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IN THE SUPREME COURT OF FLORIDA

AMBER EDWARDS,

Petitioner,

Case No. SC15-1893
District Court Case No. 2D14-3450

v.

BARTOW HMA, LLC d/b/a
BARTOW REGIONAL
MEDICAL CENTER, and
LARRY D. THOMAS, M.D.,

Respondents.

ANSWER BRIEF OF RESPONDENT, BARTOW HMA, LLC d/b/a BARTOW REGIONAL MEDICAL CENTER

On Discretionary Review of a Decision of the
Second District Court of Appeal

MCCUMBER, DANIELS, BUNTZ,
HARTIG, & PUIG, P.A.
Amy L. Dilday, B.C.S.
Florida Bar Number: 0018035
4401 West Kennedy Boulevard, Suite 200
Tampa, Florida 33609
Telephone: (813) 287-2822
Facsimile: (813) 287-2833
Attorneys for Bartow HMA, LLC
d/b/a Bartow Regional Medical Center

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STATEMENT OF THE FACTS AND OF THE CASE

In 2004, the voters of the State of Florida passed a ballot initiative "known as amendment 7, the Patients' Right to Know About Adverse Medical Incidents." *Fla. Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478, 480 (Fla. 2008). The Ballot Summary for Amendment 7 stated, in part:

> Current Florida law restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice. This amendment would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death.

Fla. Dep't of State, Div. of Elections ("*Div. of Elections Website*"), http://dos.elections.myflorida.com/initiatives/fulltext/pdf/35169-3.pdf (last accessed Jan. 3, 2017) (a copy of the proposed amendment and ballot summary is provided in the appendix to this Answer Brief ("AB App.")); *see also In re Advisory Opinion to the Atty. Gen. re Patients' Right to Know about Adverse Medical Incidents* ("*Patients' Right to Know*"), 880 So. 2d 617, 619 (Fla. 2004) (quoting the Ballot Summary). The proposed amendment included a Statement and Purpose, which was not added to the Constitution after the ballot initiative passed. *See Buster*, 984 So. 2d at 488 n.5. Amendment 7's Statement and Purpose provided, in part:

> 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 facilities' 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.

(AB App.); *Div. of Elections Website*; *Patients' Right to Know*, 880 So. 2d at 618.

Prior to the entry of the Order on review, Respondent, Bartow HMA, LLC d/b/a Bartow Regional Medical Center ("the Hospital") provided Petitioner with copies of its adverse incident reports in response to an earlier court order on Plaintiff's Amendment 7 request. *See* (Initial Brief Appendix ("IB App.") G:pp. 9-12; IB App. L:transcript pp. 16-20, 22, 26-27, 34, 37, 44)) (discussing Petitioner's trial counsel's requests for admissions based on the information contained in the incident reports he characterized as "the litany of reports"). As to the Hospital's objections to producing other documents, the trial court determined that the documents were correctly characterized as privileged but that it would conduct an in camera inspection to determine whether Amendment 7 required them to be produced. (IB App. L:transcript pp. 46-48).

The trial court inspected thousands of the hospital's peer review and other committee documents, which resulted in the June 25, 2014 order at issue. *See generally* (IB App. H:Exhibit D at Privilege Log A; IB App. N:Exhibit 1).

Complying with that order, in addition to the adverse incident reports and records previously provided, the Hospital produced documents from multiple hospital committees, including the Hospital's peer review committee. *Compare* (IB App. H:Exhibit D at Privilege Log A) (listing, among others, peer review documents, other documents from peer review committee meetings, miscellaneous case reviews, risk management reports, chart review documents, documents from medical executive committee meetings, and surgical committee meeting documents); *with* (IB App. N:Exhibit 1 at pp. 2-5) (detailing the Privilege Log A documents ordered to be produced); *see also* (IB App. N:¶ 3) (noting the Hospital's compliance with the court's order). The Hospital also produced over five thousand (5000) pages of redacted medical records related to adverse incidents, which were listed on Privilege Log B. *See* (IB App. H:Exhibit D at Privilege Log B, # 1-14); (IB App. N:Exhibit 1 at pp. 5-6) (detailing the Privilege Log B documents ordered to be produced); *see also* (IB App. N:¶ 3) (noting the Hospital's compliance with the exception of the documents that are at issue, listed on Privilege Log B # 15, 16, 20).

Accordingly, the only documents at issue are the expert opinions obtained at the request and direction of the Hospital's external counsel. (Record on Appeal ("R"):pp. 295-411). These documents are entitled "Peer Review Report," and were listed on Privilege Log B as "attorney requested external peer review." *Id.*; (IB

App. H:Exhibit D at Privilege Log B, # 15, 16, 20). Despite the title on these documents, their substance reflects that they are expert opinions on whether, based the expert's review of certain medical records, the standard of care had been met. (R:pp. 295-411). These opinions were prepared at the request of the Hospital's outside counsel. (R:pp. 321-22); *see also Bartow HMA, LLC v. Edwards*, 175 So. 3d 820, 824 (Fla. 2d DCA 2015) (IB App. S:pp. 5-6).

STANDARD OF REVIEW

"Statutory and constitutional construction are questions of law subject to a de novo review." *W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 8 (Fla. 2012). To the extent that this Court reviews whether the Second District Court of Appeal correctly interpreted and applied Amendment 7 to the documents at issue, the standard of review is de novo.

