IN THE SUPREME COURT OF FLORIDA
CASE NO. SC06-912

Lower Tribunal Case No. 1D05-4149

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

Appellant,

vs.

EVELYN BOWEN ET AL.,

Appellees.

REPLY BRIEF OF NOTAMI HOSPITAL OF FLORIDA, INC.

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INTRODUCTION

This Reply responds to issues I, II and V of the Answer Brief of Appellees (AB); the Amicus Brief of Floridians for Patient Protection (FPP); and the Amicus Brief of the Academy of Florida Trial Lawyers (AFTL).

THE ANSWER BRIEF OF APPELLEES

The Answer Brief begins with a rhetorical flourish against "special interest groups." (AB:5) This assertion is of dubious propriety before a court of law. It is also disrespectful to the medical professionals who provide vital medical care. The privileged and confidential records they make and review are "essential to . . . the continued improvement in the care and treatment of patients." *Dade County Med. Ass'n v. Hlis,* 372 So.2d 117, 120 (Fla. 3d DCA 1979).

Another inflammatory twist is the assertion that "the amendment effectively repealed statutes that kept doctors' and hospitals' records of medical negligence secret." (AB:5). Such records were not kept secret from those with a professional or regulatory need to know, whether peer review committees or the Department of Health (DOH) or Agency for Health Care Administration (AHCA).[1]

[1] "The Department of Health shall have access to any information or record maintained by the Agency for Health Care Administration, including any information or record that is otherwise confidential and exempt from the provisions of chapter 119 and s. 24(a), Art. I of the State Constitution, so that the Department of Health may corroborate any information that practitioners are required to report under s. 456.039 or s. 456.0391." § 456.043, Fla. Stat. (2005).

I. Retroactivity

With respect to the issue of vested rights, Appellees cite a Georgia case that has nothing to do with compelled disclosure of communications that were privileged and confidential when created. (AB:11). *Evans v. Belth*, 388 S.E. 2d 914 (Ga. Ct. App. 1989), addresses the obverse situation: information that once was in the public domain and then was moved out of the public domain by legislative change. The Georgia case is completely unremarkable in holding that there is no vested right on the part of a member of the public to have continued access to a record that was later exempted from disclosure by the state's open records law.[2]

Appellees seek to expose records that were private and confidential when created. The reliance interests in the two situations are wholly different. In the cases cited by Appellees, information of a public nature was exempted from the generalized statutory right of access; there could be no vested right in a specific individual that the list of what was accessible or exempted would never change. Here, the confidential nature of the written communications sought to be disclosed were specifically mandated by state law along with legal promises to the participants that their records would remain privileged and confidential. A public

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[2] Appellees cite (AB:11) another case that removed records from the public domain and made them private. Reasoning like *Evans*, *Northeast Community Hospital v. Gregg*, 815 S.W. 2d 320, 327 (Tex. Ct. App. 1991) held that there were "no vested rights to conduct discovery under the prior law" permitting disclosure.

records law does not set up equivalent detrimental reliance and privacy rights.[3] "Elementary considerations of fairness dictate that . . . settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

Appellees cite cases involving suits by the birth parents of adopted individuals. (AB:13). Unlike the Florida peer review and credentialing statutes, the Tennessee and Oregon laws did not guarantee the confidentiality of the information at issue. Both statutory schemes permitted the adopted individuals to learn the identities of their birth parents in the discretion of the court. On that basis, the legislatures of both states amended the statutes to allow disclosure of the identities of birth parents without any court order. Upon challenge, both courts held that birth parents did not have a right of confidentiality because the records could have been disclosed upon request under the prior laws. *Doe v. Sundquist*, 2 S.W. 3d 919, 925 (Tenn. 1999) and *Does 1-7 v. State*, 993 P. 2d 822, 832 (Or. Ct. App. 1999).

