IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL CASE NO. 03-008570-CI-21

MAREK RUSIECKI and KALEESA RUSIECKI,
As personal representatives of the Estate of
ANDREW RUSIECKI, deceased,

Plaintiffs,

vs.

DANUTA JACKSON-CURTIS, M.D.,
THE EMERGENCY ASSOCIATES FOR
MEDICINE, INC., TEAM HEALTH, INC.,
and ALL CHILDREN'S HOSPITAL, INC.

Defendants.

Received 2-2-05
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ORDER GRANTING ALL CHILDREN'S
HOSPITAL, INC.'S MOTION FOR PROTECTIVE ORDER

THIS CAUSE came before the Court on the Defendant, All Children's Hospital, Inc.'s Motion for Protective Order at hearing on January 26, 2005. The Court heard argument of counsel for the parties, reviewed all submissions and otherwise being fully informed in the premises, finds as follows:

This matter involves a claim for Wrongful Death, based upon the death of Andrew Rusiecki, an infant, while a patient at All Children's Hospital ("All Children's"). As a part of their discovery efforts, on November 3, 2004, Plaintiffs' counsel sent a letter to counsel for All Children's requesting that they "immediately provide all information regarding any adverse incidents involving Danuta Jackson-Curtis, M.D. This request includes all peer review records regarding the death of Andrew Rusiecki." By letter dated November 5, 2004, All Children's declined to provide the requested discovery. Plaintiffs responded in kind with a November 8, 2004 Notice of Taking Deposition Duces Tecum of the All Children's Records Custodian on December 10, 2004. ("the Notice") The Notice instructed the Records Custodian to bring "Any and all documents reflecting

any adverse incidents regarding Danuta Jackson-Curtis, M.D." On November 30, 2004, All Children's filed the Motion for Protective Order currently before the Court.

All Children's alleges that it is entitled to a protective order on at least five independent grounds. In particular, All Children's alleges that (1) Amendment 7 is not self-executing and thus requires implementing legislation; (2) Amendment 7 cannot be applied retroactively to impair vested privacy and privilege rights; (3) The scope of the request is over broad and unduly burdensome; (4) Since the information at issue was gathered pursuant to a contract between Dr. Jackson-Curtis and All Children's, the substantial impairment of that contract would violate the U.S. Constitution; (5) the Estate of a patient does not have standing to seek such records.

Plaintiffs support their discovery request under Amendment 7 on the ground that such Amendment is self executing and such request should not be unduly burdensome or oppressive.

Standard for a Protective Order

"A trial court possesses broad discretion in overseeing discovery, and protecting the parties that come before it." *Rojas v. Ryder Truck Rental, Inc.*, 641 So.2d 855, 857 (Fla. 1994). However, in order to obtain a protective order, All Children's must demonstrate good cause why the discovery sought should be protected. Rule 1.280(c), *Florida Rules of Civil Procedure; City of Oldsmar v. Kimmins Contracting Corp.*, 805 So.2d 1091, 1093 (Fla. 2d DCA 2002)(The burden of showing good cause is on the party seeking the protective order.) Courts favor liberal discovery and "a strong showing is required before a party will be denied entirely the right to take a deposition." *Deltona Corp. v. Bailey*, 336 So.2d 1163, 1169-70 (Fla.1976). Florida courts have disapproved the entry of protective orders prohibiting the taking of depositions generally and orders providing for lengthy postponements of discovery. *Office of Att'y Gen. v. Millennium Communications & Fulfillment, Inc.*, 800 So.2d 255 (Fla. 3d DCA 2001);

Maris Distrib. Co. v. Anheuser-Busch, Inc., 710 So.2d 1022, 1024-25 (Fla. 1st DCA 1998); *Brennan v. Bd. of Pub. Instruction*, 244 So.2d 463, 464 (Fla. 4th DCA 1971)).

Prior to the adoption of Amendment 7, the discovery sought was clearly protected by several statutory privileges and a protective order would have automatically been issued. However, the passage of Amendment 7 has potentially opened the door to previously protected information requiring an in depth analysis in the present case.

