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Florida Hospital Waterman v. Buster

SC06-688 | SC06-912

>> GOOD MORNING, GOOD MORNING, GOOD MORNING.
>> LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.
>> GOOD MORNING, AND WELCOME TO THE ORAL ARGUMENT CALENDAR FOR THURSDAY JUNE 7th, 2007.
FIRST CASE ON THE CALENDAR THIS MORNING IS WATERMAN v. BUTLER.
READY TO PROCEED?
>> MAY IT PLEASE THE COURT. MY NAME IS ARTHUR ENGLAND IS WITH ME TODAY IS MASON GROWER ON THE BRIEF FOR FLORIDA HOSPITAL.
ALSO, WITH US ARE STEVE WISOTSKY AND STEVE, REPRESENTING NOTAMI HOSPITAL.
THESE CASES HAVE BEEN CONSULTED DATED FOR ARGUMENT.
YOUR HONOR, WE HAVE RESERVED FOUR MINUTES FOR REBUTTAL AND IN ORDER TO ADDRESS SENSIBLY THE THREE CERTIFIED QUESTIONS IN THE FLORIDA HOSPITAL CASE, WE HAVE DIVIDED THE ARGUMENT AND WE ARE GOING TO TAKE THEM IN REVERSE ORDER.
I AM GOING TO FIRST ADDRESS THE ISSUE OF RETROACTIVITY AND THEN I'LL LAUNCH INTO THE SELF-EXECUTING NATURE AND APPLICATION OF THE STATUTE THAT WAS PASSED BY THE LEGISLATURE.
MR. WISOUGHTSKY WILL PICK UP THE BALL THERE AND GO THROUGH THAT AND FOLLOW THAT WITH THE LITIGATION DISCOVERY ISSUES THAT ARE RAISED BY THE FIRST

CERTIFIED QUESTION IN MY
CASE.

>> IF YOU ARE GOING TO DEAL
WITH THE ISSUE OF
RETROACTIVITY, WOULD YOU
RESPOND TO A CONCERN THAT I
HAVE THAT IF WE HOLD THAT IT
IS NOT RETROACTIVE THAT
REALLY WE ARE TALKING ABOUT
AN EXTENSIVE DELAY IN THE
EFFECT IN THE PASSAGE OF
THIS AMENDMENT.

THAT IS, THAT IF WE WERE
TALKING ABOUT, WELL,
STARTING THE DAY AFTER IT
WAS APPROVED AND THEN
SOMEBODY GOES IN FOR MEDICAL
TREATMENT AND CREATES
RECORDS AND THEN EVENTUALLY
YOU WILL GET TO THE POINT
WHERE THERE MAY OR MAY NOT
BE ACCESS TO THOSE RECORDS.
BUT IT WOULD APPEAR THAT
THERE WOULD BE AN EXTENSIVE
DELAY REALLY.

WHEREAS, IF WE HOLD OR IF,
IF, IF IT, WE CONCLUDE IT IS
RETROACTIVE, THEN CITIZENS,
PATIENTS, AND AGREED OR
INJURED PARTIES WOULD HAVE
IMMEDIATE ACCESS.

SO HELP, HELP ME WITH THAT,
THAT CONTRAST.

>> YOUR HONOR, CANDIDLY, I
CAN'T HELP YOU WITH IT.
THERE IS GOING TO BE A DELAY
BECAUSE THIS CONSTITUTIONAL
AMENDMENT WAS WRITTEN TO BE
PROSPECTIVE, TO GO INTO
EFFECT, AND ONLY ADDRESS
EVENTS OCCURRENCES, RECORDS
THAT SUCCEED.

LET ME TELL YOU WHY THAT HAS
TO BE THE LAW.

THAT IS THE TEST.
FOR DETERMINING THE
RETROACTIVE EFFECT OF A
CONSTITUTIONAL AMENDMENT OR
A STATUTE.

THE TEST THAT YOU HAVE SET
OUT OVER AND OVER AGAIN, THE
TEST THAT ON THE FIRST GO
AROUND YOU MUST DETERMINE IF
ON THE FACE OF THE AMENDMENT

ITSELF, IT PROVIDES A CLEAR EVIDENCE OF AN INTENT TO MAKE IT RETROACTIVE. TWO EVENTS AND DOCUMENTS BEFORE.

-- TO EVENTS AND DOCUMENTS BEFORE.

LET ME TELL YOU HOW YOU PHRASE THAT BECAUSE THIS IS WHAT YOU HAVE TO ASK YOURSELF IN THIS CASE WITH REGARD TO THE CONSEQUENCES YOU DISCUSS.

AS YOU POSE THE QUESTION, CAN IT BE SAID, AND I QUOTE, THAT THE VOTERS AFFIRMATIVELY CONSIDER THE POTENTIAL UNFAIRNESS OF RETROACTIVE APPLICATION, AND DETERMINE THAT IT WAS AN ACCEPTABLE PRICE TO PAY FOR THE COUNTERVEILING BENEFITS.

YOU HAVE TO ASK YOURSELF, DO THE VOTERS HAVE ANY IDEA, DID IT, WAS IT COMMUNICATED TO THEM EXPRESSLY THAT THEY WERE NOW OPENING UP RECORDS WHICH HAD BEEN CREATED BY PEOPLE IN THE QUALITY ASSURANCE AND THE PEER REVIEW PROCESS WHO RE-SURED

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>> -- OF THE VOTER OR THE PATIENT THAT SAYS, YOU KNOW, I'M LOOKING AT THIS AMENDMENT, AND UP TO THIS POINT, APARENTSLY I HAVE BEEN DEPRIVED OF ACCESS TO THESE RECORDS, AND I DON'T THINK THAT'S RIGHT.

I THINK I SHOULD HAVE RECORDS.

OF THIS NATURE AND SO I AM GOING TO VOTE FOR THIS SO THAT I WILL GET ACCESS TO THESE RECORDS.

AND THESE RECORDS, MEANING THE RECORDS THAT BEFORE THEY VOTED FOR THAT, THAT THEY DID NOT HAVE ACCESS TO.

>> YOUR HONOR, YOU CAN'T PUT YOURSELF IN THE MIND OF THE VOTERS.

YOU'RE OBLIGED BY THE LAW OF

THIS STATE TO DETERMINE
WHETHER THE AMENDMENT ON ITS
FACE PROVIDED CLEAR EVIDENCE
TO THE VOTERS THAT THEY WERE
UNDOING --

>> OF COURSE, THE IRONIC
PART --

>> -- OF THE PEER REVIEW
PROCESS.

>> THE IRONIC PART OF WHAT
YOU ARE SAYING IS THAT THE
VOTERS DIDN'T SEE THE
AMENDMENT.

MAY SAW THE SUMMARY.

>> AND THERE IS NOTHING IN
THE AMENDMENT THAT --
SUMMARY THAT SUGGESTS THAT
EITHER.

>> BUT WHAT ABOUT --

>> IN FACT, THE ONLY WAY,
THE ONLY WAY THE OTHER SIDE
AARGUES, THE PROPONENT
ARGUES THAT YOU COULD FIND
AN INTENT IF YOU FIND THE
WORD ANY, WHICH IS IN THE
TEXT AMENDMENT, MODIFYING
THE ADJECTIVE, MODIFYING THE
RECORDS, ANY RECORDS MUST
MEAN BEFORE BUT OF COURSE
THAT ISN'T THE CASE BECAUSE
IN THE MEMORIAL HOSPITAL
CASE, YOU SAID THE MODIFIER
EXISTING TO EXISTING LEASES
AND FUTURE LEASES EXISTING
DID NOT COMMUNICATE A CLEAR
EVIDENCE OF RETROACTIVE
INTENT.

SO, THE VOTEVRS THE SUM
RAEMPT YOU'LL FIND NOTHING
IN THERE THAT EXPRESSES A
CLEAR INTENTION THAT --
VOTERS HAVE THE SUMMARY.
YOU'LL FIND NOTHING IN THERE
THAT EXPRESS AS CLEAR
INTENTION THAT HAD BEEN
UNDER LEGISLATIVE MANDATE
AND THIS COURT'S CONSTANT
REAFFIRMANCE OF THAT THAT
THE PROCESS OF PEER REVIEW,
CREDENTIALING, RISK
MANAGEMENT WAS A
CONFIDENTIAL ONE WHICH WOULD
NEVER BE BRIEFED.

>> AND SO THE EFFECT OF YOUR

REQUIREMENT, IT MAY BE THE REAL EFFECT THAT IN 2005, A PATIENT IS GOING TO GO SEE A NEW DOCTOR, AND THIS PATIENT BELIEVES, WELL, UNDER THIS AMENDMENT, I CAN NOW SEE WHAT THIS DOCTOR WAS LIKE. I WANT TO SEE ALL HIS RECORDS, SEE IF HE'S EVER BEEN DISCIPLINED AND I REQUEST ALL THESE RECORDS AND THIS DOCTOR HAD BEEN DISCIPLINED SEVERAL TIMES IN 198Y.

HIS PRIVILEGED REVOKED, THEN REINSTATED.

WENT THROUGH ALL THIS MEZIN THE HOSPITAL, BUT THE -- MESS IN THE HOSPITAL BUT THE PATIENT CANNOT KNOW ANY OF THAT IN 2005.

>> AND YES, YOUR HONOR, AND THAT SOUND HARSH BUT THE REASON IS BECAUSE THAT'S THE WAY, THE WAY THE BALLOT SUMMARY IN THE AMENDMENTS WERE WRITTEN.

>> WELL, -- CAN WE GO BACK, CAN WE ACTUALLY GO TO, I KNOW, WE'LL GO TO THE BALLOT SUMMARY.

BUT THIS IS THE PROBLEM I HAVE, AND I AGREE WITH YOU, THERE'S GOT TO BE A CLEAR INTENT.

>> OKAY.

>> THAT SOMETHING RETROACTIVELY APPLIED, BUT YOU SEE, WHAT WE HAVE HERE IS A SITUATION, DON'T WE, WHERE THE RIGHT TO GET THOSE RECORDS, OBVIOUSLY DOESN'T START UNTIL THE EFFECTIVE DATE OF THE AMENDMENT. THE ISSUE AS TO WHAT RECORDS WOULD BE, AND IT IS CROW CONTROLLED BY THE PLAIN LANGUAGE OF THE AMENDMENT AND IT DOES SAY UPON ITS EFFECTIVE DATE, PATIENTS WILL HAVE ACCESS TO ANY RECORD AND IT DEFINES A PATIENT AS THOSE WHO HAD PREVIOUSLY UNDERGONE

TREATMENT.

SO I'D LIKE YOU TO ADDRESS
NOT JUST THE ANY RECORD, BUT
BY DEFINE AGPATIENT AS ONE
WHO HAD PREVIOUSLY UNDERGONE
TREATMENT, -- DEFINING A
PATIENT AS ONE WHO HAD
PREVIOUSLY UNDERGONE
TREATMENT, DOESN'T THAT BY
ITS PLAIN LANGUAGE, THAT, TO
ME, IN OTHER WORDS, WOULD BE
A STRAINED INTERPRETATION TO
SAY THAT SOMEONE WHO
PREVIOUSLY UNDERWENT
TREATMENT COULD
PROSPECTIVELY GET RECORDS IN
THE FUTURE THAT WOULD RELATE
TO NOTHING ABOUT THEIR
TREATMENT.

SO IF YOU --

>> PREVIOUSLY IS NO
DIFFERENT THAN THE WORD
EXISTING IN MEMORIAL
HOSPITAL AND YOU DROSED THAT
BRIDGE ALREADY BUT IT SOUNDS
HARSHER.

>> NOT THAT IT SOUNDS HARSH
TFLT SOUNDS CONTRARY TO WHAT
THE PLAIN LANGUAGE MEANS.

IN OTHER WORDS, I AGREE,
OKAY, THAT WE, EVEN IF IT'S
HARSH, IT DOESN'T MATTER.
RITHER QUESTION OF WHAT WAS
INTENDED.

-- IT'S THE QUESTION OF WHAT
WAS INTENDED.

