IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC06-688

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,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

ON REVIEW FROM A DECISION OF THE
FIFTH DISTRICT COURT OF APPEAL

Arthur J. England, Jr., Esq.
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0717

Mason H. Grower, III, Esq.
Jack E. Holt, III, Esq.
Grower, Ketcham, Rutherford,
Bronson, Eide & Telan, P.A.
390 North Orange Avenue, Suite 1900
Orlando, Florida 32801
Telephone: (407) 423-8545
Facsimile: (407) 425-7104

Co-counsel for Florida Hospital Waterman, Inc. d/b/a Florida Hospital Waterman

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

Cases

TABLE OF CITATIONS
(Continued)

Page

Statutes

Constitutional Provisions

ABBREVIATIONS USED IN THIS BRIEF

Florida Hospital Waterman will use in this brief the same abbreviations it used in its initial brief, namely:

"**Amendment 7**" and "**Section 25**" both refer to the "Patients' Right to Know About Adverse Medical Incidents" amendment to the Florida Constitution which is now found in Article X, section 25 of the Constitution;

"Section 381.028" refers to the implementing statute adopted by the Legislature in 2005;

"**Buster**" refers to the respondent;

"***Buster***" refers to the district court's decision brought for review;

"**Hospital**" refers to the petitioner,

"**R:__**" refers to the record-on-appeal.

Florida Hospital will also reference the following briefs filed with the court:

"**Answer Br. __**" refers to respondent Buster's answer brief;

"**Initial Br. __"** refers to Florida Hospital's initial brief.

"**Academy *Amicus* Br. __**" refers to the *amicus* brief filed by the Academy of Trial Lawyers in support of respondent Buster;

"**Def. Lawyers *Amicus* Br. __"** refers to the *amicus* brief filed by the Florida Defense Lawyers Ass'n in support of petitioner Florida Hospital;

"**Floridians *Amicus* Br. __"** refers to the *amicus* brief filed by Floridians for Patient Protection, Inc. in support of respondent Buster; and

"**Hosp. Ass'n *Amicus* Br. __"** refers to the amended *amicus* brief filed by the Florida Hospital Ass'n, Inc. in support of petitioner Florida Hospital.

INTRODUCTION

The parties agree that Amendment 7 preempts statutes which bar patients from inspecting and copying adverse medical incident records from health care providers, and allows *patients* to obtain those records through litigation discovery. They also agree that this case presents no issue with respect to the self-policing mechanisms in Florida law which (i) grant immunity from suit to participants in the credentialing, peer review, quality assurance, and risk management processes, (ii) grant immunity from testimonial compulsion to participants in self-policing procedures, and (iii) make inadmissible in civil and administrative proceedings the records relating to those procedures.[1] Additionally, both the district court and this Court have acknowledged that Amendment 7 does not interfere with the attorney-client privilege or work product. *Buster* at * 4; *Atty. Gen. Re Patients' Right to Know About Adverse Med. Incident,* 880 So. 2d 617, 620-21 (Fla. 2004).

The parties' agreements and the courts' acknowledgements limit the issues in this appeal to:

1. whether patients are limited to receiving only the "records" of adverse medical incidents of health care providers as Amendment 7 specifically provides, perhaps using as the definition of that term the Court's definition in *Cruger v. Love,* 599 So. 2d 111 (Fla. 1992);

---

[1] Initial Br. 24-25; Answer Br. 16 and n.7 (the issue of admissibility "is beyond the scope of the certified questions and the district court's opinion, and therefore should not be addressed").

2. whether the district court impermissibly held that the self-executing nature of Amendment 7 required the invalidation of Section 381.028; and

3. whether Amendment 7 is prospective in effect as the district court quite properly held.

SUMMARY OF ARGUMENT

In response to the district court's first certified question, the court should hold that Amendment 7 limits access only to adverse medical incident *records*, as that term is defined in *Cruger*, and that those records may be obtained for inspection and copying only by *patients* or their legal representatives informally, formally, or even in discovery, but *not* in a way which would permit their disclosure to other persons or parties in litigation.

