

# AkerAlert

## Healthcare Law

# Analysis of Florida Hospital Waterman v. Buster

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**The Florida Supreme Court in reviewing two lower court decisions has held that Article 10, §25 of the Florida Constitution, known as Amendment 7 passed in November 2004, was clear in its intent that 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. An "adverse medical incident" is defined to mean 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. This includes but is not limited to those incidents that are required by state or federal law to be reported to any governmental agency or body, 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 such committees.

The Florida Supreme Court went further in stating that this amendment mandates access to medical incident records that were in existence at the time the amendment became effective. Succinctly, while it is described as a "retroactive" implementation, the Supreme Court indicated that in its opinion the use of the terms in the Amendment indicate that the Amendment was intended to apply to existing records. The purpose of Amendment 7 plainly contemplated that its application would provide access to existing records by overriding and supplanting existing statutory provisions that limited access. The chief purpose of Amendment 7 was to do away with legislative restrictions on Florida patient's access to medical provider's "history of acts, neglects, or defaults" because such history "may be important to a patient". One conclusion was that there was no vested right created by the

statutory guarantee of confidentiality previously afforded the reports of adverse medical incidents created by and for peer review committees at issue here. This mere expectation of the continuance of a legislative policy did not create a sufficient right for the patients to be denied access to the records. Additional bases for this conclusion are that there have always been exceptions to the production of certain material for state administrative agencies; disciplinary action against a provider that is reported to the State; broad disclosure occurring within the medical community; and Federal Courts having held that even the limited statutory exemptions at issue may not be invoked to prevent disclosure or admission of the proceedings in federal cases. The right claimed by hospitals and providers are neither fixed nor vested because they were also subject to modification or elimination at any time by the Legislature.

Finally, the majority opinion struck down several provisions in the Florida

Statutes which were put in place for the purpose of implementing Amendment 7. These provisions that are found in the implementing statute include that 1) only final reports are discoverable. The Amendment provides for any records relating to adverse medical incidents and they are subject to discovery; 2) the statute indicated that disclosure is only required of final reports relating to the same or substantially similar condition, treatment, or diagnosis with that of the patient requesting access. The Amendment does not; 3) the statute indicated that production is limited to only those records generated after November 2, 2004. The Amendment has no such limitation; and 4) the statute indicated that it will not affect existing privilege statutes. The Amendment overrides those. The Supreme Court continued that in addition to those four limitations that the statute provides, patients can only access the records of the facility or provider in which they are a patient. This limitation is not contained within the Amendment. Additional exclusions were the provisions indicating that all existing laws concerning the discoverability or admissibility into evidence of records and adverse medical incidents and any judicial administrative proceeding would remain in full force and effect. The Amendment has no such limitation. The majority of the Supreme Court

concluded that the unconstitutional subsections may be limited without the need to strike down the entire implementing statute.

In a pointed concurring and dissenting decision, three Justices agreed that the Amendment was self-executing. However, they dissented regarding the Amendment's retroactive application. In citing numerous reasons why a retroactive application of law is disfavored, the three dissenting Justices indicated that the majority simply cast aside all of the precedent to reach its result. In the dissent, Justice Wells noted neither the Amendment, its declared purpose, nor the summary given to the voters explicitly addressed retroactivity. In addressing the vested rights portion of the decision, the dissenters relied upon the prior Supreme Court decision in *Cruger* indicating that the statutes in question did create a statutory privilege. The dissent indicated the majority here is plainly in error. They found that this extraordinary and troubling holding

is that when a statutory privilege is repealed, then all communications made during the period when the privilege did exist are unclothed of their privilege. Numerous privileges created by statutes were cited including those of journalist's privilege; psychotherapist-patient privilege; sexual assault counselor-victim privilege; privilege with respect to communication to clergy; and even the lawyer-client privilege. In the dissent, Justice Wells surmised that privileged communications will have a whole new character now that the communications are exposed to future disclosure. Justice Wells concluded people who complied with the statutory right clearly had an equal right to rely on the State's promise that records made while the confidentiality applied would remain confidential. By this decision, the State broke its promise.

*Please contact your Akerman attorney, or Kirk Davis, if you have any questions.*

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