Amendment 7, Patients' Right to Know About Adverse Medical Incidents

Pursuant to Article XI, § 3 of the Florida Constitution, the people of the State of Florida may propose the amendment of any portion of the Constitution. Such an amendment, known as a Citizen Initiative, can be implemented and added to the Constitution, provided certain procedural requirements are followed and it is passed by the voters. *See Smith v. Coalition to Reduce Class Size*, 827 So.2d 959, 963 (Fla. 2002)(If the requirements of Art. XI, §3 are met, then the sponsor of an initiative has the right to place the initiative on the ballot.) Once passed, a citizen's initiative amendment becomes a part of the fundamental law of the State of Florida. *Gray v. Childs*, 156 So. 274, 279 (Fla. 1934).

Amendment 7, entitled Patients' Right to Know About Adverse Medical Incidents, was a Citizen Initiative Amendment to the Florida Constitution. It was properly proposed and placed on the 2004 ballot and was passed by overwhelming majority on November 2, 2004.

The full text of Amendment 7 provides as follows:

Amendment 7

BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:

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.

The Amendment as passed, is actually found in Article X, section 25, of the *Florida Constitution,* rather than section 22 as specified above.

Prior to the placement of Amendment 7 on the ballot, the Florida Supreme Court was asked to review the proposed amendment. *Advisory Opinion to the Attorney General re: Patients' Right to Know about Adverse Medical Incidents,* 880 So.2d 617 (Fla. 2004). The Supreme Court's opinion is limited to the sufficiency of the proposed amendment and does not reflect any indication of the scope, effect or execution of the amendment once passed. However, dicta from the opinion does provides guidance on some of the issues presented here.

Amendment 7 is Not Self-Executing

The effective date of a Constitutional Amendment does not necessarily equate with the date such Amendment can be effectuated or implemented. There are two main types of Constitutional provisions, those that are self-executing and those that are not. An Amendment that is found to be self-executing is immediately implemented upon the effective date. However, an amendment that is not self-executing requires legislative enactment in order to be implemented.

The test utilized to determine whether an amendment is self executing was expounded by the Supreme Court in *Gray v. Bryant,* 125 So.2d 846, 851 (Fla. 1960):

> The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether

> or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. . . . If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. . . . 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 (citations omitted). Although this test provides some guidance, the Court notes that in the absence of clear language in the Amendment, there does not appear to be an easily applied bright line test to definitively determine whether an Amendment is self executing.

This *Gray* test was applied by the Supreme Court in *Advisory Opinion to the Governor – 1996 Amendment 5 (Everglades),* 706 So.2d 278, 281 (Fla. 1997) to determine whether a 1996 Constitutional Amendment (number 5), was self executing. The Court, disagreeing with a prior Attorney General Opinion on the same Amendment, found that the Amendment was not self executing because it failed to lay down a sufficient rule for accomplishing its purpose. *Id.* at 281.

Based on the *Gray* test, the language of Amendment 7 and its stated purpose, the Court finds that Amendment 7 similarly is not self executing because "it fails to lay down a sufficient rule for accomplishing its purpose." *Advisory Opinion to the Governor – 1996 Amendment 5 (Everglades),* 706 So.2d at 281. As noted by the Supreme Court in its analysis of 1996 Amendment 5, it appears that Amendment 7 similarly is not self executing because "too many policy determinations remain unanswered . . . such as the various rights and responsibilities, the purposes intended to be accomplished, and the means by which the purposes may be accomplished." *Id.* at 281.

The numerous statutes, both state and federal, as mentioned herein, that are potentially effected by Amendment 7, are a further indication that Amendment 7 is not self executing. *See, e.g.,* §§ 766.101(5)(Medical Review Committee); 766.1016(2)

(Patient Safety Data); 459.016(3) (Reports of Disciplinary Actions); 458.337(3) (Reports of Disciplinary Actions); 400.118 (Quality Assurance – Nursing Homes); 395.0191(8)(Staff Membership and Clinical Privileges), 395.0197(4), (6)(c), (7), (13)(Internal Risk Management); 395.0193(8)(Peer Review), *Florida Statutes*. Based on a cursory review of current Florida Statutes, the Court has located at least eight (8) different statutes that may be altered or effected by Amendment 7. As noted by the Florida Supreme Court, the stated purpose of Amendment 7 is to override protections currently found in some or all of these various statutes. *Advisory Opinion*, 880 So.2d at 621. However, the exact impact on existing Florida statutes and the limitations imposed by Federal laws are not ascertainable from the face of the Amendment. This uncertainty could easily result in inconsistent determinations between the different Florida Circuits, thereby frustrating the will of the people.