The legislature properly and appropriately implemented Amendment 7 by its enactment of Section 381.028.

Amendment 7 is facially prospective in application, and there is nothing which overcomes the presumption that the electorate intended the Amendment to operate prospectively. Under the law, the Court need not reach the question of whether vested rights are affected. Should the Court reach that question, it should hold that vested rights would be impaired if Amendment were given retroactive effect.

ARGUMENT

Buster suggests that the Court cannot consider Florida's public policy in favor of quality health care, or the statutes enacted to further that policy, because

they raise issues which "go far beyond the questions certified by the district court" and have "no bearing" on this matter. Answer Br. 9.

Buster's attempt to constrain the thinking and analysis of the Court is misguided. Buster herself acknowledges the relevance of public policy when she states that the district court "correctly" recognized that Amendment 7 heralded a "change in the public policy of this state." Answer Br. at 8. The Court could not possibly evaluate a policy change without understanding the policy that was changed. Nor is the Court barred from addressing arguments which go beyond the questions certified. *E.g., Savoie v. State,* 422 So. 2d 308, 309 (Fla. 1982) ("once we accept jurisdiction over a cause . . . we may, in our discretion, consider other issues"); *Fulton County Administrator v. Sullivan*, 753 So. 2d 549 (Fla. 1999) (addressing issues beyond the certified question), *In re Adoption of Baby E.A.W,* 658 So. 2d 961, 964 (Fla. 1995) (stating the Court has jurisdiction over issues other than one certified), *cert. denied,* 516 U.S. 1051 (1996).

I. The proper response to Certified Question No. 1 is that Amendment 7 preempts statutory self-policing procedures and allows access in discovery, but only to the extent that "records" are discoverable in litigation by "patients" (or their legal representatives) and not made accessible to anyone else.

Buster's analysis indicates her agreement with Florida Hospital that the meaning of Amendment 7, and the intent of the electorate, must be found in the text of the Amendment, the ballot title and summary, and in the legal principles for interpreting a proposed constitutional amendment which were set out by Florida Hospital in its initial brief . She identifies no other source for determining voter

intent. The crux of the dispute between the parties regarding certified question number 1, consequently, lies in disagreement as to application of those principles.

Buster's introduction to her discussion of the first certified question does not respond to Florida Hospital's detailed and documented discussion of the overbreadth and imprecision of the district court's first certified question. Rather, Buster simply relies on (and quotes extensively from) the decision of the district court. *See* Answer Br. at 11-14. Reliance on the district court is misplaced, however. The Court's review is *de novo*, and no deference is to be given that decision. *E.g., Southern Baptist Hosp. of Fla., Inc. v. Welker*, 908 So. 2d 317, 319-20 (Fla. 2005); *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003).

By its express terms, Amendment 7 makes available to patients only the "records" of adverse medical incidents in the hands of health care providers, and not all "information" concerning such incidents as the district court imprudently and imprecisely stated. The words "records" and "information" were juxtaposed by the framers of Amendment 7 in a very precise manner. *See* Initial Br. 12-13, 21-23.

Buster carelessly uses the word "information" interchangeably with the word "records." The text of Amendment 7, however, clearly uses the word "information" solely to reference the state of the law which existed at the time they formulated Amendment 7. Buster completely disregards the framers unmistakable and unambiguous use of the more narrow term "records," in both the text of the Amendment and in the ballot summary, to describe the extent of the *solution* to the problem which they were proposing to the voters. Respectfully, the Court is not

free to disregard the framers' intent set out in the plain language and structure of both the text of Amendment 7 and the ballot summary.

