IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v. Case No. SC06-688

TERESA M. BUSTER, as Personal Representative of the ESTATE OF LARRY BUSTER, deceased,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Review from the District Court of Appeal,
Fifth District
State of Florida

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INTRODUCTION

The Petitioner, Florida Hospital Waterman, Inc., d/b/a Florida Hospital Waterman, shall be referred to as "Waterman."

The Respondent, Teresa M. Buster, as Personal Representative of the Estate of Larry Buster, deceased, shall be referred as "Buster."

Citations to the Petitioner's Initial Brief on the Merits shall be referred to as (Initial Brief, at ____) with the appropriate page number inserted.

STATEMENT OF CASE AND FACTS

Buster accepts and incorporates the Statement of Case and Facts in the Initial Brief, with the additional incorporation of the "Factual and Procedural Background" set forth in the district court's opinion. *Florida Hosp. Waterman, Inc. v. Buster*, 932 So. 2d 344, 348-49 (Fla. 5th DCA 2006).

Waterman does not set forth Amendment 7 or the ballot summary in their entirety in the Initial Brief. These documents are critical to the consideration of this appeal. The Amendment states:

1) Statement and Purpose:

> The Legislature has enacted provisions relating to a patients' bill of rights and responsibilities, including provisions relating to information about practitioners' qualifications, treatment and financial aspects of patient care. The Legislature has, however, restricted public access to information concerning a particular health care provider's or facility's investigations, incidents or history of acts, neglects, or defaults that have injured patients or had the potential to injure patients. This information may be important to a patient. The purpose of this amendment is to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility's or provider's adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death. This right to know is to be balanced against an individual patient's rights to privacy and dignity, so that the information available relates to the practitioner or facility as opposed to individuals who may have been or are patients.

2) Amendment of Florida Constitution:

Art. X, Fla. Const., is amended by inserting the following new section at the end thereof, to read:

Section 22.[1] Patients' Right to Know About Adverse Medical Incidents.

(a) 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.

(b) In providing such access, the identity of patients involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained.

(c) For purposes of this section, the following terms have the following meanings:

(1) The phrases "health care facility" and "health care provider" have the meaning given in general law related to a patient's rights and responsibilities.

(2) The term "patient" means an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider.

(3) 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

[1]When Amendment 7 became law, it was redesignated as Section 25 to avoid confusion with another Amendment. Art. X, § 25 n.1, Fla. Const.

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.

(4) The phrase "have access to any records" means, in addition to any other procedure for producing such records provided by general law, making the records available for inspection and copying upon formal or informal request by the patient or a representative of the patient, provided that current records which have been made publicly available by publication or on the Internet may be "provided" by reference to the location at which the records are publicly available.

3) Effective Date and Severability:

This amendment shall be effective on the date it is approved by the electorate. If any portion of this measure is held invalid for any reason, the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.

The ballot summary reads:

> Current Florida law restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice. This amendment would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death. Provides that patients' identitie [sic] should not be disclosed.

Advisory Opinion to the Attorney Gen. re: Patients' Right to Know About Adverse Med. Incidents, 880 So. 2d 617, 618-19 (Fla. 2004).

SUMMARY OF THE ARGUMENT

Amendment 7, overwhelmingly passed by the voters of this state, was intended to do away with prior legislative restrictions on public access to health care providers' self-policing processes.

Certified Question 1: The first certified question should be answered in the affirmative. Amendment 7 preempts statutory privileges to the extent that records of health care providers are discoverable in litigation. The broad language of the Amendment provides that patients may obtain "any records" related to "any adverse medical incident." Further, the ballot summary's inclusion of the term "medical malpractice" demonstrates that Amendment 7 was intended to apply during litigation. Amendment 7, the ballot summary, and common sense all dictate that the ability to obtain records from health care providers applies during discovery. The intent of Amendment 7 should not be limited by a strained definition of the term "records," and this Court should not address speculative questions of admissibility and discoverability that were not certified, are not ripe, and are not properly before this Court.

Certified Question 2: The second certified question should be answered in the affirmative. Voter intent and the presumption in favor of self-execution clearly indicate that Amendment 7 is self-executing. The Amendment contains detailed definitions of terms and sets forth a narrow policy of allowing patients access to

information concerning adverse medical incidents. Additionally, Amendment 7 was effective immediately upon passage which expressed the intent that no enabling legislation was necessary.

Certified Question 3: The third certified question should be answered in the affirmative. The terms of Amendment 7 indicate that it was intended to be applied retroactively. Retroactive application does not impair vested rights since health care providers merely had an expectation that the statutes at issue would not be amended or superseded.

