

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2423

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

L.T. CASE NOS.:  
4th DCA: 4D07-949  
PALM BEACH CIRCUIT: 2005CA005482

Petitioner,

v.

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

Respondent.

---

**PETITIONER'S INITIAL BRIEF**

JANE KREUSLER-WALSH and  
REBECCA MERCIER VARGAS of  
KREUSLER-WALSH, COMPIANI & VARGAS, P.A.  
501 South Flagler Drive, Suite 503  
West Palm Beach, FL 33401-5913  
(561) 659-5455  
rmercier@jkwpa.com

and

JEFFREY M. FENSTER and  
STACIE L. COHEN  
FENSTER, COHEN & SOBOL, P.A.  
1391 Sawgrass Corporate Parkway  
Sunrise, FL 33323  
(954) 473-1500

## TABLE OF CONTENTS

	<u>Page</u>
Preface	1
Point on Appeal	2
Jurisdiction	2
Statement of the Case and Facts	4
Summary of Argument	9
Argument	10
 <b>AMENDMENT 7 ENTITLES PLAINTIFFS TO ACCESS RECORDS OF ADVERSE MEDICAL INCIDENTS IN NURSING HOMES.</b>	
Conclusion	24
Certificate of Service	25
Certificate of Font	25

## TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<u>Advisory Opinion to the Attorney Gen. re: Patients' Right to Know About Adverse Med. Incidents</u> , 880 So. 2d 617 (Fla. 2004)	3, 11, 12
<u>Avante Villa at Jacksonville Beach, Inc. v. Breidert</u> , 958 So. 2d 1031 (Fla. 1st DCA 2007)	2, 16, 19, 21
<u>Blankfeld v. Richmond Health Care, Inc.</u> , 902 So. 2d 296 (Fla. 4th DCA 2005)	21
<u>Bradley v. S. Baptist Hosp. of Fla., Inc.</u> , 943 So. 2d 202 (Fla. 1st DCA 2006)	22
<u>Coastal Fla. Police Benevolent Ass'n v. Williams</u> , 838 So. 2d 543 (Fla. 2003)	12
<u>Estate of Jones v. Mariner Health Care of Deland, Inc.</u> , 955 So. 2d 43 (Fla. 5th DCA), <u>review denied</u> , 961 So. 2d 933 (Fla. 2007)	21
<u>Fla. Hosp. Waterman, Inc. v. Buster</u> , 932 So. 2d 344 (Fla. 5th DCA 2006) (" <u>Buster I</u> "), <u>approved in part, quashed in part</u> , 33 Fla. L. Weekly S154 (Fla. Mar. 6, 2008)	2, 3, 7, 11, 12
<u>Fla. Hosp. Waterman, Inc. v. Buster</u> , 33 Fla. L. Weekly S154 (Fla. Mar. 6, 2008) (" <u>Buster II</u> ")	3, 4, 11, 12, 13, 21, 23
<u>Integrated Health Care Servs., Inc. v. Lang-Redway</u> , 840 So. 2d 974 (Fla. 2002)	14, 15, 22
<u>Morton Plant Hosp. Ass'n v. Shahbas ex rel. Shahbas</u> , 960 So. 2d 820 (Fla. 2d DCA 2007)	23
<u>NME Props., Inc. v. McCullough</u> , 590 So. 2d 439 (Fla. 2d DCA 1991)	22

## TABLE OF CITATIONS (Cont.)

<u>Cases</u>	<u>Page</u>
<u>N. Broward Hosp. Dist. v. Kroll</u> , 940 So. 2d 1281 (Fla. 4th DCA 2006), <u>review pending</u> (Case No. SC06-2425)	6, 11
<u>Notami Hosp. of Fla., Inc. v. Bowen</u> , 927 So. 2d 139 (Fla. 1st DCA 2006) (“ <u>Notami I</u> ”), <u>aff’d sub nom., Fla. Hosp. Waterman, Inc. v. Buster</u> , 33 Fla. L. Weekly S154 (Fla. Mar. 6, 2008)	11
<u>Schrader v. Fla. Keys Aqueduct Auth.</u> , 840 So. 2d 1050 (Fla. 2003)	17
<u>Tandem Healthcare, Inc. v. Benjamin</u> , 969 So. 2d 519 (Fla. 4th DCA 2007)	1, 3, 4, 7, 8, 13, 16, 19, 21, 22
<u>Vill. of Wellington v. Palm Beach County</u> , 941 So. 2d 595 (Fla. 4th DCA 2006)	17