Rather than stating the standard governing this Court's review, Petitioner used her Standard of Review section to include additional argument as to why she believes the Second District Court of Appeal erred—by improperly granting Certiorari review. This is not the type of error reviewable by this Court. *See generally*, Art. V, §§ 3(b)(3), 4, Fla. Const. (outlining this Court's limited jurisdiction); Fla. R. App. P. 9.030(a)(1)(A)(ii), (2)(A).

Further, the Second District Court of Appeal did not err. It is well established that appellate courts have certiorari jurisdiction when a trial court

departs from the essential requirements of the law and orders the production of privileged documents. *See, e.g., Bartow HMA, LLC v. Kirkland*, 126 So. 3d 1247, 1251-52 (Fla. 2d DCA 2013); *Columbia Hosp. Corp. of S. Broward v. Fain*, 16 So. 3d 236, 239 (Fla. 4th DCA 2009) (noting that inappropriate discovery of privileged materials "cannot adequately be remedied on direct appeal."). The precise question at issue, whether certain documents fall within the scope of Amendment 7 discovery, has been discussed and resolved on multiple occasions through the district courts' certiorari review of trial court Amendment 7 discovery orders. *See, e.g., id.; Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 826 (Fla. 2d DCA 2007); *See*, 79 So. 3d at 8 (Fla. 2012).

SUMMARY OF THE ARGUMENT

As a preliminary matter, a review of Petitioner's Initial Brief reveals that she failed to include arguments supporting her claims for the basis of this Court's jurisdiction. For instance, rather than arguing that the Second District Court of Appeal's decision resulted from an erroneous construction of article X, section 25 of the Florida Constitution (Amendment 7), as she did in her Jurisdictional Brief, Petitioner's arguments are focused on her "disagreement" with the Second DCA's application of Amendment 7 to the documents at issue. Additionally, the Initial Brief fails to demonstrate any express or direct conflict between the opinion at issue and any other Florida case, including *Florida Eye Clinic, P.A. v. Gmach*, 14

So. 3d 1044 (Fla. 5th DCA 2009). Because Petitioner's Initial Brief does not support her jurisdictional arguments—or provide a basis for this Court to exercise its discretionary jurisdiction—this Court should dismiss this case, having improvidently granted review.

The Second District Court of Appeal's decision correctly applied Amendment 7 to the facts of this case. The intent of the voters in approving Amendment 7 is reflected in the proposed amendment's Ballot Summary and Statement and Purpose. From these documents, this Court has recognized that the provision's "primary purpose" is to eliminate statutory barriers to a patient's access to health care providers' records of adverse medical incidents. *In re Advisory Opinion to the Atty. Gen. re Patients' Right to Know about Adverse Medical Incidents* ("*Patients' Right to Know*"), 880 So. 2d 617, 621 (Fla. 2004); *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 488 (Fla. 2008). They reflect no intent to mandate "disclosure of opinion work product" or materials protected by the attorney-client privilege. *Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d 949, 953 (Fla. 3d DCA 2011).

The documents at issue are opinions prepared by an external physician review company at the request of the Hospital's outside counsel. *Bartow HMA, LLC v. Edwards*, 175 So. 3d 820, 824-25 (Fla. 2d DCA 2015) (IB App. S:pp. 5-6). They do not "memorialize" any adverse medical incident because, to the extent

they contain any facts at all, the facts were gleaned from the medical records provided by the Hospital's counsel. Unlike the Hospital's incident reports, these documents do not contain a record of the incident made by an employee with personal knowledge or with a statutory duty to record the incident. Further, the documents at issue do not contain opinions that were made by the Hospital's employees or agents.

Accordingly, the Second District Court of Appeal correctly found that the documents at issue were not made or received within the course of the Hospital's business—as that term is commonly construed—and, therefore, that they do not come within the ambit of Amendment 7. *Id.* at 824-25 (p. 6-7).

Because it found that the documents at issue were not within the ambit of Amendment 7, the Second DCA did not reach the questions of whether Amendment 7 preempts the work product doctrine as it applies to opinion work product or whether it preempts the attorney-client privilege. *Id.* at 826 (p. 9-10). Therefore, there is no decision on these issues before this Court for review.

If this Court does not dismiss this case because review was improvidently granted, it should affirm the Second District Court of Appeal's decision as having properly applied Amendment 7 to the documents in question.

ARGUMENT

Preliminary Issue: This Court improvidently granted review; Petitioner's Initial Brief does not support any basis for this Court's discretionary jurisdiction.

In her Brief on Jurisdiction, Petitioner claimed that this Court has jurisdiction over this case for two reasons: 1) because the Second District Court of Appeal erroneously construed article X, section 25 of the Florida Constitution (commonly referred to as "Amendment 7"), and 2) because the Second District Court of Appeal's decision "expressly and directly conflicts with" *Florida Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009); (IB App. T:p. ii).

This Court has discretionary jurisdiction to review a district court decision that "expressly construes a provision of the state . . . constitution." Art. V, § 3(b)(3), Fla. Const. A court's application of a "recognized, clear-cut provision of the Constitution" to "the facts of a particular case," however, does not invoke this Court's discretionary jurisdiction. *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958), *abrogated on other grounds by Kirk v. Baker*, 224 So. 2d 311 (Fla. 1969), *abrogation receded from by Ogle v. Pepin*, 273 So. 2d 391 (Fla. 1973). "Applying is not synonymous with Construing; the former is NOT a basis for our jurisdiction, while the Express construction of a constitutional provision is." *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973).

