IN THE SUPREME COURT OF FLORIDA

Case No. SC06-688

On Discretionary Review from the
Fifth District Court of Appeal

FLORIDA HOSPITAL WATERMAN, INC.,
d/b/a FLORIDA HOSPITAL WATERMAN,

Petitioner,

v.

TERESA M. BUSTER, as Personal Representative
of the Estate of LARRY BUSTER, deceased,
JEFFREY B. KEELER, M.D., and
KELLER & GOODMAN, M.D., P.A.,

Respondents.

AMENDED BRIEF OF AMICUS CURIAE FLORIDA HOSPITAL ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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IDENTITY OF THE AMICUS AND THEIR INTEREST IN THE CASE

Amicus Curiae, Florida Hospital Association, Inc. ("FHA") is a Florida nonprofit trade association that represents over 150 hospitals and health systems in Florida. FHA represents member hospitals and health systems on matters of common interest before all three branches of government, particularly with respect to regulations that impact the members. FHA regularly appears as amicus curiae before Florida courts to address issues that apply to its members and that relate to the complex regulatory structure governing its members' provision of healthcare services in Florida. The issues that Petitioner raises in this proceeding concerning Amendment 7 are vitally important to FHA and its members.

SUMMARY OF THE ARGUMENT

Amendment 7 was enacted as a means of allowing patients access to more information about "adverse medical incidents," so that they could make better choices for health care services. Regardless of whether the Amendment was intended to be self-executing, in its effort to reshape the existing confidentiality protections for incident reporting, risk management, peer review and credentialing, it injected ambiguities and uncertainty into the process, thereby making legislative implementation appropriate. The Legislature therefore enacted section 381.028, to provide a clear and rationale framework for implementing the Amendment in a way that would eliminate questions about which records must be produced, to

which patients, when and at what cost. The implementing legislation was necessary to provide hospitals and patients with certainty so that the process could be as efficient and inexpensive as possible, thus carrying out the voters' overall intent.

Ignoring the ambiguities of the Amendment and in the face of these clearly unintended results, the court below determined that because the Amendment was self-executing the Legislature could not enact implementing legislation and allowed the Amendment 7 disclosure process to be injected into discovery in a malpractice case.

The lower court erred in both respects. Regardless of whether the Amendment was self-executing, the Legislature was well within its prerogative in enacting a statutory scheme to supplement and implement the Amendment in a way that made it easier for patients and hospitals to understand and apply.

Furthermore, Amendment 7 was never advertised to voters as a means to assist plaintiffs in malpractice cases through the expansion of discovery rights. Injecting Amendment 7 disclosure rights into the discovery process leads to results that are plainly not contemplated by the language of the Amendment itself. The rules of discovery in legal proceedings would allow co-defendants who are not "patients," such as physicians who are the subject of the peer review records, to obtain access to records of "adverse medical incidents" in contravention of the plain language of the Amendment. In so doing, the Amendment would be applied

in a way that will undermine the peer review and risk management systems that have been proven deterrents against medical malpractice.

However, the lower court was correct in determining that the Amendment could not be applied retroactively because to do so would interfere with the substantive vested rights of persons whose names may appear in the Amendment 7 records and who participated in the peer review process under a long-standing statutory system that guaranteed confidentiality.

This Court should reverse the lower court's rulings on all but the retroactive application issue and uphold the entire statutory system for its implementation, especially those portions of the statute that protect records of adverse medical incidents from discovery and make those records inadmissible in legal proceedings. If the Court finds any portions of the statute to be in conflict with the explicit terms of the Amendment, it should sever and declare unconstitutional only those portions.

ARGUMENT

***Standard of Review*.** The Issues involved in this case are questions of law. Therefore, the Standard of Review is de novo. *Execu-Tech Business Sys, Inc.. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582 (Fla. 2000).

Florida Hospital Association will present its position with respect to each of the three certified questions posed by the Fifth District Court of Appeal.

I. IS AMENDMENT 7 SELF-EXECUTING?

The Florida Hospital Association believes that Amendment 7 is not self-executing; however, for the purpose of argument, FHA will assume that Amendment 7 is self-executing because even if it was not, the Legislature has now acted to implement it by the enactment of section 381.028, Florida Statutes (2005). Notwithstanding, FHA does dispute the position of the court below that because the amendment was self-executing the Legislature could not enact any implementing legislation.