### Statutes and Other Authorities

Art. V, § 3(b)(3), Fla. Const.	2
Art. V, § 3(b)(4), Fla. Const.	2
Art. X, § 25, Fla. Const.	2, 6, 7-8, 9, 10, 13, 14, 17, 18, 23
Ch. 395, Fla. Stat. (2004)	8, 17, 22
Ch. 400, Fla. Stat. (2004)	14, 15, 19, 21
Ch. 408, Fla. Stat. (2004)	19, 20
Ch. 458, Fla. Stat. (2004)	8, 17, 22

**TABLE OF CITATIONS (Cont.)**

<b><u>Statutes and Other Authorities</u></b>	<b><u>Page</u></b>
Ch. 459, Fla. Stat. (2004)	8, 17, 22
Ch. 461, Fla. Stat. (2004)	8, 17, 22
Ch. 464, Fla. Stat. (2004)	15
§ 159.27, Fla. Stat. (2004)	20
§ 381.026, Fla. Stat. (2004)	4, 8, 9, 10, 16, 17, 21
§ 381.0261, Fla. Stat. (2004)	17
§ 381.028, Fla. Stat. (2005)	16, 21
§ 395.003, Fla. Stat. (2004)	8, 17, 22
§ 400.011, Fla. Stat. (2004)	4, 14, 15, 21
§ 400.021, Fla. Stat. (2004)	15
§ 400.022, Fla. Stat. (2004)	5, 6, 18, 19, 22
§ 400.023, Fla. Stat. (2004)	5, 15, 18, 19, 22, 23
§ 400.118, Fla. Stat. (2005)	3, 7
§ 400.119, Fla. Stat. (2004)	3, 11
§ 400.147, Fla. Stat. (2004)	3, 11, 19
§ 408.031, Fla. Stat. (2004)	20
§ 408.032, Fla. Stat. (2004)	20

## **TABLE OF CITATIONS (Cont.)**

<b><u>Statutes and Other Authorities</u></b>	<b><u>Page</u></b>
§ 408.033, Fla. Stat. (2004)	20
§ 408.05, Fla. Stat. (2004)	20
§ 408.07, Fla. Stat. (2004)	20
§ 440.13, Fla. Stat. (2004)	20
§ 464.002, Fla. Stat. (2004)	22
§ 464.003, Fla. Stat. (2004)	15
§ 464.008, Fla. Stat. (2004)	22
§ 765.101, Fla. Stat. (2004)	20
§ 766.1115, Fla. Stat. (2004)	22
§ 766.1116, Fla. Stat. (2004)	22
§ 766.202, Fla. Stat. (2004)	22
§ 806.01, Fla. Stat. (2004)	20
§ 817.505, Fla. Stat. (2004)	20
§ 1009.67, Fla. Stat. (2004)	20

## PREFACE

Petitioner/plaintiff, Jodi Benjamin, as Personal Representative of the Estate of Marlene Gagnon, Deceased (“plaintiff”), brought this action for violation of nursing home resident’s rights, negligence and wrongful death. Respondent/defendant, Tandem Healthcare, Inc., a foreign corporation d/b/a Tandem Healthcare of West Palm Beach, Inc., a Florida corporation (“Tandem”), operates a nursing home where Mrs. Gagnon had been admitted. Plaintiff invokes this Court’s discretionary jurisdiction to resolve the following question, which the Fourth District Court of Appeal certified as one of great public importance:

WHETHER “NURSING HOMES” 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?

Tandem Healthcare, Inc. v. Benjamin, 969 So. 2d 519, 521-22 (Fla. 4th DCA 2007) (A-1).

