IN THE SUPREME COURT OF FLORIDA

Case No. SC06-912

On Appeal from the
First District Court of Appeal

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

Appellant,

v.

EVELYN BOWEN, et al.,

Appellees.

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

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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 Appellant 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. While the Amendment is lengthy and detailed, 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. In enacting section 381.028, Florida Statutes (2005), the Legislature provided 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.

Amendment 7 was not 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, including the required disclosure of records of "adverse medical incidents" to litigants who are not "patients" as defined by the Amendment. In so doing, the Amendment would be applied so as to undercut the peer review and risk management systems that have been proven deterrents against malpractice.

Ignoring the ambiguities of the Amendment and in the face of these perverse results, the court below determined that the Amendment was self-executing, alloed the Amendment 7 disclosure process to be injected into discovery in a malpractice case, declared unconstitutional the entire statutory framework for implementing the Amendment, and ruled that the Amendment should be applied retroactively.

This Court should reverse the lower court's rulings and uphold the 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. Finally, the Court should find that the Amendment should not require the disclosure of records that were created prior to its November 2004 passage, because to rule otherwise would intrude upon the vested rights to confidentiality of those persons who cooperated with the peer review, risk management, credentialing and incident reporting systems that were historically confidential under Florida law.

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).

A) Whether Or Not Amendment 7 Is Self-Executing Is Essentially Moot

Because of various ambiguities in Amendment 7, FHA believes that it was not self-executing and required legislative implementation. At this point, however, it makes little difference because the Legislature has now implemented the Amendment by the enactment of section 381.028, Florida Statutes (2005). Therefore, for the purpose of argument, FHA will assume that Amendment 7 is self-executing and will not take issue with the conclusion of the First District Court of Appeal on that point. However, FHA believes that the court erred in declaring all of section 381.028 unconstitutional. Rather than conflicting with

Amendment 7, section 381.028 clarifies the amendment and facilitates its effective implementation.

Florida law is well settled that the Legislature may enact laws which implement constitutional amendments even if they are self-executing. 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 which was 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).

B) The Lower Court Erred In Finding Section 381.028 Unconstitutional In Its Entirety

The lower court found section 381.028 unconstitutional in its entirety based on its view that the Legislature had impinged on rights guaranteed to patients under

Amendment 7. To the contrary, FHA believes that section 381.028 has clarified certain ambiguities in Amendment 7 and supplemented it in such a way that its purposes may be accomplished with less confusion. This will be critically important to hospitals as they respond to Amendment 7 requests from patients.

Amendment 7, which now appears in the Constitution as Article X, section 25, mandates disclosure of any records relating to an "adverse medical incident." An "adverse medical incident" is defined in section 25(c)(3) 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 clearly define just what records are subject to disclosure in a given situation. In particular, whether an act "could have caused injury or death of a patient" is left to conjecture. 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, depending on the circumstances and one's point-of-view, some of these unsuccessful outcomes might not fit the definition of an "adverse medical

incident," because there was no medical negligence or other intentional act that caused injury or death.

FHA believes that section 381.028 provides an answer to clarify just what medical records must be produced as reflecting adverse medical incidents. Section 381.028(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.

Section 395.0197 requires every licensed health care facility to have an internal risk management program and defines the "adverse incidents" that must be reported to state hospital regulators. Section (5), thereof states:

> (5) 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;
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> 2. Brain or spinal damage;
>
> 3. Permanent disfigurement;
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> 4. Fracture or dislocation of bones or joints;
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> 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.

The application of section 395.0197(5) to Amendment 7 requests will give hospitals clear guidance as to which records they are required to disclose as reflecting adverse medical incidents, especially given that they already report such incidents, albeit confidentially, to state regulators. With 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.

Appellees, however, may argue that such an interpretation ignores the latter portion of the constitutional definition of "adverse medical incident" in Article X, section 25(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." 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 to be disclosed. A peer review finding that a reported incident was not the result of any negligence could hardly be considered an "adverse medical incident." To conclude otherwise would also be inconsistent with any legal construction of the language of Amendment 7.

The first clause of section 25(c)(3), which defines "adverse medical incident," clearly contemplates some form of medical malfeasance. Thereafter, the definition uses the phrase "including, but not limited to" before providing examples of events that constitute such incidents. Any examples found after the phrase "including, but not limited to…" must fit within the scope of the definition that preceded the phrase. The inclusion of examples that are potentially broader in scope than the definition renders section 25(c)(3) ambiguous, making clarification of this definition an appropriate subject for legislative action. "[W]here a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling." *Agency for Health Care Admin. v. Associated Indus. of Florida, Inc.*,

678 So. 2d 1239, 1247 (Fla. 1996) (*quoting Greater Loretta Improvement Ass'n v. State ex rel. Boone*, 234 So. 2d 665, 669 (Fla. 1970)). In such a case, this Court has stated that its "role is to determine whether the legislature has adopted a rational construction of the constitutional" provision. *Id.* Here, the Court should defer to the legislature's rational determination that the term "adverse medical incident" as used in Amendment 7 should properly be construed to have the meaning commonly accepted by health care providers and consistent with the language of the Amendment.