In her Initial Brief arguments, Petitioner does not discuss any principles of constitutional construction or claim that the Second District Court of Appeal's opinion departs from those principles. Rather, she merely contends that she "disagrees" with the Second DCA's application of Amendment 7 to the facts of this case. (IB:pp. 12, 16) (disagreeing with the court's conclusions that the documents were not created by a Hospital committee and relying on case law finding incident reports discoverable to claim that the documents here—which are indisputably not incident reports—should be discoverable). In substance, Petitioner is actually asking this Court to review the Second DCA's application of the constitution to these facts—a review that is beyond this Court's discretionary jurisdiction. *See Armstrong*, 106 So. 2d at 409.

Similarly, this Court has discretionary jurisdiction to review a district court decision that "expressly and directly conflicts with a decision of another district court of appeal." Art. V, § 3(b)(3), Fla. Const. Conflict jurisdiction, however, does not provide for a review of the correctness of the appellate court's decision. *Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962). Rather, it must stem from two cases that, if left to stand, would generate "confusion and instability among the precedents." *Id.* Therefore, if the conflict "cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise." *Id.*

If both the Second District Court of Appeal's decision at issue and the Fifth DCA's decision in *Florida Eye Clinic, P.A.*, are permitted to stand, there will be no confusion or instability among the precedents, and in her Initial Brief, Plaintiff does not claim that such a conflict exists. There is no conflict.

Here, the documents at issue are opinions prepared by an external physician review company at the request of the Hospital's outside counsel. *See* (R:pp. 321-22); *Bartow HMA, LLC v. Edwards*, 175 So. 3d 820, 824-25 (Fla. 2d DCA 2015) (IB App. S:pp. 5-6). In *Florida Eye Clinic, P.A.*, the court considered incident reports prepared by the clinic's risk manager to memorialize adverse medical incidents in the event lawsuits were filed. 14 So. 3d at 1048-49. The incident reports were never reviewed by counsel prior to litigation. *Id.*

While in both cases the health care provider claimed that the documents were intended to assist them in litigation, the nature of the documents is materially different. The documents at issue are opinions prepared by external physicians with: 1) no personal knowledge of and no authority to memorialize the facts of the incidents being reviewed, and 2) no agency relationship with the Hospital. In contrast, the *Florida Eye Clinic, P.A.* documents memorialized the facts of the incident as perceived by someone: 1) with personal knowledge of, or a statutory duty to record, those facts, and 2) who was employed by the health care provider.

14 So. 3d at 1048-49; *see also* §§ 395.0197(2), Fla. Stat. (requiring licensed facilities to hire a risk manager).

This fundamental difference in the nature of the documents and in the persons who procured them and who prepared them establishes that the different result in this case from the one in *Florida Eye Clinic, P.A.*, will not generate "confusion and instability among the precedents." *Kyle*, 139 So. 2d at 887. Accordingly, this case does not provide a basis for this Court's discretionary jurisdiction. *Id.*

Despite the claims in Petitioner's Jurisdictional Brief, her Initial Brief demonstrates that this case does not present this Court with a basis to exercise its discretionary jurisdiction. Accordingly, this Court should dismiss this case as review was improvidently granted.

Issue I *(Restated)*: The plain language of Amendment 7's Ballot Summary and Statement and Purpose reflect the intent of the people to do away with statutory restrictions on access to a health care provider's own investigations and documented history of acts that have or potentially could injure patients.

Amendment 7 provides patients with "the 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." Art. X, § 25(a), Fla. Const. Amendment 7 defines "adverse medical incident" by including reports of incidents that, under Florida Statutes, must be reported to governmental agencies and to a facility's

"peer review, risk management, quality assurance, credentials, or similar committee" or its representative. *Id.* at § 25(c)(3). Access, however, is not limited to only incidents that must be reported. The constitutional provision grants access to any records made or received in the course of a healthcare facility's business related to any adverse medical incident. *Id.* at § 25(a), (c)(3).

Prior to Amendment 7's passage, the statutes that required health care facilities to create and keep these types of reports also protected them from discovery. *See generally*, *Bartow HMA, LLC v. Kirkland*, 126 So. 3d 1247, 1253 (Fla. 2d DCA 2013) ("Amendment 7 trumps the application of the statutory discovery protections set forth in sections 395.0191, 395.0193, 395.0197, and 766.101 to the extent that documents for which those protections are asserted contain reports of adverse medical incidents."). Because the Second District Court of Appeal found that the reports obtained by the Hospital's outside counsel do not fall within the ambit of Amendment 7, it correctly held that they are not discoverable. *Edwards*, 175 So. 3d at 826 (IB App. S:p. 9).