STANDARD OF REVIEW

The standard of review for constitutional interpretation is *de novo*. *Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004). However, additional considerations come into play when this Court is interpreting a constitutional amendment that arises from the initiative process. As this Court stated:

> The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such a manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such a manner as to make it possible for the will of the people to be frustrated or denied.

Gray v. Bryant, 125 So. 2d 846, 853 (Fla. 1960). This Court has also noted that sovereignty resides in the people of the state as expressed by the constitution. *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956). The people have the right to change, abrogate or modify the constitution, and it is this Court's "first duty . . . to uphold their action if there is any reasonable theory under which it can be done." *Id.* This "first rule" is "even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval." *Id.*

ARGUMENT

This appeal involves three questions certified by the Fifth District Court of Appeal concerning Article X, Section 25 of the Florida Constitution, commonly referred to as "Amendment 7." Amendment 7 became law on November 2, 2004, when it was overwhelmingly passed by the voters of this state.[2] In passing the Amendment, the electorate clearly expressed a desire to overcome, as the ballot summary stated, the legislature's restrictions on public access to health care providers' "investigations, incidents or history of acts, neglects, or defaults that have injured patients or had the potential to injure patients." The district court correctly recognized the broad mandate of the people, and stated that Amendment 7 "heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality . . . that will allow patients . . . access to information gathered through the [health care providers'] self-policing processes." *Florida Hosp. Waterman, Inc. v. Buster*, 932 So. 2d 344, 355-56 (Fla. 5th DCA 2006).

The Amendment and ballot summary were clear and unambiguous, and the voters expressed their intent to amend the Florida Constitution to gain access to "*any* records . . . relating to *any* adverse medical incident." Art. X, § 25(a), Fla. Const. (emphasis added). Waterman seeks to have this Court undermine the will

[2]Amendment 7 passed by more than a 4 to 1 margin, with 81.2% voting in favor of the Amendment, and only 18.8% opposed.

of the voters by restricting the broad access now constitutionally required, and by upholding Florida Statutes section 381.028 which in no way can be construed as implementing Amendment 7, but rather changes its clear terms.

In its Initial Brief, Waterman does not immediately address the three questions the district court certified; rather, it chooses to first assert certain policy arguments as well as the constitutionality of Florida Statute section 381.028. Indeed, the Initial Brief is replete with arguments that go far beyond the questions certified by the district court. This Court has previously refused to address such arguments. *See, e.g., Puryear v. State*, 810 So. 2d 901, 906 n.3 (Fla. 2002) (declining to address arguments that exceeded the scope of the certified question). Additionally, Waterman raises many arguments not raised below, and not addressed by the district court. *See Reed v. State*, 470 So. 2d 1382, 1383 (Fla. 1985) (noting that the scope of review may extend to addressing the certified question and the decision of the court below). This Brief will address the three certified questions, and will address the additional points raised by Waterman as appropriate. However, one issue bears immediate comment.

Waterman argues that Florida's public policy in favor of quality health care, and the statutes enacted to further that policy, have been "consistently recognized and supported" by this Court. Initial Brief, at 11. While that may be true, it has no bearing on this matter. On November 2, 2004, the voters overwhelming supported

Amendment 7, which undeniably "heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality" that was previously in place via the statutes Waterman relies upon. *Buster*, 932 So. 2d at 355. While Waterman and other health care providers may not like what Amendment 7 permits, it is now part of the constitution of this state, and thus supersedes previous legislative authority. "A statute enacted by the Legislature may not constrict a right granted under the ultimate authority of the Constitution." *Austin v. State ex rel. Christian*, 310 So. 2d 289, 293 (Fla. 1975). As the district court stated, "what the legislature has given through its enactments and the courts have enforced through their decisions, the people can take away through the amendment process to our state constitution." *Buster*, 932 So. 2d at 356.

In considering the issues in this case, certain principles control. First, constitutional interpretation is analogous to statutory interpretation. *Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004). "Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language." *Id.* (quoting *Florida Soc'y Ophthalmology v. Florida Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986)). The sections of the amendment must be read *in pari materia* to "ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light of the others to form a congruous whole." *Bush v. Holmes*, 919 So. 2d 392, 407

(Fla. 2006) (citations omitted). Courts are obligated to apply a broader and more liberal interpretation of constitutional provisions than statutory provisions. *Coastal Florida Police Benevolent Assoc. v. Williams*, 838 So. 2d 543, 549 (Fla. 2003). Finally, as noted above, any interpretation must ascertain the will of the people, and then fulfill that will. *Gray v. Bryant*, 125 So. 2d 846, 853 (Fla. 1960).

ISSUE I. CERTIFIED QUESTION: 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?

