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IN THE SUPREME COURT OF FLORIDA

Case No. SC15-1893
(Second DCA Case No. 2D14-3450)

AMBER EDWARDS,

Petitioner,

v.

BARTOW HMA, LLC d/b/a
BARTOW REGIONAL
MEDICAL CENTER,

Respondent.
_____/

REPLY BRIEF OF PETITIONER, AMBER EDWARDS

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

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ARGUMENT

Preliminary Issue. This Court correctly granted review for the cogent reasons set forth in both Edwards' Brief on Jurisdiction and her Initial Brief.

In its Answer Brief, Bartow raised a preliminary issue regarding jurisdiction. [A.B. 8-11].[1] Bartow asserted that this Court improvidently granted jurisdiction and that Edwards' Initial Brief does not support any basis for discretionary jurisdiction. [A.B. 8-11]. Bartow's argument is a weak attempt to distract this Court from the grave constitutional concerns raised in Edwards' merits brief.

With no citation to any authority, Bartow first argues that Edwards failed to make jurisdictional arguments in her Initial Brief. [A.B. 5]. None are required or even appropriate for a ***merits*** brief. The Committee Note to Florida Rule of Appellate Procedure 9.120 establishes that the two types of briefs have distinct purposes consistent with their titles. Edwards fully briefed jurisdiction in her Brief on Jurisdiction. This Court correctly accepted Edwards' compelling arguments and granted its discretionary jurisdiction over this controversy involving protection of a state constitutional right of access to adverse medical incident reporting that 5.8 million out of 7.2 million Florida voters favored upon its adoption. *See Charles v. So. Baptist Hosp. of Fla.*, 42 Fla. L. Weekly S79, n.3 (Fla. Jan. 31, 2017).

[1] In this Reply Brief, the following abbreviations will be used: Brief on Jurisdiction, [J.B. ____]; Initial Brief, [I.B. ____]; and Answer Brief, [A.B. ____].

Next, Bartow claims that Edwards made arguments expressing her disagreement with the Second District's application of Amendment 7 to the facts of her case, rather than arguments regarding the construction of the constitutional provision. [A.B. 5, 9]. Bartow misinterprets Edwards' arguments. Clearly, Edwards advanced the point that the Second District erroneously construed Article X, § 25 of the Florida Constitution to exclude the external peer review reports at issue from the scope of both the terms "adverse medical incident" and "course of business."

The Second District misconstrued the phrase "other similar committee" in the definition of "adverse medical incident" to exclude external peer review committees. [I.B. 11-14]. The Second District limited the term "similar committee" to bodies that "perform the routine function of reviewing incidents for the Hospital when medical negligence or other events occur as specified in Amendment 7." [App. S, p. 8]. The Second District also misconstrued a term left undefined by Amendment 7, "course of business," to exclude documents created by an expert retained for purposes of litigation. [I.B. 14-18]. The Second District construed "course of business" as the equivalent of "kept pursuant to a statutorily mandated duty" and excluded external reports from the definition. [App. S, p. 7].

Bartow's attempt to draw a distinction between application of Amendment 7 to the facts of this case and construction of Amendment 7 is conceptual semantics.

Unlike the proposition cited by Bartow, this case does not involve the application of a "recognized, clear-cut provision of the Constitution" to "the facts of a particular case." In fact, the Second District necessarily construed the "course of business" term in Amendment 7 because it is undefined. Further, Amendment 7 is a relatively new addition to Florida's legal medical negligence landscape that is amidst a boom of litigation regarding its meaning, scope, and extent. Therefore, it can hardly be said that it has a recognized, clear-cut meaning. If it did, it would not generate the numerous appellate decisions regarding the proper construction of Amendment 7, "adverse medical incident," and "course of business" cited by the parties.

Additionally, Bartow also asserts that Edwards failed to demonstrate any express and direct conflict between the Second District's decision in this case and *Florida Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009). [A.B. 5-6, 10-11]. However, Edwards painstakingly set forth the circumstances of this conflict in both her Brief on Jurisdiction and Initial Brief and this Court granted review. [J.B. 8-10, I.B. 15-17]. The conflict could not be more express and direct because the views of the two courts are diametrically opposed – documents generated in anticipation of litigation either are prepared within the "course of business" (Fifth District) or they are not (Second District). As such,

discretionary review of this Court is precisely the appropriate method to remove the confusion and instability among the districts.

Bartow attempts to construct an artificial and hollow distinction between the peer review reports allegedly prepared in anticipation of litigation in this case and those in *Florida Eye*. Bartow places significance on the fact that its "peer review" reports were reviewed and handled by counsel. [A.B. 10, 19-23]. Any such distinction would inspire routine abuse by healthcare providers who could simply hand counsel otherwise constitutionally-discoverable documents memorializing adverse medical incidents to counsel in order to hide the worst errors and abuses from the light of day. Such adverse medical incidents are the very types of documents that Florida voters wanted discoverable when approving Amendment 7. In fact, a hospital could even involve an attorney in the internal peer review process in an attempt to cloak those documents from discovery under Amendment 7.

