ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case Nos.: SC11-2208
SC11-2336

MYRIAM AMPUERO-MARTINEZ, as Personal Representative of the ESTATE OF SERGIO AMPUERO,

L.T. Case No.: 3D11-34

Petitioner/Cross-Respondent,

v.

CEDARS HEATHCARE GROUP, LTD. d/b/a CEDARS MEDICAL CENTER,

Respondent/Cross-Petitioner,

and

ADRIAN LEGASPI, M.D., *et al.*,

Respondents.
_____/

INITIAL BRIEF OF PETITIONER/CROSS-RESPONDENT

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PRELIMINARY STATEMENT

The Petitioner/Cross-Respondent, MYRIAM AMPUERO-MARTINEZ, as Personal Representative of the ESTATE OF SERGIO AMPUERO, is referred to as "Mrs. Ampuero".

The Respondent/Cross-Petitioner, CEDARS HEATHCARE GROUP, LTD. d/b/a CEDARS MEDICAL CENTER, is referred to as "Cedars".

There was no record in the district court proceeding below, only an appendix compiled by Cedars. That appendix is designated as "Cedars' Third DCA App. __" followed by the appropriate tab and page number.

Mrs. Ampuero is concurrently filing her own appendix here containing the parties' substantive filings and the Third District's opinion and substantive orders below. That appendix is designated as "Mrs. Ampuero's App.," followed by the appropriate tab and page number.

Unless otherwise noted, all emphasis in quotations is supplied by the undersigned.

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STATEMENT OF THE CASE

This proceeding arises from a wrongful death medical malpractice action filed by Petitioner/Cross-Respondent, Mrs. Ampuero,[1] against a hospital, Respondent/ Cross-Petitioner, Cedars, and certain of her father's other healthcare providers.[2] (Cedars' Third DCA App., Tab 16)

In discovery, the trial court ordered Cedars to produce records of adverse medical incidents involving other patients treated by Sergio Ampuero's physicians at Cedars pursuant to Amendment 7 (Art. X, § 25, Fla. Const.). (Cedars' Third DCA App., Tabs 1 & 5) Cedars challenged that discovery order by seeking certiorari review in the Third District Court of Appeal, which Mrs. Ampuero opposed both as to jurisdiction and on the merits. (Mrs. Ampuero's App., Tabs 1-3)

The Third District summarily rejected all of Cedars' arguments, holding that the trial court's ruling did not depart from the essential requirements of law, but granted certiorari in part holding that the trial court's order "does not limit the production of those records to the same or substantially similar condition, treatment,

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[1]The parties' names are abbreviated herein. *See* Preliminary Statement, *supra*, at ii.

[2]Adrian Legaspi, M.D., 21st Century Oncology, LLC f/k/a 21st Century Oncology, Inc., Manuel M. Gonzalez, M.D., Alejandro J. Vilasuso, M.D., and Intensive Care Consortium, Inc.

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or diagnosis as the patient requesting access. *See* § 381.028(7)(a), Fla. Stat. (2010). By not limiting the request as required by the statute, the trial court departed from the essential requirements of the law." *Cedars Healthcare Group, Ltd. v. Ampuero-Martinez* (hereafter "*Cedars v. Ampuero*"), – So.3d –, 36 Fla. L. Weekly D2071, 2011 WL 4374270, at *1 (Fla. 3d DCA Sept. 21, 2011). (Mrs. Ampuero's App., Tab 3)

Mrs. Ampuero timely filed a motion for rehearing, pointing out that the portion of the statute upon which the Third District granted certiorari was declared unconstitutional in *Florida Hosp. Waterman, Inc. v. Buster* ("*Buster II*"), 984 So.2d 478, 493 (Fla. 2008), and *Notami Hosp. of Fla., Inc. v. Bowen* ("*Notami Hosp.*"), 927 So.2d 139, 143, 145 (Fla. 1st DCA 2006), *approved by id.*, and had not been argued by Cedars before the trial court or Third District, and thus the court had mistakenly granted certiorari in part based upon an unconstitutional law that had not even been raised by Cedars. (Mrs. Ampuero's App., Tab 7, at 1, 2) Quite professionally, Cedars' counsel also promptly advised the Third District that it "may have mistakenly relied on a subsection of section 381.028, Florida Statutes, namely subsection (7)(a), that was deemed invalid in *Florida Hospital Waterman, Inc. v. Buster*, 984 So.2d 478, 492-93 (Fla. 2008)." (Mrs. Ampuero's App., Tab 5, at 1)