Amendment 7 does not set forth any procedures to be followed either by the requesting party or the producing party. Although the Amendment sets forth definitions of certain words and phrases, it does not set forth any practical means by which its purpose can consistently be accomplished. Moreover, including definitions within an Amendment does not automatically render it self executing. *See e.g., Advisory Opinion to the Governor – 1996 Amendment 5 (Everglades)*, 706 So.2d at 281 (Supreme Court found Amendment in question not to be self executing. The Amendment provided that certain words within the Amendment shall have the meanings as defined in existing statutes.)

In order to determine exactly what information should be provided to the public and how it should be provided, a framework must be established that reconciles all of the implicated state and federal laws. In addition, procedural guidelines must be established to determine how such information is requested, who is responsible for addressing such inquiries and compiling the information, what information is to be

provided, what information is protected by federal law, along with a timeline for the production requirements. Importantly, the Amendment does not address the admissibility of such information in a medical malpractice action or any other civil or criminal action. It is not clear from the face of the Amendment whether such information should be made available to a patient prior to treatment in order to assist the patient in making an informed decision, or whether such information is also intended for use in medical malpractice cases as substantive evidence.

Moreover, the will of the people is best effectuated by legislative implementation of Amendment 7. The purpose of the Amendment as stated is to provide relevant information to patients or potential patients, not attorneys. If the legislature does not establish guidelines, the will of the people can easily be frustrated by health care providers responding to such requests with plethora of documents. Such a production would require the learned skill of an attorney to peruse a multitude of paper to find the one truly relevant piece of information. Thus, without guidance and instruction from the legislature, the will of the people can easily be frustrated by providing an overabundance of information without putting it into an easily ascertainable and readily understood format.

It is interesting to note that Amendment 3, The Medical Liability Claimant's Compensation Amendment, specifically provides that it is self-executing. While this is not authoritative evidence, it does demonstrate that Amendment 7 could easily have contained similar language if it was so intended.

Because of the far reaching impact of Amendment 7, and the lack of standards and procedures, the courts and the public need guidance. Legislative enactment is required in order to assimilate all of the implicated statutes and vested rights and to implement the intended purpose of Amendment 7. Accordingly, since legislation is required to properly implement Amendment 7, it is not self-executing. In addition, as

indicated previously, if a constitutional amendment is not self-executing, then existing laws remain in effect until legislative enactment is implemented.

Retroactive Application Would Impair Vested Privacy Rights and Violate Due Process

All Children's argues that retroactive application of Amendment 7 would impair vested privacy rights and violate due process. The Court agrees. Regardless of whether Amendment 7 requires legislative enactment to be implicated, it's reach is prospective rather than retroactive. It is axiomatic that an Amendment to the Constitution is deemed to be prospective rather than retroactive, unless a contrary intent is clear from the face of the Amendment. *State v. Lavazzoli,* 434 So.2d 321, 323 (Fla. 1983). As explained by the Supreme Court:

> 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.

Id. at 323 (*citations omitted)*.

Thus, it is well established in Florida that statutory and constitutional changes which effect substantive rights are presumed to operate prospectively unless a contrary intention is clear. *Id.*; *Hassen v. State Farm Mut. Auto. Ins. Co.,* 674 So.2d 106, 108 (Fla. 1996); *Arrow Air, Inc. v. Walsh,* 645 So.2d 422, 425 (Fla.1994); *Meek v. Layne-Western Co.,* 624 So.2d 345, 347 (Fla. 1st DCA 1993); *Hapney v. Central Garage, Inc.,* 579 So.2d 127 (Fla. 2d DCA 1991) *review denied,* 591 So.2d 180 (Fla.1991)(Statutes that create new rights or take away existing rights, as opposed to furthering existing

rights, are substantive in nature and may not be applied retroactively.). In determining whether a right is substantive the Florida Supreme Court explained as follows:

> The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities, and duties is presumed to apply prospectively . . . . Thus, if a statute attaches new legal consequences to events completed before its enactment, the courts will not apply the statute to pending cases, absent clear legislative intent favoring retroactive application.

Metropolitan Dade County v. Chase Federal Housing Corporation, 737 So.2d 494, 499 (Fla. 1999). "Within this context, a vested [or substantive] right is a "fixed" right that cannot be abrogated or taken away without violation of the possessor's right to due process." 821 So.2d 388, 398 (Fla. 5th DCA 2002)(*citing Chase Federal*, 737 So.2d at 503).