More significantly, Bartow also suggests that the "peer review" reports at issue are distinguishable because they were prepared by external physicians, rather than hospital employees, who possessed "no personal knowledge of and no authority to memorialize the facts of the incident being reviewed." [A.B. 10, 19-23]. A simple review of the reports should suggest otherwise – they include supporting facts regarding adverse medical incidents. The "peer review"

reports were likely commissioned because of Bartow's concerns about adverse medical incidents at its facility and created as a means of determining what actions to take to protect its patients. Outsourcing reports in order to shroud them in a cloak of secrecy is undeniably violative of the intent and purpose of Amendment 7.

Further, Bartow's unsupportable argument attempting to require "firsthand knowledge" would negate the unquestionably discoverable nature of statutory peer review committee reports. By their very nature, peer reviews are performed by one without firsthand knowledge - a neutral third-party assessing the circumstances of an adverse medical incident and evaluating the performance and fitness of the responsible medical professional, not someone who was involved in the incident affixing a stamp of approval to negate culpability. *See* § 395.0193, Fla. Stat. (setting forth statutory peer review process, including creation of peer review bodies, involvement of the physician in the process, identification of mechanisms to avoid conflicts of interest, and focus on improving patient care and outcomes).

For these cogent reasons, this Court appropriately accepted jurisdiction in this case with wide-ranging ramifications for Florida's citizens. This Court has a momentous opportunity to ensure that Florida's citizens maintain their

right to broad and unfettered access to adverse medical incident reporting pursuant to the popularly-adopted Amendment 7.

I. The Clear Intent of Amendment 7 is to Eliminate Limitations on Discovery of Adverse Medical Incident Reporting Consistent With the Will of Florida's Citizens

Overall, Bartow does not contest that Amendment 7 discovery is intended to be broad. Nonetheless, Bartow reads additional intent into Amendment 7 by proclaiming that it was intended solely to undo statutory restrictions on discovery. [A.B. 13-14]. Bartow relies on the Ballot Summary, Statement, and Purpose in support of this position. However, these materials are not categorical in explaining to voters that only legislative restrictions on access would be lifted, in that the ballot summary reads: "***Current Florida law*** restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice." *In re Advisory Opinion to the Atty. Gen. re: Patients' Right to Know About Adverse Medical Incidents*, 880 So. 2d 617, 619 (Fla. 2004) (e.s.). Both the attorney-client privilege and work-product doctrine are creatures of Florida law. Additionally, at least some Florida courts have recognized that the work product doctrine, which is not statutory in nature, is trumped by Amendment 7 (at least for fact work product). *See, e.g.*, *Bartow HMA, LLC v. Kirkland*, 126 So. 3d 1247, 1253 ("Amendment 7 also preempts application of the work product doctrine to the extent it relates to fact work product."); *Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d

949, 953 (Fla. 3d DCA 2011)("The plain language of Amendment 7 evinces intent to abrogate any fact work [product] privilege that may have attached to adverse medical incident reports prior to its passage.").

Additionally, there is no indication that Florida's voters recognized or understood any distinction between statutory and other restrictions on access, but rather simply voted for what they were broadly offered in the ballot summary: "the right to review, upon request, records of health care facilities' or provider's adverse medical incidents," regardless of their kind, genesis, or label. 880 So. 2d at 619. Nonetheless, Bartow seeks to limit the effect of Amendment 7 to only statutory restrictions so that it can place its external "peer review" reports beyond the pale of the constitutional provision and protect them from the light of day. To construe the amendment to impose such a limit opens the floodgates to the amendment being swallowed whole by external "peer review" procedures and other mechanisms intended to evade its reach.

II. Items #15, #16, and #20 on Privilege Log B Contain Adverse Medical Incident Reporting

Bartow contends that Edwards did not establish how external "peer review" reports are generated by a "similar committee" so as to be discoverable under Amendment 7. [A.B. 17]. In interpreting the constitutional provision, the Second District gave meaning to "similar committee" by inserting a "statutorily mandated"

requirement. However, there is no "statutorily mandated" requirement in the plain language of the amendment.

The interpretation of "similar committee" requires this Court to employ the *ejusdem generis* canon of construction. "Under the doctrine of *ejusdem generis*, where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated." *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992). The provision in need of construction defines "adverse medical incident":

> 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.

