court in a pair of contradictory decisions in *Buster* (not retroactive) and *Notami* (retroactive).

Independent of the non-retroactivity of Amendment 7, §381.028(3)(j), Fla. Stat. (2005), provides that the only records available under Amendment 7 are the final reports of any adverse medical incidents. Section 381.028(3)(b) further defines the accessible reports as those made or required to be made to the Agency for Health Care Administration ("AHCA").[1] Plaintiffs have not established that the document at issue in this case relates to a final adverse medical incident report made or required to be made to AHCA, nor have they created a record from which this Court could reach such a conclusion.

Finally, the privileges conferred upon the document at issue have not been abrogated by Amendment 7. Section 381.028 plainly states that Amendment 7 does not abrogate the privileges set forth in sections 395.0191 and 766.101. In order to have obtained a heretofore privileged document through pretrial discovery, plaintiffs would have been required to mount a successful constitutional challenge to the validity of this

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1 *See* §381.028(7)(b), Fla. Stat. (stating that health care facilities are to use "the process provided in s. 395.0197 for identifying records of an adverse medical incident, as defined in" Amendment 7). Section 395.0197 specifies which "adverse incidents" certain health care facilities are required to report to AHCA.

statute.[2] This they have not done.

CONCLUSION

Florida appellate courts have, until now, consistently construed the peer review privilege broadly. The courts have declined to recognize an exception to the statutes even when plaintiffs are suing for negligent credentialing and face difficulty proving their claim without access to and use of peer review privileged documents. Permitting discovery and use of Brandon Hospital's credentials lists as prepared by its credentials committee under an expectation of confidentiality involves more than a single, isolated violation of the peer review statutes. The immunity protections granted by the statutes are violated each time the Murrays try to employ the credentials delineations to further their negligent credentialing case against the Hospital. By allowing the Murrays to use the clinical credentials at issue in this lawsuit, the courts below deviated from the legislative purpose and public policy behind the peer review statutes. Brandon Hospital thus respectfully requests that this Court resolve the conflict created below by quashing the Second District decision, and remanding for entry of an appropriate protective order prohibiting the use in discovery or trial of any delineations of clinical credentials obtained by the Murrays either in pre-suit or during this lawsuit.

Respectfully submitted,

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2 They would have been required to serve the Florida Attorney General or the state attorney of the judicial circuit in which the action is pending in order to afford the State the opportunity to be heard. See § 86.091, Fla. Stat. (2005). This has not been done.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail this _____ day of June, 2006, to:

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CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that the Reply Brief on the Merits is typed in Times New Roman 14 point font, which complies with the font requirements as set forth in Florida Rules of Appellate Procedure 9.100.

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