The district court correctly answered this question in the affirmative. The court noted that Amendment 7 "provides that 'patients' may obtain 'any records' relating to [any] 'adverse medical incident.'" *Buster*, 932 So. 2d at 350. The court noted the term "patient" is defined very broadly, and that "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." *Id.* (quoting Art. X, § 25(c)(3), Fla. Const.). Based on this language, the court concluded:

> The amendment's use of the terms "medical negligence" and "intentional misconduct," and its references to acts that caused or could have caused death or injury and to

> patients who have previously received medical care, *clearly reveals to us that such information may be obtained during the course of litigation by the patient through the discovery process.*

Id. at 350 (emphasis added). The court went on to note that paragraph (c)(4) states that the information may be obtained either by an informal request (such as a letter), or "by a formal request, *which certainly includes a formal discovery request made during the course of litigation*." *Id.* (emphasis added). Additionally, paragraph (c)(4) also allows the request to be made by "patients *or their representatives, which would include lawyers*." *Id.* (emphasis added).

Based on that analysis, the district court held that Amendment 7 preempts the statutory privileges previously afforded to health care providers when such information is sought through a formal discovery request made by a patient or a patient's representative in litigation. *Id.* at 350-51. The court went on to note that such a conclusion was mandated not just by the language found in Amendment 7, but also by common sense. *Id.* at 351. The court correctly stated that it would be illogical if the law were to allow a patient to obtain such records through an informal request prior to a lawsuit being filed, but then close the door on such a request after litigation is commenced. *Id.* at 351.

The district court also examined the ballot summary, which noted that prior to the Amendment's passage, the law restricted information available to patients

"related to investigations of adverse incidents, such as medical malpractice." *Id.* at 352. The district court held that the inclusion of the term "medical malpractice" indicated to the voters that the information would be applicable to investigations of medical malpractice actions, be they before or after litigation is commenced. *Id.* at 352.[3] Further, as this Court previously noted, the Amendment would affect various existing statutes[4] which previously exempted records of investigations, proceedings and records of the peer review panel "from discovery in a civil or administration action." *Advisory Opinion to the Attorney General re: Patients' Right to Know About Adverse Medical Incidents*, 880 So. 2d 617, 621 (Fla. 2004).[5]

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[3]As one Florida circuit court commented:

> [T]here will be times when the discovery process intersects with the access process under the Amendment. When such intersection occurs, as it does here, the only logical conclusion is that the discoverability of these documents in civil litigation can be no more narrow than the right of access this same patient would have if he sought access before becoming a litigant.

Michota v. Bayfront Med. Ctr., Inc., 2005 WL 900771, at 5 (Fla. 6th Jud. Cir. Ct., Feb. 24, 2005).

[4]Specifically, subsections 395.0193(8) and 766.101(5) of the Florida Statutes (2003).

[5]Waterman argues the district court "improperly referenced language" from this Court's Advisory Opinion. Initial Brief, at 14. This Court merely stated conclusions drawn from the four corners of the ballot summary and Amendment. Further, it is clear that the district court understood the role of the Advisory

This Court, examining the ballot summary and the Amendment, came to the same conclusion the district court reached: the provisions of Amendment 7 may be exercised during the course of litigation.

In an attempt to counter the clear language of the Amendment, Waterman makes three arguments. Each will be addressed in turn.

A. The Intent of the Electorate Was Not to Limit Amendment 7 to a Technical Definition of "Records."

Waterman argues that only "records" are discoverable under Amendment 7, and this Court should impose a limited definition of that term. Initial Brief, at 21-24. As noted above, the Amendment must be read *in pari materia* so that individual clauses must be read in light of others to "form a congruous whole." *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006) (citations omitted). While paragraph 2(a) does use the term "records," other portions of Amendment 7 use the term "information," and the "statement and purpose" specifically noted that "information concerning a particular health care provider's or facility's investigations, incidents or history of acts, neglects or defaults . . . may be important to a patient." *Advisory Opinion*, 880 So. 2d at 618. The ballot summary also used the term "information." *Id.* at 619. When the language is read in context, it is apparent that the intent was to provide access to all relevant materials.

Opinion in its consideration of this matter, and found it persuasive. *Buster*, 932 So. 2d at 353.

Waterman addresses the references to "information" in other parts of Amendment 7 and argues that there is a distinction between "information" and "records," and that the term "records" should be given a definition set forth by this Court in *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992).[6] In making this argument, Waterman undercuts the very statement of law it cites concerning the interpretation of Amendment 7. As Waterman states: "[t]he meaning and scope of Amendment 7 is found within its four corners, and in the ballot title and summary." Initial Brief, at 15. Thus, Waterman inconsistently argues that intent should only be derived from those two documents, but then asserts that the term "records" should be given an interpretation from a case this Court decided twelve years prior to Amendment 7's passage. Left unanswered is the question of how the voters of the State of Florida somehow expressed their intent to define a term in Amendment 7 consistent with that opinion. Quite simply, Waterman cannot have it both ways. It cannot argue that this Court merely look at the "four corners" of the document, and then suggest that it look at now superseded statutes and case law for a definition of the term "records."