Appellees also cite *Yaffee v. International Company*, 80 So.2d 910 (Fla. 1955) (AB:14). In that case, this Court reinforced the principal that "parties to contracts executed when there are no usury statutes have accrued rights that can not be impaired or taken away by the subsequent enactment of usury statutes." *Id.* at

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[3] It is not only the participants in the peer review process who benefit but society as a whole. "The belief that important public interests are furthered by unhindered communications . . . underlies most privileges." *Somer v. Johnson*, 704 F.2d 1473, 1479 n.6 (11th Cir. 1983) (citations to Supreme Court decisions omitted).

912. The analogy to accrued rights under state statutory and administrative mandates of peer review confidentiality is obvious. Likewise in *Bureau of Crimes Compensation v. Williams*, 405 So.2d 747, 748 (Fla. 2d DCA 1981) (AB:14), a statute repealing a right to the remedy of attorneys fees was held to apply in a situation where plaintiff did not hire counsel until *after* the repealing statute went into effect. There was no unfair retroactive application of the statute or deprivation of vested rights.

Appellees assert that "the nature of the 'right' at issue is to shield evidence of doctors' and hospitals' neglect." (AB:14). This is perhaps a clever jury argument but wins no points for legal analysis. The true right "at issue" is the right to rely on legal guarantees of confidentiality that make possible the self-policing process and protect its integrity. The Fifth District correctly held that "retroactive application would not be constitutionally permissible because it vitiates a vested right that health care providers have in the confidentiality of the information generated through the self-evaluative process." *Fla. Hosp. Waterman, Inc. v. Buster*, 2006 WL 566084 at *6 (Fla. 5th DCA Mar. 10, 2006).

The proposition that "evidentiary privileges are to be narrowly interpreted" (AB:15) is inapposite. Amendment 7 does not abolish an evidentiary privilege. Like the attorney/client privilege, the peer review privilege extends beyond the confines of litigation.

Another passage is redolent of the political campaign trail: "four out of five Florida voters approved language saying very directly that the privileges the legislature afforded the medical profession were effectively repealed. . . ." (AB:16). Conspicuous by its absence is the language that "very directly" repeals such privileges. In fact, the words "privilege" or "repeal" appear nowhere in Amendment 7. Not even the ballot summary contains those words. It takes a series of inferences to arrive at the conclusion that Amendment 7 worked a repeal of all privileges. The only right created is to "give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents. . . ." Appellees have substituted political rhetoric for legal analysis.

Appellees support their asserted inference of retroactive repeal of privileges by focusing on the word "any." They invoke one possible meaning of the word "any"—"every." But that is not the primary definition. For example, the Random House Dictionary of the English Language, Second Edition Unabridged (1987) defines "any" as "one, a, an, or some; one or more without specification or identification." That is the first definition listed; "every; all" is the fourth definition listed. The case cited by Appellant relying on the 1977 New Collegiate Dictionary, *Burbank Grease Services, LLC v. Sokolowski*, 2006 WL 1911997 (Wis., Jul. 13, 2006) (AB:17), is of no value in resolving the retroactivity issue.

What is valuable is the firm presumption against retroactive application of a law absent an explicit provision declaring retroactive intent. *In Re: Advisory Opinion to the Governor – Terms of County Court Judges*, 750 So.2d 610, 614 (Fla. 1999). Amendment 7 has no such statement. There is a compelling reason for the rule: "the presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our republic." *Landgraf v. USI Film Prods.*, 511 US 244, 265 (1994).

II. <u>Contract Clause</u>

In the Summary of Argument, in back-to-back sentences, Appellees manage to advance two misrepresentations. First, the Hospital's contract with its medical staff is misrepresented as an "employment contract []." (AB:6). The Medical Staff Bylaws is not an employment contract with the Hospital; nothing in the record suggests that it is. Appellees also distort a legally mandated governance structure into "merely terms that LCMC imposes on its staff as a condition of obtaining hospital privileges." *Id*. The Bylaws impose obligations that are required by state law: peer review, risk management and quality assurance. These become part of the contract between LCMC and its medical staff. When parties "contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of the contract." *Citizens' Ins. Co. v.*

Barnes, 124 So. 722, 723 (Fla. 1929).

