IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

JODI BENJAMIN as Personal Representative of the Estate of MARLENE GAGNON, Deceased,

Petitioner,

v.

TANDEM HEALTHCARE, INC., a Foreign Corporation, d/b/a TANDEM HEALTHCARE OF WEST PALM BEACH, INC., a Florida Corporation,

Respondent.
_____/

CASE NO.: SC07-2423
4TH DCA NO.: 4D07-949
PALM BEACH CIRCUIT: 2005CA005482

FLORIDA HEALTH CARE ASSOCIATION'S AMENDED AMICUS CURIAE BRIEF ON BEHALF OF RESPONDENT

KAREN L. GOLDSMITH
Florida Bar #274534
JONATHAN S. GROUT, ESQUIRE
Florida Bar #296066
GOLDSMITH, GROUT & LEWIS, P.A.
2160 Park Avenue North
Winter Park, Florida 32789
Telephone: (407) 740-0144
Facsimile: (407) 740-8574

TABLE OF CONTENTS

TABLE OF CITATIONS

Source	**Pages**
Weinstock, PhD. v. Groth, 629 So. 2d. 835 (Fla. 1993)	8, 10
Williams v. Smith, 360 So. 2d. 417 (Fla. 1978)	14
Advisory Opinion to the Attorney General v. Patient's Right to Know About Adverse Medical Incidents, 2004 WL 1574738 (Fla.)	6, 10
Omnibus Budget Reconciliation Act of 1987	12, 15

NATURE OF RELIEF SOUGHT

That the certified question be answered in the negative and that the decision of the Fourth District Court of Appeal be affirmed.

SUMMARY OF ARGUMENT

Nursing homes are not "health care facilities" or "health care providers" within the plain language of Amendment 7. Amendment 7 specifically references the Patients' Bill of Rights and Responsibilities, § 381.026, Fla. Stat. which does not include nursing homes. Further, Amendment 7 refers to "patients" whereas nursing homes do not have "patients" but rather have "residents."

Two District Court of Appeals, the Fourth District Court of Appeal in the instant case and the First District Court of Appeal in Avante Villa at Jacksonville Beach, Inc. v. Breidert, 958 So.2d. 1031 (Fla. 1st DCA 2007) have held that nursing homes do not fall within the purview of Amendment 7. This court has also recognized that nursing homes are not within the purview of Amendment 7. Advisory Opinion to the Attorney General v. Patient's Right to Know About Adverse Medical Incidences, 2044 WL 1574738 (Fla.).

ARGUMENT

FLORIDA HEALTH CARE ASSOCIATION'S AMICUS CURIAE BRIEF

The Florida Health Care Association ("FHCA") is a non-profit organization which represents 500 nursing home facilities licensed in Florida pursuant to Chapter 400, Part II, Fla. Stat. There are 670 licensed nursing home facilities in Florida. Founded over 50 years ago, FHCA provides a number of services to its members, including education and lobbying and acts as a liaison with governmental agencies.

The Fourth District Court of Appeal, in Tandem Health Care, Inc. v. Benjamin, 969 So.2d. 519, 521-522 (Fla. 4th DCA 2007) certified the following question as one of great public importance:

WHETHER "NURSING HOME" OR "SKILLED NURSING FACILITIES" FALL WITHIN THE DEFINITION OF "HEALTH CARE FACILITY" OR "HEALTH CARE PROVIDER" AS CONTEMPLATED BY AMENDMENT 7 TO THE FLORIDA CONSTITUTION.

The Fourth District Court of Appeal correctly determined that Amendment 7 was directed toward actions for medical malpractice, while nursing home claims do not constitute medical malpractice claims citing § 400.023(7), Fla. Stat. Tandem Health Care, Inc. v. Benjamin, 969 So.2d. 519, (Fla. 4th DCA 2007);

Integrated Healthcare Services, Inc. v. Lang-Redway, 840 So. 2d. 974 (Fla. 2002); Weinstock, PhD. v. Groth, 629 So. 2d. 835 (Fla. 1993).