When the ballot summary and Amendment are examined, the intent of the electorate is clear. The intent was to have access to "*any* records . . . *relating to*

[6]Waterman concedes that the definition of "records" found in Florida Statute section 381.028(3)(j) conflicts with the intent of the Amendment. Initial Brief, at 23-24.

any adverse medical incident." Art. X, § 25(a), Fla. Const. (emphasis added). Further, "adverse medical incident" is defined as *"including, but not limited to"* records resulting from "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 such committee." Art. X, § 25(c)(3), Fla. Const. (emphasis added). As the district court concluded, "through this amendment, the people have clearly expressed their preference for freedom of information regarding adverse medical incidents over the privileges that protect the self-policing processes enacted by the Legislature and protected by the courts." *Buster*, 932 So. 2d at 352. This Court should not frustrate this intent by imposing a restrictive definition of "records" that was not presented to the electorate.

B. The Issue of Admissibility is not Before This Court.

Waterman next attempts to address the admissibility of documents produced pursuant to an Amendment 7 request,[7] an issue that the *Buster* opinion specifically declined to consider. *Buster*, 932 So. 2d at 348; Initial Brief, at 24-25. Thus, the issue is beyond the scope of the certified questions and the district court's opinion, and therefore should not be addressed. *See Reed v. State*, 470 So. 2d 1382, 1383

[7]In the heading of this portion of the Initial Brief, Waterman mentions "immunity from suit" and "immunity from compulsion from testimony," but those issues are not specifically addressed in the body of the argument. Initial Brief, at 24-25.

(Fla. 1985) (noting that the scope of review includes the certified question and the decision of the court below).

Additionally, this issue is not ripe for consideration. Waterman has not produced any documents, and therefore there is no record that may be used to determine any issues of admissibility. Any consideration of this issue is completely speculative.

Waterman argues that "by its express terms," Amendment 7 does not affect the "inadmissibility of self-regulation materials into evidence," and argues that the pre-Amendment 7 law such as *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992) should continue to shield information from discovery and admissibility. Initial Brief, at 24. As this Court noted, Amendment 7 "unquestionably" affects sections 395.0193(8)[8] and 766.101(5) of the Florida Statutes, the very statutes addressed in *Cruger*. *See Advisory Opinion*, 880 So. 2d at 620-21. As noted above, the district court correctly held that Amendment 7 applied to the discovery process. *Buster*, 932 So. 2d at 350. Given this reality, it would make no sense to impose a blanket prohibition on admissibility in civil actions. Rather, admissibility should be determined according to the Florida Evidence Code as it is in every other civil case.

[8]Section 395.0193 was formerly section 395.011.

C. The Issue of Use in Discovery is Not Before This Court.

Finally, Waterman makes a strained argument that once again seeks to improperly limit access and admissibility of information lawfully obtained pursuant to Amendment 7. Waterman argues that "Florida's voters . . . granted the right [to applicable information] *only to patients*." Initial Brief, at 26 (emphasis in original). This statement is not entirely accurate, since Amendment 7 states that records shall be made available upon request to a "patient *or representative of the patient.*" Art. X, § 25(c)(4), Fla. Const. (emphasis added). Nevertheless, Waterman argues that since only patients (or their representatives) have a right to these records, somehow the voters' intent would be frustrated if, after a patient obtains the information, it is shared with other parties during discovery. Initial Brief, at 26. Waterman then seeks to have this Court flatly prohibit parties in a lawsuit "who are not patients . . . [to] not have access to such records." Initial Brief, at 26.

As with the previous issue, the issue of sharing documents during discovery was neither addressed in the certified question, nor in the district court's opinion. Further, this issue is not ripe for this Court's consideration, and discovery disputes should be determined as they arise by the trial courts of this state. At this point, there is no record before this Court concerning what materials may be produced by

Waterman in this case, or by some other entity in some future case. This Court should not attempt to rule on an issue with no factual context.

Waterman's argument is also belied by common sense. Assuming a patient or their representative obtained the records prior to instituting litigation, there would be absolutely no prohibition against that patient sharing those materials with anyone they wished. Amendment 7 contains no confidentiality provisions or limitations on use. However, Waterman argues that the same patient should then be completely forbidden from sharing that information with other parties once a lawsuit is filed. Just as the district court stated that "it would make little sense" to allow a patient access to records prior to filing suit but not after, so would it make little sense to allow a patient to share information with the world prior to litigation and then forbid sharing with other parties once suit is commenced. *Buster,* 932 So. 2d at 351. Such an interpretation has no basis in either logic or the plain language of Amendment 7.

