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Riding the Red Rocket: Amendment 7 and the End to Discovery Immunity of Adverse Medical Incidents in the State of Florida

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On November 2, 2004, voters in Florida overwhelmingly approved Amendment 7.¹ Known as the "Patients' Right-to-Know About Adverse Medical Incidents," Amendment 7 represents one of the most sweeping changes in law and public policy ever adopted in this state.² In one fell swoop the amendment has successfully breached the walls of privilege and immunity surrounding secret peer review, credentialing, investigations, quality assurance, and risk assessments of both health care providers' and health care facilities' adverse medical incidents by paving the way for discovery of testimonial and documentary evidence relating to these activities.³ Adoption of the amendment has even lifted the spirits of medical malpractice lawyers in Florida, and the injured patients they represent,⁴ by enshrining in the Florida Constitution a virtual patient's Bill of Rights, while "lift[ing] the shroud of privilege and confidentiality" that has swaddled the health care industry for years.⁵

Heralding this change in policy, proclaimed the Fifth District Court of Appeal in *Florida Hospital Waterman, Inc. v. Buster*, 932 So. 2d 344, 356 (Fla. 5th DCA 2006), the amendment

foster[s] disclosure of information that will allow patients to better determine from whom they should seek health care, evaluate the quality and fitness of health care providers currently rendering service to them, and allow them access to information gathered through the self-policing processes during the discovery period of litigation filed by injured patients or the estates of deceased patients against their health care providers.

Prior to its approval, public policy in Florida, codified across an array of statutes, restricted a patient's right to know about a health care provider's or facility's adverse medical incidents and crowned the medical profession with an almost unlimited degree of authority, not only to regulate itself, but to conduct clandestine deliberations involving peer review,⁶ credentialing, investigations, quality assurance, and risk assessments, as well.⁷ This policy

was based on a conventional belief that the medical profession could not deliver first-class health care without a high level of self-oversight, coupled with near bulletproof immunity from discovery of behind-the-scenes activities related to these pursuits.

Viewed from a historical perspective, Amendment 7 arose from a decades-long battle between doctors, insurance companies, and tort reformers on the one hand, and trial lawyers, patients' rights advocates, and civil justice proponents on the other,⁸ over tort reform legislation⁹ and efforts by the medical-insurance complex to curtail, if not eliminate, medical malpractice claims entirely.¹⁰ Stoked, in part, by a well-coordinated campaign carried out by Floridians for Patient Protection,¹¹ its passage came to symbolize the public's long-simmering frustration over a perceived "protect our own" mentality perpetuated by the medical profession's efforts to shield from public scrutiny even the most dangerous doctors and hospitals. In the public's view, allowing the medical profession to continue to monitor itself, while hiding behind a veil of secrecy, had over time become like the proverbial fox guarding the hen house. Clearly, by 2004 the moment for change had come.¹²

In light of this tectonic shift in policy, whether the new rules articulated by Amendment 7 are more beneficial to society than the old remains to be seen.¹³ One thing, however, is certain: from the point of ignition until now, Amendment 7 has taken off like a rocket, leaving in its trail a plume of litigation and court rulings that have had a dramatic impact on the way medical malpractice attorneys engage in discovery, and the way doctors, hospitals, and other health care providers conduct peer review, credentialing, investigations, quality assurance, and risk assessments.¹⁴ While these battles will no doubt continue well into the future, as the smoke has started to clear, the contours of Amendment 7 have begun to emerge. This article will examine these lines and the significant case law that has made them distinct.

The Battle Lines are Drawn

Eloquent in its simplicity, the purpose of Amendment 7 is "to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility's or provider's adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death."¹⁵ More pragmatic than ideological, implicit in this purpose is a clear shift toward consumer protection and away from industry protection. Left unanswered following its adoption were three critical questions: 1) whether the amendment was self-executing, or required enabling legislation; 2) whether it preempted well established statutory immunities, or was it merely supplementary; and 3) whether it applied retroactively or prospectively.¹⁶ Above all, these three questions would come to dominate the legal landscape in the early rounds of litigation involving the purpose and application of Amendment 7.¹⁷

Not surprisingly, given Amendment 7's orientation, these questions, along with attendant constitutional challenges, arose in rather ordinary ways. While *Buster*, cited above, and *Notami Hospital of Florida, Inc. v. Bowen*, 927 So. 2d 139 (Fla. 1st DCA 2006), were the first district court rulings to make it to the Florida Supreme Court on certified questions and conflict,¹⁸ both emerged from common discovery disputes that surfaced in their underlying cases.

In March 2004, eight months prior to adoption of Amendment 7, Theresa Buster filed a medical malpractice action against Waterman Hospital, a doctor and a medical practice, on behalf of Larry Buster's estate.¹⁹ On November 19, 2004, 17 days after the amendment was approved, Buster sought production of documents from the hospital relating to the investigation of the decedent's death and "any medical incidents of negligence, neglect, or default of any health care provider" that occurred prior to the effective date of the

amendment.²⁰ The hospital objected and moved for a protective order. Following a hearing on Waterman's objections, the trial court ordered the hospital to produce all of the documents requested by Buster. In response, the hospital filed a petition for writ of certiorari with the Fifth District Court of Appeal.²¹

Buster I: Small Words Have a Big Impact

In March 2006, the Fifth District Court of Appeal handed down its landmark decision in *Florida Hospital Waterman, Inc. v. Buster*, 932 So. 2d 344 (Fla. 5th DCA 2006). In doing so, the *Buster* court held Amendment 7 1) "preempt[ed] statutory privileges afforded health care providers' self-policing procedures to the extent that information obtained in accordance with those procedures is discoverable during the course of litigation[;]"²² 2) did not apply retroactively; and 3) was self-executing. Foreseeing conflict with other districts, the *Buster* court certified these holdings in the form of questions to the Florida Supreme Court for its review.