"[W]hen this Court construes a constitutional provision, it will follow construction principles that parallel those of statutory interpretation." *W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 9 (Fla. 2012). "The polestar of a statutory construction analysis is legislative intent." *Id.* "As with statutory construction, a question with regard to the meaning of a constitutional provision must begin with

the examination of that provision's explicit language." *Id.* "If that language is 'clear, unambiguous, and addresses the matter at issue,' it is enforced as written." *Id.* (quoting *Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008)). If the language is ambiguous, however, or "does not address the exact issue, a court 'must endeavor to construe the constitutional provision in a manner consistent with the intent of the framers and the voters.'" *Id.*

Based on Amendment 7's plain language, and the language of its Ballot Summary and Statement and Purpose, this Court has recognized that the "primary purpose" of the amendment was to eliminate statutory barriers to accessing a health care provider's records relating to adverse medical incidents. *In re Advisory Opinion to the Atty. Gen. re Patients' Right to Know about Adverse Medical Incidents* ("*Patients' Right to Know*"), 880 So. 2d 617, 621 (Fla. 2004); *see also Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 488 (Fla. 2008) (concluding that the language of the Statement and Purpose, "and parallel language in other parts of the amendment and ballot summary make it abundantly clear that the chief purpose of amendment 7 was to do away with the legislative restrictions"). The amendment and its originating documents reflect no intent by the voters "to create a chilling effect within [the] legal profession by mandating disclosure of opinion work product" or materials protected by the attorney-client privilege. *Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d 949, 953 (Fla. 3d DCA 2011); *Fla. Eye Clinic, P.A.*,

14 So. 3d at 1050 ("We do not read amendment 7 as evincing an intent from the voters to eliminate the privilege of *opinion* work product."); *Patient's Right to Know*, 880 So. 2d at 621 ("[T]he amendment does not expressly affect . . . the attorney-client privilege, and there is no evidence of any intent to do so.").

When Florida's electorate approved Amendment 7, their decision was informed by the Ballot Summary and the text of the proposed amendment, which included its Statement and Purpose. *See generally Patients' Right to Know*, 880 So. 2d at 618-19; *see also* (AB App.); *Div. of Elections Website*. These are the same documents this Court relied on when it concluded that the voters' primary purpose in passing Amendment 7 was to do away with *statutory* restrictions—not all restrictions—on a patient's access to reports of adverse medical incidents.

Amendment 7 provides access to previously protected records whether or not the incident recorded is one that the statutes require to be reported to the state or reviewed by a committee. Art. X, § 25(c)(3) (defining "adverse medical incident). This flows well with the voters' intent to eliminate statutory restrictions, as some of the statutes affected by Amendment 7 require investigations but do not require that every investigation be reported or reviewed on another level. *See* §§ 395.0191 (requiring no reporting); 395.0193 (requiring only the investigations that lead to disciplinary action to be reported); 395.0197 (requiring all incidents to be

reported to the risk manager, but only certain types of incidents to be reported to a state agency); 766.101 (requiring no reporting).

That Amendment 7 permits access to only those adverse medical incident records made and received in the course of the health care facility's business also aligns with the voters' intent to do away with statutory restrictions. *See* Art. X, § 25(a). The previously protected records were ones that the statutes required a facility's own risk management programs or internal review and quality assurance committees to create as a condition of licensure. *See* §§ 395.0191 (requiring licensed facilities to establish procedures for obtaining staff membership and contemplating records of investigations and proceedings connected with those procedures); 395.0193(2) (requiring a peer review process as a condition of licensure, which includes investigations and reporting of disciplinary actions); 395.0197(1) (requiring licensed facilities to establish an internal risk management program that includes internal and external incident reporting); 766.101(2) (requiring cooperation with a medical review committee as a condition of licensure).

Accordingly, since Amendment 7's passage—and in accordance with its intent—any documents created or kept pursuant to these statutes, which relate to adverse medical incidents, are no longer protected from access by patients.

Amendment 7's plain language and this Court's interpretation of the constitutional provision does not support Petitioner's position that Amendment 7 eliminates all limitations on discovery of all documents relating to adverse medical incidents—even those made at the request of outside counsel. *See* (IB:pp. 10, 13). In support of her position, Petitioner cites *Amisub N. Ridge Hosp., Inc v. Sonaglia*, 995 So. 2d 999, 1001 (Fla. 4th DCA 2008), which noted, "As construed in *Waterman*, Amendment 7 removed any barrier to a patient's discovery of adverse medical incident information." Reading this select sentence from *Sonaglia* alone, however, does not accurately reflect this Court's *Waterman* holding, which was limited to only whether section 381.028, Florida Statutes, could preserve the statutory discovery restrictions Amendment 7 was expressly intended to eliminate. *See generally Buster*, 984 So. 2d 478; *see also Baldwin v. Shands Teaching Hosp. & Clinics, Inc.*, 45 So. 3d 118, 123 (Fla. 1st DCA 2010) (noting that Amendment 7 "abrogates" the statutes that previously protected the records). Thus, Petitioner has cited no authority that supports her contention that the electorate intended to eliminate protections other than those the legislature had put in place.

Issue II *(Restated):* The documents at issue are not adverse incident reports or documents created by the Hospital's peer review committee.

The records at issue are not incident reports created through the Hospital's risk management program pursuant to section 395.0197. The Hospital produced its incident reports prior to the entry of the order at issue, and incident reports were

not at issue in Petitioner's motion for an in camera inspection. *See* (IB App. G:pp. 9-12; IB App. L:transcript pp. 16-20, 22, 34, 37 44). The records at issue are not documents created by the Hospital's own peer review committee or any other Hospital committee. The Hospital produced, for the trial court's inspection, thousands of documents relating to adverse medical incidents from its peer review and other committees. *See* (IB App. N:Exhibit 1 at pp. 2-5). Although the documents at issue relate to "adverse medical incidents," they were obtained at the request of the Hospital's outside counsel and were not created as a result of statutory requirements. Further, the documents are not of a type relied on in the normal course of the Hospital's business. *See generally, Brown v. Int'l Paper Co.*, 710 So. 2d 666, 668 (Fla. 2d DCA 1998) (holding that a handwriting analyst's report created during the investigation of an alleged forgery was not made in the course of business).