ISSUE II. CERTIFIED QUESTION: IS AMENDMENT 7 SELF-EXECUTING?

The district court answered this question in the affirmative. In doing so, it relied on the time-honored principles set forth by this Court in *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960). That opinion noted that there is a presumption in favor of finding amendments to be self-executing. *Gray*, 125 So. 2d at 851. This is so

"because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people." *Id.*

With these principles in mind, this Court set forth the test to determine if an amendment is self-executing. The test is whether or not the provision in question

> lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. . . . If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. . . . 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.

Gray, 125 So. 2d at 851 (citations omitted). Applying this test to Amendment 7, the district court held that it was self-executing. *Buster*, 932 So. 2d at 355 (stating that Amendment 7 sufficiently satisfies the *Gray* test so as to "leave undisturbed the presumption in favor of self-execution").[9]

[9]Several circuit courts reached the same conclusion. *See Michota*, 2005 WL 900771, at 5-10 (setting forth extensive analysis concerning why Amendment 7 is self-executing); *McHale v. Tenewitz*, 2005 WL 900744, at 4 (Fla. 18th Jud. Cir. Ct., Feb. 28, 2005) (finding that Amendment 7 is "unquestionably" self-executing); *Sardes v. South Broward Hosp. Dist.*, 2005 WL 831964, at 2-5 (Fla. 17th Jud. Cir. Ct., Apr. 7, 2005) (setting forth extensive analysis and concluding that because Amendment 7 is "devoid of ambiguity in a constitutional sense, it is clearly self executing").

The *Buster* opinion detailed the reasons behind the holding. Specifically, it found that Amendment 7 contained "sufficiently detailed" definitions of terms[10] and sets forth a "fairly narrow policy"[11] of allowing patients access to information concerning adverse medical incidents, "including those who seek discovery during the course of litigation against their health care providers." *Buster*, 932 So. 2d at 355. Importantly, the district court followed the dictates of *Gray* and found that if it were to hold that Amendment 7 was not self-executing, the intent of the electorate would be frustrated. *Id.* Amendment 7 became effective immediately (which obviously left no time for passage of enabling legislation), and the clear intent was to "abrogate the law that prohibited access to information regarding adverse medical incidents during the course of discovery." *Id.* The court

[10]As one circuit court succinctly stated:

> Various terms utilized in the statute are expressly defined therein. Provision for the protection of the identity of health care recipients is included in the body of the amendment, thereby complying with both state and Federal mandates. Ample identification of those subject to both its strictures and its benefits are set forth in verbiage which should not be subject to serious challenge. There is no need for further legislative action for such determination to be made.

Sardes, 2005 WL 831964, at 3.

[11]As this Court recognized, Amendment 7 "has but one purpose – providing access to records on adverse medical incidents – and all provisions of the amendment appear to be logically related to that purpose." *Advisory Opinion*, 880 So. 2d at 620.

concluded that the people "sought to eliminate certain legislative provisions rather than to add more." *Id.*

The First District reached the same conclusion in *Notami Hospital of Florida, Inc. v. Bowen*, 927 So. 2d 139 (Fla. 1st DCA 2006). After discussing and analyzing the principles set forth in *Gray*, the court concluded that "[i]f the broadly worded constitutional amendment in *Gray* was determined to be self-executing, the much more specific language in Amendment 7 easily passes that test." *Id*. at 144.

Waterman, perhaps recognizing the sound reasoning set forth in *Buster* and *Notami Hospital*, chooses to avoid directly answering the certified question. Rather, it states that the question should be answered with a "qualified yes." Initial Brief, at 26. It argues that it was self-executing in a remarkably limited sense, but that the legislature had the right to pass legislation to "maintain immunities" and consider other aspects of Amendment 7.

The constitutionality of section 381.028 was not certified by the district court for this Court's consideration. Yet, it is clear that any legislation, including section 381.028, must not constrict express rights granted by Article X, section 25. *Austin v. State ex rel. Christian*, 310 So. 2d 289, 293 (Fla. 1975); *see also Buster*, 932 So. 2d at 356 ("[w]hat the people provide in their constitution, the Legislature and the courts may not take away through subsequent legislation or decision"). The First District held that section 381.028 restricted the rights granted by

Amendment 7, and therefore was unconstutional. To the extent that this Court wishes to consider the issue of constitutionality in the context of this case, Buster incorporates the reasoning set forth in *Notami Hospital* on this issue, as well as the portions of *Buster* which address section 381.028.

ISSUE III. CERTIFIED QUESTION: SHOULD AMENDMENT 7 BE APPLIED RETROACTIVELY?