In many respects, an adverse incident defined in section 395.0197(5) is actually broader in scope than the "adverse medical incident" contemplated by section 25(c)(3) because it requires the reporting of events that may or may not have involved "medical negligence, intentional misconduct, act or default" of an actor. The criteria in section 395.0197(5) are more objective, and do not require a predicate finding of fault. Rather, the emphasis is placed on determining what constitutes an untoward result. The overriding merit of section 395.0197(5) consists of the fact that it is definite and avoids the confusion over what might otherwise be construed as an "adverse medical incident."

Furthermore, a careful analysis of section 381.028 demonstrates that many of its other provisions properly assist in carrying out the purpose of Amendment 7. As explained above, for health care facilities, section 381.028(7)(b)2, also provides

the criteria that health care providers can use in determining which records to disclose by referring to section 458.351 which describes adverse incidents applicable to them.

Section 381.028 also provides meaningful definitions of the "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. Further, the statute indicates how a request for the production of records should be submitted, specifies the charges which may be made for the production of the records, and requires that the production of records must be made in a timely manner.

There are also other provisions in section 381.028 which FHA believes to be entirely consistent with Amendment 7, but which require a more detailed discussion. Section 381.028(6)(a) and (b) states as follows:

> 6) USE OF RECORDS.--
>
> (a) This section does not repeal or otherwise alter any existing restrictions on the discoverability or admissibility of records relating to adverse medical incidents otherwise provided by law, including, but not limited to, those contained in ss. 395.0191, 395.0193, 395.0197, 766.101, and 766.1016, 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, ss. 395.0191, 395.0193, 766.101, and 766.1016.

> (b) Except as otherwise provided by act of the Legislature, records of adverse medical incidents, including any information contained therein, obtained under s. 25, Art. X of the State Constitution, are not discoverable or admissible into evidence and may not be used for any purpose, including impeachment, in any civil or administrative action against a health care facility or health care provider. This includes information relating to performance or quality improvement initiatives and information relating to the identity of reviewers, complainants, or any person providing information contained in or used in, or any person participating in the creation of the records of adverse medical incidents.

At first blush, the reaffirmation of the restrictions on discoverability contained in the enumerated statutes may appear to conflict with Amendment 7. However, the restrictions on the discovery of records set forth in the enumerated statutes consistently say that such records "shall not be subject to discovery or introduction into evidence in any civil or administrative action." This language does not conflict with Amendment 7, because Amendment 7 says nothing about the patient's right to obtain the information through discovery in litigation.

The primary purpose of providing confidentiality for information gathered in a peer review or similar proceeding is to ensure that the participants can speak fully and frankly without fear of retaliation by doctors or others who may be the subject of the proceeding. *See Holly v. Auld*, 450 So. 2d 217 (Fla. 1984). A complete absence of confidentiality would chill the willing participation of hospital staff in the self-policing process that is critical to sustaining and improving the quality of patient care. Unquestionably, Amendment 7 authorizes the patient to

have access to the records regardless of whether litigation is pending. However to authorize such access as part of discovery during litigation would also disclose the records to co-defendants or other parties to litigation who are not "patients" but who would necessarily see the documents obtained through the discovery process.

While Section 381.028(6) reaffirms the existing law which precluded obtaining the records by discovery, it does not divest a patient of the right to obtain records simply because the patient has become a plaintiff in a lawsuit. But, if a patient wishes to obtain access to Amendment 7 records during litigation, the proper procedure is to make the request for such records 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 disclosed to the patient are not discoverable from the patient. Thus, the restrictions on discovery contained in the several statutes and reaffirmed in section 381.028(6) are not in conflict with Amendment 7, because those statutes only refer to traditional discovery during litigation.

The balance of sections 381.028(6)(a) and (b) cannot possibly be said to be in conflict with Amendment 7. These provisions explain that the existing statutory restrictions against the records so obtained being admitted into evidence or used

for impeachment and the existing statutory restrictions against compelled testimony are not repealed or altered by Amendment 7. These provisions cannot be said to restrict any rights created by Amendment 7 because Amendment 7 relates only to the disclosures of records to patients. Neither Amendment 7, nor its ballot summary, nor any of the other materials provided to voters, indicated that Amendment 7 was intended to have any effect on litigation. Moreover, the validity of such restrictions was never at issue in this litigation.

The only portions of section 381.028 which may arguably conflict with Amendment 7 are found in sections (2)(j), (5), and (7)(a), which shall be discussed in turn. Section (2)(j) of the statute limits discovery of records to the "final report of any adverse medical incident." For health care providers, this would encompass the report contemplated by section 395.0197, including the supporting data. In evaluating and selecting a physician, it is hard to imagine that a consumer would need more than the final report which determines that medical negligence or intentional misconduct occurred.