All emphasis is supplied unless indicated otherwise. The following symbols are used:

- A - Appendix to this Initial Brief (A-tab:page);
- AA - Appendix to Tandem’s petition for certiorari filed in the Fourth District (AA-tab:page).

## **POINT ON APPEAL**

### **AMENDMENT 7 ENTITLES PLAINTIFFS TO ACCESS RECORDS OF ADVERSE MEDICAL INCIDENTS IN NURSING HOMES.**

## **JURISDICTION**

This Court has jurisdiction to review the certified question of great public importance of whether article X, Section 25 of the Florida Constitution (commonly known as “Amendment 7”), applies to nursing homes. See Art. V, § 3(b)(4), Fla. Const. The First District previously certified the same question as one of great public importance in Avante Villa at Jacksonville Beach, Inc. v. Breidert, 958 So. 2d 1031, 1034 (Fla. 1st DCA 2007). Neither party in Avante Villa sought further review. The decisions have statewide impact and prevent patients in nursing homes across the state from obtaining records of adverse medical incidents.

This Court also has jurisdiction because the Fourth District’s decision expressly and directly conflicts with Florida Hospital Waterman, Inc. v. Buster, 932 So. 2d 344, 351 n.6 (Fla. 5th DCA 2006) (“Buster I”), approved in part, quashed in part, 33 Fla. L. Weekly S154 (Fla. Mar. 6, 2008). See Art. V, § 3(b)(3), Fla. Const. In Buster I, the Fifth District stated in dicta that the purpose of Amendment 7 was to abrogate numerous statutory peer review privileges,



including a quality assurance privilege for nursing homes in section 400.118, Florida Statutes (2005). See *Buster I*, 932 So. 2d at 351 n.6. The peer review statutes Tandem cited in the Fourth District, sections 400.119 and 400.147, Florida Statutes, serve an almost identical purpose as those that Amendment 7 abrogated, i.e., to limit discovery of the risk management process with the goal of improving care through self-regulation. See *Fla. Hosp. Waterman, Inc. v. Buster*, 33 Fla. L. Weekly S154, S156-57 (Fla. Mar. 6, 2008) (“*Buster II*”); *Buster I*, 932 So. 2d at 351 n.6; see also *Advisory Opinion to the Attorney Gen. re Patients’ Right to Know About Adverse Med. Incidents*, 880 So. 2d 617, 620-21 (Fla. 2004).

This Court should exercise its jurisdiction and decide that Amendment 7, which grants all patients the right to access records of any adverse medical incidents involving a “health care facility or provider,” applies to nursing homes. The Fourth District recognized that nurses are “health care providers” and that nursing homes are “health care facilities” under many general laws. See *Tandem*, 969 So. 2d at 521-22. It also observed that “the purpose of the voters adopting the amendment would be well served by applying the amendment to privileged incident reports in **any** health-related context, including those prepared in a nursing home.” *Id.* at 522 (emphasis supplied). Nonetheless, the Fourth District refused to apply Amendment 7 to records created by nursing homes. See *id.* at 521-22. The

Fourth District violated settled precepts by narrowly construing Amendment 7 as only incorporating the definition of “health care facility” or “provider” set forth in section 381.026, Florida Statutes (2004), which does not include nursing homes or nurses. See Tandem, 969 So. 2d at 521-22.

This interpretation frustrates the intent of the voters in adopting Amendment 7-- to create a broad right to access the records of “**any** adverse medical incident” and abrogate contrary peer review statutes. See Buster II, 33 Fla. L. Weekly at S156-57 & S159. It also eviscerates the intent of the Nursing Home Act--to provide remedies to frail and elderly nursing home residents who are receiving both medical and custodial care in nursing homes. See, e.g., § 400.011, Fla. Stat. (2004). Nursing homes are clearly a type of “health care facility or provider” and nursing home residents are a type of “patient” as those terms are used in Amendment 7. This Court should answer the certified question in the affirmative and quash the Fourth District’s decision.

