IN THE CIRCUIT COURT OF THE
18th JUDICIAL CIRCUIT IN AND FOR
BREVARD COUNTY, FLORIDA

CIVIL DIVISION

CASE NO: 05-2004-CA-018363

ROSALINDA QUNINE, Individually and as PERSONAL REPRESENTATIVE OF THE ESTATE OF LEROY QUNINE,
Plaintiff,

v.

JOSEPH STERLING, M.D. and MELBOURNE SURGERY CENTER, L.P., d/b/a HealthSouth Melbourne Surgery Center,
Defendants.
_______________________________/

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT, MELBOURNE SURGERY CENTER, L.P.'S OBJECTIONS TO AMENDMENT 7 DISCOVERY

NOW COMES the Plaintiff, ROSALINDA QUNINE, as Personal Representative of the Estate of Leroy Qunine, and files her Memorandum of Law in Opposition to Defendant, Melbourne Surgery Center, L.P.'s Objections to Plaintiff's Request to Produce Dated April 9, 2008 and Objections to Plaintiff's Interrogatory Dated April 9, 2008, all involving discovery of adverse medical incidents under Amendment 7, stating as follows:

1. On April 9, 2008, the Plaintiff served a Request to Produce and a Set of Interrogatories. Both seek discovery regarding adverse medical incidents which are now indisputably available to patients under Article 10, section 25 of the Florida Constitution, commonly referred to by its ballot numeration "Amendment 7."

2. Amendment 7 provides:

§ 25. 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. On March 6, 2008, the Florida Supreme Court upheld Amendment 7 against various challenges, holding that it is self-executing, applied to records created before its adoption in 2004, and rendered various conflicting Florida Statutes unconstitutional, including a statute purporting to "implement" the amendment, Fla. Stat. § 381.028. Florida Hosp. Waterman, Inc.

v. Buster, – So.2d –, 33 Fla. L. Weekly S154, 2008 WL 596700 (Fla. 2008). Rehearing and clarification was denied by the Florida Supreme Court on May 12, 2008.

4. In the subject discovery, the Plaintiff sought production of all records of adverse medical incidents regarding the Plaintiff, his various healthcare providers including Dr. Sterling and seven nurses involved in his care, and regarding any post-operative cardiac arrest from January 1, 2004 to date. The request provided for the identities of patients other than the Plaintiff's to be redacted as required by Amendment 7 and federal law. They also specifically requested all "notes, records, summaries, diary entries, and other recorded recollections of any kind prepared by the healthcare providers involved in Leroy Qunine's care at the defendant Melbourne Healthsouth Surgery Center" which were not included in the medical chart. Finally, the Plaintiff's interrogatory asked whether the Defendants or the nurses involved in Mr. Qunine's care had ever been "the subject of a risk management, peer review, quality assurance, or other investigation or proceeding arising out of an adverse medical incident" and, if so, asked that all documents created as a result be identified. Copies of these discovery requests are attached hereto as Exhibits A & B, respectively.

5. On May 8, 2008, Defendant, Melbourne Surgery Center, L.P., served identical objections to these discovery requests, as follows:

> Objection; attorney/client privilege, prepared in anticipation of litigation, work product, irrelevant, not reasonably calculated to the discovery of admissible evidence. Please see Privilege Log for the years 1998, 1999, and 2000. However, there are no date limitations in any of these Requests [Interrogatories], so the undersigned prepared privilege logs only for the three years preceding the incident. The Defendant reserves its right to produce privilege logs for other years should the Court so require.

A copy of these objections are attached hereto as Exhibits C & D, respectively.[1]

6. As demonstrated herein, none of these objections have any substantive merit and they should be overruled. Each is discussed in turn.

7. Attorney/Client Privilege: Although in these objections, and in prior privilege logs, the Defendant hospital has claimed several documents are protected by the attorney/client privilege, it has never made a showing of such in the record. "[T]he burden of establishing the existence of the attorney-client privilege rests on the party asserting the privilege." Carnival Corp. v. Romero, 710 So.2d 690, 694 (Fla. 5th DCA 1998) (citations omitted). In the absence of a showing that any of the requested documents were prepared by or at the specific request of counsel, as opposed to being standard internal risk management/peer review/quality assurance documents created after an adverse medical incident (which are discoverable under Amendment 7), no attorney/client privilege can apply.

8. Prepared In Anticipation of Litigation, Work Product: As with the attorney/client privilege invocation, the burden is on the Defendant hospital to show that these records were prepared in anticipation of litigation, as opposed to being standard internal risk management/peer review/quality assurance documents created after an adverse medical incident (which are discoverable under Amendment 7), no work product privilege can apply.