Reading the amendment in *pari materia*, while applying a far more liberal interpretation of its provisions than those of ordinary statutes,²³ the *Buster* court found that under subsection (a) of the amendment, the phrase "'patients' may obtain 'any records' relating to an 'adverse medical incident[.]'" was to be construed "in very broad terms to include *any* individual who has received or is currently receiving medical care or treatment."²⁴ Similarly, "'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. . . .'"²⁵

Equally expansive was the *Buster* court's reading of the terms "medical negligence" and "intentional misconduct," and their reference to "acts that caused or could have caused death or injury and to patients who have previously received medical care."²⁶ Read together, these stipulations "clearly revealed" to the court "that such information may be obtained during the course of litigation by the patient through the discovery process,"²⁷ or under subsection (c)(4) by merely sending "an informal request, such as a letter, or by a formal request, which certainly includes a formal discovery request made during the course of litigation . . . [and] allows the request to be made by the patients or their representatives, which would include lawyers."²⁸

Reasoning that "[i]t would make little sense to allow a patient access to the information prior to the institution of legal proceedings against a health care provider, but not during the course of litigation,"²⁹ the *Buster* court concluded that law and "common sense" supported its holding that "Amendment 7 preempts the statutory privileges afforded health care providers regarding their self-policing procedures to the extent that such information is obtainable through a formal discovery request made by a patient or a patient's legal representative during the course of litigation."³⁰ This ruling, the first of its kind, was nothing short of groundbreaking.

Left unanswered, however, was whether a patient or prospective patient may obtain the same information outside the course of litigation, as both the amendment's stated purpose seems to imply — for instance when an individual merely seeks to obtain adverse medical information about a health care provider prior to treatment — and the *Buster* court seemed to confirm when it wrote, "Amendment 7 . . . will allow patients to better determine from whom they should seek health care"³¹

Nonetheless, the *Buster* court did not stop with its unprecedented ruling on the amendment's preemption of statutory privileges. Calling into question the validity of the enabling statute, F.S. §381.038, it then determined the legislature had overstepped its

bounds by enacting §381.038 to implement the provisions of Amendment 7, in a way that “expressed an interpretation” of the amendment contrary to the court’s view.³² Recognizing that “when the people have spoken through the amendment process, the Legislature is not free to abrogate it through subsequent enactments,” the *Buster* court rejected the legislature’s restrictive interpretation of the amendment set forth under §381.038.³³ However, because the court “expressed no opinion regarding the processes established in §381.038 to secure the requested [adverse medical] information,” it stopped short of overturning the statute on constitutional grounds, leaving that to the *Notami* court to accomplish a month later.³⁴

Next, the *Buster* court addressed the most controversial issue of all: Whether Amendment 7 was retroactive or prospective in its operation.³⁵ Finding the amendment could not be applied retroactively, it reached this result using a two-pronged test applicable to statutory interpretation set forth in *Metro Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494 (Fla. 1999): 1) Whether the statute expresses clear evidence of retroactive intent; and 2) whether its retroactive application is constitutionally permissible.³⁶

Persuaded by the hospital’s argument that a law is presumed to operate prospectively, absent manifest intent to the contrary, the *Buster* court observed that nowhere on the ballot, or in the body of the amendment, did it state Amendment 7 was to be applied retroactively.³⁷ Moreover, the *Buster* court noted, by the amendment’s own words it was to become effective on the date it was approved, which clearly had forward looking connotations. Hence, the court refused to apply it retroactively.

Rejecting the plaintiff’s argument that the amendment was “remedial and procedural” in nature, rather than substantive as the hospital argued, the *Buster* court examined the problem through the usual, though limited, analytical lens of legislative intent, rather than that of elevated constitutional principles. In doing so, the court held that retroactive application of the amendment would be constitutionally impermissible, because it would “vitate a vested right” the hospital had in confidentially generated materials.³⁸ Implicit in its holding was a tacit recognition of the hospital’s expectations of confidentiality under the old statutory regime, existing at the time the hospital created the reports sought by *Buster*. As predicted, the issues of expectations and vested rights would become a heated point of contention between the litigants as the case made its way to the Florida Supreme Court.

Finally, relying on *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960), the *Buster* court held the amendment to be self-executing, because it established a clearly defined rule through which its rights and purpose were conveyed, sufficient to give rise to a presumption in favor of self-execution.³⁹ To hold otherwise, the *Buster* court determined, would simply frustrate the will of the people who enacted it in violation of the law.