### **STATEMENT OF THE CASE AND FACTS**

Marlene Gagnon was admitted to Tandem’s nursing home in July 2004 (AA-1:2). She suffered from a series of disabilities caused by spinal polio, including weak throat and voice muscles (AA-1:2).

Tandem established a treatment plan to address Mrs. Gagnon's swallowing problems (AA-1:2). The treatment plan incorporated her physicians' orders to provide a special diet of soft or chopped food and required that she be assisted while eating (AA-1:2-3, 7-8). Tandem failed to follow the orders and treatment plan (AA-1:2-3, 7-8).

Shortly after Mrs. Gagnon's admission, Tandem gave Mrs. Gagnon a full lunch tray, including a large helping of coleslaw (AA-1:3). Providing coleslaw directly violated the special diet Mrs. Gagnon's doctors had ordered (AA-1:3, 7-8). Tandem also failed to provide Mrs. Gagnon assistance during meals (AA-1:7). Not unexpectedly, Mrs. Gagnon choked on the coleslaw (AA-1:3, 7-8). Tandem's employees then failed to properly clear her airway or perform CPR (AA-1:8). As a result, Mrs. Gagnon suffered cardiac failure and irreversible brain damage (AA-1:3, 7-8). She died from these injuries several days later (AA-1:3, 14-15).

Plaintiff, Jodi Benjamin, as the personal representative of the Estate of Marlene Gagnon, sued Tandem for violations of nursing home resident's rights pursuant to sections 400.022 and 400.023, Florida Statutes (2004), common law negligence and wrongful death (AA-1). The complaint specifically alleged that Tandem had violated Mrs. Gagnon's right to receive adequate and appropriate

health care and protective and support services under section 400.022(1)(l) (AA-1).

During discovery, plaintiff requested that Tandem produce “[a]ll reports or records of any ‘Adverse Medical Incident’ involving Marlene Gagnon” and any quality of care records regarding Mrs. Gagnon (AA-2:1-2). Plaintiff cited article X, section 25 of the Florida Constitution (commonly known as “Amendment 7”), which grants patients a right to access reports of any adverse medical incidents (AA-2). Tandem objected, claiming that Amendment 7 “does not apply in this matter” (AA-3:1). Tandem never mentioned what specific statute allegedly shielded these documents from discovery (AA-3:2; see also AA-4; AA-6; AA-7). Tandem’s privilege log listed two documents allegedly protected by the peer review privilege: an Adverse Incident Report and a Statement of Dorothy Inman, RN (AA-4).

Plaintiff moved to compel production of the Amendment 7 materials, pointing out that the Fourth District had held in North Broward Hospital District v. Kroll, 940 So. 2d 1281, 1282-83 (Fla. 4th DCA 2006), review pending (Case No. SC06-2425), that Amendment 7 creates a broad right of access to any records related to adverse medical incidents (AA-5; AA-7:5-7; AA-8). Tandem responded that Amendment 7 does not apply to records created by nursing homes because

nursing homes are not “health care providers” and nursing home residents are not “patients” under Amendment 7 (AA-6; AA-7:4).

The trial court granted plaintiff’s motion to compel production of the Amendment 7 materials, citing Florida Hospital Waterman, Inc. v. Buster, 932 So. 2d 344, 351 n.6 (Fla. 5th DCA 2006) (“Buster I”), approved in part, quashed in part, 33 Fla. L. Weekly S154 (Fla. Mar. 6, 2008) (A-2:4-5).<sup>1</sup> The trial court observed that in Buster I, the “court stated the amendment was an ‘obvious’ reference to the statutory reference [sic, privilege] contained in section 400.118, among other statutes.” (A-2:5).

Tandem filed a petition for certiorari in the Fourth District. The Fourth District concluded that Amendment 7 does not apply to records created in nursing homes and quashed the order compelling production. See Tandem Healthcare, Inc. v. Benjamin, 969 So. 2d 519, 521-22 (Fla. 4th DCA 2007) (A-1). According to the court, nursing homes are not a “health care facility” or “health care provider” because Amendment 7 provides that these terms “have the meaning given in general law to a patient’s rights and responsibilities.” Id. at 521 (quoting Art. X, §

---

<sup>1</sup> The copy of the order compelling production included in the appendix to Tandem’s certiorari petition appears to be missing page 4 (AA-10). A complete copy of the circuit court’s order is included in the appendix to this brief (A-2).