Petitioner's argument that the physicians who created the documents at issue "should be considered a similar [hospital] committee" is unsupported by any valid factual or legal analysis. *See* (IB:p. 12). When a hospital's outside attorneys seek opinions as to adverse medical incidents—as is necessary to assist counsel in understanding the issues, assessing his or her client's potential liability, and advising the client on how to proceed—the resulting documents should not be treated as if they were made pursuant to the licensing statutes. Reviews conducted

at the direction of outside counsel to allow counsel to investigate potential claims and provide legal advice is outside of the course of the hospital's business—including its statutory duties to conduct risk management, quality assurance, and other peer reviews. *See generally Brown*, 710 So. 2d at 668.

Petitioner acknowledges that in this case, the Hospital "may have conducted the statutorily-required internal peer review." (IB:p. 13). She suggests, however, that under Amendment 7, a hospital should not be permitted to conduct only a "bare minimum" review. *Id.*

If a hospital's conduct under the licensing statutes is insufficient, however, it is a matter for the licensing board, not a discovery matter for the courts. The purpose of the statutes affected by Amendment 7 is to ensure that health care facilities are reviewing adverse medical incidents and conducting risk management and quality improvement activities. *See Cruger v. Love*, 599 So. 2d 111, 113 (Fla. 1992) ("The Florida Legislature enacted these peer review statutes in an effort to control the escalating cost of health care by encouraging self-regulation by the medical profession through peer review and evaluation." (citing *Holly v. Auld*, 450 So. 2d 217, 219-20) (Fla. 1984)). That patients now have access to the documents related to adverse medical incidents is ancillary to the underlying objective of these statutes. Amendment 7 was passed to do away with protections on the records created under these statutes, not to require health care facilities to create additional

records or to provide patients with information that is protected by reasons other than the former statutory bar on discovery. *See generally Patients' Right to Know*, 880 So. 2d at 621; *Buster*, 984 So. 2d at 488.

Issue III *(Restated)*: The documents at issue were not made or received in the course of the Hospital's business.

Any time a hospital's outside counsel sends selected medical records for a standard of care opinion, the records would relate to adverse medical incidents as that term is broadly defined by Amendment 7. *See* Art. X, § 25(c)(3) (defining "adverse medical incident" as "medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility . . . that caused or could have caused injury to or death of a patient"). The Second District Court of Appeal correctly held that the mere fact that the expert's opinion relates to adverse medical incidents does not place it within Amendment 7's ambit such that it must be produced at a patient's request. *See Edwards*, 175 So. 3d at 825-26 (IB App. S:pp. 7-9). While Amendment 7 requires the production of records "relating to any adverse medical incident," it limits what is required to be produced to only those "records made or received in the course of business by a health care facility." *See* Art. X, § 25(a).

As the Second District Court of Appeal noted, the term "course of business" is not defined in Amendment 7. *Edwards*, 175 So. 3d at 824-25 (IB App. S:p. 6). Of course, it has a plain meaning. *Id.* Courts have noted that records kept in the

course of business include: 1) records kept pursuant to a statutory duty, and 2) records regularly relied on to conduct business activities. *Id.* (pp. 6-7) (citing *Yisrael v. State*, 993 So. 2d 952, 958 (Fla. 2008); *Bank of N.Y. v. Calloway*, 157 So. 3d 1064, 1071 (Fla. 4th DCA 2015)). "Records created by an expert retained" for litigation purposes do not fulfill a hospital's statutory duty, nor do hospitals regularly rely on these types of records to conduct their ordinary business activities. *Id.* (citing §§ 395.0193, 395.0197; *Brown*, 710 So. 2d at 668).

Inexplicably, Petitioner claims that because a health care facility or provider's incident reports are discoverable under Amendment 7, the documents at issue should also be produced. There is no dispute, however, that the Hospital produced its incident reports before the order at issue was entered. *See* (IB App. G:pp. 9-12; IB App. L:transcript pp. 17, 20, 22, 26-27, 44) (discussing the incident reports produced). In response to the June 2014 order, the Hospital also produced over five thousand pages of redacted medical records relating to adverse medical incidents. *See* (IB App. N:Exhibit 1 at pp. 5-6) (ordering the Privilege Log B documents to be produced); *see also* (IB App. N:¶ 3).

Unlike incident reports prepared pursuant to section 395.0197, the reports at issue were not created by the Hospital's staff. Contrary to Petitioner's claim, they do not "memorialize" adverse medical incidents like the incident reports and medical records that have been produced do. *See* (IB:p. 16). The documents at

issue were not made by any individual with personal knowledge of an incident or who was in a position to report, record or memorialize the occurrence. The opinions documented are not those of an employee or agent of the Hospital. To the extent that the documents contain a case overview and findings of fact, these are the impressions of the reviewing experts who gleaned those facts from the medical records provided by the Hospital's attorney. *See Edwards*, 175 So. 3d at 824 (IB App. S:p. 6) (describing the documents). The documents' facts were not reported by a facility's employee who was present or had a duty statutory to report incidents.