The district court answered this question in the negative. It is respectfully suggested that the reasoning and holding on this issue set forth by the First District in *Notami Hospital* should control, and Amendment 7 should be given retroactive application.

Courts engage in a two step analysis when considering the issue of retrospective application. The court must first determine if there was clear evidence that the provision was intended to apply retrospectively, and then determine if "retroactive application is constitutionally permissible." *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388, 395 (Fla. 5th DCA 2002), *rev. denied*, 848 So. 2d 1153 (Fla.), *cert. denied*, 540 U.S. 1049, 124 S. Ct. 821 157 L. Ed. 2d 698 (2003).

A. Amendment 7 was Intended to Have Retrospective Application.

The first inquiry as to retrospective application concerns the intent of the voters in enacting Amendment 7. Intent is determined from the Amendment's

language, and if the language is clear, unambiguous and conveys a definite meaning, then the Amendment must be given its plain and obvious meaning. *Earnhardt*, 821 So. 2d at 395.

The First District in *Notami Hospital* stated:

> Here, the plain language of the amendment permits patients to access *any* record relating to *any adverse medical incident*, and defines "patient" to include individuals who had *previously undergone treatment.* The use of the word "any" to define the scope of discoverable records relating to adverse medical incidents, and the broad definition of "patient" to include those who "previously" received treatment expresses a clear intent that the records subject to disclosure include those created prior to the effective date of the amendment. The effective date merely sets forth the date patients obtained the right to receive the records requested.

Notami Hospital, 927 So. 2d at 145 (emphasis in original).

Notami Hospital's emphasis on the word "any" was appropriate. The word must be given meaning, and it is a word that, by definition, does not contain limitations. "Any" is "often synonymous with 'either', 'every', or 'all.'" *Black's Law Dictionary* (6th ed. 1990). "Any" certainly does not imply a limitation to only those documents created after a certain date.

One purpose of Amendment 7 is to provide information to consumers so that they might make informed decisions concerning health care. Applying it in only a prospective manner would undermine that purpose and run contrary its plain

language, as well as the underlying principles behind its passage. *See Florida Soc'y of Ophthalmology v. Florida Optometric Assoc.*, 489 So. 2d 1118, 1119 (Fla. 1986) (stating that when a court adjudicates "constitutional issues, the principles, rather than the direct operation or literal meaning of the words used, measure the purpose and scope of the provision").

Florida law contains precedent for the principle that the critical date concerning documents that may be exempt is not the date when the documents were created, but the date when the request was made. In *News-Press Publishing Co., Inc. v. Kaune*, 511 So. 2d 1023 (Fla. 2d DCA 1987), a party requested documents one day after the legislature passed an exemption to the public records act removing public access to certain employee medical records. Noting that "[n]ormally the critical date in determining whether a document is subject to examination is the date the request for examination is made," the Second District held that the exemption applied to records in existence before the exemption was enacted:

> It seems to us indisputable that if the legislature determines that 'all documents pertaining to subject 'A' in personnel files shall be exempt,' it intends, unless it specifies otherwise, that on the effective date of the law creating the exemption all such documents are exempt from any request for disclosure made thereafter regardless of which they came into existence or first found their way into the public records.

Id. at 1026; *see also Baker County Press, Inc. v. Baker County Med. Servs., Inc.*, 870 So. 2d 189, 193 (Fla. 1st DCA 2004) (for public records act request, law in effect at time of request with regard to exemptions applies), *rev. denied*, 885 So. 2d 386 (Fla. 2004).

If the legislature can make confidential what was once public record, then Florida voters through their constitution are able to make available what was once confidential. As such, Amendment 7's revocation of confidentiality applies to records of adverse medical events created before the amendment was adopted, so long as the request was made after the voters approved the Amendment.

It is respectfully submitted that the district court incorrectly decided this issue. The district court relied on *State v. Lavazzoli*, 434 So. 2d 321 (Fla. 1983), where this Court gave prospective effect to a constitutional provision addressing an evidentiary issue. In *Lavazzoli*, this Court noted that the amendment did not manifest any intent to be applied retroactively. *Id.* at 323. The provision at issue in *Lavazzoli* stands in sharp contrast to Amendment 7, which contains language that "expresses a clear intent that the records subject to disclosure include those created prior to the effective date of the Amendment." *Notami Hospital*, 927 So. 2d at 145. Additionally, the effect of a change in an evidentiary rule is far different from the content and purpose of Amendment 7, on amendment designed in part to assist patients in making informed decisions regarding their health care providers.

As noted above, this Court must construe constitutional provisions consistent with the principles that gave rise to the enactment of such provisions. *Florida Soc'y of Ophthalmology,* 489 So. 2d at 119. Further, "to determine legislative intent as to retroactivity, both the terms of the statute *and the purpose of the enactment* must be considered." *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999) (emphasis added). Here, it is clear that the voters intended to have access to any documents relevant to adverse medical incidents.