25(c)(1), Fla. Const.). The court reasoned that “[a] number of other general laws define healthcare facilities as including nursing homes.” Id. However, it concluded that Amendment 7 intended to only reference the definitions in section 381.026, Florida Statutes (2004), because that statute is titled, “The Florida Patient’s Bill of Rights and Responsibilities.” Tandem, 969 So. 2d at 522. Section 381.026(2)(b) defines a “health care facility” as a “facility licensed under chapter 395,” which governs hospitals, ambulatory surgical centers and mobile surgical facilities. See § 395.003(1)(a), Fla. Stat. (2004). Section 381.026(2)(c) defines a “health care provider” as a doctor (“a physician licensed under chapter 458, an osteopathic physician licensed under chapter 459, or a podiatric physician licensed under chapter 461”).

The Fourth District concluded that “[o]bviously, nursing homes are health care facilities for some purposes,” but not “for purposes of applying Amendment 7.” Tandem, 969 So. 2d at 522. The Fourth District did, however, recognize that construing Amendment 7 as applying to nursing homes would further its purpose. See id. The decision certified the question as one of great public importance for this Court to resolve. Id. at 521-22.

## SUMMARY OF ARGUMENT

The citizens of Florida adopted article X, section 25 of the Florida Constitution (“Amendment 7”) to allow patients a broad right to access records of adverse medical incidents that had been shielded from discovery by numerous peer review statutes. The Fourth District concluded that Amendment 7 did not extend to patients in nursing homes, relying solely upon the definitions in section 381.026, Florida Statutes. The Fourth District recognized the statewide impact of its decision and certified to this Court the question of whether Amendment 7 extends to records created by nursing homes.

Amendment 7 defines “health care facility” and “health care provider” as having “the meaning given **in general law** related to a patient’s rights and responsibilities.” Art. X, § 25(c)(1). Section 381.026 is only one of many general laws related to patients’ rights and responsibilities. For example, the Nursing Home Act is a general law that grants nursing home residents the right to adequate health care, a right enforceable through a statutory cause of action. Numerous other general laws refer to nursing homes as “health care facilities” and to nurses as “health care providers.” The Fourth District erred in reading Amendment 7 narrowly, rather than giving it the broad right of access intended by Florida voters.

The cramped construction the Fourth and First Districts gave to Amendment 7 leads to an absurd result. Both courts recognize that nurses provide professional health care. However, nurses can never be considered “health care providers” under Amendment 7 because section 381.026 limits this term to doctors.

Voters never intended to exempt nurses and nursing homes from the requirement to provide patients with records of adverse medical incidents. Construing Amendment 7 as including nursing homes furthers the intent of the voters to abrogate contrary peer review statutes. It also furthers the purpose of the Nursing Home Act--to protect vulnerable nursing home residents. This Court should answer the certified question in the affirmative and quash the decision of the Fourth District.

### ARGUMENT

#### **AMENDMENT 7 ENTITLES PLAINTIFFS TO ACCESS RECORDS OF ADVERSE MEDICAL INCIDENTS IN NURSING HOMES.**

In 2004, the citizens of Florida amended the Florida Constitution to create Amendment 7, which affords all patients a “right to have access to **any records** made or received in the course of business by **a health care facility or provider relating to any adverse medical incident.**” Art. X, § 25(a), Fla. Const.