BUT IN LOOKING AT THE PLAIN
LANGUAGE AND AS WELL AS EVEN
THE BALLOT SUMMARY THAT
WOULD SAY THE PATIENTS WOULD
GIVE THE RIGHT TO REVIEW
UPON RECORDS OF REQUESTS OF
HEALTH CARE FACILITIES T.
DOESN'T SAY RECORDS THAT
WILL THEN COME INTO
EXISTENCE AFTER THE DATE OF
THE AMENDMENT T. SAYS
RECORDS --

>> IT DOESN'T SAY RECORDS
THAT PRE-EXISTS.

BUT, YOUR HONOR.

>> LET ME ASK YOU THIS
QUESTION.

THE DAY AFTER THE PATIENT

HAS THE RIGHT TO RECEIVE THE RECORDS, THE DAY AFTER, THERE ARE NO RECORDS THAT THEY WOULD HAVE A RIGHT TO GET BECAUSE THERE'S NOTHING

--

>> CORRECT.

THAT'S WHAT JUSTICE ANSTEAD SAID.

>> BUT THE LANGUAGE SAYS, WHEN THEY ARE VOTE TONG THE AMENDMENT WOULD GIVE THEM THE RIGHTS TO REQUEST RECORDS OF HEALTH CARE FACILITIES.

WHERE DOES IT SAY RECORDS THAT COME INTO EFFECT AN THE -- AFTER THE DATE OF THIS AMENDMENT?

>> IT IS NOT OBLIGED TO SAY THAT BUT IT IS OBLIGED UNDER YOUR DECISIONS TO SAY RECORDS THAT PREEXIST THE DATE WHEN THIS RIGHT EXISTS BUT YOUR HONOR, EVEN IF I'M WRONG ON THAT, NOT WRONG, I CAN'T BE WRONG ON THAT, EVEN IF YOU DISAGREE WITH THAT, REASONABLY DISAGREE.

>> I CAN'T EVER IMAGINE YOU BEING WRONG.

[LAUGHTER]

>> I APPRECIATE THAT.

YOU STILL HAVE TO GET PAST THE NEXT STEP.

WHICH IS DOES HAVE THAT RETROACTIVE EFFECT DOES ABRIDGE, IMPAIR, OR DESTROY EXISTING RIGHTS AND THAT'S A PRETTY HIGH HURDLE TOO BECAUSE NOW WHAT YOU'VE GOT IS THE INQUIRY DOES THIS CONSTITUTIONAL RIGHT THAT'S BEEN CREATED CREATE NEW OBLATIONIGATION OR NEW LEGAL -- OBLIGATION NEW LEGAL CONSEQUENCES TO EVENTS BEFORE ITS ENACTMENT AND SURELY IT DOES.

THE PHYSICIANS, THE NURSES, ALL THE PEOPLE WHO WENT THROUGH THE CONFIDENTIALALITY, THE HOSPITALS THAT CREATED THE

RECORDS, THE ALL WERE MADE WITH THE ASSURANCE OF CONFIDENTIALITY.

>> BUT CAN ONE PLACE THE CONCEPT OF KNOWLEDGE OF THAT DOES THAT PLACE DISCLOSURE OTTHAT IN THE SAME CONSEQUENCE, THE ADVERSE CONSEQUENCE.

DOES THE KNOWLEDGE OF THAT EVENT DOES THAT EQUATE TO A CONSEQUENCE.

YOU SAID THE TEST IS.

>> THERE'S MORE THAN JUST THE KNOWLEDGE OF THE EVENT. THIS AMENDMENT NOW REQUIRES, AND THAT'S WHY THE LEGISLATION WAS ENACTED, THE HOSPITALS TO GO THROUGH A MASSIVE PROCESS TO FIGURE OUT WHAT IT IS THEY HAVE TO PROVIDE.

>> YOU ARE SAYING THAT'S THE CONSEQUENCE.

NOT THE DISCLOSURE OF THE INFORMATION.

BUT THE REQUIREMENT THAT THEY MUST DO SOMETHING.

>> IT'S, ONE OF THE CONSEQUENCES.

THE OTHER ONE IS THE FACT THAT NOW THE SCRUB NURSES OR THE PHYSICIANS WHO HAVE GONE THROUGH CANDID ASSESSMENT BECAUSE THEY NEEDED TO IN THESE PROCESSES ARE NOW BEING DISCLOSED.

>> THAT'S WHAT I'M ASKING.

IS THE MERE DISCLOSURE, IS THAT THE TYPE OF CONSEQUENCE THAT WE ARE TALKING ABOUT IN THOSE CASES WHERE WE MAKE THAT DISTINCTION BECAUSE THERE'S CERTAINLY BEST VESTED RIGHTS THAT MAY ARISE THAT YOU CANNOT GO AND REMOVE VESTED RIGHTS SO I AM ASKING S THE DISCLOSURE IN AND OF ITSELF THAT KIND OF CONSEQUENCE AS OPPOSED TO A SANCTION AGAINST THEM, FOR EXAMPLE.

>> OUR POSITION IS, YES IT IS, AND --

>> DO WE HAVE ANY LAW THAT SAYS THAT?

>> YES, I DO.

IT'S MYERS v. HAWKINS CASE AND I WANT TO TAKE YOU AWAY FROM THE WORD VESTED BECAUSE THAT'S NOT REALLY THE TEST. MYERSS. HAWKINS IN THIS COURT REALLY PINNED ON WHAT'S INVOLVED HERE BUT WHEN YOU SAID IT'S EXTREMELY DIFFICULT TO, TO ESTABLISH DEFINITE CRITERIA, AND THEN WENT ON TO SAY WHAT THE END IS THIS OBJECTIVE ABOUT EXISTING RIGHTS AND WHETHER THEY HAVE BEEN ABRIDGED, SUBTLE JUDGMENTS CONCERNING THE FAIRNESS AND UNFAIRNESS OF APPLY AGNEW CONSTITUTIONAL AMENDMENT RULE TO AFFECT INTEREST WHICH ACCRUED OUT OF EVENTS WHICH TRANSPIRED TO THE END THAT, QUOTE, SETTLED EXPECTATIONS HONESTLY ARRIVED AT WITH RESPECT TO SUBSTANTIAL INTERESTS OUGHT NOT TO BE DEFEATED.

>> WELL, IS THE DISCLOSURE, AGAIN, A SUBSTANTIAL -- WE ARE REALLY GETTING RIGHT BACK TO THIS.

IT'S A LINGUISTIC KIND OF GAME AND WE NEED NOT PLAY THAT.

WHAT WE NEED TO DO IS UNDERSTAND WHAT THE CRITERIA REALLY MEANS.

>> I ABSOLUTELY AGREE. WE DON'T NEED THE WORD GAMES.

WE DON'T NEED TO LABEL T. WE KNOW IT IS SUBSTANNATIVE RIGHT.

WE DON'T NEED TO CALL IT EXPECTED ACTION.

THE WHOLE PEER REVIEW SYSTEM DEPENDED ON THIS.

>> THAT YOU BELIEVE IS THE KEY, THE EXPECTATION.

>> THAT PLUS ALL -- THE EXPECTATION OF EVERYBODY WHO WAS INVOLVED IN AMASSING THE

MATERIAL AND PARTICIPATING.
JUSTICE CONVINCED HAD A
QUESTION.

>> MY PROBLEM IS THIS.
IT SEEMS THAT YOU ARE SAYING
BASICALLY THAT ALL OF THIS
INFORMATION IS GOING TO HAVE
TO BE DISCLOSED BUT AS I
READ THIS AMENDMENT, IT
SEEMS TO ME THAT WHAT IS
BEING DISCLOSED REALLY IS
THE ADVERSE MEDICAL
INCIDENTS, WHICH MAY BE
CONTAINED IN THESE PEER
REVIEWS, THESE RECORDS
CONCERNING THOSE RECORDS,
THAT KIND OF THING SO WE ARE
NOT REALLY TALKING ABOUT A
MASSIVE PRODUCTION OF ALL
THAT INFORMATION.

AREN'T WE REALLY TALKING
ABOUT A SMALLER AMOUNT OF
INFORMATION THAT MAY BE
CONTAINED IN THOSE RECORDS.
NO, YOUR HONOR, BECAUSE YOU ARE
-- YOUR HONOR, BECAUSE YOU
ARE ASSUMING THERE IS A
DISCREET FILE YOU CAN REACH
IN AND PICK UP AND HAND --

>> NO, I AM NOT SAYING IT
MAY NOT BE CONTAINED WITHIN
OTHER DOCUMENTS BUT
CERTAINLY WE CAN GO THROUGH
PROCEDURES OF REDACTING AND
GETTING INFORMATION OUT OF
DOCUMENTS AND SO, I'M JUST
SAYING THAT, AREN'T WE
TALKING ABOUT A SMALLER
DISCREET DISCLOSURE OF
INFORMATION AS OPPOSED TO
THE MASSIVE INFORMATION
CONCERNING THE PROCESS.

>> THAT REALLY GETS TO THE
QUESTION OF WAS THE
LEGISLATURE REASONABLE IN
ENACTING A STATUTE WHICH HELPED
DEFINE WHAT AN ADVERSE
MEDICAL INCIDENT WAS.
BECAUSE IT IS NOT DISCREET
AS YOU DESCRIBE.
IT IS AN ONGOING PROCESS.
THE, THE HOSPITALS HAVE BEEN
INSTRUCTED, PHYSICIANS HAVE
BEEN INSTRUCTED BY THE

LEGISLATURER FOR MORE THAN
20 YEARS.

>> BUT IT SEEMS TO ME, THE
AMENDMENT IT IT REALLY IS
VERY DISCREET.

IN WHAT IT IS SAYING ABOUT
AN ADVERSE MEDICAL INCIDENT.

>> THE, THE, THANK YOU.

THE AMENDMENT IS DISCREET.

IT IS NARROW.

BUT THE DISTRICT COURT
OPINIONS THAT ARE BROUGHT TO
YOU IN THESE CASES ARE VERY,
VERY BROAD.

AND THAT'S WHY I'M GOING TO
HAVE MR. WISOTSKY ANSWER
YOUR QUESTION BECAUSE WE
HAVE TO TRANSITION TO GIVE
HIM SOME TIME, AND HE WAS
GOING TO ADDRESS THE
SPECIFICS OF WHAT IS
INVOLVED.

MR. WISOTSKY, YOU'RE UP.

>> IN YOUR BRIEF -- IN THE
BRIEFS THAT WE'RE, I THINK,
MR. ENGLAND'S BRIEF
SPECIFICALLY, THERE WAS A
DIFFERENTIATION MADE BETWEEN
INFORMATION AND RECORD.

WOULD YOU ADDRESS THAT?

>> WELL, YES, YES, YOUR
HONOR.

>> WOULD YOU PLEASE GO AHEAD,
ANNOUNCE YOUR APPEARANCE.

>> YES, SIR.

STEVE WISOTSKY FOR NOTAMI
HOSPITAL DOING BUSINESS AS
LAKE CITY MEDICAL CENTER.

>> AND DON'T FORGET THE
QUESTION THAT WAS PENDING ON
THE FLOOR AFTER YOU ANSWER
THIS.

>> I SHOULD ANSWER --

>> GO AHEAD AND ANSWER THIS
QUESTION, THEN GO BACK AND
ANSWER --

>> IN OUR CASE, YOUR HONOR,
THE STURBTH CIRCUIT
COURT-ORDERED NOT ONLY THE
DISCLOSURE OF RECORDS BUT
ALSO ORDERED THE CEO OF LAKE
CITY MEDICAL CENTER TO
ANSWER ORAL QUESTIONED ON
ORAL DEPOSITION.

AND I THINK AMENDMENT SEVEN IS CRYSTAL CLEAR THAT IT PROVIDES A PATIENT'S RIGHT TO KNOW VIA ACCESS TO RECORDS.

AND IT DOES, IT SAYS NOTHING ABOUT THE ABILITY TO ENGAGE IN THAT KIND OF DISCOVERY. SO, WE SUBMIT THAT THAT IS A CLEAR ERROR IN THE INTERPRETATION --

>> ARE YOU ARGUING OTHER THAN THE QUESTIONS AT DEPOSITIONS, ARE YOU ARGUING THAT THEY CANNOT REQUEST RECORDS IN THE CONTEXT OF LITIGATION?