Florida law is well settled that statutes which implement a constitutional provision should be "broadly and liberally construed" so as to "implement and complement" the constitutional rights and duties. *See Austin v. State*, 310 So. 2d 289, 293 (Fla. 1975). As this Court stated in *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960):

> If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. {citation omitted}. The fact that the right granted by the provision *may be supplemented by legislation*, further protecting the right or making it available, does not of itself prevent the provision from being self-executing.

Id. at 851 (emphasis added).

In *Parker v. State*, 843 So. 2d 871, 878 (Fla. 2003), the Court held that the statute enacted after a constitutional amendment "reasonably may be viewed as implementing" the amendment, and "works hand in hand" with the constitutional

provision. Thus, the Legislature is permitted to enact a statute clarifying and supplementing a constitutional amendment, providing there is no conflict between the two. It is only when statutory provisions "collide with provisions of the Constitution the statute must give way." *Henderson v. State*, 20 So. 2d 649, 651 (Fla. 1945).

Statutes come before the courts with a presumption of constitutionality. *Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 881 (Fla. 1983). Moreover, it is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional. *Sunset Harbour Condo Assn. v. Robbins*, 914 So. 2d 925, 929 (Fla. 2005).

While not explicitly saying so, the court below apparently held section 381.028 invalid in its entirety.[1] Yet, a careful analysis of section 381.028 demonstrates that its provisions properly assist in carrying out the purpose of Amendment 7. Thus, the statute provides meaningful definitions of the words "agency," "department," "health care provider," "health care facility," "identity," "privacy restrictions imposed by federal law," and "representative of the patient," that are not covered in the Amendment itself. The statute specifies how a request under Amendment 7 for the production of records would be submitted; specifies the charges which may be made for the production of the records; and specifies

[1] The court opined that "we are not much impressed or persuaded by the legislative interpretation of Amendment 7 pronounced in section 381.028."

that the production of records must be made in a timely manner. All of these provisions fairly supplement and clarify the requirements of Amendment 7, and it is hard to imagine how these provisions would conflict with Amendment 7 in a way that would render them unconstitutional.

The most important provisions of section 381.028 are those which clarify which records must be disclosed in response to an Amendment 7 request. FHA agrees that Amendment 7 mandates the disclosure to patients of certain medical records which were heretofore deemed confidential by statute, but the Amendment does not clearly specify the records that must be disclosed. The hospitals' concern is to be able to readily determine just what records must be disclosed upon a request so that they can promptly and efficiently respond to such requests without becoming engaged in ancillary litigation.

Amendment 7 provides in Article X, section 25(a) 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."

Article X, section 25(c)(3), defined an adverse medical incident as follows:

> The phrase "adverse medical incident" means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management,

> quality assurance, credentials, or similar committee, or any representative of any such committees.

Unfortunately, this definition does not fully clarify just what records are subject to disclosure in a given situation. Obviously, persons seeking treatment or care from a doctor or a hospital do not always obtain the result they hope for. Some patients are not cured and operations are not always successful. Yet, not all of these cases with unsuccessful outcomes involve the necessary medical negligence, intentional misconduct or other act required for the incident to be characterized as an "adverse medical incident." Without additional guidance, hospitals will often be at a loss to know just what records should be produced and courts will become embroiled in resolving these disputes on a case-by-case basis.

In section 381.028, Florida Statutes (2005), legislation was enacted to implement Amendment 7 and to provide a logical answer. Section (7)(b)(1) reads as follows:

> Using the process provided in s. 395.0197, the health care facility shall be responsible for identifying records as records of an adverse medical incident, as defined in s. 25, Art. X of the State Constitution.

The application of section 395.0197(5), which pertains to the internal risk management program which every licensed health facility is required to have, would provide hospitals with clear guidance as to what records must be disclosed to patients under Amendment 7. This is especially true because hospitals already

report such adverse incidents to state regulators, albeit confidentiality. Section 395.0197(5) provides that:

> For purposes of reporting to the agency pursuant to this section, the term "adverse incident" means an event over which health care personnel could exercise control and which is associated in whole or in part with medical intervention, rather than the condition for which such intervention occurred, and which:
>
> (a) Results in one of the following injuries:
>
> 1. Death;
>
> 2. Brain or spinal damage;
>
> 3. Permanent disfigurement;
>
> 4. Fracture or dislocation of bones or joints;
>
> 5. A resulting limitation of neurological, physical, or sensory function which continues after discharge from the facility;
>
> 6. Any condition that required specialized medical attention or surgical intervention resulting from nonemergency medical intervention, other than an emergency medical condition, to which the patient has not given his or her informed consent; or
>
> 7. Any condition that required the transfer of the patient, within or outside the facility, to a unit providing a more acute level of care due to the adverse incident, rather than the patient's condition prior to the adverse incident;
>
> (b) Was the performance of a surgical procedure on the wrong patient, a wrong surgical procedure, a wrong-site surgical procedure, or a surgical procedure otherwise unrelated to the patient's diagnosis or medical condition;
>
> (c) Required the surgical repair of damage resulting to a patient from a planned surgical procedure, where the damage was not a recognized specific risk, as disclosed to the patient and documented through the informed-consent process; or

