IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC06-912

NOTAMI HOSPITAL OF FLORIDA, INC., d/b/a LAKE CITY MEDICAL CENTER,

Appellant,

-vs-

EVELYN BOWEN and DON BOWEN; JOHN C. NICELY, as Personal Representative of the Estate of CHRISTINE NICELY; etc., et al.,

Appellees.
_____/

BRIEF OF AMICUS CURIAE
THE ACADEMY OF FLORIDA TRIAL LAWYERS
ON BEHALF OF APPELLEES, BOWEN

Paul D. Jess
General Counsel
ACADEMY OF FLORIDA TRIAL LAWYERS, INC.
218 South Monroe St.
Tallahassee, FL 32301
(850) 224-9403
Attorney for Amicus Curiae
The Academy of Florida Trial Lawyers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Other Cites

INTRODUCTION

The Academy is a large voluntary statewide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law.

The members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The Academy has been involved as amicus curiae in hundreds of cases in the Florida appellate courts and this Court.

The lawyer members of the Academy care deeply about the integrity of the legal system and, towards this end, have established an amicus curiae committee. The committee considered the issues presented in the case sub judice to be of importance, especially because the specific issues have never before been considered by this Court, and voted to seek leave of this Court to appear as amicus.

The case is important to the Academy because it involves the application of a recently created constitutional provision granting a right to Florida patients.

The Academy believes that its input may be of assistance to the Court in resolving the issues raised in this case, and that this Court=s decision will have a tremendous impact on its members and their clients. See, e.g., Ciba-Geigy Ltd. v. Fish Peddler, Inc., 683 So.2d 522 (Fla. 4th DCA 1999)(briefs from *amicus curiae* are generally for the purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues). Accord Rathkamp v. Dept. of Community Affairs, 730

So.2d 866 (Fla. 3d DCA 1999) (endorsing and adopting the opinion in Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062 (7th Cir. 1997), regarding the role of *amicus curiae*).

SUMMARY OF ARGUMENT

The statutory provisions affected by Amendment 7 did not create vested rights in healthcare providers and, therefore, the Amendment can apply to all existing records and documents. The statutory provisions relied upon by the healthcare providers did not create absolute privileges, but rather only limited disclosure of certain materials in particular circumstances, with no guarantee that those materials would not be fully disclosed in other contexts. The investigative materials and committee records addressed by the statutes are subject to discovery or admission into evidence in any federal claim in federal court, and are subject to disclosure in certain administrative proceedings. Moreover, the underlying information which was the subject matter of the relevant investigation on committee proceedings was not protected by those statutes. While there are constitutional protections against retroactive diminution or elimination of substantive vested rights, they are defined as Aan immediate right of present enjoyment, or a present, fixed right of future enjoyment,@ City of Sanford v. McClelland, 163 So.2d 513, 514-15 (Fla. 1935). The statutory rights relied upon by the healthcare providers do not rise to that level, and were always subject to amendment or repeal by the legislature. Moreover, they were not designed to protect the privacy rights of the healthcare providers, but rather to facilitate the flow of accurate information in the relevant investigations or committee proceedings. Even assuming arguendo there was any intent to grant a right to the healthcare providers themselves, it has been held not to be a constitutionally recognized

liberty or property interest. Certainly, it is not the equivalent of a chose in action, which is a right derived from statute or the common law that this Court has recognized as constituting a substantive vested right which cannot be retroactively diminished or eliminated by legislative action.

For these reasons, the First District properly determined that Amendment 7 can constitutionally be applied to all existing records and documents.

ARGUMENT

POINT ON APPEAL

THE STATUTORY PROVISIONS AFFECTED BY AMENDMENT 7 DID NOT CREATE VESTED RIGHTS IN HEALTHCARE PROVIDERS AND, THEREFORE, AMENDMENT 7 APPLIES TO ALL EXISTING RECORDS AND DOCUMENTS.