>> I'M ALSO ARGUING THAT AS WELL.

>> WELL, IF YOU CAN HAVE ACCESS TO RECORDS, WHY CAN'T YOU HAVE ACCESS IN CONTEXT TO LETIGATION?

WHY DOES THE CONTEXT MATTER? ASSUMING YOU ARE A FORMER PATIENT AT THIS TIME.

>> WELL, YOUR HONOR, I THINK IT WOULD HELP IF THE COURT WOULD PERMIT ME A FEW MINUTES TO DEVELOP THE NEED FOR THE LEGISLATION THAT HAS BEEN PASSED BECAUSE IF WE'VE, IF WE PICK AT CLAUSES WITHOUT SEEING THE BIGGER PICTURE, WE ARE GOING TO LOSE SIGHT OF THE ULTIMATE QUESTION, AND I THINK, JUSTICE QUINCE IT WILL ADDRESS YOUR QUESTION TOO, BUT IF IT DOESN'T, PLEASE REMIND ME.

BUT HERE MY PROBLEM.

AMENDMENT 7 ADDRESSES THE PATIENT'S RIGHT TO KNOW. WHO COULD POSSIBLY BE OPPOSED TO A PATIENT'S RIGHT TO KNOW.

THE PROBLEM IS AMENDMENT 7 DOESN'T REALLY SAY WHAT DEFINES -- OR DEFINE WHAT IT IS A PATIENT HAS A RIGHT TO KNOW OR BY WHAT PROCEDURE THE PATIENT HAS A RIGHT TO KNOW.

& IF YOU LOOK AT IT WITH A
LAWYER'S EYE OR EVEN WITH A
VOTER'S EYE, PATIENT, THE
CRUCIAL TERMS OF THE
AMENDMENT ARE NOT DEFINED.

WHAT IS A PATIENT.

WE HAVE BEEN SPEAKING DURING
JUSTICE -- AS A PATIENT WAS
IN A MEDICAL OFFICE OR ABOUT
TO BE.

BUT ACCORDING TO A AMENDMENT
A PATIENT WAS ANYONE EVER
BORN IN A HOSPITAL OR HAS
EVER BEEN TO A PHYSICIAN
WITHOUT REGARD TO THE POINT
IN TIME WHICH IT WOULD OCCUR.

THAT INCLUDES --

>> WHAT IS WRONG WITH THAT
DEFINITION OF A PATIENT, A
PERSON WHO SOUGHT, IS
SEEKING, IS UNDERGOING, HAS
UNDERGONE SOME KIND OF
TREATMENT IN A HEALTH CARE
FACILITY OR BY A PROVIDER.
WHAT'S MISSING IN THAT
DEFINITION?

>> WHAT'S MISSING IS THE
NEXUS TO INITIAL ROUND OF
QUESTIONS WHICH SAID WE HAVE
A PATIENT WHO IS GOING TO A
PHYSICIAN OR SEEKING MEDICAL
CARE AND WANTS TO CHECK ON
THE TRACK RECORD OF THAT
PHYSICIAN.

>> IT SAYS IS SEEKING.

I MEAN, IT SEEMS TO ME THAT
THAT COVERS A PERSON WHO, I
GO TO MY PRIMARY PHYSICIAN
AND HE SAYS TO ME, YOU NEED
TO GO TO SEE DR. XYZ WHO IS
A SPECIALIST IN THIS
PARTICULAR AREA AND I WANT
TO KNOW WHETHER OR NOT I
REALLY WANT TO GO TO HIM OR
SOME OTHER SPECIALIST IN THE
AREA.

I WANT TO KNOW WHETHER OR
NOT HE HAS THESE ADVERSE
MEDICAL INCIDENTS.

>> AND, AND, YOUR HONOR, THE
STATUTE RESPECTS THAT
PURPOSE.

THE STATUTE, 381028 IS DRAWN
WITH THAT MODEL IN MIND.

THE MODEL OF, AND A CONCERNS
PERSPECTIVE CONSUMER OF
MEDICAL INFORMATION WHO
WANTS TO CHECK ON THE, ON
THE CREDENTIALS AND, AND
QUALIFICATIONS OF, AND TRACK
RECORD OF A PHYSICIAN OR A
HOSPITAL.

BUT THE, THE AMENDMENT AS
ARGUE SAID BY THE OPPONENTS
IN THIS CASE AND AS
INTERPRETED BY THE FIRST AND
FIFTH DISTRICT IS AS BROAD
AS ALL OUTDOORS.

IT SAYS VIRTUALLY ANYTHING
GOES BACK TO THE FIRST DAY
OF OPERATION OF A HOSPITAL.
THERE IS NOT EVEN A LOOKBACK
PERIOD.

>> YOU ARE TALKING ABOUT
WHETHER IT'S SELF-EXECUTING
OR WHETHER YOU NEED ENABLING
LEGISLATION?

>> IT IS NOT, IT IS NOT WE
SUBMIT THAT IT IS NOT
SELF-EXECUTING.

>> HAVEN'T WE HELD THAT THE
FACT THAT LANGUAGE IN A
STATUTE WILL NEED TO BE
IRONED OUT LATER IS NOT
NECESSARILY MEAN IT'S NOT
SELF-EXECUTING.

>> NOT NECESSARILY, YOUR
HONOR, BUT THE PRINCIPAL
CASE RELIED ON BELOW, GRAY
v. BRYSON COMPLETELY
INOPPOSITE.

THAT CASE WAS ONE JUDGE PER
50,000 POPULATION A. SIMPLE
MATHEMATICAL RATIO.

HERE WE HAVE A PROBLEM OF
WHO IS A PATIENT, HOW FAR
BACK IN TIME DO YOU GO, WHAT
IS A RECORD, DOES IT INCLUDE
VOICE MAIL MESSAGES?

>> THAT'S WHAT I'M HAVING
REAL TROUBLE WITH BECAUSE
THE AMENDMENT COULDN'T BE
CLEARER IN DEFINING WHO A
PATIENT IS, AND AS JUSTICE
QUINCE SAID, IT IS AS BROAD
AS EVERYBODY.

AND THIS COURT KNEW WHAT
THIS AMENDMENT DID, AS I WAS

THINK THE VOTERS WOULD, WHEN WE SAID IN THE ADVISORY OPINION THAT UNQUESTIONABLY, THE AMENDMENT WILL AFFECT THESE STATUTORY PROVISIONS, THE PROCEEDINGS AND RECORDS OF PEER REVIEW PANEL FROM DISCOVERY A IN A CIVIL OF ADMINISTRATIVE ACTION SO WERE WE WRONG WHEN WE SAID WHAT EFFECT THE AMENDMENT WAS GOING TO HAVE.

>> I WOULD NEVER SAY THAT, YOUR HONOR.

[LAUGHTER]

YES, CLEARLY DOES -- IT WILL AFFECT THE PRIVILEGES TO THE EXTENT OF DISCLOSE AGFINAL REPORT.

IT WILL NOT AFFECT IT IN ABOLISHING PEER REVIEW.

>> NOW DO WE AGREE ON THIS. THAT WHAT IS NOT AT STAKE HERE THAT NOBODY IS SAYING THAT THE IMMUNITY THAT PEOPLE ENJOYED BEFORE THIS AMENDMENT, THAT IS IMMUNITY FROM PARTICIPATING OR EVEN NOW, TESTIMONIAL COMPULSION, I SEE THAT AS BEING DIFFERENT AND I DIDN'T REALIZE THAT WE HAD AS A CERTIFIED QUESTION WHETHER SOMEBODY COULD ANSWER THE QUESTIONS BECAUSE I DO THINK THAT IS A DIFFERENT ISSUE.

>> EXCUSE ME FOR INTERRUPTING.

THAT WAS NOT CERTIFIED. THE CERTIFIED QUESTIONS ARE IN THE COMPANION CASE. THE BUSTER CASE. WE DON'T HAVE ANY CERTIFIED QUESTION.

>> SO IS THE ISSUE WHETHER SOMEBODY IS COMPELLED TO TESTIFY BECAUSE I DIDN'T REALIZE --

>> IT SHOULD BE.

WE RAISED THE ISSUE WITH THE FIRST DISTRICT BUT THEY SIMPLY DID NOT ADDRESS IT.

>> IT IS NOT PART OF THEIR OPINION?

>> IT IS NOT PART OF THEIR
OPINION, IT IS PART OF THEIR
CASE.

IT IS PART OF THE REASON WHY
WE ARE APPEALING.

>> BUT I HAVE A HARD TIME
THAT THE LEMG SLACHER BY SAY
AGPATIENT HAS ONLY GET
SOMETHING WHEN IT HAS TO DO
WITH SAME OR SIMILAR
CONDITIONS ISN'T A
SIGNIFICANT RESTRICTION OR
ALTERATION OF THE PLAIN
LANGUAGE OF THIS AMENDMENT.

>> WELT, LET ME SAY TWO
THINGS, YOUR HONOR.

FIRST OF ALL, ADVERSE
MEDICAL INCIDENT REPORT HAS
NOT -- WAS NOT ADEQUATELY
DEFINED OR RECOGNIZED BY, BY
THE, BY THE COURTS BELOW.
THEY'RE TREATING IT AS, AS
SOMETHING THAT YOU CAN LOOK
AT AND YOU KNOW WHAT IT IS.
WHEN THE AMENDMENT 7
SUBSECTION C 3 SAYS THAT IT
HAS TO BE BASED ON FAULT OR
NEGLECT OF THE HOSPITAL OR
HEALTH CARE PROVIDER, NUMBER
1, AND THERE HAS TO BE
CAUSATION.

THIS IS SOMETHING A RISK
MASKER OR A PHYSICIAN CAN
DETERMINE BY REVIEWING THE
DOCUMENTS.

AND HERE'S THE PROBLEM.
YOU TAKE A TYPICAL LARGE
HOSPITAL.

IT TREATS TENS OF THOUSANDS
OF PATIENTS, IN-PATIENTS,
OUTPATIENTS, EMERGENCY ROOM
ADMISSIONS, SURGICAL
PROCEDURES, DYING NOSTIC
PROCEDURES.

IT GENNERATES TONS OF
DOCUMENTS.

SOME OF THEM ELECTRONIC,
SOME OF THEM ON PAPER, SOME
OF THEM STORED ON SITE, SOME
OF THEM STORED OFF SITE.

HUNDREDS OF THOUSANDS OF
DOCUMENTS F. AMENDMENT 7
MEANS ANYTHING GOES, YOU ARE
GOING TO BE DIVERTING

MASSIVE AMOUNTS OF HOSPITAL PERSONNEL, SKILLED PERSONNEL, NOT MERE CLERICAL PERSONNEL, WHO, WHO NEED TO MAKE A MEDICAL JUDGMENT ABOUT WHETHER OR NOT A DOCTOR -- >> I THINK THAT BRINGS ME BACK TO THE QUESTION THAT I HAD ORIGINALLY IS THAT I THINK THAT YOU ARE BLOWING THIS OUT TO, YOU KNOW, WAY OUT OF PROPORTION BECAUSE THE AMENDMENT ITSELF TALKS ABOUT ADVERSE MEDICAL INCIDENTS, AND YES, THERE ARE ALL KINDS OF OTHER DOCUMENTS AND MILLIONS OF DOCUMENTS THAT ARE GENERATED BY HOSPITALS AND MEDICAL CARE PROVIDERS.

BUT THIS AMENDMENT IS, IS ABOUT THESE INCIDENTS. AND THAT'S WHAT A PATIENT HAS A RIGHT TO KNOW. WHETHER OR NOT THE, THE DOCTOR HAS HAD SOME OTHER PERSON SAY THAT THEY'VE DONE SOMETHING, THAT THEY HAVE LEFT SOME SCALPEL IN SOMEONE.

THOSE ARE THE KINDS OF THINGS THAT THIS AMENDMENT IS DESIGNED TO GET TO.