The explicit provision that the Amendment would become law on the date of enactment contemplates that it would apply to documents generated prior to enactment. If this was not the case, then a patient seeking information on a health care provider on November 3, 2004 (the day after Amendment 7 became law) would find that no information existed. To interpret Amendment 7 in this fashion would render it meaningless for that hypothetical patient because even egregious reports of adverse incidents would remain hidden. "In construing provisions of the constitution . . . [t]he court must give provisions a reasonable meaning, tending to fulfill, not frustrate, the intent of the framers and adopters. Constructions which . . . lead to absurd results . . . must be avoided." *In re Advisory Opinion to Governor Request of June 29, 1979*, 374 So. 2d 959, 964 (Fla. 1979) (citation omitted). As this Court stated:

> In construing a constitutional provision, the words should be given reasonable meanings according to the subject matter, but in the framework of contemporary societal needs and structure. Such light may be gained from historical precedent, from present facts, or from common sense. Further light may be shared by examination of the purpose the provision was intended to accomplish or the evils sought to be prevented or remedied.

In re Advisory Opinion to Governor, 276 So. 2d 25, 29 (Fla. 1973) (citations omitted).

The district court's reliance on *State, Department of Revenue v. Zuckerman-Vernon Corp*., 354 So. 2d 353 (Fla. 1977) is misplaced. *Buster* cites *Zuckerman-Vernon* for the proposition that the inclusion of an effective date essentially rebuts any argument that retroactive application of the law was intended. *Buster,* 932 So. 2d at 354. However, *Zuckerman-Vernon* only addressed an increase in tax penalties applicable as of a date certain, and noted that the statute prohibited compromising any tax assessment that was final as of that date. *Id.* at 358. The *Zuckerman-Vernon* holding was limited by its facts and the express language of the statute involved, and has no application here.

Waterman relies primarily on *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 784 So. 2d 438 (Fla. 2001) to support its argument that "the purposes for Amendment 7 can be fully achieved prospectively." Initial Brief, at 33. However, *Memorial Hospital-West Volusia* is distinguishable from this case.

In *Memorial Hospital-West Volusia*, a statute exempting certain records from the Public Records Act did "*not set forth the clear legislative intent* that the statute exempt records created and minutes of meetings held before its effective date which is necessary for the presumption of prospective application to be overcome." *Id.* at 441 (emphasis added). Thus, the inquiry in *Memorial Hospital-West Volusia* turns on the question of intent. In enacting Amendment 7, the voters intended the patients to have access to these important records, regardless of whether they were created before or after the effective date of the Amendment. Since courts have an obligation to broadly construe constitutional amendments to achieve their underlying principles, the only way to give Amendment 7 an effective construction is to hold that it applies to documents generated prior to its enactment.

B. Amendment 7 Does Not Vitiate Vested Rights.

Assuming that Amendment 7 was intended to have retrospective application, the next inquiry concerns if such application will impair a vested right. *See generally*, *Earnhardt*, 821 So. 2d. at 398-401. It is respectfully submitted that the district court erred in finding that retroactive application of Amendment 7 would vitiate "a vested right that health care providers have in the confidentiality of the information generated through the self-evaluative process." *Buster*, 932 So. 2d at 354. In reaching this conclusion, the district court did not set forth any analysis as to why the court believed such rights are vested.

In contrast, *Notami Hospital* addressed this same issue and provided a well-reasoned analysis as to why no vested rights were affected by the Amendment. *Notami Hospital* found that health care providers merely had an expectation that existing law would not change, and thus no vested rights were present:

> "To be vested a right must be more than a *mere expectation based on an anticipation of the continuance of an existing law . . .*" *Id.* (quoting *Div. of Workers' Comp. v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st DCA 1982)) (emphasis added). Here, the Hospital does not have a vested right in maintaining the confidentiality of adverse medical incidents. The Hospital's "right" is no more than an expectation that previously existing statutory law would not change. Because the Hospital's expectation is not a vested, substantive right, applying Amendment 7 to records created prior to its passage is not unconstitutionally retrospective.

Notami Hospital, 927 So. 2d at 143-44 (emphasis in original).