The statutory provisions upon which the healthcare providers rely for their argument that they have vested rights which cannot be retroactively affected by Amendment 7 are contained in the following statutes: '395.0191, Fla. Stat., '395.0193, Fla. Stat., '395.0197, Fla. Stat., '766.101, Fla. Stat., and '766.1016, Fla. Stat. Properly analyzed, those statutes do not create absolute privileges, but rather only limit disclosure of certain materials in particular circumstances, with absolutely no guarantee that the material will not be fully disclosed in other contexts. Four of those statutes provide only that the investigation, proceedings and records of the respective committees or organizations are not subject to discovery or admission into evidence in any civil or administrative action against a healthcare provider arising out of the particular incidents or matters at issue, see '395.0191(8), Fla. Stat., '395.0193(8), Fla. Stat.; '766.101(5), Fla. Stat.; '766.1016(2), Fla. Stat. However, that limitation does not apply to federal claims in federal court, see Feminist Women=s Health Center, Inc. v. Mohammad, 586 F.2d 530, 545 n.9 (5th Cir. 1978), cert. den., 100 S.Ct. 262 (1979), see also, Atteberry v. Longmont United Hosp., 221 F.R.D. 644 (D. Colo. 2004) (EMTALA action); Accreditation Ass=n

for Ambulatory Health Care, Inc. v. United States, 2004 WL 783106 (N.D. Ill. 2004) (federal health care fraud criminal investigation); Nilavar v. Mercy Health Sys. - Western Ohio, 210 F.R.D. 597 (S.D. Ohio 2002) (federal antitrust claim); Marshall v. Spectrum Medical Group, 198 F.R.D. 1 (D. Me. 2000) (Americans with Disabilities Act claim); United States v. OHG of Indiana, Inc., 1998 WL 1756728 (N.D. Ind. 1998) (False Claims Act qui tam action); Johnson v. Nyack Hosp., 169 F.R.D. 550 (S.D.N.Y. 1996) (racial discrimination claim).

The remaining statute, '395.0197, Fla. Stat., provides in subsection (4) that incidents reports generated by an internal risk management program are part of the work papers of the attorney defending the hospital in litigation. As a result, the protections afforded by that statute are that the relevant materials are subject to the work product doctrine, which means they can be produced to the opposing party in litigation upon a showing of need and hardship, see Dade County Public Health Trust v. Zaidman, 447 So.2d 282 (Fla. 3d DCA 1983); Health Trust, Inc. v. Saunders, 651 So.2d 188 (Fla. 4th DCA 1985).

None of the statutes at issue preclude disclosure of the underlying information, and none of them were designed to protect the privacy or reputation of the healthcare providers. The statutes were designed to facilitate the candor of witnesses and participants in those proceedings, see Holly v. Auld, 450 So.2d 217 (Fla. 1984). Even assuming arguendo those statutes indicated any legislative intent to protect the reputation

of healthcare providers, case law holds that interest does not rise to the level of a constitutionally recognized liberty or property interest, see Randall v. United States, 30 F.3d 518 (4th Cir. 1994), cert. den., 514 U.S. 1107 (1995); Simkins v. Shalala, 999 F.Supp. 106 (D.D.C. 1998).

This Court has defined a substantive vested right as Aan immediate right of present enjoyment, or a present, fixed right of future enjoyment,@ City of Sanford v. McClelland, 163 So. 513, 514-15 (Fla. 1935). See also, Division of Workers= Compensation v. Brevda, 420 So.2d 887, 891 (Fla. 1st DCA 1982); R.A.M. of South Florida, Inc. v. WCI Communities, Inc., 869 So.2d 1210, 1218 (Fla. 2d DCA 2004). ATo be vested, a right must be more than a mere expectation based on an anticipation of a continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of the demand,@ Brevda, supra, quoting Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 284 (Tex.Civ.App. 1975).

The limited protection granted to healthcare providers by the statutes at issue regarding the disclosure of certain materials in particular contexts do not rise to the level of a vested substantive right as defined above. Whatever rights the healthcare providers received under those statutes prior to Amendment 7 could not even be classified as a Achose in action,@ which is a constitutionally protected form of property. A chose of action is defined as:

> A personal right not reduced into possession, but recoverable by a suit at law.... A right to receive or recover a debt, demand, or damages on a cause of action ex contractu or for a tort or omission of a duty.

Puzzo v. Ray, 386 So.2d 49, 50 (Fla. 4th DCA 1980), quoting Black=s Law Dictionary (rev. 4th Ed. 1968).