The holding and reasoning by the Fourth District Court of Appeal in Benjamin supports the decision and reasoning of the First District Court of Appeal in Avante Villa at Jacksonville Beach, Inc. v. Breidert, 958 So.2d. 1031 (Fla. 1st DCA 2007), where the First District Cout of Appeal also held that nursing homes do not fall within the definitions of "health care facility" or "health care provider" as contemplated by Article X, Section 25, Florida Constitution (Amendment 7). Both the Fourth DCA and the First DCA correctly relied on the plain language of Amendment 7 as it was proposed to the voters in 2004 and both these courts pointed out, under the Statement and Purpose, of Amendment 7 that the language specifically states:

"The legislature has enacted provisions relating to a patient's bill of rights and responsibilities, . . ."

These two courts also relied on Article X, Section 25(c)(1), Florida Constitution which provides that "health care facilities" and "health care provider" have the meaning given in general law related to a patient's rights and responsibilities. As noted by the courts, there is only one statute that was in existence when Amendment 7 was adopted that addresses "a patient's rights and

responsibilities". That statute is § 381.026 which was enacted by the legislature in 1991.

Section 381.026, Fla. Stat. is entitled "Florida Patient's Bill of Rights and Responsibilities." Section 381.026(2), Fla. Stat. defines a "health care facility" as one licensed under Chapter 395 "hospitals" and defines "health care provider" as a physician licensed under Chapter 458, an osteopathic physician licensed under Chapter 459 or a podiatric physician licensed under Chapter 461.

Therefore, the Fourth District Court of Appeal and First District Court of Appeal concluded that it was reasonable, based on the specific language of Amendment 7, to refer to § 381.026, Fla. Stat. to determine which "health care facility" and "health care provider" fall within the purview of Amendment 7.

In Breidert, the First District Court of Appeal, further emphasized that when the Florida legislature in 2005 codified Amendment 7, in § 381.028(3), Fla. Stat., the legislature defined (e) "health care provider" as a physician licensed under Chapter 458, 459 or 461 and (f) "health care facility" as a facility licensed under Chapter 395. Therefore, § 381.028, Fla. Stat. excludes nursing homes and skilled nursing facilities.

This court in Greater Loretta Improvement Association v. State ex. rel. Boone, 234 So.2d. 665 (Fla. 1970) held that where there has been a legislative

codification of a constitutional amendment that is not in conflict with the purpose of the amendment the legislative interpretation should be given deference.

At the time of the passing of Amendment 7 the general law in Florida held that nursing homes are not "health care providers" or "health care facilities." NME Properties, Inc. v. McCullough, 590 So. 2d. 439 (Fla. 2nd DCA 1991); Weinstock, PhD. v. Groth, 629 So. 2d. 835 (Fla. 1993); Integrated Healthcare Services, Inc. v. Lang-Redway, 840 So. 2d. 974 (Fla. 2002). Admissions to a hospital are called patients and have a Patient's Bill of Rights and Responsibilities as set out in § 381.026, Fla. Stat. Persons admitted to a nursing home are called residents not patients. They have a Resident's Bill of Rights. §400.022, Fla. Stat. Nursing homes do not meet the general definition of "health care providers" or "health care facilities."

This court recognized that nursing homes are not covered under Amendment 7. Advisory Opinion to the Attorney General v. Patient's Right to Know About Adverse Medical Incidences, 2044WL1574738 (Fla.). This court held that nursing homes are not identified in the Patient's Bill of Rights and therefore the financial impact statement prepared by the Agency for Health Care Administration was erroneous as it considered cost from nursing homes in its calculation of the financial impact statement of Amendment 7.