>> AGREED, YOUR HONOR, AND THE STATUTE HONORS THAT BY SAYING TO THE HOSPITAL PERSONNEL, GO TO THE DEFINITIONS CONTAINED IN 395.01917 AND LOOK AT THE LIST THERE WHICH GOES FROM CETH TO ALL THE WAY DOWN TO -- DEATH ALL THE WAY DOWN TO, YOU KNOW, LEAVING IMPLEMENTS BEHIND T. HAS A DETAILED LIST OF THINGS THAT MUST BE REPORTED BY LAW BY RISK MANAGERS TO THE STATE DEPARTMENT OF HEALTH. THOSE ARE THE THINGS WHICH WHEN A FINAL REPORT COMES OUT AND FINDS THAT THERE IS FAULT AND CAUSATION ON THE PART OF THE HEALTH CARE PROVIDER OR THE HOSPITAL,

THOSE ARE THE KINDS OF THINGS THAT WOULD CONSTITUTE UNDER THE STATUTE AN ADVERSE MEDICAL INCIDENT WHICH THE PATIENT WOULD HAVE A RIGHT TO ACCESS.

>> AND SO ARE WE, ARE WE GOING TO LIMIT THIS JUST BECAUSE IT MAY BE SOME DIFFICULTY IN, IN THE HOSPITAL OR THE PROVIDER GETTING TO THE INFORMATION?

>> YOUR HONOR --

>> I MEAN I'M SURE IT MAY TAKE SOME TIME AND SOME EFFORT TO GET TO THIS, BUT THAT HAPPENS IN ALL KINDS OF DISCOVERY --

>> SEE, THIS IS THE PROBLEM WITH COMING UP ON CERT FROM A DISCOVERY RECORD.

WE DON'T HAVE THE A RECORD TO SHOW THE MASSIVE AND PERVASIVE AND FINANCIAL IMPACT THAT IT IS GOING TO HAVE AN HOSPITAL STAFF.

IN ADDITION TO THE FORMAL COMPLAINTS, WE HAVE PATIENT COMPLAINTS, INFECTION CONTROL, CLEANLINESS, HOUSEKEEPING, BEHAVIORAL ISSUES, MISDIAGNOSIS, SKILLS, COMPETENCIES.

>> A LOT OF THOSE THINGS YOU ARE GOING TO DON'T SEEM TO MEET THE DEFINITION OF ADVERSE MEDICAL INCIDENT IN THE AMENDMENT.

>> NO, ONLY IF THERE'S FAULT AND CAUSATION BY THE HOSPITAL.

THAT IS THE THING THAT'S MISSING FROM THE LOWER COURT OPINIONS.

>> YOU SAID PATIENT COMPLAINTS AND THINGS LIKE THAT.

>> A PATIENT COMPLAINT DOESN'T MEAN THERE IS FAULT, NEGLIGENCE.

>> RIGHT, SO YOU ARE SAYING THEY HAVE TO PRODUCE ALL THESE THINGS.

>> THEY HAVE, -- NOT PRODUCE

THEM, YOUR HONOR, THEY HAVE TO REVIEW THEM.

WHO CAN REVIEW THEM?

WE CAN'T TAKE A TEMPORARY CLERICAL WORKER.

>> WELL, BUT, SEE, PATIENT COMPLAINT MIGHT NOT HAVE BEEN EVEN PROTECTED BEFOREHAND.

I MEAN, I, THIS IS, AGAIN, I'M NOT, TRYING TO MINIMIZE THAT THIS IS CHANGING THE LANDSCAPE FOR HOSPITALS, BUT, YOU KNOW, THE FACT THAT SOMEBODY IN A PEER REVIEW COMPLAINT MIGHT SAY, YOU KNOW, DR. X IS REALLY QUIRKY.

HE'S SORT OF GOES AROUND AND HE'S GOT A TICK, AND YOU KNOW, WE THINK HE'S A LITTLE ODD, THAT'S NOT GOING TO BE, THAT'S NOT PRODUCIBLE. BUT OR A PATIENT SAYING I DIDN'T LIKE THE DR. XY'S ATTITUDE.

>> A PATIENT COMPLAINT, YOUR HONOR,.

>> THAT'S NOT, THAT'S NOT WITHIN WHAT AN ADVERSE MEDICAL INCIDENT S SO THAT'S HOW THAT GETS FERRETED OUT IN DISCOVERY.

>> BUT IT DOESN'T GET FERRETED OUT UNTIL IT'S SCREENED OUT.

SOMEBODY HAS TO --

>> BUT THAT'S TRUE WITH ANY DISCOVERY.

BEFOREHAND I COULD'VE ASKED THE QUESTION HAS ANYBODY COMPLAINED ABOUT DR. X AND THAT WASN'T PROTECTED BY A PRIVILEGE.

YOU CAN EITHER SAY IT'S BURDENSOME OR NO, I MEAN, I'M HAVING A HARD TIME WITH THIS BURDENSOME PART.

>> I'M SORRY I CAN'T PERSUADE YOU BUT WHAT YOU HAVE TO UNDERSTAND IS THE LEGISLATURE DID NOT ACT PRECIPITOUSLY.

THE LEGISLATURE ACTED

AGAINST A LOOMING CRISIS
THAT PERCEIVED IN THE
HEALTH CARE SYSTEM.
AND NOT ONLY WITH THE SHEER
VOLUME OF IT BUT ITS IMPACT
ON PEER REVIEW.
KRUGER v. LUV AND JUST A FEW
WEEKS AGO IN THE BRANDON
CASE, EFFECTIVE PEER REVIEW
IS INDISPENSABLE TO
IMPROVING THE QUALITY OF
CARE AND KEEPING COSTS DOWN
AS WELL AND SOME OF THE
THINGS THAT WE JUST SPOKE OF,
YOUR HONOR, WOULD END UP,
SOME OF THEM WOULD BE
SCREENED OUT BUT SOME OF
THEM WOULD BE IN PEER REVIEW
OR MEDICAL REVIEW
COMMUNITIES AND RISK
MANAGEMENT SO WHAT YOU ARE
TALKING ABOUT, I SEE MY TIME
IS UP.

>> JUST BRING YOUR ANSWER TO
A CONCLUSION.

>> WHAT YOU ARE TALKING
ABOUT IS A RADICAL UPHEAVAL
IN THE HEALTH CARE SYSTEM
WHICH LOOKING AT THE 56
WORDS OF THE BALLOT SUMMARY,
NO VOTER OR EVEN AN ORDINARY
LAWYER WOULD BE ABLE TO
APPRECIATE.

>> MR. EQUELS.

>> MAY IT PLEASE THE COURT,
I'M TOM EQUELS.

I'M HERE REPRESENTING THE
FAMILIES OF THE BOWEN, GREEN,
AND NICELY FAMILIES, EXCUSE
ME.

ALL OF WHOM HAD SUFFERED
TRAGIC LOSS AT THE HANDS OF
ONE DOCTOR AT NOTAMI
HOSPITAL ACCORDING TO THE
ALLEGATIONS OF THE
COMPLAINTS.

>> ARE YOU GOING TO ADDRESS
THE RETROACTIVITY ISSUE?

>> I WAS GOING TO SAY
JUSTICE CANTERO, THAT WE'RE
GOING TO SPLIT UP OUR
ARGUMENT IN THE INTEREST OF
NOT HAVING ANY REDUNDANCY.
I WAS GOING TO ADDRESS

UNCONSTITUTIONALITY AND THE SELF-EXECUTING NATURE OF THE AMENDMENT.

AND MR. CAR LYLE, WHO, WHO WAS THE, IS THE COUNCIL FOR THE BUSTER FAMILY WILL BE ADDRESSING RETROACTIVITY AND THE RELATED ISSUES.

>> PLEASE, GO AHEAD.

YOU ARE USING MUCH OF YOUR TIME EXPLAINING WHERE YOU ARE, SO.

>> OKAY.

THANK YOU.

>> TIME IS PASSING.

>> I WOULD LIKE TO SAY I AM HONORED AND HUMBLLED TO BE HERE IN PART BECAUSE THIS IS A RARE OCCURRENCE FOR ME TO APPEAR BEFORE THIS TRIBUNAL.

>> WELCOME TO THE COURT.

>> THANK YOU, YOUR HONOR.

BUT PRIMARILY, BECAUSE --

>> YOU'RE NOT SUGGESTING THAT, THAT THIS, THIS STATUTE SHOULD BE IN TOTO HELD UNCONSTITUTIONAL, ARE ROW YOU?

>> YES, I AM.

>> IN TOTO?

WHAT'S THE BASIS THAT WE WOULD HOLD A, AN ENTIRE STATUTE UNCONSTITUTIONAL UNLESS WE GO DOWN THROUGH IT AND SEE THAT EVERY PART OF IT IS IN CONFLICT WITH THIS PROVISION?

>> YOUR HONOR --

>> -- OF THE CONSTITUTION.

>> THERE'S NO QUESTION THAT PURSUANT TO THE RULING IN THE CRAMP CASE THAT THERE IS A CONCEPT OF SEVERAL, SEVERABILITY THAT HAS TO BE RESPECTED WHEN DEALING WHEN UNCONSTITUTIONAL PROVISIONS OF STATUTES, HOWEVER, IN THIS PARTICULAR CASE, IF I MAY, WHEN YOU COMPARE AMENDMENT 7 ON THE ONE HAND WITH THE STATUTE ON THE OTHER, YOU FIND YOU FIND THAT THE STATUTE EFFECTIVELY DISABLES OR EVISCERATES THE

WHOLE CONCEPT OF AMENDMENT

7.

>> BUT, BUT THE AMENDMENT ITSELF CONTEMPLATES THAT THERE IS GOING TO BE AN IMPLEMENTATION BY GENERAL LAW.

-- IMPLEMENTATION.

IT REPEATS THE WORD GENERAL LAW WITHIN THE BODY OF THE AMENDMENT.

>> JUSTICE WELLS, THERE IS NO QUESTION IN THIS, I THINK, ADDRESSES JUSTICES CANTERA, JUSTICE CANTERO'S EARLIER QUESTION REGARDING THE SAME ISSUE THAT UNDER GRAY v. BRYANT, THIS COURT HAS RULED THAT A SELF-, A CONSTITUTIONAL AMENDMENT MAY BE SELF-EXECUTING AND STILL HAVE FURTHER LEGISLATION. BUT THAT LEGISLATION CANNOT BE INCONSISTENT WITH OR --.

>> WHY DON'T YOU GET ON WITH THAT AS OPPOSED TODAY BROAD THING OF -- OPPOSED TO THE BROAD THING OF THE WHOLE LEGISLATIVE SCHEME BEING UNCONSTITUTIONAL.

WHAT PARTS OF THE STATUTE DO YOU FEEL ARE PARTICULARLY EGREGIOUS AND IN CONFLICT WITH THIS NEWLY INACTED CONSTITUTIONAL PROVISION? WHAT PARTS -- WOULD YOU PUT AT THE TOP OF THE LIST THAT ARE IN CONFLICT?

>> IT WOULD BE MY PLEASURE, YOUR HONOR.

FIRST AND FOREMOST, ARTICLE TEN 2nd 25, -- SECTION 25 PROVIDES FOR 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. NOW, WHEN WE LOOK AT SECTION 381.028 SUBSECTION 3 J, WE FIND THAT THIS DISCLOSURES LIMITED TO FINAL REPORTS. SO THAT'S AN INCONSISTENCY, A REPUGNANCY THAT CANNOT STAND BECAUSE THE LAW IS

CLEAR THAT STATUTES THAT ARE
INCONSISTENT WITH THE
CONSTITUTION MUST GIVE WAY
TO THE CONSTITUTION BECAUSE

--

>> SO, IT'S YOUR VIEW THAT
IT'S MUCH TOO NARROW A
READING OF WHAT THE
CONSTITUTIONAL PROVISION
INTEND UNDER.

>> YES, YOUR HONOR.
THE THE PLAIN LANGUAGE OF
THAT AMENDMENT, SO CLEARLY
CALLS FOR A MORE EXPANSIVE
CONCEPT OF RECORDS THAT THE
STATUTE BY RESTRICTING IT TO
A FINAL REPORT IS NOT
CONSISTENT WITH THE STATUTE.

