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SPECIAL REPORT: FLORIDA COURT PENDING CASES

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Florida Hospital Waterman Inc. d/b/a Florida Hospital Waterman v. Teresa M. Buster, as personal representative of the estate of Larry Buster, deceased, Case No. SC06-688

Notami Hospital of Florida Inc., d/b/a Lake City Medical Center v. Evelyn Bowen, et al., Case No. SC06-912

The extent of patient access to confidential hospital records will be determined by the Florida Supreme Court in a case that could have a major impact on medical malpractice litigation.

Plaintiff attorneys claim the "Right to Know" constitutional amendment approved by voters in 2004 should be interpreted broadly and applied retroactively.

They want access through discovery in litigation to all documents about medical errors and physician discipline created before passage of the measure.

But hospitals, which vehemently opposed the amendment, argue the amendment applies only to documents from its effective date forward. They also contend 2005 legislation limiting the scope of the amendment is both constitutional and necessary to make it workable.

The issue comes before the justices after the 1st and 5th District Courts of Appeal declared the enabling legislation unconstitutional in 2006 and opened the records to discovery.

The 5th DCA certified several questions of great public importance to the Supreme Court in the case of *Waterman v. Buster*. The 1st DCA in *Notami v. Bowen* certified a conflict with the 5th on retroactivity.

Hospitals argue 'Right to Know' law in 2004 not retroactive

Now three issues await judgment:

- Is the amendment retroactive?
- Can patients seek records through discovery?
- Was the amendment self-executing, making the legislation unconstitutional?

In the two underlying cases filed before 2004, plaintiffs sued hospitals and doctors for actions that allegedly injured them or killed loved ones. After passage of the referendum, plaintiffs sought records about adverse medical incidents and other information.

In *Waterman*, the hospital moved for a protective order. In *Notami*, the plaintiffs in three medical malpractice suits consolidated for discovery filed a motion to compel production of records.

Shortly after oral arguments in June, *Notami* and the plaintiffs reached a confidential settlement. The parties filed a motion to dismiss the appeal, but the justices denied the request in September. Attorneys said the court does that only when the case deals with a matter of great public importance.

Miami attorney Thomas Equels, who represented the plaintiffs against *Notami*, said the amendment is necessary in today's world of managed care where patients don't have close relationships with their surgeons.

"Patients have a right to know the track record of the people they are entrusting their health and in some instances their lives," the Holtzman Equels attorney said. "It is of paramount importance that access to this information be free and unfettered."

The amendment wouldn't benefit patients if it applied only to documents created after passage, Equels said. He also speculated it could lead hospitals to adopt new record-keeping procedures to hide misconduct.

Notami attorney Stephen Bronis of Miami said hospitals are fighting to preserve their quality of care, and the amendment hinders

the peer-review process because people won't be honest without confidentiality.

The Zuckerman Spaeder partner warned plaintiff attorneys will "inundate hospitals with abusive and overbroad requests" in discovery and force hospital staffs to search for records as opposed to care for patients if the court allows discovery.

Waterman's attorney Arthur England, a former Florida Supreme Court justice, said if the justices find the amendment is self-executing, they shouldn't strike down the entire statute, only the few provisions that create conflicts.

"It was perhaps very noble of people of Florida to say they want access to the reports of medical incidents," said the Greenberg Traurig shareholder in Miami. But "there has to be some practical limitation for what the patient can get and should get." ■



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Miami attorney Thomas Equels says, 'Patients have a right to know the track record of the people they are entrusting their health.'