There are two separate categories of "adverse medical incidents" included in this provision, one of which are 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. Pursuant to *ejusdem generis*, the term "similar committee" must be given meaning based on the company it keeps: which includes peer review, risk management, quality assurance, and credentials committees. However, these committees are not limited

to those statutorily mandated based on the plain language of the constitutional amendment. *See Bush v. Holmes*, 886 So. 2d 340, 352 (Fla. 1st DCA 2004)(explaining that interpretation of constitutional provision begins with plain language and provision should be given effect according to its plain and ordinary meaning)(citations omitted). Certainly, these types of committees are statutorily mandated, but that does not mean that hospitals may not have additional committees of this type (meaning groups of third parties who review the conduct of individual professionals performing services in the hospital). Further, in the absence of any statute establishing a "similar committee," regardless of appellation, the term would be meaningless if it did not encompass elective hospital committees, and constitutional provisions should be construed to give meaning to words rather than render them superfluous. *See City of Tampa v. Birdsong*, 261 So. 2d 1, 5 (Fla. 1972)("An elementary rule of construction is that if possible, effect should be given to every part and every word of the Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous or meaningless or inoperative.").

Overall, Bartow takes exception to the discovery of any documents generated above and beyond those required by statute. Bartow asserts that Amendment 7 does "not 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." [A.B. 18-19]. Edwards is not asserting that Amendment 7 required Bartow to obtain external "peer review" reports. However, Bartow clearly saw fit to investigate adverse medical incidents occurring at its facility through an external "peer review" process. Once it made the decision to engage a "similar committee" to review the conduct of its medical providers, it accepted the risk that those documents would be discoverable pursuant to Amendment 7.

III. Items #15, #16, and #20 on Privilege Log B Were Made or Received in the Course of Bartow's Business

Bartow draws a distinction between an external standard of care opinion and adverse medical incident reporting discoverable under Amendment 7 by asserting that reports generated by the hospital were made in the course of business while those developed by an outside provider were not. [A.B. 20]. Bartow overlooks that the source of the information relied upon by the external peer reviewer was necessarily information and documentation developed within the course of Bartow's patient care and review processes. Nowhere does Amendment 7 express that because internal reports have been produced, external reports are untouchable or superfluous. In fact, to the extent that the external reports reflect information similar or identical to that in the internal reports, the external reports are clearly discoverable because any privilege attached to the information has evaporated. *See* *Tumelaire v. Naples Estates Homeowners Ass'n, Inc.*, 137 So. 2d 596, 599 (Fla. 2d

DCA 2014)(explaining the general principle, here in the work-product context, that privilege is waived when confidential information is voluntarily disclosed).

Further, the Second District's construction of "course of business" limiting it to statutory reporting requirements and excluding investigation involving counsel is a restrictive view of the business performed by a hospital. In fact, the Second District recognized that records can be kept in the ordinary course of business even in the absence of a statutory duty, but arbitrarily decided that external peer review reports with a purported litigation purpose were not. [App. S, p. 7]. However, the sheer number of external "peer review" reports over which Bartow claims privilege suggests that such external "peer review" was a regular and ordinary practice of Bartow when it had elevated concerns about patient care and safety. Further, *Florida Eye* establishes that even documents made in anticipation of litigation can fall within the course of a hospital's business.

IV. Amendment 7 Trumps Any Work-Product Protection Otherwise Applicable to Items #15, #16, and #20 on Privilege Log B

This Court should exercise its discretion to consider Edwards' work-product arguments that were not reached by the Second District. The issues at hand are both capable of repetition and having a wide-ranging effect on Florida's voters.

A. Items #15, #16, and #20 on Privilege Log B Are Discoverable to the Extent They Contain Fact Work Product

Bartow maintains that any facts contained in the external "peer review" reports mirror the facts found in the incident reports and medical records already produced to Edwards. [A.B. 25]. If so, the external "peer review" documents cannot be protected as fact work product and are discoverable. Any privilege applicable to the facts reflected in the external "peer review" reports was destroyed by the previous production of the internal peer review reports.

B. Items #15, #16, and #20 on Privilege Log B Should Be Discoverable Even If They Contain Opinion Work Product

Bartow further maintains that the external "peer review" reports are opinion work product because they "were created by external, non-staff physicians who reviewed select portions of medical records at the Hospital's outside counsel's direction." [A.B. 28]. Even if this assertion is borne out by the confidential portion of the record, it remains the case that the external "peer review" reports are not the mental impressions of Bartow's counsel and are therefore not opinion work product. *See, e.g. Florida Eye,* 14 So. 3d at 1049 (the documents did not contain "any attorney's mental impressions, conclusions, opinions, or theories concerning his client's case (i.e., any opinion work product)").

V. Amendment 7 Should Trump Any Attorney-Client Privilege Otherwise Applicable to Items #15, #16, and #20 on Privilege Log B Under the Record Facts of this Case

This Court should also exercise its discretion to reach Edwards' attorney-client privilege arguments.