Despite the parties' agreement that the Third District had made a mistake in granting certiorari upon this unconstitutional statutory subsection, that court treated

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Cedars' suggestion of error as a motion for rehearing and denied it. (Mrs. Ampuero's App., Tab 9) The district court then separately denied Mrs. Ampuero's motion for rehearing without explanation. (Mrs. Ampuero's App., Tab 10)

Both Mrs. Ampuero and Cedars timely invoked this Court's discretionary jurisdiction, and the case was accepted for review by this Court on May 15, 2012. Cedars and Mrs. Ampuero have now settled the wrongful death claim, of which the Court is being concurrently advised, with Mrs. Ampuero moving the Court to maintain jurisdiction over the case to correct the Third District's erroneous Amendment 7 discovery decision.[3]

SUMMARY OF ARGUMENT

The Third District's decision conflicts with this Court's decision in *Buster II*. A district court cannot overrule a decision of this Court, so its decision is erroneous and must be quashed. In addition to causing harm to Mrs. Ampuero and future citizens seeking records under Amendment 7, the decision below will cause confusion and unnecessary judicial labor as litigants and judges grapple with the silent conflict between it and *Buster II*. Indeed, it is apparently already causing mischief in Florida's courts.

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[3]*See* Mrs. Ampuero's Notice of Partial Settlement and Motion for the Court to Retain Jurisdiction of Case, dated June 8, 2012.

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ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *BUSTER II* AND IS THEREFORE ERRONEOUS AND SHOULD BE QUASHED

In 2004, Florida's citizens adopted Amendment 7 by a super-majority vote of more than 4 to 1. *Buster II*, 984 So.2d at 480 n.1. That constitutional amendment gives "patients . . . a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." Art. X, § 25(a), Fla. Const.

Following Amendment 7's passage, the Florida Legislature passed an implementing statute, § 381.028, Fla. Stat. (2005), which actually restricted patients' rights in part "[p]ursuant to" the amendment. One subsection thereof provided:

> Pursuant to s. 25, Art. X of the State Constitution, *the adverse medical incident records to which a patient is granted access are those* of the facility or provider of which he or she is a patient and *which pertain to any adverse medical incident affecting the patient or any other patient which involves the same or substantially similar condition, treatment, or diagnosis as that of the patient requesting access.*

Id., § 381.028(7)(a). Thus, despite Amendment 7 giving patients a broad constitutional right to access "any records . . . relating to any adverse medical incident," the Legislature sought to limit the scope of records made available under that constitutional right by mere statute.

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Soon thereafter, both the First and Fifth Districts held that the implementing statute unconstitutionally restricted patients' rights under Amendment 7, and struck it down.[4] The First District specifically held that subsection (7)(a) was unconstitutional.[5]

This Court, in *Buster II*, agreed with the First District that subsection (7)(a) of the implementing statute, among others, was unconstitutional. "We agree that the four provisions cited by the *Notami Hospital* court contravene the broad rights of access to adverse medical incident records granted by amendment 7.... Because these

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[4]*Florida Hosp. Waterman, Inc. v. Buster* ("*Buster I*"), 932 So.2d 344, 353 (Fla. 5th DCA 2006) (in adopting the implementing statute's restrictions, "the Legislature expressed an interpretation of Amendment 7 contrary to ours.... [W]hen the people have spoken and expressed their will through the constitutional amendment process, the Legislature is not free to abrogate it through subsequent enactments.... While we express no opinion regarding the processes established in section 381.028 to secure the requested information pursuant to Amendment 7, we do reject the interpretation of that amendment by the Legislature") (citation omitted), *approved in part and quashed in part*, *Buster II*, 984 So.2d at 494; *Notami Hosp.*, 927 So.2d at 143, 145 ("[s]ection 381.028, Florida Statutes, purports to implement Amendment 7. However, a comparison of the plain language of the "implementing" statute and article X, section 25, reveals the statute drastically limits or eliminates discovery of records the amendment expressly states are discoverable, and limits the "patients" qualified to access those records. * * * Because section 381.028, restricts express constitutional rights, it must fall. The trial court did not depart from the essential requirements of law by concluding the statute is unconstitutional"), *aff'd*, *Buster II*, 984 So.2d at 494.