The same imprecise use of terminology is found in Buster's suggestion that a different meaning is found in the phrase "any records . . . relating to any adverse medical incident." Answer Br. 15-16. The operative noun "records" in that phrase is not broadened to all "information" because patients are given access to "any" rather than "some" of that species of documentation, and it is certainly not expanded by the textual restriction that records must fall into the category of "relating to" adverse medical incidents, and no other subject.[2]

Finally, Florida Hospital pointed out that Amendment 7 does not provide access – expressly defined in Section 25(c)(4) of Amendment 7 as being limited to inspection and copying -- to anyone other than "patients" and their legal representatives,[3] and that the Court should not make adverse incident records discoverable in litigation to other persons or parties. Initial. Br. 25-26. Buster says that this discovery issue "was neither addressed in the certified question, nor in the district court's opinion," and is "not ripe for this Court's consideration." Answer

---

[2] Buster rejects Florida Hospital's suggestion, as a plausible construction of the term, that the "records" singled out in Amendment 7 should be given the meaning formulated by the Court with respect to peer review in the *Cruger* decision. Answer Br. 15. Obviously, the Court is not obligated to draw on that definition, although it would meet the constitutional construction principle of providing the broadest possible meaning for this new provision of the Constitution.

[3] There is no disagreement that Amendment 7 also allows access to patient representatives.

Br. at 18-19.[4] Florida Hospital respectfully suggests that the issue is inherent in the first certified question, and cannot be ignored.

The Court should clarify that any authorization for patients and their legal representatives to obtain adverse medical incident records through discovery does *not* make those records available to other persons and parties in the litigation.

II. The proper response to Certified Question No. 2 is that Amendment 7 is self-executing, and that the legislature properly enacted Section 381.028 to implement its provisions.

Florida Hospital agrees with the district court that Amendment 7 is self-executing, insofar as it deals with the right of patients to inspect and copy the records of health care facilities with respect to adverse medical incidents. Florida Hospital takes issue with the district court's heavy-handed invalidation of all of Section 381.028, though, and has demonstrated that the legislature not only had full authority to implement Amendment 7 but did so appropriately in seven carefully crafted subsections. Initial Br. 15-20, 28-29. *And see,* Fla. Hosp. Ass'n *amcius* Br. at 5-13.

Buster argues that that Section 381.028 "in no way can be construed as implementing Amendment 7," in reliance on the reasoning of the district court and

---

[4] The incompatibility with Amendment 7 and inadvisability of extending "records" access to persons and parties other than patients and their legal representatives through discovery is addressed in detail by *amici* supporting Florida Hospital. *See* Fla. Hosp. Ass'n *Amicus* Br. at 13-15, and Fla. Def. Lawyers *amicus* Br. at 4-18.

the First District in its *Notami* decision. Answer Br. at 9, 23.[5] She makes no attempt to address its detailed subsections, however, or to respond to Florida Hospital's meticulous analysis of them. The tacit acceptance of Florida Hospital's analysis without any response is tantamount to an acknowledgement that the legislature appropriately implemented Amendment 7 with Section 381.028.

Given the legitimacy and importance of Section 381.028, the Court should expressly validate those subsections in Section 381.028 which appropriately implement Amendment 7 by reaffirming immunities untouched by the Amendment and by setting guidelines for its operation. *See* Initial Br. 15-20; Fla. Hosp. Ass'n *amcius* Br. at 5-13 . The *Notami* decision, which offers no more persuasive reasoning for declaring the statute unconstitutional than did the district court here, is no impediment to a declaration of its validity.

III. The proper response to Certified Question No. 3 is that Amendment 7 should *not* be applied retroactively.

The district court quite correctly applied the required two-step analysis when it found no clear evidence in the language of Amendment 7 that the electorate intended it to apply retroactively and applied the presumption of prospectivity, and

---

[5] Ambivalently, though, she asks the Court to avoid the issue altogether by suggesting that Section 381.028 was neither invalidated nor certified by the district court. Answer Br. 22. The Court should decline that suggestion. The district court unquestionably held that Section 381.028 was an invalid exercise of legislative power (*Buster* * 8), and the Court cannot fully discharge its law-giving function unless it addresses the validity of Section 381.028.

when it held that in any event vested rights would be impaired if Amendment 7 was given retrospective effect. Buster spends considerable energy arguing that a prospective application of the Amendment would undermine the intent of the voters, but her rhetoric is no substitute for the two-step analysis which she herself acknowledges must be applied. Answer Br. 23. A brief review of the district court's reasoning exposes Buster's attempt to replace legal anaylsis with emotional discourse.