The *Notami* Court Certifies a Conflict

Like *Buster*, *Notami* also grew out of a discovery dispute. Evelyn Bowen and her co-plaintiffs sued *Notami* Hospital in three medical malpractice actions, which were consolidated for discovery purposes.⁴⁰ Each case alleged medical negligence against a doctor, resulting in injury or death to the plaintiffs’ decedents,⁴¹ and against the hospital for “credentialing, retaining or supervising the doctor.”⁴²

The plaintiffs served the hospital with a notice of taking a deposition duces tecum of the hospital’s CEO.⁴³ The notice was mailed prior to passage of Amendment 7, and sought production of “[a]ll files, papers, and computer records relating to the selection, retention, or termination” of the doctor at the hospital.⁴⁴ While the hospital moved for a protective

order as to the credentialing file and related documents, invoking risk management, peer review, and statutory privileges in the process,⁴⁵ the hospital's CEO, claiming the same protections, refused to answer any questions pertaining to these subjects during his deposition, held the day after voters adopted Amendment 7.⁴⁶

The plaintiffs then filed a motion to compel production of documents and answers to deposition questions, asserting Amendment 7 applied to the information sought from the hospital's CEO.⁴⁷ Following a hearing, the trial court concluded 1) §381.028 was unconstitutional because it restricted rights granted under Amendment 7;⁴⁸ 2) Amendment 7 was not unconstitutionally retrospective because the hospital had no vested right in maintaining the confidentiality of the adverse medical incidents sought by the plaintiffs; and 3) the amendment was self-executing and prospective in operation, but retrospective as to existing records.⁴⁹

In resolving these issues on appeal, the *Notami* court took a more succinct route to its conclusions than did the *Buster* court, first by upholding the trial court's order finding that §381.028 placed unconstitutional limitations on the operation of Amendment 7, irrespective of the statute's language purporting to "implement" the amendment.⁵⁰ For the *Notami* court, like the *Buster* court, the words "'any records . . . relating to any adverse medical incident,'" assumed the broadest implications.⁵¹

However, because the *Notami* court found 1) §381.028(3)(j) limited records only to "final reports"; 2) §381.028(7) limited disclosure to those final reports relating to the same or similar condition, treatment, or diagnosis with that of the patient requesting record access; 3) §381.028(5) restricted production of records only to those generated after November 2, 2004; and 4) §381.028(6) provided that Amendment 7 will have no effect on existing privilege statutes, the court held the restrictions amounted to an unconstitutional attempt by the legislature to render feckless the amendment, while circumventing the will of the people.⁵²

Second, the *Notami* court departed from the *Buster* court's ruling by holding Amendment 7 was not unconstitutionally retrospective in its operation, because it did not impair a substantive, vested right the hospital had in maintaining the confidentiality of adverse medical incidents.⁵³ Rather, the hospital merely had an "'expectation based on an anticipation of the continuance of an existing law[.]'" which could be defeated by a change in the law.⁵⁴ Relying on the broad language of the amendment, the *Notami* court held that "applying Amendment 7 to records created prior to its passage is not unconstitutionally retrospective."⁵⁵

Finally, the *Notami* court, like the *Buster* court, found the amendment to be self-executing based on *Gray's* presumption of self-execution, referenced above. However, recognizing the *Buster* court's ruling on the issue of retroactivity to be in conflict with its own, the *Notami* court certified this question to the Florida Supreme Court for its resolution.

Buster II: The Florida Supreme Court Weighs In
In March 2008, the Florida Supreme Court handed down its groundbreaking decision in *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008). In a per curiam opinion resulting in a 4-3 split, the majority addressed in reverse order the certified



questions raised by the *Buster* court below.⁵⁶ In doing so, the majority first found the amendment to be self-executing. Concurring with both the *Buster* and *Notami* courts' reliance on *Gray's* presumption, the majority found Amendment 7 "provid[ed] a 'sufficient rule' by which patients can gain access to records of a health care provider's adverse medical incidents."⁵⁷ Thus, the amendment was self-executing.

Thereafter, the majority undertook to resolve the central issue of retroactivity by employing the same two-pronged test enunciated in *Chase Federal*.⁵⁸ As to the first prong, the majority sided with the *Notami* court on the issue of express intent. By finding

the amendment permits patients to access *any* record relating to *any adverse medical incident*, and defines "patient" to include individuals who *had previously undergone treatment* . . . [the majority held Amendment 7] expresses a clear intent that the records subject to disclosure include those created prior to the effective date of the amendment.⁵⁹

In other words, the effective date of the amendment merely established a date by which an individual's right to obtain "any" existing records took effect, not simply the right to acquire those records generated after the effective date. Since one purpose of Amendment 7 is to provide "potential patients" with information so they might make informed decisions concerning future health care, and another is to allow injured patients to discover information relating to adverse medical incidents during litigation, forcing the amendment to operate prospectively would torture its meaning and "postpone any benefits provided by the amendment to a time in the distant future [that] would leave a permanent gap in the disclosure granted, consisting of the medical provider's history prior to the amendment's passage. Hence, a patient would never actually gain the access plainly promised by the amendment,"⁶⁰ reasoned the majority, with seemingly unassailable logic.