FHCA, without reiterating all the arguments of Respondent, adopts the arguments and analysis by Respondent as to the fact that:

- Amendment 7 provides that "health care facility" and "health care provider" have the meaning given in the "general law related to a patient's rights and responsibilities."
- § 381.026(2), Fla. Stat. defines a "health care facility" as one licensed under Chapter 395 and defines "health care provider" as a physician licensed under Chapter 458, an osteopathic physician licensed under Chapter 459, or a podiatric physician licensed under Chapter 461.
- The language of Amendment 7 is clear and unambiguous in defining the facilities (hospitals) and health care providers (physicians, osteopathic physicians and podiatric physicians) to which the Amendment applies.
- Since nursing homes are clearly neither health care facilities nor health care providers there is no reason to resort to other rules of construction.
- Amendment 7 refers to "patients" while Chapter 400, Part II, refers to the occupants of nursing homes as "residents".

In determining whether nursing homes are "health care facilities" or "health care providers" within the meaning of Amendment 7 it is very significant to

consider the fact that all references to Amendment 7 prior to the vote and in the text of Amendment 7 are to "patients" rather than "residents." Nursing homes are governed by Chapter 400, Part II, Fla. Stat. and Chapter 59A-4, F.A.C., along with the federal regulations. References within Chapter 400, Part II, Fla. Stat. and Chapter 59A-4, F.A.C., are to "residents," rather than "patients." The same result is found after a review of the federal laws, regulations and surveyor guidelines as they apply to nursing homes. The term "patient" has been discouraged as a term utilized for the residents of nursing homes for a number of years. The Omnibus Budget Reconciliation Act of 1987 ("OBRA 87") refers to "residents" not "patients." The Florida legislature changed § 400.022 from "Patient's rights" in 1981 to "Resident rights" in 1984. A review of the hospital statute, Chapter 395, Fla. Stat., reveals that the individuals are referred to as "patients," not "residents."

The Office of State Long-Term Care Ombudsman was created to assist in the oversight of nursing homes in Florida. Chapter 400, Part I, Fla. Stat. The legislative findings and intent are set out in § 400.0061, Fla. Stat. § 400.0061(1), Fla. Stat., provides in part as follows:

> (1) The Legislature finds that conditions in long-term care facilities in this State are such that the rights, health, safety, and welfare of residents are not insured by rules of the Department of Elderly Affairs or the Agency for

Health Care Administration, or by the good faith of owners or operators of long-term care facilities. . .(emphasis added)

All references to individuals in Chapter 400, Part I, Fla. Stat. are to "residents." The duties and responsibilities of the Office of State Long-Term Care Ombudsman is to identify, investigate and resolve complaints made by or on behalf of residents of long-term care facilities. § 400.0065(1)(a), Fla. Stat.

An individual goes to a nursing home to reside there, rather than to a hospital for surgery or recovery from an injury or illness that requires constant medical supervision. Residents of nursing homes have the right to choose a personal attending physician pursuant to 42 CFR § 483.10(d)(1). Nursing homes do not typically have physicians on staff.

In nursing homes the federal regulations govern the environment. 42 CFR § 483.15(h)(l) states that a nursing home must provide a safe, clean, comfortable, and homelike environment, even to the point of allowing the resident to use his or her personal belongings to the extent possible.

42 CFR § 483.25, under a federal quality of care regulation, provides that each resident must receive and the nursing home must provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being of the resident. This must be provided in accordance with the resident's comprehensive assessment and plan of care.

Activities must be provided to the residents on a regular basis in nursing homes pursuant to 42 CFR § 483.15(f)(l). Most residents of nursing homes wear personal clothes not gowns as in hospitals. Nursing homes are resident oriented, while hospitals are patient oriented.

These are some of the very reasons that Florida legislators chose to call the consumers of nursing home care "residents" rather than "patients."

While it is not possible to know the intent of each voter as to Amendment 7, the materials available during the decision-making process must be considered. Williams v. Smith, 360 So. 2d. 417 (Fla. 1978). There was no material provided for inspection by the voters that referred to "nursing home," "skilled nursing facility," "nursing facility," "assisted living facility," or "resident." The only reference throughout Amendment 7 is to "patient". With the all inclusive use of "resident" rather than "patient" throughout not only the Florida Statutes and Regulations, but also the Federal Statutes and Regulations governing nursing homes, it can not be assumed that the voters were intending that Amendment 7 pertain to nursing homes. In fact the opposite is much more likely. That is that the voters assumed that Amendment 7 did not pertain to nursing homes.