>> SO WHILE YOU ARE THERE,
WOULD YOU ADDRESS JUSTICE
QUINCE'S EARLIER QUESTION.
TO YOUR OPPONENTS ON THE
OTHER SIDE AS FAR AS, YOU
KNOW, WHAT, WHAT INFORMATION
OR RECORDS ARE WE TALKING
ABOUT?

UNDER THIS CONSTITUTIONAL
AMENDMENT?

IS IT, IS MR. WISOTSKY
POINTS OUT HERE, GIVE ME THE
KEY TO THE HOSPITAL DOOR,
AND WE'RE GOING TO GO IN
THERE AND RUMINATE THROUGH
THE WHOLE OR WHAT IT IS?
WHAT IT IS?

>> IF I MAY, AND THIS
REQUIRES SOME LEVEL OF
SPECULATION BECAUSE WE DON'T
HAVE THE RECORDS THAT THE
COURT-ORDERED PRODUCED BUT
IN OUR PARTICULAR CASE, IF A
PARENT WERE TAKE AGTEENAGER
TO NOTAMI HOSPITAL FOR
SURGERY, THE PRIMARY
PHYSICIAN IS RECOMMENDED,
DR. PENDRICK AS THE SURGEON
AND THAT PARENT ASKS FOR THE
RECORDS RELATED TO ADVERSE
MEDICAL INCIDENTS, THAT
PARENT SHOULD BE ENTITLED TO
KNOW THAT THERE HAD BEEN A
NUMBER OF DEATHS ATTRIBUTED
TO POTENTIALLY NEGLIGENT
EVI SCERATION DURING SURGICAL

PROCEDURES, IN OTHER WORDS,
THEIR BOWEL --

>> BY, BY.

>> BY DR. PENDRICK AND THIS
IS SOMETHING I WOULD THINK
IN OUR AGE OF HEALTH CARE
THAT ANY PERSON
CONTEMPLATING HEALTH CARE,
PROCEDURES THAT ARE --

>> LET ME ASK YOU A QUESTION
ON THIS, AND I'VE FINAL
REPORT MAY BE TOO LIMITED,
BUT IF WE ACCEPT YOUR
ARGUMENT THAT WHAT THE
HOSPITAL CAN ALSO DO IS JUST
GIVE THEM FOUR FILE DRAWERS
OF INFORMATION THIS POOR
PERSON IS TRYING TO FIGURE
OUT WHAT YOU'RE SAYING, AND
JUST GIVE THEM A WHOLE FILE
WORTH OF ALL THE NURSING
RECORDS, ALL THE ADMISSION
RECORDS, THE WHOLE THING AND
SAY HERE S. THAT GOING TO
SATISFY THE NEED HERE?

>> WELL, I DON'T THINK THAT
THAT'S WHAT'S CONSPLATED BY
THE AMENDMENT EITHER.
JUSTICE BELL.

AND, AND IT, THIS CONCEPT OF
ADVERSE MEDICAL INCIDENT,
YOU KNOW, CLARIFIES.
THIS FAMILY, AND THIS
HYPOTHETICAL SITUATION,
WANTS TO KNOW THAT WHEN,
WHEN THE, THEY ENTRUST THEIR
12-YEAR-OLD TO THE KNIFE OF,
OF THIS DOCTOR, THAT IT'S
SOMEBODY THAT THEY CAN BE
SAFE AND SECURE IN FEELING
IS A COMPETENT AND WORTHY --

>> AND DOESN'T A DISCREET --
AND DOESN'T A DECRETE FINAL
REPORT ON THAT QUESTION AS
OPPOSED TO THE ENTIRE
MEDICAL RECORDS OF THE
TREATMENT OF A PERSON IN
WHICH AN INCIDENT OCCURRED
ACHIEVE THAT, THAT GOAL OF
KNOWING?

>> WELL, THE PEER REVIEW
PROCESS MAY HAVE ADDITIONAL
RECORDS OUTSIDE THE FINAL
REPORT THAT WOULD BE GERMANE

AND PERTINENT TO THAT
ANALYSIS.
YOU KNOW, SO CERTAINLY AFTER

--

>> WOULDN'T THAT REALLY BE
MORE PERTINENT TO THE
LITIGATION ASPECT OF IT AS
OPPOSED TO THE DECISION ON
WHETHER OR NOT TO USE THE
PHYSICIAN IN THE FIRST
PLACE?

>> WELL, CLEARLY, CLEARLY,
THE PERSONS WHO SUFFERED
FROM ADVERSE TREATMENTS, WHO
ARE ENTITLED TO THE RECORDS
THEY WOULD HAVE A MUCH MORE
BROADER SCOPE OF ACCESS TO
RECORDS.

BUT THE AMENDMENT GIVES THEM
ALL ACCESS TO RECORDS RELATED
TO ADVERSE HEALTH CARE
INCIDENTS. I MAY, I ONLY
GOT TO MY FIRST --

>> PLEASE KEEP GOING.
YOU ARE RUNNING OUT OF TIME
VERY RAPIDLY.

>> DO YOU AGREE WITH ALL --

>> ARTICLE --

>> DO YOU AGREE WITH THE
ONES THAT ARE LISTED IN THE
FIRST DCA OPINION?
DO YOU AGREE WITH ALL OF
THOSE.

>> YES, I DO AND THERE ARE
SOME ADDITIONAL ONES.

>> WELL, WHY DON'T YOU GET
TO THE ADDITIONAL ONES.

>> WELL, THE FIRST DCA
POINTED OUT THAT THERE WAS
NO TIME LIMITATION IN OUR,
THE AMENDMENT.

HOWEVER, SECTION 381.0825
SAYS IT ONLY RELATES TO
RECORDS CREATED AFTER
NOVEMBER 2nd BUT IT ALSO IN
THAT SAME SUBSECTION CREATES
A STATUTE OF REPOSE.
WHICH IS NOT CONTEMPLATED
ANYWHERE IN THE, IN THE
AMENDMENT.

SAYING YOU ARE ONLY ENTITLED
TO RECORDS GOING FOUR YEARS
BACK.

THAT AGAIN IS A LIMITATION

BECAUSE THAT PARENT MIGHT WANT TO KNOW THAT IN AN APPENDECT OIM FIVE YEARS AGO, THIS DOCTOR, THROUGH NEGLIGENCE KILLED ANOTHER CHILD BY ACCIDENTALLY DISEMBOWELING HIM.

THIS IS THE KIND OF THING THAT, THAT I UNDERSTAND THE, THE SPECIAL INTEREST OR ORIENTATION, AND WHY IT'S IMPORTANT FOR THIS INDUSTRY, BUT IT IS INCONSISTENT WITH THE INTENT OF THE AMENDMENT.

>> SO YOU AGREE THIS IS AN ENORMOUS RESPONSIBILITY.

IF YOU HAD A PHYSICIAN THAT'S BEEN PRACTICING IN A 20 YEARS AND THEY MICROFICHE AFTER FOUR YEARS, YOUR INTERPRETATION WOULD BE, AND I THINK CONSISTENT THAT THE HOSPITAL WOULD HAVE TO GO AND NOT ONLY TAKE CARE OF EXISTING RECORDS, COMPUTERIZED OR OTHERWISE GO BACK AND MICROFICHE AND PRODUCE ALL THESE RECORDS.

>> TO THE EXTENT THAT THERE ARE THESE TYPE OF RECORDS THAT EXIST FOR THAT PHYSICIAN, YES.

AND I THINK THAT THE COMPLIANCE -- SOTHAT'S AN ENORMOUS RESPONSIBILITY. YOU HAVE TO ADMIT THAT'S AN ENORMOUS RESPONSIBILITY, BURDEN.

>> JUSTICE BELL, THAT THE PEOPLE OF FLORIDA HAVE, HAVE PLACED A RESPONSIBILITY ON THIS INDUSTRY.

THEY HAVE CALLED UPON THEM TO MAKE THE ACCESS TO THIS INFORMATION AVAILABLE TO PATIENTS.

AND THAT ACCESS A PART OF A NEW ERA IN HEALTH CARE, YOU KNOW, THE IDEA OF PATIENT SELF-DETERMINATION HAS BECOME VERY IMPORTANT. YOU KNOW, WE ARE NO LONGER IN AN ERA OF PHYSICIAN PATERNALISM.

PATIENTWISE A RIGHT TO KNOW,
AND THEY HAVE A RIGHT TO
KNOW ABOUT THE DETAILS OF
THEIR PROCEDURE.

YOU KNOW, WHEN YOU, YOU TAKE
THIS DRUG, THESE ARE THE
SIDE EFFECTS BUT ITS IT'S
JUST AS IMPORTANT FOR THEM
TO KNOW, I SUBMIT, THAT THE
PHYSICIAN THAT'S TREATING
THEM, ESPECIALLY GIVEN OUR
MANAGED HEALTH CARE SYSTEM
WHERE YOU HAVE NO KNOWLEDGE
OF THESE PEOPLE YOU'RE
REFERRED SOMETIMES, THAT THE
PHYSICIAN WHO IS FREEING
THEM -- TREATING THEM IS
COMPETENT AND WORTHY OF
THEIR TRUST.

>> THANK YOU VERY MUCH.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.
MY NAME IS CHRIS KARLYLE I'M
HERE ON BEHALF OF TERESA
BUTLER I AM GOING TO BE
ADDRESSING THE RETROACTIVITY
ISSUE WHICH I THINK FRANKLY
IS THE, PERHAPS THE MOST
IMPORTANT ISSUE HERE, IS THE
ONLY ISSUE THAT THE THREE
DISTRICT COURTS OF APPEAL
THAT HAVE CONSIDERED THIS
HAVE SEEN FIT TO DISAGREE
ON.

>> WOULD YOU AGREE THAT,
THAT THE RECORDS THAT ARE
REQUESTS IN THIS DISCOVERY
ARE RECORDS THAT ON THE DAY
THAT THE VOTE WAS TAKEN FOR
THIS AMENDMENT WERE
PROTECTED BY STATUTE.

>> YES, TO --

>> SO THERE WAS A STATUTE
THAT THAT GAVE A STATUTORY
RIGHT TO NOT PRODUCE THESE
RECORDS PRIOR TO THE
EFFECTIVE DATE OF THIS
AMENDMENT?

>> JUSTICE WELLS, YES, THERE
WERE A SERIES OF STATUTES
THAT GAVE LIMITATIONS
UNLIMITED TO.

AND AS THIS COURT RECOGNIZED
AND AS JUSTICE PARIENTE

POINTED OUT PREVIOUSLY, THE ENTIRE PURPOSE OF THE AMENDMENT IS TO DEAL WITH THOSE STATUTES AND TO OPEN UP THE ACCESS TO THOSE RECORDS, BUT YES, THAT'S THE REASON THE AMENDMENT WAS PASSED WAS TO GAIN ACCESS TO PREVIOUSLY LIMITED ACCESS TO CERTAIN RECORDS.

>> SO ISN'T A WAY TO LOOK AT THIS IS THAT ON THE DATE OF EFFECTIVENESS OF THIS AMENDMENT, THAT THE, THOSE STATUTES WHICH GAVE THOSE RIGHTS WERE NO LONGER EFFECTIVE, CORRECT?
SURE.

>> IN DEALING WITH A STATUTE, AS WE HAVE DEALT WITH CONSTITUTIONALLY IN THE AIR OKAY.

UNLESS THE STATUTE SPECIFICALLY STATES THAT IS A TAKING AWAY A VESTED RIGHT RETROSPECTIVELY, THEN WE ARE GOING TO GIVE IT PROSPECTIVE APPLICATIONS, CORRECT?

>> WELL, IT DEPENDS ON WHAT YOU MEAN BY SPECIFICALLY. TO THE EXTENT THAT --

>> BECAUSE IT SAYS IN THE STATUTE.