Significantly, Bartow commented on Edwards' concern that the external "peer review" process and similar mechanisms could be abused to circumvent Amendment 7. [A.B. 30]. This Court recently addressed such a circumstance in *Charles*, in which it made resoundingly clear that "health care providers should not be able to unilaterally decide which documents will be discoverable and which will not in medical malpractice cases" pursuant to Amendment 7. *Charles v. So. Baptist Hosp. of Fla.*, 42 Fla. L. Weekly S79 (Fla. Jan. 31, 2017).

In *Charles*, the issue concerned the intersection between Amendment 7 and hospital reporting under the voluntary Federal Patient Safety and Quality Improvement Act. The hospital produced some documents, but withheld others claiming that they were patient safety work product pursuant to the federal scheme. The patient asserted that the documents were created for the dual purposes of Florida statutory adverse incident reporting and elective participation in the federal program and should be discoverable pursuant to Amendment 7.

In resolving this conflict, this Court held that "the records do not become patient safety work product simply because they were placed in a patient safety evaluation system or submitted to a patient safety organization because providers have an independent obligation under Florida law to create and maintain them, and Amendment 7 provides patients with a constitutional right to access them" and rejected the hospital's work product argument. This Court also considered and

rejected a preemption argument made by the hospital, explaining that "[i]n the context of the Federal Act's scheme allowing for voluntary participation, it is clear that a mandatory disclosure law in our state constitution is not preempted by a health care provider's *choice* to participate in the Federal Act." [E.o.]. Finally, this Court noted that if the hospital's view as adopted by the First District were the law "then medical providers would be free to determine for themselves what information was available in litigation through their own strategic use of the benefits in the Federal Act by placing all of their reports, regardless of any other state requirements, in the patient safety evaluation system and therefore making them confidential patient safety work product."

The parallels between *Charles* and this case are striking. Like participation in the federal patient safety and quality program, Bartow's use of an external "peer review" process was voluntary. By that choice, Bartow is not permitted to cloak information and documentation regarding adverse medical incidents that was or could have been included in internal, statutory reports in the veil of work product protection or attorney-client privilege to avoid discovery under Amendment 7. As with the federal program, if use of external "peer review" could avoid the dictates of Amendment 7, then hospitals like Bartow would be free to determine for themselves what information and documentation they protect or disclose and could place all of the most significant, serious, and concerning information into external

"peer review" reports to shield egregious acts of medical malpractice from discovery by affected or potentially affected patients. This undermines the intent of Amendment 7 to provide free availability of adverse medical incident reporting to permit patients to make informed choices about their health care and protect the public. For the reasons the documents in *Charles* were discoverable, the external "peer review" documents here are equally discoverable under Amendment 7.

CONCLUSION

The Second District's construction of Amendment 7, specifically the terms "adverse medical incident" and "course of business," undermines the intent and purpose of Amendment 7 by narrowing the scope of documents discoverable in medical malpractice actions. Consistent with this Court's recent decision in *Charles*, Bartow is not free to selectively choose which documents memorializing adverse medical incidents are discoverable under Amendment 7, including by using an attorney as a conduit for external "peer review." Therefore, this Court should reverse the Second District's decision and order that Items #15, #16, and #20 on Privilege Log B be produced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via email this 24th day of February, 2017 to: **Karen E. Terry, Esq.,** Searcy Denney Scarola Barnhart & Shipley, P.A., (Counsel for EDWARDS), 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409, Email: _terryteam@searcylaw.com; ket@searcylaw.com; mks@searcylaw.com; and aje@searcylaw.com; **Scott B. Albee, Esq.,** Fulmer LeRoy & Albee, PLLC, 605 S. Boulevard, Tampa, FL 33606; Email: sAlbee@fulmerleroy.com; sSchaefer@fulmerleroy.com; and eservicetpa@fulmerleroy.com; **Amy L. Dilday, Esq., and Andrew R. McCumber, Esq.,** McCumber, Daniels, Buntz, Hartig & Puig, P.A., (Appellate Counsel for BARTOW), 4401 W. Kennedy Blvd., Suite 20, Tampa, FL 33609-2058, Emails: adilday@mccumberdaniels.com; amiles@mccumberdaniels.com and amccumber@mccumberdaniels.com; and **Holly B. Platter, Esq.,** Graziano & Rice, P.A., (Counsel for THOMAS, M.D.), 101 East Kennedy Blvd., Suite 1700, Tampa, FL 33602, Email: eserve@bgrplaw.com; and tdomi@bgrplaw.com.

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I HEREBY CERTIFY that this brief has been prepared in Microsoft Word, Times New Roman 14-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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