As to the second prong, the majority again sided with the *Notami* court by holding the hospital had no "vested right" in a continuing "statutory guarantee of confidentiality previously afforded the reports of adverse medical incidents created by and for peer review committees at issue here."⁶¹ To be "vested," a right must be more than a mere expectation "based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand. . . ."⁶² In this context, notwithstanding years of case law to the contrary, and relying mostly on similar federal law in support, the majority reached the following remarkable conclusions:

[T]he [immunity] statutes in question do not actually create a statutory privilege. The statutes do not deem relevant materials to be either confidential or privileged. Rather, they provide that the investigations, proceedings, and records of the respective medical committees or organizations are not subject to discovery or introduction into evidence in any action against a health care provider arising out of the matters which are the subject of the committee or organization's inquiry.⁶³ These statutes also provide that if information, documents, or records are otherwise available from the original sources, they are not shielded from discovery or use in any such civil or administrative action; and a witness who testifies before such committee or organization may not be prevented from testifying as to matters within his or her knowledge about the medical incident in question.⁶⁴

. . .

Hence, medical providers have never been granted a substantive vested right in the secrecy of the information contained in the limited medical records in question.⁶⁵

In sum, since the viability of discovery immunity of adverse medical incidents remains solely at the discretion of the legislature, or the people in the case of a constitutional amendment

like Amendment 7, the hospital could claim only an “expectation” of the continued confidentiality in such records, and nothing more.⁶⁶ Moreover, because the hospital had no vested right in the ongoing confidentiality of such records, retroactive termination of the privilege did not violate the due process rights of Mr. Buster’s medical providers, whose actions may have been the focus of adverse incident investigations, reports, or the like.⁶⁷

Given the thrust of the majority’s opinion, however, it remains curious why the court’s ruling only calls into question the validity of the statutory immunities, rather than declares them unconstitutional, or otherwise overrules them entirely. This seems paradoxical, not only given the breadth of Amendment 7 and the majority’s affirmation that the amendment “heralds a change in public policy,”⁶⁸ but also because, like the *Notami* court, the majority excised the heart of §381.028 by declaring most of it in conflict with Amendment 7, and therefore unconstitutional.⁶⁹ Accordingly, the immunity statutes remain on the books, however ineffectual they now may be.

Nevertheless, while the majority’s opinion, on the one hand, is a monument to transparency marking the end of one era and the beginning of another, the dissent, on the other hand, fractured over the issue of retroactivity that may portend future limitations. Writing for the dissent, Justice Wells sided with the Fifth District when he wrote:⁷⁰

[T]he majority’s decision is contrary to the law and fundamental fairness. I specifically reject the majority’s and the First District’s conclusion that the statute, which for over twenty years has protected hospitals’ statutorily mandated peer review as part of medical quality assurance, did not establish vested rights that the investigations, proceedings, and records of peer review panels were ‘not subject to discovery’ and could not be introduced into evidence in civil actions. §395.0193(8), Fla. Stat. (2002). Furthermore, to allow discovery of peer review records containing statements by those who had a right to rely upon the statute’s promise that the records would not be discovered or introduced in a civil action is not only legally unsupportable but is fundamentally unfair and puts into jeopardy all statements made based upon the promise of any statutory privilege.⁷¹

The Future of Amendment 7

Amisub North Ridge Hospital, Inc. v. Sonaglia, 2008 WL 464145 (Fla. 4th DCA 2008), has pushed the limits of Amendment 7 to include production of a nonparty’s peer review records for use by a consenting patient’s physician in a defamation and tortious interference suit against the physician’s prior partners. Given the steady flow of Amendment 7 motions to compel discovery that trial courts are now wrestling with across the state, however, and the petitions for writ of certiorari that will ultimately follow in the wake of their being granted, defendant health care providers and facilities are not giving up without a fight.⁷² Thus, going forward, the two most significant challenges to Amendment 7 will remain 1) attempts by health care providers and facilities to limit through assertions of the attorney-client privilege, or work product doctrine, the operation of the amendment in response to discovery requests⁷³; and 2) charges of federal preemption.

Regarding the first challenge, in an effort to expand the reach of both attorney-client and work product protections, so as to restrict the operation of the amendment, risk managers have been instructing health care providers and facilities throughout the state how to immunize from discovery minutes, records, reports, and other information generated by peer review, credentialing, investigations, quality assurance, and risk assessment committees, by having present at such meetings an attorney or attorneys who may later claim the attorney-client privilege or work product protection in order to circumvent the amendment’s operation.⁷⁴

Interestingly, this was the same tactic employed for years by the tobacco industry. The industry sought to immunize from discovery millions of incriminating internal documents by blessing them with the privilege with the simple pass of an attorney's hand. Although this tactic ultimately failed, in light of its increasing use by health care providers and facilities to avoid the actions of Amendment 7, the Florida Supreme Court will undoubtedly be required to revisit its opinion in *Southern Bell Telephone and Telegraph Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994), where the court established the limits of the attorney-client privilege in the corporate setting using five criteria,⁷⁵ and reiterated the definition of the work product doctrine as specified by Fla. R. Civ. P. 1.280(b)(3).⁷⁶

Respecting the issue of federal preemption, in one intriguing case, voluntarily dismissed by the plaintiffs, the Florida Hospital Association, the Florida Medical Association, numerous hospitals, and certain individual patients had challenged Amendment 7 in federal court on the basis that it "violates the federal Constitution and is preempted by federal statutory provisions requiring the confidentiality of certain records."⁷⁷

Faced with 400 separate demands for adverse medical incident reports and related information, the Florida Hospital Association plaintiffs had sued certain Florida state officials in a pre-enforcement/declaratory action. These officials included the Surgeon General and Secretary of the Department of Health, the Secretary of the Agency for Health Care Administration, and the Attorney General, who all have the authority in their official capacities to enforce Amendment 7 against the associations' members, should they fail to comply with the demands, and may even levy fines against them for their failing to do so.