>> DOES NOT REQUIRE TO BE IN THE STATUTE THE WORDS THIS WILL APPLY RETROSPECTIVELY. RATHER, THIS COURT HAS HELD TIME AND TIME AGAIN THAT WE NEED TO DETERMINE THE INTENT OF THE CONSTITUTIONAL AMENDMENT OR THE STATUTE AND FIND OUT IF THE INTENT TO APPLY RETROSPECTIVELY IS. THERE I WOULD DISAGREE IF YOU ARE SUGGESTING THAT THE STATUTE, THE ONLY WAY IT CAN BE APPLIED RETROSPECTIVELY IS IF THE WORDS THIS WILL BE APPLIED RETROSPECTIVELY -- THIS COURT HAS NOT HELD --

>> WE HAVE HELD THAT THERE HAS TO BE A CLEAR STATEMENT. INTENT.

>> ABSOLUTELY.

YES.

>> THAT IS REFLECTED WITHIN EITHER THE CONSTITUTION OR TO, IN ORDER FOR THAT TO ELIMINATE RETROACTIVELY, VESTED RIGHTS THAT PEOPLE HAVE DEPENDED UPON IN MAKING RECORDS, IN DOING WHATEVER THEY DO IN FLORIDA LIFE.

>> WELL, I WOULD AGREE THAT THERE IS A TWO-STEP PROCESS THAT THIS COURT HAS RECOGNIZED IN MANY OCCASIONS GOING THROUGH THIS, AND BEFORE YOU GET TO THE VESTED RIGHTS ANALYSIS, YOU ARE CORRECT IN THAT THIS COURT HAS HELD TIME AND TIME AGAIN THAT WE LOOK TO THE AMENDMENT AND WE TRY TO DISCERN THE INTENT TO FIND OUT IF THERE IS A CLEAR EXPRESSION OF INTENT THAT WE APPLIED RETROACTIVELY.

>> WHY DON'T WE GO ABOUT WHAT WE ARE TALKING ABOUT INSTEAD OF NEBULOUS CONCEPTS AND ANSWER HIS RESPONSE DO WHETHER THIS IS CONSTITUTIONAL.

>> IN DETERMINING THE INTENT AND I WILL BACK UP JUST FOR A MOMENT BECAUSE IT IS NOT JUST THE FACE OF THIS. AND THIS COURT HAS HELD THAT COMMON SENSE PLAY AS ROLE IN THIS, IT HAS HELD THAT THE PURPOSE OF THE AMENDMENT PLAYS A ROLE IN THIS, AND SO BEYOND THE FACE OF THE DOCUMENT, WE HAVE TO LOOK AT THE PURPOSE WHICH IS STATED IN THE AMENDMENT AND WE HAVE TO APPLY COMMON SENSE. THE PURPOSE OF THIS AMENDMENT IS TO GRATE A CONSTITUTIONAL RIGHT TO ACCESS RECORDS THAT WERE PREVIOUSLY RESTRICTED. AND SO WHEN WE'RE LOOKING AT THIS, AND THAT'S THE PURPOSE OF THIS AND THERE WERE SEVERAL QUESTIONS PREVIOUSLY ABOUT IT.

CAN IT POSSIBLY BE SUGGESTED THAT THE VOTERS OF THE STATE OF FLORIDA INTENDED TO VOTE FOR AN AMENDMENT THAT SAYS YOU'RE GOING TO HAVE ACCESS TO RECORDS THAT WERE PREVIOUSLY RESTRICTED AND IT'S EFFECTIVE ON THE DAY THAT IT BECOMES LAW AND ON THAT DAY, ZERO RECORDS EXIST.

THE REASONS FOR THIS ARE, ARE REALLY THREE.

AND THAT'S THE FIRST ONE, THE COMMON SENSE ASPECT OF THIS, TO SUGGEST THAT THE VOTERS INTENDED, NO, WE DON'T WANT ANY RECORDS ON THE DAY IT'S AFFECTED. WE WANT TO WAIT AND WAIT FOR THE RECORDS TO BE CREATICIDE FRANKLY BELIED BY COMMON SENSE.

TURNING TO THE TERMS OF THE AMENDMENT ITSELF, THE USE OF THE WORD ANY IS IN THERE, AND AGAIN CBAERBSH RECORDS TO A LAYMAN, I WOULD SUGGEST, MEANS WHAT IT SAYS, ANY RECORDS.

>> LET ME ASK YOU, THERE'S A SECOND PRONG TO THIS, AND REALLY IT'S A CONSTITUTIONAL KIND OF ISSUE ABOUT, IT TALKS ABOUT VESTED RIGHTS BUT IT IS REALLY A DUE PROCESS KIND OF ISSUE.

>> RIGHT.

>> SUPREME COURT, THE U.S. SUPREME COURT IN A CASE CALLED LANDSGRAFT HAS SAID IN RETROACTIVELY. COURT SHOULD BE CONSIDERATIONS OF FAIR NOTICE, REASONABLE RELIANCE, AND SETTLED EXPECTATIONS. NO NOW, DO YOU THINK THAT IN CONSIDERING THOSE FACTORS, THAT A CONSTITUTIONAL AMENDMENT TO A -- SHOULD APPLY TO CONDUCT AND ACTS AND RECORDS THAT OCCURRED AT A TIME WHEN EVERYBODY INVOLVED UNDERSTOOD THAT

THEIR STATEMENTS THAT THESE RECORDS, THAT EVERYTHING WAS GOING TO GO CONFIDENTIAL AND EVERYTHING THEY SAID WAS BASED ON THAT PRESUMPTION.

>> BUT, YOUR HONOR, AGAIN, I THINK THAT YOU ARE CORRECT, AND THE QUESTION IS DUE PROCESS, ET CETERA, AS FOUND IN THAT U.S. SUPREME COURT CASE, AND THERE WAS A DISCUSSION EARLIER THAT WE'RE NOT TAKING AWAY AND SUDDENLY EXPOSING PEOPLE TO LIABILITY, ET CETERA, BY VIRTUE OF THIS, AND THAT THERE WAS NO DISCUSSION THAT SUDDENLY THAT WAS GOING TO OCCUR HERE BUT THE CONCEPT OF VESTED RIGHTS, WHILE, AGAIN, YES, THESE RECORDS WERE CREATED WITH THOSE STATUTES IN PLACE, BUT THE ANALYSIS THAT THIS COURT MUST UNDERTAKE IS ARE THOSE A MERE EXPECTATION OF THE CONTINUEATION OF THAT OR CAN THEY BE TAKEN AWAY BY THE LEGISLATURE?

AND WHILE I WOULD AGREE THAT WHILE THOSE RECORDS WERE CREATED, CERTAIN STATUTES WERE IN PLACE WHICH LIMITED ACCESS, THAT IS NOT TO SAY THAT ANYONE INVOLVED IN THAT PROCESS HAD AN ABSOLUTE RIGHT OR AN ABSOLUTE GUARANTEE THAT THE LEGISLATURE IN ITS WISDOM OR THE VOTERS OF THE STATE OF FLORIDA MIGHT AT SOME POINT SEE FIT TO CHANGE THAT.

AND THAT IS NOT --

>> I CAN --

>> VESTED RIGHT.

>> I CAN ENVISION SEVERAL DOCTORS IN THESE PEER REVIEW COMMITTEES SAYING I MESSED UP, I DID THE WRONG THING, I CUT OFF THE WRONG LEG OR WHATEVER, YOU KNOW, THOSE THINGS, YOU KNOW, I JUST WASN'T THINKING, OR, YOU KNOW, MY FATHER HAD DIED

THAT WEEK, AND I JUST, I, I
WAS WRONG.

I WAS NEGLIGENT, AND THEY
FIND THAT.

BUT IF HE KNEW THAT SOMEBODY
LATER ON WAS GOING TO SUE
HIM FOR MALPRACTICE AND BE
ABLE TO GET THAT STATEMENT,
HE WOULDN'T HAVE MADE THAT
STATEMENT TO THE PEER REVIEW
COMMITTEE.

>> THAT PERHAPS IS TRUE,
YOUR HONOR, AND THAT IS
AGAIN, THE KIND OF PROBLEM
THAT EXISTS NOW IF
PROSPECTIVE APPLICATION IS
GIVEN TO THIS, THE CANDOR
PERHAPS WOULD NOT BE THERE,
BUT, YES, YOUR HONOR --

>> LET ME ASK YOU A
HYPOTHETICAL --

>> I'M SORRY.

>> WHAT IF THE VOTERS,
ENACTED AN AMENDMENT, THE
FLORIDA CONSTITUTION THAT
SAYS AS TO ALL CIVIL CASES,
WE ARE GOING TO ABROGATE THE
ATTORNEY-CLIENT PRIVILEGE.

>> I THINK, AGAIN, THAT IT
IS IMPORTANT FOR THE COURT
TO RECOGNIZE THAT THESE ARE
NOT PRIVILEGES AND ONE OF
THE REASONS AND IT DOESN'T
RISE TO THAT LEVEL AND IT IS
NOT -- IMPRACTICING DUE
PROCESS TO THAT EXTENT THESE
RUR LIMITATIONS PLACED UPON
IT DUE TO DISCOVERY AND
OTHER.

WE FILED NOTICE TO
SUPPLEMENTAL AUTHORITY AND
THERE WERE WAYS THESE
RECORDS WERE AVAILABLE IN
FEDERAL CASE IN CERTAIN
CIRCUMSTANCES.

AND DUE PROCESS --

>> IS THERE ANYTHING THAT,
PREVENTS A TRIAL JUDGE,
BECAUSE IF IT'S IN
LITIGATION, FROM LIMITING
THE USE OF THE DOCUMENTS OR
THE LEGISLATURE FR PASS SAID
SOMETHING THAT SAYS THAT
THESE ARE AVAILABLE BUT THEY

CAN'T BE USED OR DISTRIBUTED TO, TO OTHER -- IS THAT A DIFFERENT ISSUE, FIRST OF ALL?

>> WELL, IT WAS AN ISSUE THAT WAS ADDRESSED BY THE FIFTH DCA --

>> BECAUSE ALL THE TIME WE GRANT PROTECTIVE ORDERS ON THINGS.

>> SURE.

>> THIS DOESN'T AFFECT THE PERSON WHO HAS DONE ANYTHING.

THAT IS NOT THE NEGLIGENT PERSON BUT THE PEOPLE IMMUNITY FRAUGHT SUIT.,

>> CORRECT.

>> OR IT HASN'T CHANGED ANYTHING THAT I CAN SEE ABOUT THE ADMISSIBILITY OF THIS INFORMATION INTO EVIDENCE.

>> I WOULD NOT THINK SO, AND AGAIN, --

>> SO IT STILL MAY BE PRECLUDED FROM BEING ADMISSIBLE IN EVIDENCE, AND THE OTHER PART, AND I AM CONCERNED ABOUT THIS I GUESS IN THE FIRST DISTRICT CASE, I DON'T SEE THAT IT DOES ANYTHING TO SEE THAT SOMEBODY WHO MIGHT HAVE TESTIFIED AND THOUGHT IT WAS CONFIDENTIAL WOULD BE COMPELLED TO TESTIFY NAL DEPOSITION.

NOW, IF, IS THAT AN ISSUE THAT WE'RE SUPPOSED TO BE LOOKING AT, BECAUSE I THINK THAT IS A CONCERN, AND I THINK THOSE ARE OTHER OF THE IMUNITY FROM SUIT, THE ADMISSIBILITY IN EVIDENCE, THE PROTECTION, OTHER THAN FOR THE USE OF, OF THE PARTICULAR PERSON OR IN A LAWSUIT, THAT THOSE ARE ALL THINGS THAT ARE LEGITIMATE CONCERNS THAT HAVE TO BE ADDRESSED AND, AT SOME POINT.

>> SURE.

>> DO YOU AGREE WITH THAT?
>> I DON'T DISAGREE THAT
THEY WOULD HAVE TO BE
ADDRESSED TO SOME EXTENT BUT
I WOULD ANSWER THE QUESTION
THIS WAY.