As a condition of continuing licensure, LCMC is required to "have a planned, systematic, hospital wide approach to the assessment and improvement of its performance to enhance and improve the quality of health care provided to the public." Fla. Admin. Code R. 59A-3.271(1). Further, such system "must be defined in writing, approved by the governing board of the hospital, *and shall include a confidentiality policy*." Fla. Admin. Code R. 59A-3.271(1)(b)(3). (emphasis added).

Appellees acknowledge the existence of Rule 59A-3.271(1) but they omit mention of the crucial mandated confidentiality clause. They likewise elide the whole truth in asserting that "the health care industry may have convinced the legislature that peer review can not work effectively absent complete confidentiality of records. . ." (AB:24). This Court has accepted the centrality of confidentiality in the peer review process, the purpose of which is "to reduce morbidity and mortality and to improve patient care." § 395.0193(2)(g), Fla. Stat. (2005). "In order to make meaningful peer review possible, the legislature provided a guarantee of confidentiality for the peer review process." *Cruger v. Love*, 599 So.2d 111, 113 (Fla. 1992).

Appellees attempt to trivialize the role of confidentiality in credentialing, peer review and related quality assessment proceedings as "only a collateral aspect

of the relationship." (AB:24). They rely upon *Medical Society of New Jersey v. Mottola*, 320 F.Supp.2d 254 (D.N.J. 2004). That case upheld the mandatory public posting of malpractice settlement agreements or judgments as collateral to the agreements at issue. Here, as recognized by this Court in *Love*, confidentiality is fundamental and central to the obligations of peer review. Furthermore, the court in *Mottola* specifically refused to decide the issue of retroactivity.

There is yet another citation (AB:25) to an out-of-state case, *May v. Wood River Township Hospital,* 629 N.E. 2d 170 (Ill. Dist. Ct. 1994). The statute at issue there did not make a physician's application for staff privileges a confidential document. Florida law does. A physician's credentialing file "is not subject to discovery because it falls within the statutory privilege." *Columbia/JFK Med. Ctr. v. Sanguonchitte*, 920 So.2d 711, 711 (Fla. 4th DCA 2006).

Appellees also make the unjustified assertion of a "broad societal problem of repeated malpractice . . . ." (AB:26). There is not a shred of evidence in the record that "repeated malpractice" is "fostered by a system of self-policing under conditions of secrecy and privilege." (AB:26). That is pure *ipse dixit.* The considered judgment of both the legislature and the courts for decades has been that the problem of malpractice is ameliorated by self policing and not "fostered" by it. The privilege "seeks to promote candor among those persons conducting and participating in evaluations of medical care." *Somer v. Johnson*, 704 F.2d at 1479.

V. Federal Preemption

Appellees assert "federal courts have routinely held that there is no federal peer review privilege. . . ." (AB:33). This ceased to be true when Congress passed the Patient Safety Quality Improvement Act of 2005 (PSQIA), Pub.L. No. 109-41, 119 Stat. 340 (codified as sections of 42 U.S.C. § 299). Thus, the cases cited by Appellees all pre-date the 2005 passage of PSQIA. More fundamentally, the existence *vel non* of a federal peer review privilege is quite irrelevant to this case. It matters not that the source of privileges is in state rather than federal law. Indeed, Congress specifically recognized the role of state law privileges when it enacted the HCQIA: "Under current state law, most professional review activities are protected by immunity and confidentiality provisions." H. Rep. No. 99-903, 99th Cong. 2d Sess. 245, reprinted in U.S.C.C.A.N. 6384, 6391.

What is really at issue is the survival of the peer review process and related privileges mandated by pre-existing state law. Their survival is essential to the accomplishment of the federal objectives of the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101 *et seq*. Preemption arises when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Amendment 7's right of access to all documents related to the peer review process is preempted by the HCQIA because it prevents Congress from achieving

its core objective. "The HCQIA was intended to permit more effective professional review actions and thereby benefit patients." *Simpkins v. Shalala,* 999 F.Supp.106, 116 (D.D.C. 1998).