Although the district court had denied defendants' motion to dismiss, the Florida Hospital Association plaintiffs curiously chose to dismiss the suit and as of this writing have not refiled it. Nonetheless, given that the constitutional and preemption issues remain undecided, health care providers, including the Florida Hospital Association and its constituent members, will most certainly continue to test the amendment in federal court against state officials and even injured patients and their survivors, who can ill afford the time and expense involved in combating federal suits. And while no one is willing to guess the outcome of the constitutional and preemption challenges at this time, one thing is clear: until these issues are resolved, the viability of Amendment 7 will hang in the balance.

¹ "1) Statement and Purpose:

"The Legislature has enacted provisions relating to a patients' bill of rights and responsibilities, including provisions relating to information about practitioners' qualifications, treatment and financial aspects of patient care. The Legislature has, however, restricted public access to information concerning a particular health care provider's or facility's investigations, incidents or history of acts, neglects, or defaults that have injured patients or had the potential to injure patients. This information may be important to a patient. The purpose of this amendment is to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility's or provider's adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death. This right to know is to be balanced against an individual patient's rights to privacy and dignity, so that the information available relates to the practitioner or facility as opposed to individuals who may have been or are patients.

"2) Amendment of Florida Constitution:

"Art. X, Fla. Const., is amended by inserting the following new section at the end thereof, to read:

"Section 22. Patients' Right to Know About Adverse Medical Incidents.

"(a) In addition to any other similar rights provided herein or by general law, patients have 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.

“(b) In providing such access, the identity of patients involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained.

“(c) For purposes of this section, the following terms have the following meanings:

“(1) The phrases ‘health care facility’ and ‘health care provider’ have the meaning given in general law related to a patient’s rights and responsibilities.

“(2) The term ‘patient’ means an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider.

“(3) 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.

“(4) The phrase ‘have access to any records’ means, in addition to any other procedure for producing such records provided by general law, making the records available for inspection and copying upon formal or informal request by the patient or a representative of the patient, provided that current records which have been made publicly available by publication or on the Internet may be ‘provided’ by reference to the location at which the records are publicly available.

“3) Effective Date and Severability:

“This amendment shall be effective on the date it is approved by the electorate. If any portion of this measure is held invalid for any reason, the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.”

When Amendment 7 became law, it was designated as §22 to avoid confusion with another amendment. See Fla. Const. art. X, §25 n.1.

² See Florida Department of State, Division of Elections, Patients’ Right to Know About Adverse Medical Incidents, *available at* <http://election.dos.state.fl.us./initiatives/initdetail.asp?account=35169&segnum=3>. As an indication of Amendment 7’s popularity, 5,849,125 citizens voted for it, while only 1,358,183 voted against it.

³ Although Amendment 7 was supposed to be “effective on the date it [was] approved,” during its regular session in 2005, the legislature passed “enabling legislation” in the form of Fla. Stat. §381.028, which had the effect of making the amendment more restrictive. Fla. Laws, Ch. 2005-265, §2, *See Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008). Significantly, §§381.028(6)(a) and (b) provided that Amendment 7 neither repealed restrictions on the admissibility of records to adverse medical incidents, nor made them “discoverable or admissible into evidence for any purpose, including impeachment, in any civil or administrative action against a health care facility or health care provider.” The intent of these provisions was to keep intact the long standing privileges and immunities surrounding peer review, credentialing, investigations of adverse medical incidents, quality assurance, and risk assessment set forth under §§395.0191, 395.0193, 395.0197, 66.101, and 766.1016, the very statutes Amendment 7 aimed to modernize. Section 381.028 would come to play a central role in the litigation that followed.

⁴ Some predicted legislated caps on noneconomic damages in medical malpractice actions set forth in Fla. Stat. §766.118, together with approval of Amendment 3, which voters adopted along with Amendments 7 and 8, capping attorneys’ fees in medical negligence actions (*see note 12, infra*), would sound the death knell for medical malpractice attorneys

in Florida. Fla. Const. Amendment 3, art. I, §26, titled "Claimant's right to fair compensation," states: "In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70 [percent] of the first \$250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90 [percent] of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation. This Amendment shall take effect on the day following approval by the voters."

The Florida Bar later emasculated Amendment 3 by allowing individuals to waive their rights with notice under the amendment when retaining medical malpractice counsel under a contingent fee contract. *See Rules Regulating The Florida Bar, Rule 4-1.5(f) et seq., Fees and Costs for Legal Services.*

⁵ *Florida Hospital Waterman, Inc. v. Buster*, 932 So. 2d 344, 356 (Fla. 5th D.C.A. 2006).

⁶ Maureen Glabman, *The Future for Peer Review*, *Trustee Magazine* (Dec. 2005) ("The earliest known peer review can be traced to the American College of Surgeons. In 1918, the [c]ollege sought to standardize hospitals, organize medical staffs and set minimum standards. Today, virtually all U.S. hospitals conduct peer review — JCAHO standard MS. 4.90 requires it.").