(d) Was a procedure to remove unplanned foreign objects remaining from a surgical procedure.[2]

By defining an "adverse medical incident" to mean the existing report of adverse incidents in section 395.0197, the hospitals will have a clear understanding of what records they are required to disclose as reflecting adverse medical incidents.[3] With these definite guidelines, the courts will be spared the necessity of resolving the frequent disputes which would otherwise occur over just what records are subject to disclosure.

Respondents, however, may argue that such an interpretation ignores the latter portion of the constitutional definition of "adverse medical incident" in paragraph (c)(3), which calls for disclosure of records "including, but not limited to . . . 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." But not all such reports and records reflect medical negligence. Surely, this language cannot be intended to require that the records of any incidents reported to such committees or their representatives, no matter how false or specious, and even if rejected out-of-hand, would still have

[2] The statute in section (7)(b)2 thereof also provides the criteria that health care providers can use for determining what to disclose by referring to section 458.351, which describes the adverse incidents.

[3] The definition of an "adverse incident" under section 395.0197 is, in fact, broader than the definition of an "adverse medical incident" under Amendment 7 because the former does not require any finding of negligence.

to be disclosed. A peer review finding that a previously reported "adverse incident" was not the result of negligence could hardly be considered to be an "adverse medical incident" as defined by Amendment 7. To conclude otherwise would also be inconsistent with any logical construction of the Amendment.

The first portion of paragraph (c)(3) of Amendment 7 defining "adverse medical incident" clearly contemplates some sort of medical error. By the latter use of the term "including, but not limited to," anything that follows must necessarily still be within the scope of the earlier language. In other words, any language following those words should not be construed more broadly than the language which preceded them. In any event, this dichotomy renders paragraph (c)(3) at least ambiguous, and presents another reason why the Legislature was within its rights to construe to the term "adverse medical incident" in its implementing legislation by defining it in the manner it had always been understood by the hospitals. *See Agency for Health Care Association v. Associated Industries of Florida,* 678 So. 2d 1239 (Fla. 1996) ("This Court is deferential when reviewing a legislative determination as to the meaning of a constitutional provision.").

Finally, Florida Hospital Association emphatically asserts, consistent with the wording of section 381.028(6), that Amendment 7 does not repeal or otherwise alter any existing restrictions on the "admissibility of records relating to adverse

medical incidents" which is contained in those statutes or repeal or otherwise alter "any immunity provided to, or prohibition against compelling testimony by, persons providing information or participating in any peer review panel, medical review committee, hospital committee, or other hospital board otherwise provided by law, including, but not limited to," the enumerated statutes.[4]

Amendment 7 is limited to obtaining access to records. The Amendment has no effect on the statutes which provide for immunity from suit for those involved in the self-regulating process; immunity from testimonial compulsion; and the inadmissibility of the records in civil or administrative proceedings.

The Respondents may point to portions of section 381.028 that arguably may conflict with Amendment 7, such as the provision in section 381.028(2)(j) limiting available records only to "final reports of adverse medical incidents"; the requirement in section 381.028(7)(a) that the records requested must involve "the same or substantially similar condition, treatment, or diagnosis as that of the patient requesting access"; or the four-year limitation on the period a request for records can cover contained in section (5). These provisions are reasonable ways of implementing the overall purpose of the Amendment and are important to make the process more predictable, more efficient, faster, and less costly for the benefit

[4] The court below made it clear that it was not passing on the admissibility of the records subject to discovery.

of both patients and hospitals. Consider that unless the hospitals have certainty concerning the records that must be produced, the task of reviewing all of its records, redacting patient identifying and other patient confidential information, and copying the records will potentially be different for each request and will consume enormous amounts of time and resources. The framework established by the Legislature also reduces the need for judicial involvement in determining on a case-by-case basis what must be disclosed. It was for these practical reasons that the statute was enacted. But if these portions of the statute are deemed in conflict with the constitutional language, they may be severed.[5] As a consequence, Florida Hospital Association respectfully suggests that the proper course of action for this Court is to reject the district court's conclusion that the amendment is self-executing and, as a result, that the entire implementing legislation in section 381.028 is unconstitutional. Instead, the FHA believes that should this Court find any specific portion of section 381.028 to be in conflict with Amendment 7, it

[5] As this Court said in *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999):

> Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions. *See State v. Calhoun County*, 126 Fla. 376, 383, 170 So. 883, 886 (1936). This doctrine is derived from the respect of the judiciary for the separation of powers, and is "designed to show great deference to the legislative prerogative to enact laws." *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991).

should declare unconstitutional only that portion and uphold the balance of section 381.028 as properly implementing the manner in which Amendment 7 shall be carried out.