Prior to the passage of Amendment 7, health care providers had a vested substantive statutory right to non disclosure of much of the information now potentially discoverable. Florida Statutes contain numerous vested substantive discovery privileges that may be implicated herein. *See, e.g.,* §§ 766.101(5)(Medical Review Committee); 766.1016(2) (Patient Safety Data); 459.016 (Reports of Disciplinary Actions); 458.337 (Reports of Disciplinary Actions); 400.118 (Quality Assurance – Nursing Homes); 395.0191(8)(Staff Membership and Clinical Privileges), 395.0197(4), (6)(c), (7), (13)(Internal Risk Management); 395.0193(8)(Peer Review), *Florida Statutes.* Those statutory privileges guaranteed confidentiality and encouraged self regulation by specifically providing that information obtained under those statutes "shall not be subject to discovery or introduction into evidence." *Id.*

Based on the terms of Amendment 7, it appears that the intent of the Amendment is to abrogate any conflicting provisions of these existing privacy statutes. This abrogation of existing statutes was recognized and acknowledged by the Florida Supreme Court in its Advisory Opinion. *Advisory Opinion,* 880 So.2d at 621

("Unquestionably, the amendment would affect sections 395.0193(8) and 766.101(5) of the Florida Statutes (2003), which currently exempt the records of investigations, proceedings, and records of the peer review panel from discovery in a civil or administrative action. Indeed, this is a primary purpose of the amendment.")

Thus, prior to the passage of Amendment 7, doctors and health care providers had a vested privacy right as delineated in these numerous statutes, to participate in certain peer review and other procedures without fear of disclosure and possible repercussions. They were encouraged and mandated by law to fully participate in procedures designed to expose mistakes and weaknesses within the health care system. *Cruger v. Love,* 599 So.2d 111, 114 (Fla. 1992). Those individuals involved in the process participated with the understanding and the statutory assurance, that any information revealed or obtained would be confidential. As such they acted based upon a vested statutory right to confidentiality and privacy. Amendment 7, seeks to remove the confidentiality from these statutes. A removal of that cloak of confidentiality without prior notice to the participants, violates their due process rights as protected by the Florida and United States Constitutions. This is especially true given the nature of the protected information which could likely lead to liability, both civil and potentially criminal, for the parties involved. Clearly, Amendment 7 attaches new legal consequences to events completed before its enactment. A retroactive application of Amendment 7, divests the participants of their vested statutory rights and has the similar effect of an improper ex post facto law. Accordingly, regardless of whether Amendment 7 is self executing or not, it may only be applied prospectively. Therefore, any information compiled prior to the enactment of the Amendment is not implicated.

Conclusion

Based on the foregoing, the Court finds that All Children's is entitled to a Protective Order. In particular, the Court finds that Amendment 7 as passed by the

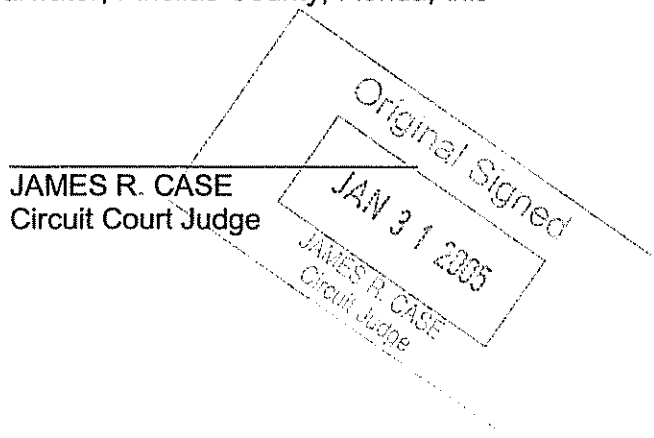
voters on November 2, 2004 is not self-executing. In addition, the effect and application of the terms of Amendment 7 is prospective, not retroactive. Accordingly, any information compiled or obtained by health care providers prior to its passage, remains protected and confidential. Since the Court finds that these points are dispositive, this opinion does not address the remaining issues raised in the Protective Order.

Accordingly, All Children's has established good cause for a protective order in this matter.

WHEREFORE, it is hereby,

ORDERED AND ADJUDGED that the Defendant All Children's Motion for a Protective Order relating to the information sought in the November 8, 2004 Notice of Taking Deposition Duces Tecum of the Records Custodian of All Children's Hospital, is **GRANTED.**

DONE AND ORDERED in chambers at Clearwater, Pinellas County, Florida, this ___ day of January 2005.



JAMES R. CASE
Circuit Court Judge

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