Related to the foregoing is the indisputable but irrelevant observation that 42 U.S.C. §11115(d) of the HCQIA does not affect "in any manner, the rights and remedies afforded patients under any provision of federal or state law to seek redress for any harm or injury suffered as a result of negligent treatment by any physician, health care practitioner, or health care entity. . . ." (AB:35) Amendment 7 does not provide "redress for any harm." It provides access to records of adverse medical incidents only.

Appellees assert that "the amendment does nothing to halt the peer review process or repeal the requirements in health care providers engaged in risk management." (AB: 34). In fact, Amendment 7 strips the process of confidentiality and thereby renders peer review impractical, ineffective or incomplete.

"HCQIA is designed to facilitate the frank exchange of information among professionals conducting peer review inquiries . . . ." *Bryan v. James E. Holmes Regional Medical Center*, 33 F. 3d 1318, 1322 (11th Cir. 1994). "The system . . . is designed to raise the quality of medical care by encouraging physicians to police themselves." *Id.* at 1324. The reporting requirements were designed to "restrict the ability of incompetent physicians to move from state to state without disclosure

or discovery of the physician's previous damaging or incompetent performance." *Id.* at 1322. This federal purpose is of great importance to the Nation's health care system. Amendment 7 significantly impedes the accomplishment of that purpose and is therefore by implication preempted.[4]

AMICUS BRIEF OF FPP

The sole point argued by the FPP is the retroactive application of Amendment 7 to records which existed prior to its enactment. FPP invokes C*ampus Commnc's, Inc. v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2002) in support of retroactivity. (FPP:9). Autopsy photos formerly deemed public records were by new law made presumptively private (subject to a good cause override) in order to protect the privacy rights of the family members of the late race driver Dale Earnhardt. A website specializing in celebrity autopsy photos had requested them, as did others. The Fifth District correctly held that there was no vested right to continue to have access to specific public records.[5] The statute, unlike Amendment 7, was explicitly retroactive.

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[4] Appellees cite *Mattice v. Memorial Hospital of South Bend*, 203 F.R.D. 381 (N. D. Ind. 2001), for the proposition that there was no "frustration of core congressional objectives in other cases where preemption has been claimed as a shield of disclosure." (AB:35). The case simply does not support this statement.

[5] Amicus cites *News-Press Publishing v. Kaune*, 511 So.2d 1023 (Fla. 2d DCA 1987). (FPP:6). There the court upheld retroactive exemption of documents from disclosure under the Public Records Act. As stated in *Earnhardt*, the Public Records Act creates only public rights and is not apposite to this appeal.

"Both the Florida Constitution and the Public Records Act allow for the creation of exemptions to the Act by the Legislature . . . ." *Id.* at 391. The court concluded that there was no vested right to materials under the Florida Public Records Act because the right to inspect and copy was "subject to divestment" and "the rights provided under the Public Records Act are public rights." *Id.* at 398. "[O]nly private, and not public rights, may become vested in this constitutional sense. *Hodges v. Snyder*, 261 U.S. 600, 43 S.Ct. 435, 67 L.Ed. 819 (1923)." *Id*. at 399. Here, the contractual rights between LCMC and its medical staff are private rights.

FPP also relies upon the independent source rule to support invasion of the statutory privileges. It correctly notes that information obtained independently is not immune from discovery or use in any civil or administrative action. (FPP:12.) But this is a *non sequitur*. Obtaining a record from an independent source has nothing to do with compelling disclosure from a privileged source. The privileged communication remains inviolate.

Amicus argues that state statutory provisions do not bar the use of such evidence in civil proceedings against a health care provider on a federal cause of action. (FPP:12). But, of course, such material would remain privileged in a federal suit based upon a state law cause of action (typically in diversity jurisdiction cases). A prime example is *Somer v. Johnson*, 704 F. 2d 1473, 1479 (11th Cir. 1983),

holding that the Florida peer review statute was not a mere procedural right but created a "substantive privilege" protecting the confidentiality of records of hospital committees that evaluate and improve quality of health care.