The most common choses in action involve accrued causes of action in tort or contract, which are entitled to constitutional protection. The United States Supreme Court has held a civil cause of action as a species of property protected by the due process clause, Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985). Additionally, that property right includes any substantive defenses created thereunder, such as immunity, see Martinez v. California, 444 U.S. 277, 282 n.5 (1980) (AThe immunity defense, like an element of the tort claim itself, is merely one aspect of the state=s definition of that property interest@). Here, the immunities from civil liability provided in the statutes at issue, see '395.0193(5), Fla. Stat.; '395.0197(16), (17), Fla. Stat.; '766.101, Fla. Stat.; '766.1015, Fla. Stat., are not affected by Amendment 7. Nonetheless, immunity provisions are entitled to protection against retroactive elimination, see Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977) (workers= compensation immunity which was in effect on date of employee=s injury not retroactively eliminated by subsequent legislation).

The statutory rights upon which the healthcare providers rely were created solely by the legislature and were always subject to repeal or modification. As a result, they do not rise to the level of a vested property right sufficient to preclude retroactive application of a constitutional provision, see Hopkins v. The Vizcayans, 582 So.2d 689 (Fla. 3d DCA 1991) (corporation had no vested right in amendment procedure contained within Chapter 617, Fla. Stat.); see also, Tel Service Co. v. General Capital Corp., 227 So.2d 667 (Fla. 1969) (legislature has full authority to amend or repeal statutory provisions regarding penalties for usury, and no party has vested rights in such provisions).

While the First District properly resolved the retroactivity issue, its reliance on Clausell v. Hobart Corp., 515 So.2d 1275 (Fla. 1987), is somewhat problematic, since that decision has been limited to its particular and unique facts. In Clausell, the plaintiff filed a products liability claim against a defendant, but it was barred by the statute of repose contained in '95.031(2), Fla. Stat. (1983). However, the legislature had amended that statute to abolish that statute of repose, and one of the issues was whether that operated retrospectively to revive the plaintiff=s cause of action. Additionally, that statute of repose had been declared unconstitutional in Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980), but that decision had been subsequently overruled in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). In Clausell, this Court determined that the plaintiff=s cause of action was barred and that the application of Pullum did not deprive the plaintiff of a vested right retroactively.

For the reasons explained in detail by Judge Campbell in City of Winter Haven v. Allen, 541 So.2d 128 (Fla. 2d DCA 1989). Clausell is of limited utility in analyzing the issue of what choses in action are subject to constitutional protection when attempts are made to retroactively eliminate or diminish them. In subsequent cases involving accrued tort causes of action, this Court has relied on the analysis it applied in State, Dept. of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981); and Rupp v. Bryant, 417 So.2d 658 (Fla. 1982), see Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55 (Fla. 1995). In fact, Clausell, supra, has never been relied upon, nor even cited, by this Court since it was issued, despite the fact this Court has addressed issues regarding vested rights in accrued tort claims in Kaisner and Laforet, supra. Therefore, for the reasons expressed above, the First District=s decision below is correct, and is supported by extensive case law other than Clausell, supra.

In summary, the statutory provisions affected by Amendment 7 did not create vested rights in healthcare providers sufficient to entitle them to constitutional protection against their abrogation by subsequent constitutional amendment. The statutes at issue did not create absolute privileges, but only established limitations on the disclosure of certain materials in certain contexts. The underlying information which was the subject of the relevant investigations or committee proceedings was not protected by those statutes. Furthermore, case law holds that the healthcare providers= personal interests in the non-

disclosure of that information does not rise to the level of a constitutionally protected liberty or property interest.

CONCLUSION

For these reasons, Amendment 7 can apply to all existing documents because its application does not interfere with any party=s vested rights.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to all counsel on the attached counsel service list, by mail, on August 25, 2006.

ACADEMY OF FLORIDA TRIAL LAWYERS, INC.
218 South Monroe St.
Tallahassee, FL 32301
(850) 224-9403
Attorney for Amicus Curiae
The Academy of Florida Trial Lawyers

By:_____
PAUL D. JESS
Florida Bar No. 348082

CERTIFICATE OF TYPE SIZE & STYLE

Amicus Curiae, The Academy of Florida Trial Lawyers, hereby certifies that the type size and style of the Amicus Curiae Brief is Times New Roman 14pt.

_____

PAUL D. JESS
Florida Bar No. 348082