The second sentence of section (5) of the statute, which limits requests for records created in the past four years, is also logical because hospitals cannot reasonably be expected to keep records forever, and the costs of searches will increase dramatically if hospitals are required to conduct searches for records

further back in time. Without firm guidelines, hospitals will spend huge sums responding to (and likely litigating) their responses to Amendment 7 requests.

Section (7)(a) of the statute, which restricts the discovery of records to those involving the same or substantial similar condition, treatment, or diagnosis of the patient requesting access, is further intended to provide hospitals with some consistent and predictive method of responding to Amendment 7 requests so as to control the costs of responding.

However, should any portion of section 381.028 be found in conflict with the Constitution, the proper course of action for this Court is to sever and declare unconstitutional those few sections of the statute which conflict with Amendment 7 and uphold the balance of section 381.028 as properly implementing the manner in which Amendment 7 shall be carried out.

As this Court explained in *Ray v. Mortham*, 742 So. 2d 1276, 1280 (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).

In *Smith v. Department of Insurance*, 507 So. 2d 1080, 1089 (Fla. 1987), this Court set forth the test for determining severability:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative process expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Section 381.028 clearly meets each of these standards. Each section is directed toward a different aspect of implementing Amendment 7. Any sections which the Court might deem invalid stand alone in content and can be stricken without affecting the integrity of the rest of the statute. It cannot fairly be said that the Legislature would not have enacted this statute had it known that these few sections would not survive.

C) Amendment 7 Should Not Be Applied Retroactively

Section 381.028(5) states that Amendment 7 shall not apply retroactively to records created before the enactment of the Amendment. This position is entirely consistent with Florida law, and the holding to the contrary by the court below is wrong.

The well-established rule is that constitutional amendments are given prospective effect only, "[u]nless specifically stated in the text or in the statement placed on the ballot." *In re Advisory Opinion to the Governor—Terms of County Court Judges*, 750 So. 2d 610 (Fla. 1999) (*citing State v. Lavazzoli*, 434 So. 2d

321, 323 (Fla. 1983)). Here, the text of the Amendment itself, as well as its ballot summary and other materials, give no indication that it is to be applied retroactively. Without any indication of retroactivity in the text of the Amendment or its ballot summary, one cannot conclude that retroactive application was intended.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 252 (1994), the United States Supreme Court explained:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

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). In the Court's view, restricting a legislator's ability to represent clients before a state agency would be "tantamount to changing the qualifications for office" after the fact, which would be impermissible and "obviously defeats expectations honestly arrived at when the office was initially sought." 362 So. 2d at 935.

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, gives no indication that it is to be applied retroactively. It makes no difference whether or not the Amendment is self-executing. Without any indication of retroactivity in the text of the Amendment or its ballot summary, it is impossible to conclude that retroactive application was intended.

Notwithstanding the foregoing principles, the court below held that Amendment 7 applied retroactively because of its reference to "any" record relating to "any adverse medical incident" and its definition of "patient" to include individuals who had "previously undergone treatment." This analysis is wrong for two reasons. First, a reading of the Amendment's language together, with its predicate Statement and Purpose, clearly shows that the Amendment uses the term "any" to indicate the inclusion of records of "adverse medical incidents" to which existing statutes have restricted access; the Amendment provides no indication that the term "any" refers to records existing prior to the Amendment's effective date. Second, nowhere does the Amendment use the phrase "*previously* undergone treatment." The term "patient" is defined as "an individual who has sought, is seeking, is undergoing, or has undergone care or treatment…." Without regard to retroactive intent, if the Amendment had not included the past tense of the verbs it used, the right of access would have been limited just to current or prospective patients. Again, this language provides no indication of an intent to abrogate the confidentiality of records created before the effective date of the Amendment.

Furthermore, 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. *See Metropolitan Dade County v. Chase Federal Housing*, 737 So. 2d 494 (Fla. 1999). 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 vested substantive right of confidentiality, which cannot be infringed through a retroactive application of Amendment 7.

CONCLUSION

Amendment 7 was touted to voters as a way to provide patients with more information about medical errors to allow better choices of hospitals and doctors. It was not advertised as an aid to plaintiffs in legal proceedings and should not be construed in that fashion.

Regardless of whether the Amendment is self-executing, the Legislature has enacted a statutory scheme that rationally supplements the Amendment and gives hospitals some reasonable, predictable parameters to guide them in responding to Amendment 7 requests. Finally, under any consideration, Amendment 7 should not be ruled to apply retroactively so as to require disclosure of records created prior to November 2004.

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. In so doing, the Court will have preserved the intent of the Legislature to the extent it is constitutionally permissible.

Respectfully submitted this ____ day of July, 2006.

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