Another weak assertion is that "any disciplinary action against a physician by a medical association or hospital must be reported to the Department of Health" (DOH) and disseminated further to every hospital and HMO in the state when the action "is severe enough for expulsion or resignation." (FPP:13.) But authorized disclosures are limited to those with a professional or regulatory need to know. Such disclosures, intended for quality-of-care purposes, are not remotely like the kind of open access argued for by Amicus.

Amicus tries to build an argument for compelled disclosure based upon the work product doctrine. (FPP:14). The argument is deeply flawed. Certain risk management incident reports are part of the work papers of the attorney defending the licensed facility in litigation or in anticipation of litigation and are presumptively privileged. The presumption may sometimes be overcome. But risk management reports may also qualify under § 395.0191 or § 395.0193, Fla. Stat. (2005), or § 766.101, Fla. Stat. (2005), and to that extent are fully protected from compelled disclosure. FPP's work product argument is misleading because it does not differentiate among reports that might be discoverable and those that would be excluded from discovery. Even the former are discoverable only upon a showing of

need and inability without undue hardship to obtain a substantial equivalent from other sources. *See HealthTrust, Inc. v. Saunders,* 651 So.2d 188 (Fla. 4th DCA 1995); *Bay Med. Ctr. v. Sapp*, 535 So.2d 308 (Fla. 1st DCA 1988). The limited exception to the work product privilege is hardly an open door policy.

Amicus asserts that "the statutory limitations on disclosure were not designed to protect the privacy of the individual doctor or hospital whose conduct at issue, but rather to promote the flow of accurate and complete information in the particular investigation or committee proceedings, *see Holly v. Auld*, 450 So.2d 217 (Fla. 1984)." (FPP:17). But, the fact that an individual *physician* may not have a constitutionally protected liberty interest in avoiding the stigma[6] resulting from disclosure of such information is wholly irrelevant. The privileges protect not the physician under review or investigation but the physicians and other individuals who conduct or express opinions in the investigation. The argument of Amicus misses the mark.

AMICUS BRIEF OF THE AFTL

This amicus brief argues that Amendment 7 is retroactive to "all existing records and documents." (AFTL:5). One point bears brief reply. Amicus cites *Hopkins v. The Vizcayans*, 582 So.2d 689 (Fla. 3d DCA 1991), upholding

[6] The cases cited by Amicus (FPP:17) limit constitutional adjudication under the Civil Rights Act, 42 U.S.C. § 1983 and have nothing to do with the issues in this case.

retroactive application of a statutory procedure under § 607.411, Fla. Stat. (2005), for amending bylaws of not-for-profit corporations. (AFTL:9). That statute contained a reservation of power "to amend, repeal or modify this chapter at pleasure." The court held that "the reservation of power is part of the corporate 'contract' . . . ." *Id*. at 692. There is nothing comparable in Chs. 395 and 766, Fla. Stats. *Hopkins* does not support AFTL's position.[7]

CONCLUSION

This Court should decide that (1) Amendment 7 is not retroactive in application; (2) Amendment 7 applies only to "records" and not to testimonial information; (3) § 381.028 Fla. Stat. (2005) is constitutional; (4) Amendment 7 as applied to extant hospital-medical staff contract violates the Contract Clause; (5) Amendment 7 is unconstitutional under the Supremacy Clause.

[7] Similarly, a case cited by Appellees (AB:12) was decided under the Michigan constitutional provision relating to the state's reserved power to amend corporate charters. *Stott v. Stott Realty*, 284 N.W. 635, 637 (Mich. 1939), holds that "a franchise granted by the state with a reservation of a right to repeal must be regarded as a mere privilege . . . ." *Id*. at 639. There is no reservation of a right to repeal in the confidentiality provisions of Florida's peer review and credentialing statutes.

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I HEREBY CERTIFY that this Brief was prepared using the Times New Roman in 14-point font pursuant to the requirements of Rule 9.100 of the Florida Rules of Appellate Procedure.

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