⁷ *See, e.g.*, Fla. Stat. §395.0193(7) and §766.101(5) (confidentiality of proceedings and reports in peer review proceedings); Fla. Stat. §395.0191(8) (immunity from discovery of investigations, records, and reports regarding credentialing); Fla. Stat. §395.0193 and §766.101(5) (same for peer review); Fla. Stat. §395.0197(6)(c) and (7) (same for annual risk management reports of adverse incidents); Fla. Stat. §766.1016(2) (same for quality assurance and patient safety); Fla. Stat. §395.0193(8) (testimonial and discovery immunity of "investigations, proceedings, and records" of the peer review body); Fla. Stat. §395.0193(1) ("immunity from retaliatory tort suits" for those physicians who participate in peer review process in good faith). *See Buster*, 932 So. 2d 344, n.7 (citing, *Cruger v. Love*, 599 So. 2d 111, 114 (Fla. 1992) (acknowledging previous holding that the discovery privilege for peer review committees is "'designed to provide that degree of confidentiality necessary for the full, frank medical peer evaluation which the legislature [has] sought to encourage'" (quoting, *Holly v. Auld*, 450 So. 2d 217, 219-20 (Fla. 1984))); *Tenet Healthsystem Hosps., Inc. v. Taitel*, 855 So. 2d 1257, 1258 (Fla. 4th D.C.A. 2003) (same); *Beverly Enters.-Fla., Inc. v. Ives*, 832 So. 2d 161 (Fla. 5th D.C.A. 2002), *rev. denied*, 845 So. 2d 890 (Fla. 2003); *Miami Heart Inst. v. Reis*, 638 So. 2d 530, 532 (Fla. 3d D.C.A. 1994) ("The constancy of the privilege [afforded medical review committees] is thus far absolute, [regardless of] the nature of the litigation or the procedural posture of the case...."). These privileges have been enforced, even though Florida courts have recognized that to do so "will impinge on the rights of some civil litigants to discovery of information that might be useful, or even essential, to their causes." *Holly*, 450 So. 2d at 220.

⁸ *See, e.g.*, Mary Ellen Klas, *Doctors, Lawyers Wage Fierce Battle on State Ballot*, *The Miami Herald*, Oct. 28, 2004, §1B.

⁹ *See, e.g.*, Fla. Stat. §766.118 (generally capping noneconomic damages in medical negligence actions at \$500,000); Fla. Stat. §§768.16-768.21 (shielding medical personnel and facilities from wrongful death actions where decedent is over the age of 25, unmarried and has either no dependents, or none under the age of 25); Fla. Stat. §95.031 (shortening

statute of repose in most products liability claims); Fla. Stat. §768.72(2) (requiring proof of egregious conduct by clear and convincing evidence before allowing plaintiff to plead punitive damages); Fla. Stat. §§768.73-768.737 (limiting the amount of punitive damages recoverable); Fla. Stat. §768.096 (giving employers a safe harbor from negligent hiring claims by third parties where employer carries out background checks on employees); Fla. Stat. §768.075 (immunizing owners and possessors of real property from potential liability for injuries sustained by trespassers).

¹⁰ See note 4, *supra*.

¹¹ Floridians for Patient Protection was affiliated with the Academy of Florida Trial Lawyers and the Florida Lawyers Action Group. See James S. Sawran and Robert C. Weill, *Amendment 7: Will the Patient's Right to Know Come at Too High A Price?*, 24 No. 2 Trial Advoc. Q.7, n. 3 (Spring 2005).

¹² Along with amendments 3 and 7, voters also approved Fla. Const. Amendment 8, art. X, §26. Known as the "three strikes" law, the amendment reads, in part, as follows: "(a) No person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor."

For more on amendments 3, 7, and 8 and Florida's citizens' initiatives, see generally, Eric S. Matthew, *A New Prescription: How a Thorough Diagnosis of the Medical Malpractice Amendments Reveals Potential Cures for Florida's Ailing Citizen Initiative Process*, 14 U. Miami. Bus. L. Rev. 331 (2006).

¹³ See, e.g., David Rosenfeld, *Florida Supreme Court Lifts Veil on Peer Review*, May 2008, available at <http://host1.bondware.com/~orlandomedical>; Lisa Greene, *Is Sunshine the Best Disinfectant for Errors?*, St. Petersburg Times, Oct. 31, 2004; and Andi Atwater, *Amendment 8 Will Hurt, Doctors Say*, The News Press, Nov. 14, 2004.

¹⁴ See, e.g., Peer Review in Florida Since Constitutional Amendment 7 Passed, www.benedictriskmanagement.com/docs/Peer_review_06062006.pdf. Advising health care providers to: "[R]eplac[e] the use of a peer review rating system with a narrative peer review system Track the peer reviewer's identity by a separate method versus requiring that they place their signatures on each peer review document that is permanent to the reviewed physician's quality file . . . substitute oral discussions for written letters, forms and other documents . . . [r]eview all draft copies of minutes of the peer review committees. Eliminate patient identification and details that lead to conclusions and actions . . . document the fact that the topic was discussed and the action to be taken. Consider keeping the committee attendee list on a separate document and not in the actual minutes. Develop a process by which the draft minutes are reviewed and determined 'final' that does not include placing the signature of the reviewer. . . . Consider having an attorney present at root cause analysis meetings, to strengthen the privilege claim by adding attorney-client." (Emphasis added.)