II. DOES AMENDMENT 7 PREEMPT STATUTORY PRIVILEGES AFFORDED HEALTH CARE PROVIDERS' SELF-POLICING PROCEDURES TO THE EXTENT THAT INFORMATION OBTAINED THROUGH THOSE PROCEDURES IS DISCOVERABLE DURING THE COURSE OF LITIGATION BY A PATIENT AGAINST A HEALTH CARE PROVIDER?

Another certified question asks whether the materials required to be disclosed by Amendment 7 should be discoverable in legal proceedings. This question should be answered in the negative.

At first blush, this question seems easy to answer much as the District Court did. But the issue is more complex. Amendment 7 was touted as a "pro-consumer" change that would allow the public more information about the track records of doctors and hospitals to facilitate better consumer choices. It was not advertised to the voters as a way to expand discovery for plaintiffs in legal proceedings.

Assuming Amendment 7 information is "discoverable" by traditional means in litigation has more ramifications than just providing an alternative means for the patient to obtain Amendment 7 information. If Amendment 7 information is "discoverable" in the course of litigation and all of the existing statutory privileges

are abrogated, then Amendment 7 information will be available to persons who are not "patients" as defined by Amendment 7. By making the records discoverable, co-defendants of the producing hospital will have access to the records even if they do not meet the definition of a "patient" under Amendment 7. Clearly, such a result is contrary to the plain language of Amendment 7, which grants access to such records only to "patients" and says nothing at all about discovery in legal proceedings.[6]

Allowing persons who are not "patients" to gain access to records of adverse medical incidents, including records of underlying peer review records, will undermine the self-policing process that hospitals use effectively to improve care. Removing the protections of confidentiality will have a chilling effect on the willingness of doctors and other health care professionals to participate in the peer review process. An interpretation that allows persons who are not patients to obtain records of adverse medical incidents directly conflicts with the plain language of the Amendment.

Moreover, if a patient has a right to Amendment 7 information with or without a lawsuit, what purpose is served by making the information "discoverable" in a legal proceeding? Indeed, in some respects, tying access to

[6] With all due respect, the reference by the court below to formal or informal requests does not compel an interpretation that "formal" means a discovery request in a lawsuit. "Formal" could just as easily mean a letter and "informal" could mean a telephone call or in-person request.

Amendment 7 records to the rules of discovery might actually circumscribe access by requiring that the information be relevant to the issues in the proceedings or that it be subject to other discovery limitations.

Therefore, the proper procedure for a patient who wishes to obtain the records during litigation would be to make the request unconnected with discovery. However, even if this Court were to conclude that a request made as a part of discovery is equivalent to a formal request as contemplated by Amendment 7, it should be made clear that the disclosure of the records need only be made to the patient and not to the other parties in the lawsuit, and that the records are not further discoverable from the patient.

The FHA hospitals submit that the Legislature has made the correct interpretation of Amendment 7 by declining to repeal the statutory privileges that protect such information from discovery in lawsuits, but protecting patients' access to the same information through other means; the Court should uphold that legislative interpretation.

III. SHOULD AMENDMENT 7 BE APPLIED RETROACTIVELY?

The court below correctly decided this issue by ruling that Amendment 7 cannot be applied retroactively to records created prior to November 2004. The well-established rule is that constitutional amendments are given prospective effect only, unless the text of the amendment or the ballot statement clearly indicates

otherwise. *See In re Advisory Opinion to the Governor—Terms of County Court Judges*, 750 So. 2d 610 (Fla. 1999). In addressing the operation of the constitutional amendment which mandated conformity of interpretation of the state's constitutional exclusion rule with the United States Supreme Court's interpretation of the Fourth Amendment, this Court stated:

> It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively.… ***This rule applies with particular force to those instances where retrospective operation of the law would impair or destroy existing rights.*** … In accordance with the rule applicable to original acts, it is presumed that provisions added by an amendment affecting existing rights are intended to operate prospectively also. … Nowhere in either article I, section 12 as amended or in the statement placed on the November ballot is there manifested any intent that the amendment be applied retroactively. Therefore, the amendment must be given prospective effect only.