(commonly known as “Amendment 7”). Amendment 7 “heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality in order to foster disclosure of information that will allow patients . . . access to information gathered through the self-policing processes during the discovery period of litigation filed by injured patients . . . against their health care providers.” Fla. Hosp. Waterman, Inc. v. Buster, 33 Fla. L. Weekly S154, S159 (Fla. Mar. 6, 2008) (“Buster II”) (quoting Buster I, 932 So. 2d at 355-56). Its “chief purpose” is to eliminate privileges under numerous peer review statutes that had restricted a “patient’s access to a medical provider’s ‘history of acts, neglects, or defaults’ because such history ‘may be important to a patient.’” Id. at S157 (quoting Advisory Opinion to the Attorney Gen. re: Patients’ Right to Know About Adverse Med. Incidents, 880 So. 2d 617, 618 (Fla. 2004)).<sup>2</sup>

The peer review statutes Tandem cited for the first time in the Fourth District, sections 400.119 and 400.147, Florida Statutes,<sup>3</sup> have an almost identical

---

<sup>2</sup> See also Fla. Hosp. Waterman, Inc. v. Buster, 932 So. 2d 344, 351 n.6 (Fla. 5th DCA 2006) (“Buster I”), approved in part, quashed in part, 33 Fla. L. Weekly S154 (Fla. Mar. 6, 2008); Notami Hosp. of Fla., Inc. v. Bowen, 927 So. 2d 139, 143-45 (Fla. 1st DCA 2006), aff’d sub nom., Fla. Hosp. Waterman, Inc. v. Buster, 33 Fla. L. Weekly S154 (Fla. Mar. 6, 2008); N. Broward Hosp. Dist. v. Kroll, 940 So. 2d 1281, 1282-83 (Fla. 4th DCA 2006), review pending (Case No. SC06-2425).

<sup>3</sup> In the trial court, Tandem never cited any specific statutes as supporting its claims of a peer review privilege (AA-3:2; see also AA-4; AA-6; AA-7).

purpose to those that Amendment 7 abrogated. See Buster II, 33 Fla. L. Weekly S156-57 & S159; see also Patients' Right to Know, 880 So. 2d at 620-21. These peer review statutes limit discovery of the risk management process with the goal of improving care through self-regulation. See, e.g., Buster I, 932 So. 2d at 351 n.6. The voters adopting Amendment 7 chose to abrogate these peer review statutes, including those applicable to nursing homes.

Courts must broadly construe Amendment 7 to protect the right of access intended by Florida's citizens. See Buster II, 33 Fla. L. Weekly at S156 & S159. Courts afford constitutional provisions "a broader and more liberal construction than statutes" because they "are 'living documents,' not easily amended, which demand greater flexibility in interpretation than that required by legislatively enacted statutes." Coastal Fla. Police Benevolent Ass'n v. Williams, 838 So. 2d 543, 549 (Fla. 2003). Courts should not construe constitutions "so as to defeat their underlying objectives." Id. at 549. This Court recently applied these settled precepts in observing that Amendment 7 "must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied." Buster II, 33 Fla. L. Weekly at S156.

The Fourth District’s conclusion that Amendment 7 does not apply because nursing homes are not “a health care facility or provider” and nursing home residents are not “patients” conflicts with the plain language of Amendment 7 and its purpose.<sup>4</sup> Even the Fourth District recognized that:

It may well be that there is substantial social benefit in recognizing freedom of information over a nursing home’s privilege with respect to health care matters generally, and that the **purpose of the voters adopting the amendment would be well served by applying the amendment to privileged incident reports in *any* health-related context, including those prepared in a nursing home.**

Tandem, 969 So. 2d at 522 (italics in original) (A-1).

Amendment 7 grants all patients a broad right to “access . . . **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 provides the following definitions:

(1) The phrases “health care facility” and “health care provider” have **the meaning given in general law related to a patient’s rights and responsibilities.**

(2) The term “**patient**” means an **individual who has sought**, is seeking, is undergoing, or **has undergone care or treatment** in a health care facility or by a health care provider.

---

<sup>4</sup> This Court reviews de novo this issue of constitutional interpretation. See Buster II, 33 Fla. L. Weekly at S155.

(3) The phrase “**adverse medical incident**” means **medical negligence**, intentional misconduct, **and any other act, neglect, or default** of a health care facility or health care provider **that caused or could have caused injury to or death of a patient**, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

Art. X, § 25(c)(1)-(3), Fla. Const. These broad definitions, read in light of the purpose of Amendment 7, make clear that nursing home residents are “patients” entitled to records of “adverse medical incidents” in nursing homes under Amendment 7.