[5]"Section 381.028(7), Florida Statutes, limits disclosure to . . . [records] relating to the same or a substantially similar condition, treatment or diagnosis with that of the patient requesting record access.... Clearly, the statute impermissibly restricts rights expressly granted under the Constitution." *Notami Hosp.*, 927 So.2d at 143.

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restrictions and those identified by the district court conflict with the provisions of amendment 7, these statutory restrictions cannot stand." 984 So.2d at 492-93.

In this case, the Third District erroneously granted certiorari in part, holding that the trial court's order "does not limit the production of those records to the same or substantially similar condition, treatment, or diagnosis as the patient requesting access. *See* § 381.028(7)(a), Fla. Stat. (2010). By not limiting the request as required by the statute, the trial court departed from the essential requirements of the law." *Cedars v. Ampuero*, 36 Fla. L. Weekly D2071, 2011 WL 4374270, at *1. (Mrs. Ampuero's App., Tab 3)

The Third District's decision is unusual because it enforces a statute this Court already held unconstitutional in *Buster II*. Of course, "a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida." *Hoffman v. Jones*, 280 So.2d 431, 440 (Fla. 1973). Its decision is more unusual still because Cedars never invoked this subsection before the trial court or Third District, and because after its opinion issued, both Mrs. Ampuero and Cedars pointed out that this subsection was held unconstitutional in *Buster II* (Mrs. Ampuero's App., Tabs 5 & 7), yet the Third District declined to correct its error. (Mrs. Ampuero's App., Tabs 9 & 10) Because the Third District did not seek to explain or justify its ruling, one can only assume that it did not actually intend to issue a decision in conflict with

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this Court. To be sure, Mrs. Ampuero imagines no malignant purpose behind the Third District's error here. But it is error nonetheless, and it needs to be corrected by this Court so that citizens' constitutional rights enshrined by Amendment 7 and vindicated against Legislative encroachment by this Court in *Buster II* are not frustrated by this intervening judicial lapse.

Leaving the decision below in place will not only operate to deny Mrs. Ampuero access to records of adverse medical incidents which she is entitled to obtain under the Florida Constitution in this and future situations, but it likely will also prevent future patients from obtaining such records. Indeed, it is already apparently causing mischief and additional judicial workload before the same general magistrate from whom the ruling at issue in this case originated.[6]

CONCLUSION

For the foregoing reasons, Mrs. Ampuero respectfully requests that this Court

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[6]*See Acevedo v. 21st Century Oncology, Inc.*, 2011 WL 7622437 (Fla.Cir.Ct., 11th Cir., Oct. 13, 2011) (No. 09-65817 CA 05) (Schwabedissen, Gen. Mag.) ("2. The Magistrate finds that further argument is required on the following issues: . . . (c) the Plaintiffs' argument which challenged, in part, the recent opinion of the Third District Court of Appeal in *Cedars Healthcare Group, Ltd. v. Ampuero-Martinez*, 36 Fla. L. Weekly D2071 (Fla. 3d DCA September 21, 2011) (limiting the production of adverse medical incident records to the same or substantially similar condition, treatment, or diagnosis as the party requesting the records)....").

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quash the decision below.

Respectfully submitted,

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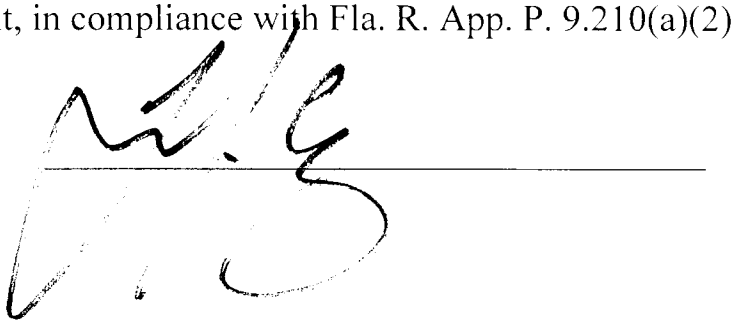
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on June 8, 2012 on the Honorable Amy Steele Donner, Miami-Dade County Courthouse, 73 West Flagler Street, Room 635, Miami, FL 33130, the Honorable General Magistrate Elizabeth M. Schwabedissen, Miami-Dade County Courthouse, 73 West Flagler Street, Room 1502, Miami, FL 33130, and on all counsel on the attached service list.

_____

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

WE HEREBY CERTIFY that the foregoing Initial Brief was printed in 14-point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).



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