THE CERTIFIED QUESTION WITH
DISCOVERY AND THE PROCESS
AND THE FIFTH DCA'S OPINION
WAS ACCURATE I THINK START
FRAG THUM LARGE PICTURE IT
MAKES NO SENSE TO ALLOW
ACCESS TO THESE RECORDS
PRIOR TO LITIGATION BUT
SUDDENLY WHEN LITIGATION IS
SAYING SORRY YOU CAN'T
DISCOVER THESE OR USE THEM
IN SOME CONTEXT SO I THINK
THAT IS FAIRLY OBVIOUS.
THAT BEING SAID, ONCE THESE
RECORDS ARE RECEIVED BY
SOMEONE, THE SAME PROCEDURES
THAT WOULD APPLY TO ANY SORT
OF EVIDENCE IN THE CASE
REGARDING ADMISSIBILITY,
ET CETERA, WOULD BE IN PLACE
IN THE COURTS WOULD NEED TO
WIND THROUGH THOSE ISSUES
AND FOR US TO SIT HERE TODAY
AND SPECULATE AS TO WHAT
ISSUES MIGHT ARISE
CONCERNING ADMISSIBILITY, I
THINK IS BEYOND THE SCOPE
CLEARLY OF WHAT WE ARE HERE
TO DO TODAY --

>> IN A, IN A, IN A
LITIGATION CONTEXT, IS IT
ONLY THE PATIENT THAT'S ABLE
TO GET THIS INFORMATION?
OR IS IT SOME ANCILLARY
DEFENDANT THAT'S ABLE TO GET
THE INFORMATION?
OR?

CLEARLY, AND AGAIN, THAT
ISSUE WAS NOT PART OF THE
CERTIFIED QUESTION AND IT
WAS RAISED AND I'LL ANSWER
THAT AS BEST I CAN.
THE TERMS OF THE AMENDMENT
DICTATE WHO A PATIENT IS.
AND FURTHERMORE, THE TERMS
OF THE AMENDMENTS DO NOT
SUGGEST THAT ONCE THESE
RECORDS ARE PRODUCED TO A

CERTAIN PATIENT, THAT THERE
SOME SORT OF CONFIDENTIALITY
THAT ATTACHES TO THEM.

>> RIGHT.

AND SO THAT GOES BACK TO
JUSTICE CANTERO'S QUESTION,
DUE PROCESS ISSUE, IS THEY
CAN NOT ONLY BE USED ONCE
THEY'RE MADE, AND PUT IN THE
PUBLIC DOMAIN BY THE PUBLIC,
THEY CAN BE USED BY THE
DEFENDANT, BY OTHER
PLAINTIFF, THEY CAN BE USED,
THEY COULD TAKE IT DOWN TO
THE, TO THE DAYTONA BEACH
NEWS JOURNAL, COULD THEY
NOT.

>> I WOULD SUGGEST THAT, YES,
THESE ARE NOW PUBLIC RECORDS
IN THE SAME WAY THAT A
MEETING OF A PUBLIC BODY
THAT AFTER THE LITIGATION IS
OVER, THE MEETINGS BECOME
PUBLIC CERTAINLY THERE IS
ACCESS TO THESE AND NO
LIMITATION TO USE OF THESE
AND TO IMPOSE THE LITIGATION
USE IN THE CONTEXT FRANKLY
DOESN'T MAKE MUCH COMMON
SENSE IN THE SENSE THAT ONE
PARTY, THE PLAINTIFF HAS
ACCESS TO THESE RECORDS AND
COULD'VE GOTTEN THEM AND
SHARED THEM WITH WHOEVER WAS
CHOSEN NOW THE LITIGATION
HAS STARTED THEY CAN'T,
NOBODY ELSE IN THE
LITIGATION CAN SEE THESE
RECORDS AND I DON'T
UNDERSTAND REALLY THE
ARGUMENT THERE AND HOW THAT
IS LOGICAL.

CLEARLY THEY ARE THE ONES
ACCORDING TO THE AMENDMENT
TO ASK FOR THEM AND TO
RECEIVE THEM BUT TO LIMIT
THEM AT THAT POINT AND
IMPOSE SOME ORT OF
LIMITATION ON USE THAT THE
AMENDMENT DOESN'T
CONTEMPLATE IS CONTRARY TO
COMMON SENSE.

>> MR. KARLYLE IN THE NISHSAL
DISCUSSION YOUR COLLEAGUE

WAS DESCRIBING WHATEVER THE WORD THAT INTEREST S VESTED RIGHT, AN EXPECTATION, WHATEVER THAT S. WOULD YOU DESCRIBE IN THIS CASE YOUR VIEW AS TO WHAT THAT INTEREST IS AND WHY OR WHY NOT IT DESERVES PROTECTION.

>> SURE.

I THINK -- 72 IS THAT NOT THE KEY TO THE RETROACTIVE ISSUE.

>> WELL, I THINK AGAIN THE INTEREST TO USE PREVIOUSLY SOUGHT TO FURTHER WERE FREE FLOW OF DISCUSSION, ET CETERA, DURING THE PERIOD OF THE PROCESS.

AND I THINK IT IS IMPORTANT TO RECOGNIZE.

>> I THINK YOU ARE TALKING ABOUT THE INTEREST OF THE PERSON OR THE INDIVIDUAL INVOLVED OR ENTITIES. JUST A NEBULOUS INTEREST. THEY ARE TALKING ABOUT THE INTEREST OF ENTITIES OR INDIVIDUALS.

I THINK THAT'S THE DISCUSSION.

>> ARE YOU ASKING ABOUT THE INDIVIDUALS SEEKING THE RECORDS OR --

>> NO THE INDIVIDUALS WHO HAD BEEN PROTECTED, WHETHER IT'S AN INSTITUTION, WHETHER IT'S AN INDIVIDUAL, I THINK THAT'S WHERE THIS DISCUSSION GOES.

IS THE QUESTION OF WHATEVER, HOW DO YOU WANT TO DESCRIBE IT, WHETHER IT'S A VESTED RIGHT TO THIS CONFIDENTIALITY CONCEPT.

>> SURE.

>> THAT'S WHAT I'M RR ASKING YOU TO DESCRIBE WITHOUT USING LABELS.

>> I WOULD BE HAPPY TO. IT IS NOT A VESTED RIGHT. THE COURT HAS, AGAIN, AND THERE ARE NUMEROUS CASES THAT WE ARE TALKING ABOUT HERE TALKING ABOUT BEING

MORE THAN A MERE EXPECTATION
OF, OF CONTINUE!!ING MATTERS.
THERE'S ALSO A BODY OF LAW
THAT TALKS ABOUT --
>> WHAT IS THE INTEREST?
CONFIDENTIALITY?
IS THAT THE INTEREST?
>> IT IS NOT A VESTED RIGHT.
>> WHATEVER THE INTEREST IS.
IS IT CONFIDENTIALITY OR IS
THE SOMETHING ELSE.
>> I'MSUMING IT WAS THE
CONFIDENTIALITY THAT, THEY
AGAIN, AT ONE POINT THEY
BELIEVED THESE WOULD NOT BE
DISCHROUSED HIRVE IT
WASINATE AN ABSOLUTES RIGHT
OR VESTED IN THAT.
>> THEY WOULD HAVE A RIGHT,
THAT'S WHY I SAID IMMUNITY,
THE RIGHT THAT THEY WOULDN'T
BE SUED.
WHEN THEY DID THIS.
IF WOOERN NOW DEALING WITH
SOMEBODY SAYING NOW THEY
COULD BE SUED.
>> I BELIEVE THAT'S THE
CASE.
>> NOW WE HAVE A WHOEL
DIFFERENT --
>> I TEND TO AGREE WITH YOU
BECAUSE THERE IS NOTHING IN
THE AMENDMENT --
>> IS THAT RIGHT?
>> I BELIEVE THAT IS THE
CASE.
THERE IS NOTHING IN THE
AMENDMENT THAT SPECIFICALLY
ADDRESS SAID REMOVING THE
IMMUNITY FROM STUTE SO SAT
-- SUIT SO THAT IS TIED UP
IN THIS WHOLE DUE PROCESS
SUIT.
>> LIEUSIS TRYING TO FIND
OUT WHAT IS, GIVE IT IN THE
LIGHT MOST FAVORABLE TO THE
HOSPITAL WHAT IS THE
INTEREST THAT IS BEING, THAT
WAS PROTECTED BEFORE?
THE INTEREST IN NOT BEING
KNOWN THAT YOU YOURSELF WAS
THE ONE THAT WERE TELLING ON
THE DOCTORS SAY IT WAS A CO,
IT WAS SOMEBODY THAT

OBSERVED IT BUT WAS WORRIED
ABOUT HIS OR HER JOB?
IS THAT, THE RIGHT OR
INTEREST?

>> AGAIN I THINK IT IS
IMPORTANT TO RECOGNIZE THAT
INCOURT HAS FOUND THAT THE
INTEREST WAS AND THE
INTEREST THAT THOSE
RESTRICTIONS WERE TO FURTHER
WAS THE FREE FLOW AND THE
CANDID DISCUSSIONS IN THE
PEER VIEW PROCESS.
IT WASN'T SOOSHIELD
NEGLIGENT DOLLARS FROM --
DOCTORS FROM THE
CONSEQUENCES OF THAR ACTIONS
AND I THINK THAT IS CRITICAL
FOR THIS COURT TO RECOGNIZE.
IT WAS AT THAT TIME, WE WANT
FREE FLOW OF INFORMATION IN
THE PEER REVIEW PROCESS AND
THE WAY TO ALLOW THAT TO
OCCUR IS BY PLACING CERTAIN
LIMITATIONS AND --

>> THE INTEREST THAT THE
LEGISLATURE WAS ATTEMPTING
TO PROTECT WAS THE INTEREST
IN, THAT THE STATE HAS, IN
THERE BEING QUALITY HEALTH
CARE.

SCPP THE LEGISLATE!!IVE
DECISION WAS, -- LEGISLATIVE
DECISION WAS, AND AFFECTED
THAT SAID THAT THE TRADEOFF
WAS THAT IF YOU HEALTH CARE
PROVIDER OR YOU HEALTH CARE
FACILITY WILL GO AHEAD AND
HAVE A FULL DISCLOSURE, THEN
THIS INFORMATION THAT YOU'RE
USING IN THAT IS GOING TO BE
PROTECTED FROM DISCLOSURE SO
THAT IT WILL BE FLANK AND
CANDID.

-- FRANK AND CANDID SO THAT
YOU CAN FULFILL THAT ROLE
AND SO THAT THESE PEOPLE CAN
RELY UPON THE FACT THAT
THEY'RE NOT GOING TO BE PUT
IN THE DAYTONA BEACH NEWS
JOURNAL FOR WHAT THEY SAY.
AND HURT THEIR PRACTICE.

>> YES, YOUR HONOR, I
UNDERSTAND.

AND I THINK THAT, AGAIN, I
AGREE WITH YOU.

AND I THINK WE CAN ALL AGREE
THAT THERE ARE TWO COMPETING
INTERESTS HERE.

THE INTERESTS OF THE FREE
FLOW OF INFORMATION IN THE
PEER REVIEW PROCESS VERSUSES
THE INTEREST OF THE CITIZENS
OF THE STATE OF FLORIDA TO
KNOW ABOUT ADVERSE MEDKLING
INCIDENTS.

THE QUESTION ABOUT WHICH ONE
OUTWAYS THE OTHER, WHICH ONE
DOMINATES WAS ANSWERED BY
THE VOTERS OF THE STATE OF
FLORIDA BY PASSING
THEAMENDMENT.

>> BUT NOT QUITE.

>> BUT IN ORDER TO,.

>> JUSTICE QUINCE GO AHEAD.

>> IN ORDER TO FILL THE
PURPOSE OF THIS AMENDMENT,
DO WE HAVE TO REALLY
ABROGATE THE, THE FREE FLOW
OF THIS INFORMATION?

IT SEEMS TO ME THAT YOU CAN
REALLY GET TO WHAT THE
CITIZENS WERE VOTING FOR,
WHICH IS TO FIND OUT ABOUT
WHAT DOCTORS HAVE DONE IN
THE PAST WITHOUT GETTING TO
HOW OTHER PEOPLE HAVE
DISCUSSED WHAT THE DOCTOR
MAY HAVE DONE IN THE PAST.
SO ISN'T THIS, ISN'T THAT
WHAT THIS AMENDMENT IS
LIMITED TO, IS THOSE
INCIDENTS AND NOT HOW OTHER
DOCTORS VIEWED IT OR HOW THE
HOSPITAL VIEWED IT IN TERMS
OF HOW THEY WERE GOING TO
CREDENTIAL HIM AND ALL OF
THOSE THINGS.