¹⁵ See *Advisory Opinion to the Attorney General re: Patient's Right to Know About Adverse Medical Incidents*, 880 So. 2d 617, 619 (Fla. 2004). The summary for the proposed amendment stated: "Current Florida law restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice. This amendment would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death.

Provides that patients' identitie [sic] should not be disclosed."

¹⁶ *Buster*, 932 So. 2d at 356, certified the following questions to the Florida Supreme Court: "(1) [D]oes amendment 7 preempt statutory privileges afforded health care providers' self-policing procedures to the extent that information obtained through those procedures is discoverable during the course of litigation by a patient against a health care provider; (2) is amendment 7 self-executing; and (3) should amendment 7 be applied retroactively."

¹⁷ In *Buster*, 932 So. 2d at 348, the district court recognized "a frenzy of litigation" over these questions, where litigants and trial courts had struggled to define the purpose and scope of Amendment 7 (citing, *Sardes v. S. Broward Hosp. Dist.*, No. 03-5290 (Fla. 17th Cir. Apr. 7, 2005) (2005 WL 831964)); *Brown v. Graham*, No. 501999 (Fla. 15th Cir. Mar. 18, 2005) (2005 WL 900722); *McHale v. Tenewitz*, No. 052003 (Fla. 18th Cir. Feb. 28, 2005) (2005 WL 900744); *Michota v. Bayfront Med. Ctr., Inc.*, No. 04-1057 (Fla. 6th Cir. Feb. 24, 2005) (2005 WL 900771); *Rusiecki v. Jackson-Curtis*, No. 03-008570 (Fla. 6th Cir. Jan. 31, 2005) (2005 WL 408133); *Richardson v. Nath*, No. 04-006970 (Fla. 6th Cir. Jan. 18, 2005) (2005 WL 408132); *Bridgman v. Health Mgmt. Assocs., Inc.*, No. 51-04-CA-59-ES (Fla. 6th Cir. Jan. 14, 2005) (2005 WL 900630)).

¹⁸ *Buster*, 984 So. 2d 478.

¹⁹ For a succinct statement of the facts, see Petitioner's Initial Brief at 2, *Florida Hospital Waterman, Inc. v. Buster*, Case No. SC06-688 (Fla. 2006).

²⁰ See *Buster*, 984 So. 2d 344; and *Notami*, 927 So. 2d at 145 (certifying conflict).

²¹ *Buster*, 932 So. 2d 349. Since the standard of review for an interlocutory petition for writ of certiorari is simply whether the trial court departed from the essential requirements of the law and whether the resulting harm is irreparable and cannot be remedied on appeal, the *Buster* court simply ruled on the petitioner's and respondent's briefs without oral argument.

²² *Buster*, 932 So. 2d at 349.

²³ See *id.* at 349 (citing, *Zingale v. Powell*, 885 So. 2d 277 (Fla. 2004)).

²⁴ *Id.*

²⁵ *Id.* at 350 (citing, Fla. Const. art. X, §25(c)(3) (emphasis in original)).

²⁶ *Id.* (citing, Fla. Const. art. X §25(c)(3)).

²⁷ *Id.* (citing, Fla. Const. art. X §25(c)(4)).

²⁸ *Id.*

²⁹ *Id.* at 351.

³⁰ *Id.*

³¹ *Id.* at 354.

³² *Id.* at 353.

³³ *Id.* (citing, *Austin v. State ex rel. Christian*, 310 So. 2d 289, 293 (Fla. 1975)).

³⁴ *Id.*

³⁵ *Id.* at 354.

³⁶ *Id.* at 353.

³⁷ *Id.* (citing, *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983) (manifest intent) (citations omitted)).

³⁸ *Id.*

³⁹ *Id.* at 354-55.

⁴⁰ See *Notami*, 927 So. 2d at 141-42.

⁴¹ *Id.* at 142.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* See also note 5, *supra*.

⁴⁹ *Id.*

⁵⁰ *Id.* at 143.

⁵¹ *Id.* (emphasis in original).

⁵² *Id.* (citing, *Holley v. Adams*, 238 So. 2d 401, 405 (Fla. 1970) (to the extent a statute conflicts with express or clearly implied mandates of the constitution, the statute must fall)).

⁵³ *Id.*

⁵⁴ *Id.* (citing, *Clausell v. Hobart Corp.*, 515 So. 2d 1275, 1276 (Fla. 1987) (emphasis in original)).

⁵⁵ *Id.* at 144. See also *North Broward Hosp. Dist. v. Kroll*, 940 So. 2d 1282 (Fla. 4th D.C.A.

2006) (siding with *Notami* on the issues of self-execution and retroactivity); and *North Broward Hosp. Dist. v. Kenyon*, 963 So. 2d 992 (same and certifying conflict).

⁵⁶ Justices Lewis, Anstead, Pariente, and Quince concurred.