A law is presumed to operate prospectively unless there is a clear indication in its language that the framers intended retroactive effect. *E.g., State v. Lavazzoli,* 434 So. 2d 321, 323 (Fla. 1983). Even an *implication* that the provision is to operate retroactively is given no weight if the framers have included in the provision an effective date. *Buster* * 6, applying *State, Dep't of Revenue v. Zuckerman-Vernon Corp.,* 354 So. 2d 353 (Fla. 1977), and related cases.[6] The framers of Amendment 7 provided an effective date.

The district court found nothing in the language of Amendment 7 which suggested that the framers intended to give the Amendment retroactive effect. Then, as is appropriate, the court applied established precedent to hold that the inclusion of an effective date created a presumption that prospective effect was

---

[6] *Zuckerman-Vernon* is not limited by its facts or the express language of the particular statute involved as Buster suggests (Answer Br. 28), as is made evident from the other decisions cited by the district court for the same proposition. *See Buster* * 6.

intended. The court found nothing which either rebutted or overcame that presumption.

Buster responds to the district court's analysis by asking the Court to accept the First District's view, as expressed in *Notami,* that retroactive intent is found in the words "any" and "previously" which modify the term "records" in the Amendment. Answer Br. 24-25. Florida Hospital had anticipated that argument, though, and in its initial brief demonstrated that neither the meaning nor the context of those words provided a *temporal* meaning for the effectiveness of the Amendment. *See* Initial Br. 35, citing to *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp*., 784 So. 2d 438, 441 (Fla. 2001).[7] Neither Buster nor either of the *amici* supporting her position has offered any response to Florida Hospital's demonstration that the words "any" and "previously" which modify the term "records" *cannot* be read to mean that the Amendment was to be given retroactive effect to pre-existing records.[8]

Buster attempts to sidestep the absence of retroactive language in Amendment 7 by arguing that if the legislature *can* make a public record confidential, then the voters can make public what was once confidential. Answer

---

[7] Buster contradicts herself when she argues that the *Memorial Hospital-West Volusia* decision is inapplicable because it turned "on the question of intent." Answer Br. 29. The question of intent is precisely the question which Buster herself has stated is determinative of whether a provision is retroactive or prospective. *See* Answer Br. 23 ("The first inquiry as to retrospective application concerns the intent of the voters . . . .").

[8] *See* Floridian's *amicus* Br., and *Academy* amicus *Br.*

Br. 26. That statement is true, of course, but meaningless here. The question is not *whether* Amendment 7 could be made retroactive, but whether it *was*. That issue was resolved in favor of prospectivity when the framers included an effective date in the Amendment and gave no indication to voters that pre-existing records would be exposed to patient access.[9]

The district court correctly analyzed the law, and properly applied it to hold (i) that there is no evidence of retroactive intent in the language of the Amendment, and (ii) that the presumption of prospectivity applies. In a circumstance such as this, it is not neither necessary nor appropriate to inquire whether a retroactive effect would impair vested rights. *Buster* * 6. Should the Court make an inquiry into whether vested rights are impaired, however, it will have little difficulty agreeing with the district court that Amendment 7 cannot be characterized as merely remedial or procedural. *Buster* * 6.[10]

---

[9] It is noteworthy that the "sponsor" of Amendment (*see* Floridians *amicus* Br. at vii) does not address the presumption of prospectivity created by the inclusion of an effective date in the Amendment, but rather relies on public records law decisions addressing remedial legislation (which Amendment 7 is not) and cases from *other* jurisdictions. *See* Floridians *amicus* Br. at 6-9.

[10] This issue is discussed extensively by the *amici* for the parties. *See* Fla. Hosp. Ass'n *amicus* Br. at 18-19; Floridian's *amicus* Br. at 9-20; and Academy *amicus Br.* at 5-11. Much of the discussion in the brief filed by the Academy of Florida Trial Lawyers, however, is directed to the law governing "choses in action," which has no relevance to the confidentiality rights at issue here which are indispensable to making hospitals and other health care facilities workable, and to criticism of the First District's decision in *Notami* which is contrary to the decision of the district court in this case. *See* Academy *amicus* Br. at 7-11.