This lack of personal knowledge of the adverse medical incident and lack of any agency relationship with the Hospital by the purported reporter distinguishes the records at issue from incident reports that have repeatedly been found to be discoverable pursuant to Amendment 7. *See, e.g.*, *Fla. Eye Clinic, P.A.*, 14 So. 3d 1048-49 (holding that Amendment 7 required production of reports prepared by a health care provider's risk manager to memorialize an event at or near the time it occurred). The records at issue do not report, record, or memorialize an incident. Rather, they contain an expert physician's impression and opinion made after reviewing medical records that were provided by the Hospital's outside counsel.

In addition to not being prepared contemporaneously to the event by someone who was in a position to memorialize its occurrence, the records at

issue—unlike those considered in *Fla. Eye Clinic* and in *Lakeland Regional Medical Center v. Neely*—were created at the request of the Hospital's counsel. *See* (R:pp. 321-22); *see also Fla. Eye Clinic, P.A.*, 14 So. 3d at 1049 (noting the "reports in question were never reviewed by counsel."); *Neely*, 8 So. 3d 1268, 1270 n.2 (Fla. 2d DCA 2009) (noting that the hospital did not argue that the incident reports at issue were prepared "at the specific request of the client's attorney"). Florida's district courts have expressly noted that the incident reports they determined to be discoverable were not created at the request of, or reviewed by, the health care facility's attorney. *Id.*; *Fla. Eye Clinic, P.A.*, 14 So. 3d at 1049. The fact that the documents at issue were prepared pursuant to an attorney's request makes them distinguishable from the incident reports in *Florida Eye Clinic, P.A.*, even though in both cases the health care providers claimed that the documents were made in anticipation of litigation.

Petitioner's contention that the Hospital outsourced its peer review function is belied by the record, which reveals the Hospital provided thousands of pages of peer review and other committee documents for the trial court's review, and produced those the trial court found to be discoverable pursuant to Amendment 7. *See* (IB App. H:Exhibit D at Privilege Log A; IB App. N:Exhibit 1). If the Hospital were not complying with its statutory functions, the documents that were provided would not have existed.

When a hospital complies with its statutory duty and its outside counsel also obtains opinions from external sources, Amendment 7's express provisions and intent do not provide a basis for requiring the external opinions procured by counsel to be produced along with the Hospital's internal peer review documents. *See Acevedo*, 68 So. 3d at 953 (finding no intent "mandate[s] disclosure of opinion work product" or materials protected by the attorney-client privilege); *Fla. Eye Clinic, P.A.*, 14 So. 3d at 1050; *Patient's Right to Know*, 880 So. 2d at 621. Accordingly, the Second District Court of Appeal correctly concluded that the documents at issue do not fall within the ambit of Amendment 7 and need not be produced. *See Edwards*, 175 So. 3d at 826 (IB App. S:p. 9).

Issue IV *(Restated)*: The question of whether Amendment 7 preempts the work product doctrine is not before this Court because the Second DCA did not reach this issue.

The trial court found that the documents at issue were privileged, without stating whether the privilege stemmed from the work-product doctrine or attorney-client protections. (IB App. L:transcript p. 46); *Edwards*, 175 So. 3d at 826 (IB App. S:pp. 9-10). Because it found that the documents at issue are not within the ambit of Amendment 7, the Second District Court of Appeal, in *Edwards*, did not consider whether Amendment 7 applied to opinion work product. *Id.* Accordingly, there is no district court decision on this issue for this Court's review and this Court should decline addressing it in this proceeding. *See generally Leggett v.*

State, 103 So. 3d 131, 132 n.1 (Fla. 2012) (declining to address an issue that was not reached by the district court).

Even if this Court disagrees that the documents were not made or received in the course of the Hospital's business and considers whether they are discoverable as opinion work product, the available legal precedent supports a finding that Amendment 7 does not preempt the common law work product privilege as it applies to opinion work product. *Kirkland*, 126 So. 3d at 1253 (noting that Amendment 7 does not preempt the opinion work product doctrine); *Acevedo*, 68 So. 3d at 953 (noting that nothing suggests the voters intended to mandate "disclosure of opinion work product."); *Fla. Eye Clinic, P.A.*, 14 So. 3d at 1050 ("We do not read amendment 7 as evincing an intent from the voters to eliminate the privilege of *opinion* work product."). Thus, the existing opinions expressly construing the language of Amendment 7 and its intent show that the courts have come to a conclusion contrary to Petitioner's position that Amendment 7's preemption was intended to include opinion work product. *See* (IB:p. 18); *but see Kirkland*, 126 So. 3d at 1253; *Acevedo*, 68 So. 3d at 953; *Fla. Eye Clinic, P.A.*, 14 So. 3d at 1050 (concluding that neither Amendment 7, the Ballot Summary, nor the Statement and Purpose, indicate an intent to provide access to opinion work product).

A. The documents at issue are not fact work product. *(Restated).*

In contrast to Petitioner's representation, the Hospital did not concede that the documents at issue were fact work product or that they were discoverable under Amendment 7. *Compare* (IB:p. 19) *with* (IB App. Q:pp. 8, 12). As explained in Issue III above, to the extent that they contain any "facts" at all, the documents record only the physician-experts' impressions of the incidents reviewed, which were gleaned from the medical records the Hospital's outside counsel provided. *See Edwards*, 175 So. 3d at 824 (IB App. S:p. 6).