⁵⁷ *Florida Hospital Waterman v. Buster*, 984 So. 2d at 486 (noting further that “all key terms are defined within the amendment, including ‘health care facility,’ ‘health care provider,’ ‘patient,’ ‘adverse medical incident,’ and ‘have access to any records’ . . . the term ‘have access to any records’ indicates that it is to encompass current document production procedures as provided ‘by general law’ . . . and as emphasized by both district courts, the amendment expressly declares that it is to be effective on passage, indicating that its effectiveness in overriding prior statutory law was not to be dependent upon the enactment of implementing legislation”).

⁵⁸ *Chase Federal Housing Corp.*, 737 So. 2d at 499 (Fla. 1999).

⁵⁹ *Buster*, 984 So. 2d at 485 (emphasis in original).

⁶⁰ *Id.* at 488-89.

⁶¹ *Id.* at 490.

⁶² *Id.* (quoting, *Division of Workers’ Compensation v. Brevda*, 420 So. 2d 887 (Fla. 1st D.C.A. 1982)).

⁶³ *Id.* (citing, Fla. Stat. §§395.0191(8), 395.0193(8), 766.101(5) (2005); *cf.* Fla. Stat. §766.1016(2) (2005)).

⁶⁴ *Id.* (citing, Fla. Stat. §§395.0191(8), 395.0193(8), 766.101(5), 766.1016(2) (2005)).

⁶⁵ *Id.*

⁶⁶ The majority relied on federal law to support its conclusion (citing, *Feminist Women’s Health Ctr., Inc. v. Mohammad*, 586 F.2d 530, 545 n. 9 (5th Cir. 1978) (noting that the peer review privilege will not bar evidence in federal cause of action)); *see also Adkins v. Christie*, 488 F.3d 1324, 1330 (11th Cir. 2007) (same), *cert. denied*, 128 S.Ct. 903, 169 L.Ed.2d 785 (2008)).

⁶⁷ *See also Lifemark Hospitals of Florida, Inc. v. Herrera*, 981 So. 2d 527 (Fla. 3d D.C.A. 2008) (quoting, *Buster*, 984 So. 2d at 494) (“the right of access granted pursuant to the amendment is retroactive and therefore applies to adverse medical incident records existing prior to its effective date . . .”). *But see North Broward Hosp. Dist. v. Durham*, 991 So. 2d 967 (Fla. 4th D.C.A. 2008) (trial court deprived defendant hospital due process rights by overruling peer review objections to discovery without adequate notice and an opportunity to be heard where objections were never noticed for hearing and plaintiff never moved to compel).

⁶⁸ *Buster*, 984 So. 2d at 494 (quoting, *Buster*, 932 So. 2d at 355).

⁶⁹ *Id.* at 492-94, concurring with *Notami* in finding unconstitutional §§381.028(3)(j), (5)-(7)(a), but severing §§381.028(3)-(4), 7(b), and (c) as viable.

⁷⁰ Justices Cantero and Bell concurred.

⁷¹ *Id.* at 495, n.7, which reads: "These provisions were amended over the years and included an explicit requirement for licensed facilities to provide for peer review of the physicians who deliver health care services at the facility and guaranteeing that the proceedings or records of such proceedings would not be subject to discovery or introduction into evidence in any civil or administrative action against a provider of professional health care services arising out of matters which were the subject of evaluation and review. The fundamental premise of the act was the peer review process would be enhanced if health care providers knew that the records of the review would not be used against them in medical malpractice or libel civil actions. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984). The sections protecting records and statements in peer review are sections 395.0191(8), 395.0193(8), 766.101(5), 766.1016(2), and 395.0197(6)(c), (7), (8), (13) of the Florida Statutes (2002)."

⁷² *See, e.g., Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d D.C.A. 2008) (quashing Amendment 7 discovery order).

⁷³ *See Advisory Opinion to the Attorney General*, 880 So. 2d at 621 (Fla. 2004) (suggesting Amendment 7 does not affect the work product and attorney-client privileges). *See also* Fla. Stat. §90.502 (1991) (defining attorney-client privilege), and Fla. R. Civ. P. 1.280(b)(3) (defining work product doctrine).

⁷⁴ *See, e.g., Peer Review in Florida Since Constitutional Amendment 7 Passed*, www.benedictriskmanagement.com/docs/Peer_review_06062006.pdf.

⁷⁵ *Southern Bell*, 632 So. 2d at 1383 ("1) the communication would not have been made but for the contemplation of legal services; 2) the employee making the communication did so at the direction of his or her corporate superior; 3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services; 4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties; 5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents").

⁷⁶ *But see Morton Plant Hospital Assoc., Inc. v. Shahbas*, 960 So. 2d 820, 825, 827 (Fla. 2d D.C.A. 2007) (holding 1) no requirement that records discoverable under Amendment 7 be relevant to any pending litigation; 2) whether discovery request is overly burdensome is not relevant consideration under Amendment 7; and 3) amendment does not require production of documents relating to general policies and procedures of such committees or other documents that do not contain information about particular adverse medical incidents). Judge Canady wrote the *Shahbas* opinion for the Second District between the time the Fifth District rendered its opinion in *Buster* and the Supreme Court issued its ruling in the same case. Judge Canady, now Justice Canady, was recently appointed to the Florida Supreme Court.

⁷⁷ *Florida Hospital Association v. Ana Viamonte*, Case No.: 4:08cv312-RH/WCS (N.D. Fla.). The federal statutes include the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. §1320d *et seq.*, and the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. §11101 *et seq.*

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