9. Presumably the basis for this objection is the knee-jerk objection typically made by hospitals pre-Amendment 7 based upon Fla. Stat. § 395.0197(4), which provided that, inter alia, "[e]ach internal risk management program [of a hospital] shall include the use of incident reports to be filed with an individual of responsibility who is competent in risk management

[1]The objection to the interrogatory also objected claiming that "These interrogatories exceed the thirty interrogatories permitted by Fla. R. Civ. P. 1.340(a) and this Defendant did not stipulate or agree to allow Plaintiff a larger number of interrogatories than allowed under the rule...."

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techniques in the employ of each licensed facility.... The incident reports are part of the workpapers of the attorney defending the licensed facility in litigation relating to the licensed facility and are subject to discovery, but are not admissible as evidence in court . . ." (emphasis added). Thus the statute rendered hospital incident reports as "workpapers of the attorney" leading courts to broadly interpret this provision as allowing discovery of hospital incident reports only upon a showing of need and an inability to obtain this information without undue hardship, the test for invading fact work product. See, e.g., South Broward Hosp. Dist. v. Gaudia, 533 So.2d 880 (Fla. 4th DCA 1988) (involving the statute's predecessor, § 395.041(4), Fla. Stat. (1987)).

10. But this burden has been erased by Amendment 7 which now allow access to and requires disclosure of such records. See Florida Hospital Waterman, Inc. v. Buster, 932 So.2d 344, 352 (Fla. 5th DCA 2006) ("Amendment 7 is intended to change Florida law by eliminating those privileges to the extent that such information is discoverable during the course of litigation between a patient and his or her health care provider"), aff'd, 2008 WL 596700 (Fla. 2008); Advisory Op. to the Attorney Gen. Re Patients' Right to Know about Adverse Medical Incidents, 880 So.2d 617, 622 (Fla. 2004) (Amendment 7 "will affect this Court's procedural rules only to the extent that certain records currently classified as work product may have to be disclosed to certain persons").

11. Irrelevant and Not Calculated to Lead to the Discovery of Admissible Evidence: There can be no dispute that records regarding what happened to Leroy Qunine are highly relevant to the claims made in this case, and certainly the documents sought regarding other post-operative cardiac arrests and other adverse medical incidents suffered by other patients involving

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the hospital, Dr. Sterling, and the nurses involved in Mr. Qunine's care are potentially relevant and are certainly calculated to lead to the discovery of admissible evidence.

12. Indeed, the documents themselves, to the extent relevant, are admissible under Amendment 7. See Buster, 2008 WL 596700, at *11 ("the [implementing] statute . . . provides that 'all existing laws concerning the discoverability or admissibility into evidence of record of an adverse medical incident in any judicial or administrative proceeding remain in full force and effect.' § 381.082(2), Fla. Stat. (2005). Because these restrictions . . . conflict with the provisions of amendment 7, these statutory restrictions cannot stand") (emphasis added).

13. Finally, the Defendant hospital's reliance upon traditional discovery objections under Fla. R. Civ. P. 1.280 are misplaced as the Plaintiff's right to obtain these documents is not premised upon the Rules of Civil Procedure, but instead the Florida Constitution, to wit: Amendment 7. Thus, even if the Defendant's objections as to relevance (which itself is never a proper discovery objection) or that the request is not calculated to lead to admissible evidence had any merit, such objections are trumped by the Plaintiff's unlimited constitutional right to obtain these records. See Morton Plant Hosp. Ass'n, Inc. v. Shahbas, 960 So.2d 820, 825, 826 (Fla. 2d DCA 2007) ("[t]here is no requirement that the records discoverable under Amendment 7 be relevant to any pending litigation. * * * Whether the request is unduly burdensome is not a relevant consideration under Amendment 7").

CONCLUSION

For the foregoing reasons, and based upon the foregoing authorities, the Plaintiff, Rosalind Qunine, as Personal Representative of the Estate of Leroy Qunine, respectfully requests that Defendant, Melbourne Surgery Center, L.P.'s objections to the subject discovery be

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overruled and that it be compelled to produce the requested documents and information forthwith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. mail and facsimile this 20th day of May, 2008 to all counsel on the attached Service list.

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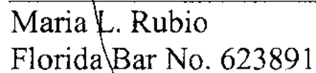

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Florida Bar No. 623891

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Package Information

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