Buster argues that the confidentiality of adverse medical incident records which existed under prior law was nothing more than an expectation that existing law would not change. Answer Br. 30-33. Confidentiality, however, as Florida Hospital has shown, is woven into the fabric of the state's public policy and its commitment to quality care health care for Floridians. Prior to Amendment 7, health care institutions and the physicians who function within them found confidentiality of patient records to be essential to the preservation and protection of their patients. The legislative cloak of confidentiality has been held to be a substantive right. *Somer v. Johnson, M.D.P.A.*, 704 F. 2d 1473, 1478-79 (11th Cir. 1983). As such, that cloak cannot be stripped away by an Amendment evidencing no intention to reach back and retroactively change the long-standing confidentiality privilege on which health care providers relied in carrying out the state's public policy of providing quality health care for Floridians.

CONCLUSION

The Court should answer the three certified questions by holding:

1. that adverse medical incident *records*, as that term is defined in *Cruger*, may be obtained by *patients* or their legal representatives, either informally in the manner prescribed by the legislature in Section 381.028(7)(d)(2), or in discovery, but that access to those records may not be extended to other persons or parties in litigation;

2. that Amendment 7 is self-executing to the extent that it allows the inspection and copying of adverse medical incident records, and the provisions Section 381.028 are valid; and

3. that Amendment 7 is prospective in application, and provides access only to adverse medical incident records developed *after* November 2, 2004.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0717

- and -

Mason H. Grower, III, Esq.
Florida Bar No. 205915
Jack E. Holt, III, Esq.
Florida Bar No. 909300
Grower, Ketcham, Rutherford,
Bronson, Eide & Telan, P.A.
390 North Orange Avenue, Suite 1900
Orlando, Florida 32801
Telephone: (407) 423-9545
Facsimile: (407) 425-7104

Co-counsel for Florida Hospital Waterman, Inc. d/b/a Florida Hospital Waterman

CERTIFICATE OF SERVICE

I certify that a copy of this reply brief was mailed on September ___, 2006 to:

Christopher V. Carlyle, Esq.
Shannon M. Carlyle, Esq.
Gilbert S. Goshorn, Jr., Esq.
The Carlyle Appellate Law Firm
The Carlyle Building
1950 Laurel Manor Drive, Suite 130
The Villages, Florida 32162
Counsel for Teresa M. Buster

Lincoln J. Connolly, Esq.
Rossman, Baumberger, Reboso & Spier, P.A.
44 West Flagler Street, 23rd Floor
Miami, Florida 33130
Counsel for Floridians for Patient Protection, Inc.

Philip M. Burlington, Esq.
Burlington & Rockenbach, P.A.
2001 Palm Beach Lakes Boulevard
Suite 410
West Palm Beach, Florida 33409
Counsel for Floridians for Patient Protection, Inc.

Hon. Stephen H. Grimes
Holland & Knight LLP
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301
Counsel for Florida Hospital Association, Inc.

Pierre J. Seacord, Esq.
Ringer, Henry, Buckley & Seacord, P.A.
14 East Washington Street, Suite 200
Orlando, Florida 32801
Counsel for Jeffrey B. Keller, M.D. and Keller & Goodman, M.D., P.A.

Sean C. Domnick, Esq.
Searcy, Denney, Scarola, Barnhart, Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Gail Leverett Parenti, Esq.
Parenti & Parenti, P.A.
9155 South Dadeland Boulevard, Suite 1504
Miami, Florida 33156
Co-counsel for Florida Defense Lawyers Association

Andrew S. Bolin, Esq.
Macfarlane, Ferguson McMullen
Post Office Box 1531
Tampa, Florida 33601
Co-counsel for Florida Defense Lawyers Association

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____

MIA-FS1\ENGLANDA\1817623v03\1NF0N03_.DOC\9/12/06\10:39:00AM\37075.010500