State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983) (emphasis added; cites omitted).

Applying these same principles, the Court ruled that the "Sunshine Amendment," which prohibited members of the Legislature from representing another person before any state agency during their term of office, should be applied prospectively only. *Myers v. Hawkins*, 362 So. 2d 926 (Fla. 1978). More recently, the Court once again affirmed the prospective application rule in *Terms of County Court Judges*, 750 So. 2d 610 (Fla. 1999). *See also Bogle v. Perkins*, 240 So. 2d 801 (Fla. 1970) (property law amendment); *State v. City of Delray Beach*,

191 So. 188 (Fla. 1939) (homestead tax exemption); *Copeland v. State*, 435 So. 2d 842 (Fla. 2d DCA 1983) (search and seizure), *rev. denied*, 443 So. 2d 980 (Fla. 1983).

The same analysis that is employed in determining the retroactivity of statutes is applicable here. In *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d 494 (Fla. 1999), the Supreme Court explained:

> Two interrelated inquiries arise when determining whether statutes should be retroactively applied. The first inquiry is one of statutory construction: whether there is clear evidence of legislative intent to apply the statute retrospectively. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So.2d 106, 108 (Fla.1996). If the legislation clearly expresses an intent that it apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible. *See State Farm Mut. Auto. Ins. v. Laforet*, 658 So.2d 55, 61 (Fla.1995); *State Dep't of Transp. v. Knowles*, 402 So.2d 1155, 1158 (Fla.1981); *see also Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 425 n. 8 (Fla.1994).
>
> * * *
>
> The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively. *See Hassen*, 674 So.2d at 108; *Arrow Air*, 645 So.2d at 425. Thus, if a statute attaches new legal consequences to events completed before its enactment, the courts will not apply the statute to pending cases, absent clear legislative intent favoring retroactive application. *See Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483; *Arrow Air*, 645 So.2d at 425.
>
> The policy rationale behind this rule of construction is that the retroactive operation of statutes can be harsh and implicate due process concerns.

Under these governing principles, Amendment 7 must be construed as prospective only. First and foremost, the text of the Amendment itself, as well as its supporting ballot summary and other materials, give no indication that it is to be applied retroactively. It makes no difference whether or not the Amendment is self-executing. Without any clear indication of retroactivity in the text of the Amendment or its ballot summary, it is impossible to conclude that retroactive application was intended.

Even if Amendment 7 could be read to express a retroactive intent, it would still have to be applied prospectively because a retroactive application would impair vested substantive rights. The records in question—adverse incident reports, peer review materials, and the like—were created by those who participated under a "settled expectation" that the documents would be exempt from disclosure to persons other than those necessary to accomplish the peer review and regulatory process. Florida law expressly guarantees confidentiality of peer review materials, adverse incident reports, and quality assurance materials. *See* §§ 381.0055, 381.0273, 395.0193(7), 395.0193(8), 766.1016(2), 766.1016(3) and 766.101(5), Fla. Stat. (2004). The law created a clear vested substantive right of confidentiality, which cannot be infringed through a retroactive application of Amendment 7.

Allowing retrospective access to previously created records will potentially allow physicians access to old peer review records to find out who had complained

or cooperated in prior peer review investigations; thus, allowing the re-opening of closed wounds. Consistent with the rationale of the court below, Amendment 7 cannot and should not be applied retroactively.

CONCLUSION

The lower court's view that "existing law was sufficient to implement the provisions of the Amendment and that no further legislation was necessary" sharply collides with the Legislature's clear prerogative to enact supplemental legislation, even where the constitutional amendment is "self-executing." Viewed as a whole, section 381.028 clarifies significant ambiguities in Amendment 7 and supplements it in such a manner as to facilitate its proper application. Notwithstanding, should this Court deem any portions of the statute to be invalid, the FHA urges the Court to sever them as unconstitutional and uphold the balance of the statute. Furthermore, by any construction, records of adverse medical incidents should not be made discoverable in legal proceedings, as such a process would undermine ensuring peer review confidentiality by allowing persons who are not "patients" to access records.

Finally, Amendment 7 must not be applied retroactively to any records created prior to November 2004, as such a ruling would breach substantive vested rights of persons who participated in the peer review process under the promise of confidentiality.

Respectfully submitted this _____ day of July, 2006.

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