The record reflects that the Hospital produced its fact work product incident reports and the medical records that reflected the discoverable facts relating to adverse medical incidents. *See* (IB App. N:¶ 3, and Exhibit 1). There is no fact work product contained in the documents at issue that would be responsive to Petitioner's Amendment 7 request and that has not already been produced.

B. The Second District Court of Appeal did not reach the question of whether Amendment 7 preempts the privilege provided to opinion work product, but Florida's appellate courts have recognized that it does not. *(Restated).*

Because the Second District Court of Appeal did not reach the question of whether Amendment 7 eliminates the work product privilege as it relates to opinion work-product and the documents at issue, there is no decision for this Court to review on that question. *See Edwards*, 175 So. 3d at 826 (IB App. S:pp. 9-10). Even if this Court chooses to consider it, the district courts of appeal that have

expressly considered the issue have stated that the work-product doctrine, as it relates to opinion work-product, survives Amendment 7. *See Kirkland*, 126 So. 3d at 1253; *Acevedo*, 68 So. 3d at 953; *Fla. Eye Clinic, P.A.*, 14 So. 3d at 1050. Of course there is no express conflict with this established precedent and the opinion at issue, and the Second District Court of Appeal did not construe the constitutional provision's relationship to opinion work product at all. Accordingly, there is no express conflict or constitutional construction issue for this Court to review.

Nevertheless, the opinion in *Neely*, relied on by Petitioner to support her contention that the documents at issue are discoverable even if they contain opinion work product, simply does not stand for that proposition. *See* (IB:p. 20-25). Petitioner claims that under the holding in *Neely*, "there are no exceptions to Amendment 7," even if the document in question contains opinion work-product. *Id.* at 20-21. In *Neely*, however, the Second District Court of Appeal characterized the incident reports at issue to be work-product generally, without discussing the difference between fact and opinion work-product. 8 So. 3d at 1268. As Petitioner recognizes, in a more recent case, the Second District recognized that Amendment 7 "does not preempt application of the work product doctrine with respect to *opinion* work product." *Kirkland*, 126 So. 3d at 1253.

Opinion work product includes facts and information an attorney selects as being significant to the case. *Ford Motor Co. v. Hall-Edwards*, 997 So. 2d 1148, 1152-53 (Fla. 3d DCA 2008). The documents at issue are opinion work product. They are reports created by an external peer review company at the direction of the Hospital's outside attorneys, who provided select medical records created on certain dates—not entire records—to be reviewed. (R:pp. 321-22). The choice of these select medical records reflects the Hospital's counsel's opinion regarding the facts and information that were important to its assessment of the Hospital's legal issues. As such, the reports based on that select information are opinion work product. *See Ford Motor Co.*, 997 So. 2d at 1152-53.

The cases Petitioner cites to show that the documents at issue are not opinion work product discuss only incident reports and other risk management documents created by the health care facility or provider's staff, which have consistently been considered only fact work product. *See* (IB:pp. 21-25) (citing *Neely*, 8 So. 3d at 1268 (discussing incident reports prepared pursuant to statutory requirements); *Acevedo*, 68 So. 3d at 953-54 (rejecting a claim that the hospital personnel's routine opinions, comments, and recommendations found in incident reports were opinion work-product); *Fla. Eye Clinic, P.A*, 14 So. 3d at 1048-49 (considering incident reports prepared by the clinic's risk manager)). Staff members who create incident reports and risk management documents are either in a position to record

personal knowledge of an event or—pursuant to a statutory duty—to make the record in the regular course of their employment. *Neely*, 8 So. 3d at 1268; *Acevedo*, 68 So. 3d at 951-582; *Fla. Eye Clinic, P.A*, 14 So. 3d at 1048-49. Their opinions, if any, are memorialized in their capacity as the facility's employees.

As explained at length above, the documents at issue were not created by the Hospital's staff pursuant to a statutory duty or in the course of employment. The Hospital produced its incident reports. (IB App. G:pp. 9-12; IB App. L:transcript pp. 22, 44). The documents at issue, unlike incident reports, were created by external, non-staff physicians who reviewed select portions of medical records at the Hospital's outside counsel's direction. (R:pp. 321-22). Thus, they are opinion work product, which is exempt from discovery under Amendment 7. *See Kirkland*, 126 So. 3d at 1253; *Acevedo*, 68 So. 3d at 953; *Fla. Eye Clinic, P.A.*, 14 So. 3d at 1050.

If this Court disagrees with the Second District Court of Appeal's decision that the documents at issue were not made or received in the course of the Hospital's business, rather than determining this issue in the first instance, it should remand this case for the Second DCA to consider whether the opinion work product privilege protects them from Amendment 7 discovery.

Issue V *(Restated)*: The facts of this case demonstrate that the Hospital produced the records required by Amendment 7; accordingly, there is no basis to determine whether the constitutional provision preempts the attorney-client privilege.