Relevant to this issue is *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002), *rev. denied*, 848 So. 2d 1153 (Fla.), *cert. denied*, 540 U.S. 1049, 124 S. Ct. 821 157 L. Ed. 2d 698 (2003). In *Earnhardt*, the court upheld the retroactive application of a new public records act exemption passed after the media sought access to NASCAR champion Dale Earnhardt's autopsy photographs, which at the time of the request were public records. *Id.* at 391-92. *Earnhardt* cited authority concerning what makes a right "vested." Specifically, it cited *City of Sanford v. McClelland*, 163 So. 513, 514-15 (Fla. 1935), which

defined a vested right as "an immediate, fixed right of future enjoyment." *Earnhardt*, 821 So. 2d, at 398. It also cited, as did *Notami Hospital, Division of Workers' Compensation v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st DCA 1982), which held that a vested right must be more than a "mere expectation based on an anticipation of the continuance of an existing law." *Earnhardt*, 821 So. 2d, at 398. Relying on this precedent, *Earnhardt* held that the right to inspect and copy the autopsy photographs was not vested because it was "a right subject to divestment by enactment of statutory exemptions by the Legislature," and thus was not a "fixed" right.[12] *Id*.

Applying *Earnhardt* to this matter, it is clear that the rights Waterman claims are not vested because they were also subject to divestment by the legislature, or, indeed, by constitutional amendment. Waterman cannot claim that the right to confidentiality of the records was "fixed" since many of the statutes at issue have all been subject to numerous legislative amendments through the

[12]Other jurisdictions have come to the same conclusion concerning vested rights. *See, e.g., Evans v. Belth*, 388 S.E. 2d 914, 916 (Ga. Ct. App. 1989) (noting that an individual has no vested right in a statutory privilege that may be taken away by legislative amendment); *Stott v. Stott Realty*, 284 N.W. 635, 637 (Mich. 1939) (noting that "it is a general rule of constitutional law that a citizen has no vested right in statutory privileges and exemptions").

years,[13] and federal courts[14] have specifically held that documents subject to the peer review privilege were admissible. *See Feminist Women's Health Ctr., Inc. v. Mohammed*, 586 F.2d 530, 545 n.9 (5th Cir. 1978) (stating that the peer review privilege will not bar use of evidence in a federal cause of action), *cert. denied*, 100 S. Ct. 262 (1979). All Waterman had was an expectation that neither the legislature nor the people would take away the limited privileges that it enjoyed. That expectation does not create a vested right, and therefore the will of the electorate in enacting Amendment 7 controls.

Additionally, the statutes addressing staff membership, peer review, medical review committees, and patient safety organizations do not actually create a statutory privilege. Rather, they state that the investigation, proceedings, and records of the respective committee or organization are not subject to discovery or

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[13]*See* § 395.0191, Fla. Stat.; § 395.0193, Fla. Stat.; § 395.0197l, Fla. Stat.; § 766.101, Fla. Stat.; § 766.1016, Fla. Stat.

[14]Concerning federal law, an Amicus Brief was filed in this matter by the Florida Patients Safety Corporation, Inc., which attempts to address the impact of the Federal Patient Safety and Quality Improvement Act of 2005. The impact of that law, or any federal law, is beyond the scope of the questions before this Court. Further, the Act applies to communications between health care providers and certified patient safety organizations ("PSO") as defined in the Act. There is no record that any information at issue falls within the scope of the Act. Further, the Act requires the secretary of Health and Human Services to create a process through which PSO's can be certified. As of this date, it does not appear that this has occurred. If that is the case, there apparently cannot be any confidential communications between health care providers and certified PSOs.

introduction into evidence in any civil or administrative action against a health care provider arising out of the incidents or matters which are the subject of the committee or organization. *See* § 395.0191(8), Fla. Stat.; § 395.0193(8), Fla. Stat.; § 766.101(5), Fla. Stat; § 766.1016(12), Fla. Stat. They also state that witnesses at those proceedings or meetings may not be permitted or required to testify in any such civil or administrative action. *Id.* The statutes also state that if information, documents, or records are otherwise available from the original sources, they are not shielded from discovery or use in any such civil or administrative action. *Id.* Additionally, a witness who testifies before such committee or organization may not be prevented from testifying as to matters within his or her knowledge, though they may not testify about the opinions relevant to the investigations or proceedings. *Id.*

A review of the statutes reveals that they do not deem relevant materials to be either confidential or privileged. In reality, the restrictions or disclosures are limited solely to discovery or introduction into evidence in some (not all) civil or administrative actions. As such, these statutes do not create a right of confidentiality let alone a vested right as found in *Buster*. All of these statutory provisions may be modified or even done away with by subsequent statute, and therefore do not create vested rights.

CONCLUSION

WHEREFORE, for all the foregoing reasons, this Court should answer the Certified Questions as follows:

Certified Question 1, which asks "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?" should be answered in the affirmative.

Certified Question 2, which asks "Is Amendment 7 self-executing?" should be answered in the affirmative.

Certified Question 3, which asks "Should Amendment 7 be applied retroactively?" should be answered in the affirmative.

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I HEREBY CERTIFY that this Brief conforms to the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was computer generated utilizing Times New Roman 14 point type.

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