As Respondent, TANDEM HEALTHCARE, INC., a Foreign Corporation, d/b/a TANDEM HEALTHCARE OF WEST PALM BEACH, INC., a Florida Corporation, set out in its Answer Brief, the Congress of the United States by way

of the Omnibus Budget Reconciliation Act of 1987, 42 CFR § 483 and 42 USC § 1395i-3, 1396r, legislated its intent to preempt the issues involving quality assurance in nursing homes throughout the nation.

42 CFR § 483.1 requires nursing homes to meet certain requirements which are set out throughout 42 CFR § 483. If the nursing home fails to comply with these requirements Medicare and Medicaid payments may be withheld or other sanctions imposed. Nursing homes are subject to severe federal sanctions for failure to comply with the rules and regulations.

42 CFR § 483.75(o) requires nursing homes to establish quality assessment and assurance committees which consist of the director of nursing services, a physician and at least three other members of the facility's staff. This committee is to meet at least quarterly, to assess and consider quality issues for the residents and develop and implement plans of action to correct any identified quality deficiency issues.

42 CFR § 483.75(o)(3), specifically provides that neither a State nor the Secretary may require disclosure of the records of the assessment and assurance committee except as such disclosure is required to demonstrate the compliance of such committee with the requirements of this section.

Inherent in a quality assurance program is an open line of communication between those individuals on the committee. It is the protections afforded by

federal and state law to quality assurance records that has been the back bone of these open and frank discussions of quality issues in nursing homes. The removal of these protections will likely chill this process.

This language certainly demonstrates the intent of the Congress to preempt this area of quality assurance, by insisting that neither the State nor the Secretary can require disclosure of these quality assurance records. If nursing homes are found to be "health care providers" or "health care facilities" pursuant to Amendment 7, then nursing homes in Florida will be facing violation of this regulation upon a demand for these records by a resident. This would defeat the purpose of the Federal regulations.

42 CFR § 488.400-488.456 delineates the sanctions that may be imposed against nursing homes for failure to comply with the rules and regulations. The sanctions that may be imposed for disclosing assurance committee records include civil money penalties, denial of payment for new admissions and termination of the nursing home's provider agreement, which would result in the nursing home not being able to receive Medicare and Medicaid funds. The civil money penalties can range from $50.00 to $10,000.00 a day. For Florida nursing homes, these sanctions would be imposed by the Centers for Medicare and Medicaid Services, Atlanta Region.

Based on the foregoing and the analysis set out in Respondent's Answer Brief it is the obvious intent of the United States Congress to preempt state legislation regarding disclosure of nursing home quality assurance records.

CONCLUSION

It is respectfully requested that the certified question be answered in the negative and the decision of the Fourth District Court of Appeal be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of May, 2008 a true and correct copy of the foregoing has been furnished by U.S. Mail to:

Rebecca Mercier Vargas, Esquire
Kreusler-Walsh, Compiani & Vargas, P.A.
501 South Flagler Drive, Suite 503
West Palm Beach, Florida 33401

Thomas A. Valdez, Esquire
Quintairos, Prieto, Wood & Boyer, P.A.
4905 West Laurel Street, Suite 200
Tampa, Florida 33607

Philip M. Burlington, Esquire
Burlington & Rochenbach, P.A.
2001 Professional Building, Suite 410
2001 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

_____

KAREN L. GOLDSMITH, ESQUIRE
Florida Bar #274534
JONATHAN S. GROUT, ESQUIRE
Florida Bar #296066
GOLDSMITH, GROUT & LEWIS, P.A.
2160 Park Avenue North
Winter Park, Florida 32789
Telephone: (407) 740-0144
Facsimile: (407) 740-8574
Attorney for FHCA

CERTIFICATE OF COMPLIANCE

I CERTIFY that this Amicus Curiae Brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure and is in the required font of Times New Roman 14.

JONATHAN S. GROUT, ESQUIRE
Florida Bar #296066
KAREN L. GOLDSMITH
Florida Bar #274534