The trial court found that the documents at issue were privileged, without stating whether the privilege stemmed from the work product doctrine or attorney-client protections. (IB App. L:transcript p. 46); *Edwards*, 175 So. 3d at 826 (IB App. S:pp. 9-10). Like the issue of whether Amendment 7 trumps the opinion work product privilege, because it found that the documents at issue were outside the scope of Amendment 7, the Second District Court of Appeal did not consider whether the constitutional provision required the production of attorney-client privileged records. *Id.* Accordingly, there is no district court decision on this issue for this Court's review, and this Court should decline addressing it in this proceeding. *See generally Leggett*, 103 So. 3d at 132 n.1 (declining to address an issue that was not reached by the district court).

No Florida court has expressly determined whether the attorney-client privilege is preempted by Amendment 7's requirements, but court opinions have suggested that it is not. *See Kirkland*, 126 So. 3d at 1253 (citing *Morton Plant Hosp. Ass'n, Inc. v. Shahbas ex rel. Shahbas*, 960 So. 2d 820, 825 (Fla. 2d DCA 2007)); *Neely*, 8 So. 3d at 1270 n.2; *Patient's Right to Know*, 880 So. 2d at 621. With no dispositive opinion on this issue, and the Second DCA declining to decide it, there is no express conflict or constitutional construction for this Court to

review. Further, if Petitioner's argument is correct, and the documents at issue are not protected by the attorney-client privileged, this Court should not reach the issue of whether Amendment 7 preempts the attorney-client privilege on these facts. *See generally* (IB:pp. 26-27) (contending the documents are not attorney-client privileged materials).

As stated, the record reflects that the Hospital provided thousands of pages of peer review and other committee documents for the trial court's review. *See* (IB App. H:Exhibit D at Privilege Log A; IB App. N:Exhibit 1). It produced all the documents the trial court ordered to be produced with the exception of the documents at issue. *Id.*; (IB App. N:¶ 3). While the Hospital is sympathetic to Petitioner's concern that other Hospitals may attempt to circumvent Amendment 7's requirements, on the facts of this case there is no basis for Petitioner's repeated claim that the Hospital's counsel did so here. *See Edwards*, 175 So. 3d at 826 (IB App. S:p. 9). Further, failure to meet the statutory requirements is a licensure issue.

Requiring the production of attorney-client privileged documents would place an unprecedented chill on attorney-client relations and severely restrict the free flow of information between an attorney and his or her client. Hospitals, like any other defendant, have a right to consult counsel who can thoroughly investigate their clients' concerns without being restrained by the threat of potential disclosure of materials created or obtained in confidence. Nothing in the

language of Amendment 7, its Statement and Purpose, or its Ballot Summary reflects that the electorate intended to invade this confidential relationship. *See generally Patient's Right to Know*, 880 So. 2d at 621; *Morton Plant Hosp. Ass'n, Inc. v. Shahbas ex rel. Shahbas*, 960 So. 2d 820, 825 (Fla. 2d DCA 2007).

Ultimately, because the Second District Court of Appeal did not reach this issue, this Court should not decide it in the first instance.

CONCLUSION

For the reasons set forth above, this Court should dismiss this case because review was improvidently granted. If this Court does not agree, it should affirm the Second District Court of Appeal's decision as having properly applied Amendment 7 to the documents at issue. Finally, in the event this Court determines that the documents at issue are subject to Amendment 7's requirements, it should remand for the Second DCA to determine whether they are nevertheless protected by the opinion work product or attorney-client privileges.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to: kbrock@flacivillaw.com (Kara Berard Rockenbach, Esq., Methe & Rockenbach, P.A., 1555 Palm Beach Lakes Boulevard, Suite 1200, West Palm Beach, FL 33401, Appellate Attorney for Petitioner Edwards), krothell@flacivillaw.com and tbermudez@flacivillaw.com; ket@searcylaw.com (Karen E. Terry, Esq., Searcy Denney Scarola Barnhart & Shipley, P.A, 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 34409, Attorney for Petitioner Amber Edwards), mks@searcylaw.com, aje@searcylaw.com and terryteam@searcylaw.com; hplatter@bgrplaw.com (Holly B. Platter, Esq., Graziano & Rice, P.A., 101 East Kennedy Boulevard, Suite 1700, Tampa, FL 33602, Attorney for Larry D. Thomas, MD); eservebgrplaw.com, tdomi@bgrplaw.com; and sAlbee@fulmerleroy.com (Scott B. Albee, Esq., Fulmer LeRoy & Albee, PLLC, 605 S. Boulevard, Tampa, FL 33606, Attorney for Respondent, Bartow HMA, LLC), sSchaefer@fulmerleroy.com, and eservicetpa@fulmerleroy.com, this 5th day of January, 2017.

/s/ Amy L. Dilday

Amy L. Dilday, B.C.S.
Florida Bar No. 0018035
4401 West Kennedy Boulevard, Suite 200
Tampa, Florida 33609
(813) 287-2822 telephone

(813) 287-2833 facsimile
adilday@mccumberdaniels.com
mhicks@mccumberdaniels.com
eservice@mccumberdaniels.com
Appellate counsel for Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Answer Brief was typed in Times New Roman 14 point font.

McCumber, Daniels, Buntz
Hartig & Puig, P.A.

/s/ Amy L. Dilday
Amy L. Dilday, B.C.S.
Florida Bar Number: 0018035
adilday@mccumberdaniels.com
4401 West Kennedy Boulevard, Suite 200
Tampa, FL 33609
813-287-2822
813-287-2833 Facsimile
adilday@mccumberdaniels.com
mhicks@mccumberdaniels.com
eservice@mccumberdaniels.com