>> I TEND TO AGREE THAT
THERE IS SOME.

IT'S NOT OPENING THE DOORS
AND GETTING EVERYTHING.
THERE IS A LIMITATION THAT'S
INCLUDED IN THE AMENDMENT
REGARDING ISSUES REGARDING
ADVERSE MEDICAL INCIDENTS
BUT I ALSO THINK IT'S
IMPORTANT, YOU KNOW, TO

RECOGNIZE THERE WAS A NOTICE OF SUPPLEMENTAL AUTHORITY FILE ADCOUPLE DAYS GO CONCERNING THE COMMITTEE DISCUSSIONS ABOUT THE STATUTE THAT WAS MULTIPLY PASSED AND IN THERE, THERE'S A ROEFRNS THAT KENTUCKY ASTATE HAS OPEN RECORD OF PEER REVIEW LAWS. CERTAINLY, AGAIN, THE QUESTION IS NOT, DOES THE INTEREST OF KEEPING THESE THINGS RESTRICTED OVERCOME THE INTEREST OF THE PUBLIC BECAUSE THAT'S BEEN DECIDED. AND THE QUESTION NOW BECOMES, OR, OR WE'RE TRYING TO FIGURE OUT, WHAT IS THE RIGHT TO ACCESS? AND AND IT'S BEEN CLEARLY EXPRESSED AND SO I THINK TO, TO SUGGEST THAT THE SKY IS FALLING, PEER REVIEW WILL BE DESTROYED AND DOCTORED WILL NOT BE CANDID, NUMBER ONE, WOULD SUGGEST THEY ARE NOT WILLING TO LIVE UP TO THEIR DUTIES UNDER THE STATUTES TO ENGAGE IN THE PRAUSSING, BUT NUMBER TWO, SO, IF, THERE IS A CHANGE IN THE WAY THESE THINGS ARE APPROACHED THAT'S WHAT THE VOTERS INTENDED AND THAT'S WHY THIS AMENDMENT BECAME LAW.

>> LET ME MAKE SURE I UNDERSTAND IT. YOU SEEM TO BE -- YOU ARE TALKING ABOUT INTEREST. A BROAD GENERIC INTEREST OF THE STATE OF FLORIDA IN A PROCESS. THAT'S WHAT YOU HAVE JUST DESCRIBED RATHER THAN INTRS OF ANY ENTITY OR INDIVIDUALS IN THE LAW AS IT EXISTS AND THAT'S WHERE I SEE A MAJOR DISTINCTION HERE THAT WE ARE TALKING ABOUT. THAT'S WHAT I THOUGHT WENT TO THE HEART OF A RETROACTIVE ANALYSIS.

>> AND AGAIN, THE QUESTION

BEING THAT BECAUSE THERE WAS AN EXPECTATION THAT THESE WOULD NOT BECOME PUBLIC DOES THAT RISE TAVESTED RIGHT WHICH IS THE ISSUE HERE.

AND, AND FRANKLY, YOUR HONOR, IF YOU LOOK AT THE BODY OF CASE LAW WHERE VESTED RIGHTS HAVE BEEN FOUND, IT'S SITUATION WHERES A JUDGMENT IS IN SOMEONE'S HANDS, AND THE LAW CHANGES WHERE SOMEHOW THAT JUDGMENT WILL BE TAKEN AWAY.

THAT IS A VESTED RIGHT. THE EXPECTATION, AND I THINK WE CAN ALL AGREE, THE STATUTES HAVE BEEN AMENDED BY THE LEGISLATURE NUMEROUS TIMES OVER THE YEARS.

THEY, THEY HAVE THE RIGHT AND THE LEGISLATURE CERTAINLY COULD'VE SAID, YOU KNOW WHAT, WE WANT TO HAVE OPEN RECORDS REGARDING PEER REVIEW.

THIS COULD'VE HAPPENED.

>> WE ARE TALKING ABOUT RETROACTIVITY NOW.

FOR THE FUTURE, THEY CAN SAY WE ARE GOING TO HAVE OPEN EVERYTHING, THEY CAN SAY THERE'S NO ATTORNEY-CLIENT PRIVILEGE FOR THE FUTURE.

THE QUESTION S DOES THAT RELATE TO THE PAST, AND I GET BACK TO WHAT THE SUPREME COURT SAID, YOUR ARGUING THAT THE, THE VOTEVERS ALREADY DETERMINED WHICH SIDE THEY'RE ON ON THAT IN THE BALANCING PROCESS, BUT WE ALSO HAVE TO CONSIDER THE CONSTITUTIONAL OVERLAY AND THE SUPREME COURT SAYS THAT OVERLAY HAS TO CONSIDER SETTLED EXPECTATIONS, FAIR NOTICE, AND REASONABLE RELIANCE.

AND I DON'T SEE HOW WE CAN SAY THAT PEOPLE DID NOT REASONABLY RELY ON THE FACT THAT THIS PEER REVIEW PROCESS WAS ALL CONTAINED IN

A CONFIDENTIAL ARENA.

>> WELL, YOUR HONOR, AGAIN,
I WOULD -- MY TIME IS JUST
ABOUT UP.

I WOULD ONLY ANSWER BY
SAYING, YES, THAT THERE IS
THE ISSUE THAT PEOPLE DID
HAVE THE STATUTES IN PLACE
AT THAT TIME.

BUT GIVEN THE ANALYSIS THAT
THIS COURT HAS GAN THROUGH
ON NUMEROUS OCCASIONS IT
DOESN'T IMPLICATE DUE
PROCESS IN THE WAY A TRUE
PRIVILEGE WOULD AND
FURTHERMORE IT DOES NOT RISE
TO THE LEVEL BEING BEYOND A
EXPECTATION THAT THEY RELY
TOND AND IT IS NOT A VESTED
RIGHT.

>> LET ME SEE IF I CAN
CAPTURE IT.

THERE IS NO VESTED INTEREST
THAT FLOWS TO ANY PERSON OR
ANY ENTITY OR ANYPLACE OTHER
THAN JUST THE OVERALL STATE
INTEREST BASED ON THESE
STATUTES?

IS THAT THE SUMMARY?

>> I BELIEVE THAT'S THE
CASE.

THANK YOU, YOUR HONOR.

>> YOUR HONOR, AS I THINK A
CONSENSUS HAS EMERGED AMONG
EVERYBODY.

THE JUSTICES AND THE
PARTIES.

THAT THE LEGISLATURE CAN
REASONABLY IMPLEMENT A
CONSTITUTIONAL AMENDMENT.

I DON'T THINK THAT ARE
DEBATABLE AND A VERY GOOD
QUESTION WAS ASKED.

WHY THE WHOLESALE
INVALIDATION OF SECTION
381028 BY TWO DISTRICT
COURTS OF APPEAL ON THE
THIRD ONE ACTUALLY NOW?

WHEN, WHY NOT GO, AND DRILL
DOWN TO WHAT PARTICULAR
PROVISIONS THERE ARE?

AND I THINK THE ANSWER IS
THAT YOU EXACTLY HAVE TO DO
THAT.

AND MR. EQUCELLS PROVIDED THE BASIS.

YOU ASKED HIM FOR AN EXAMPLE, AND HE GAVE ONE. THE EXAMPLE HE GAVE IS A PARAPHRASE OF SUBSECTION 7 A OF SECTION 328.018.

IN OTHER WORDS -- 28.

THAT IS, THE LEGISLATURE REASONABLY CONSIDERED THIS. JUST TWO DAYS AGO, THE FIRST DISTRICT COURT OF APPEAL, IN AVANT VILLA v. BRIDER SAID WE'RE GOING TO LOOK AT INDIVIDUAL PROVISIONS AND THERE'S NO CONFLICT WITH ANYTHING WITH REGARD TO THE PROVISION THEY HAD IN FRONT OF THEM AND SUSTAINED A PROVISION.

DESPITE A PANEL WHICH HAD STRUCK THE WHOLE STATUTE, OUT OF THAT VERY STATUTE. SO WHAT DOES THIS -- AND OF COURSE, THE ORAL COUNSEL FOR THE ACADEMY OF FLORIDA TRIAL LAWYERS TESTIFIED IN THE MATERIALS YOU HAVE IN FRONT OF US.

BUT, OF COURSE, HIS WORDS, THE LEGISLATURE CAN SUPPLEMENTAL, CLARIFY, AND EXPRESS LEGISLATIVE INTENT, AND THE COURTS WILL HAVE TO GIVE IT, QUOTE, GREAT DEFERENCE, ACCORDING TO MR. JEFF.

SO WHAT ARE WE REALLY TALKING ABOUT?

EVEN IN THE NEW ERA THAT YOU HEARD MENTIONED, QUALITY HEALTH CARE IN FLORIDA DEPENDS ON OPEN AND FREE COMMUNICATION IN THE PEER REVIEW, THE CREDENTIALING, THE QUALITY ASSURANCE, AND THE RISK MANAGEMENT PROCESSES.

>> IS THAT THE INTEREST WE ARE TALKING ABOUT THAT --

>> NO, IT IS THE INDIVIDUAL.

I'M GLAD YOU CLARIFIED.

AMENDMENT 7 STANDS AT CROSS PURPOSES.

WITH THAT PEER REVIEW AND
QUALITY ASSURANCE PROCESS,
AND NEEDS HARMONIZATION.
IT DOESN'T NEED TO BE A THIS
OR A THAT AS YOU JUST HEARD
T. NEEDS HARMONIZATION.
WHO IS BEST EQUIPPED TO DO
THAT?

A TRIAL COURT IN A DISCOVERY
DISPUTE ERN IN A MEDICAL
MALPRACTICE CASE WITH
VIRTUALLY NO RECORD AS WE
HAVE HERE?

OR THE FLORIDA LEGISLATURE
IN THE CAULDRON OF ITS
LEGISLATIVE PROCESS WITH
DELIBERATION, DEBATE, AND
INPUT FROM EVERYBODY WITH
ENOUGH INFORMATION AND THE
BACKGROUND OF WHAT THEY ARE
TRYING TO ACCOMPLISH WITH
OPEN COMMUNICATIONS?

>> YOU ARE NOT ARGUING THAT
THE LEGISLATURE CAN
DETERMINE WHETHER THE
AMENDMENT IS RETROACTIVE?

>> NO, YOUR HONOR, WHAT I'M
SAYING IS SECTION 381.028
WAS A VALID --

>> CAN YOU IMPLEMENT --

>> REASONABLY IMPLEMENT.

>> AND TO THE EXTENT THAT
YOU CONCLUDE THAT IT IS
INCONSISTENT.

THAT IS THE TEST THAT WE
AGREE APPLIED.

SEVER THAT PROVISION BUT
DON'T THROW OUT THE WHOLE
STATUTE.

YOU HAVE TO.

AND WE URGE YOU TO FOSTER,
TO FIND A WAY TO MAINTAIN
THAT WHICH, YOU SO OFTEN
SAID IN THE LEGISLATURE HAD
FOR 20 YEARS WHICH IS THAT
WE HAVE TO HAVE QUALITY CARE
THROUGH THE PEER REVIEW
PROCESS, RISK MANAGEMENT,
CREDENTIALING, QUALITY
ASSURANCE WITH OPEN
COMMUNICATIONS.

THANK YOU FOR YOUR TIME.

>> YOU'RE SAYING THE
LEGISLATURE --

>> THE LEGISLATURE --
>> EXTENSIVE REGULATORY
SCHEME HERE AS LONG AS IT
DOESN'T CONFLICT WITH THE
PROVISIONS OF THIS
AMENDMENT.

>> I THINK WE AGREE WITH
THAT.

I DON'T KNOW WHY THE TWO
DISTRICTS COURTS FOUND IT
NECESSARY TO REACH BEYOND
THAT AND INVALIDATE AN
ENTIRE STATUTORY SCHEME.
THANK YOU, YOUR HONORS, FOR
YOUR ATTENTION.

>> THE COURT WILL TAKE THE
CASE UNDER ADVISEMENT.