Most basically, chapter 400 is entitled, “Nursing Homes **and Related Health Care Facilities.**” The express purpose of chapter 400 is to protect the **health** of elderly residents in nursing homes by developing, establishing and enforcing basic standards for “[t]he **health**, care, and **treatment** of persons in **nursing homes and related health care facilities.**” § 400.011(1), Fla. Stat. (2004); see also Integrated Health Care Servs., Inc. v. Lang-Redway, 840 So. 2d 974, 979-81 (Fla. 2002) (explaining that chapter 400 “provides for the development and enforcement of basic standards of care imposed upon nursing homes”). The Legislature intended these standards would “ensure safe, adequate, and appropriate

**care, treatment, and health** of persons in such facilities.” § 400.011(2).

Nursing homes provide residents with professional nursing care. Section 400.021(13), Florida Statutes (2004), defines “**nursing home facility**” as “any facility which **provides nursing services** as defined in part I of chapter 464 and which is licensed according to this part.”<sup>5</sup> See also Integrated Health Care, 840 So. 2d at 980-81 (explaining that nursing homes provide residents with both professional health care by licensed nurses and custodial care by unlicensed staff). Under section 400.023(4), nursing homes are vicariously liable for a **nurse’s** failure to “exercise care consistent with the **prevailing professional standard** of care for a nurse.” Nursing homes are also liable under chapter 400 “for failure to provide a resident with appropriate **observation, assessment, nursing diagnosis, planning, intervention and evaluation of care by nursing staff.**” § 400.023(5). Thus, nursing homes are liable under section 400.023 for negligently rendered

---

<sup>5</sup> Chapter 400 defines “nursing service” as “such services or acts as may be rendered, directly or indirectly, to and on behalf of a person by individuals as defined in s. 464.003.” § 400.021(14). Section 464.003(3)(a), Florida Statutes (2004), defines the “[p]ractice of professional nursing” as performing “acts requiring substantial specialized knowledge, judgment, and nursing skill,” including “observation, assessment, nursing diagnosis, planning, intervention, and evaluation of care” and “administration of medications and treatments as prescribed or authorized by a duly licensed practitioner.” Section 464.003(3)(e) defines “nursing treatment” as “the establishment and implementation of a nursing regimen for the care and comfort of individuals, the prevention of illness, and the education, **restoration and maintenance of health.**”

professional nursing care.

This Court should reject the contrary interpretations of the district courts in Tandem, 969 So. 2d at 521-22, and Avante Villa at Jacksonville Beach v. Breidert, 958 So. 2d 1031, 1033-34 (Fla. 1st DCA 2007). The First District in Avante Villa reasoned that “[a]lthough in certain general law provisions nursing homes have been included in the definition of health care facility and health care provider, Amendment 7 limits the definitions to the ‘meaning given in general law *related to patient’s rights and responsibilities.*’” Avante Villa, 958 So. 2d at 1033 (footnote omitted) (italics in original). The Fourth District adopted the rationale and holding of Avante Villa in Tandem, 969 So. 2d at 521-22 (A-1). Both decisions construed the term “general law” as only incorporating subsections 381.026(2)(b) and (c), Florida Statutes. See Tandem, 969 So. 2d at 521-22; Avante Villa, 958 So. 2d at 1033-34. They also observed that the statute codifying Amendment 7, section 381.028(3), Florida Statutes (2005), parroted the definitions found in section 381.026(2). See Tandem, 969 So. 2d at 521; Avante Villa, 958 So. 2d at 1034.

No language in Amendment 7 indicates an intent to limit the definitions of health care provider and health care facility to the definitions used in section 381.026(2). This statute provides:

**381.026 Florida Patient’s Bill of Rights and Responsibilities.--**

(1) SHORT TITLE.--This section may be cited as the “Florida Patient’s Bill of Rights and Responsibilities.”

(2) DEFINITIONS.--As used in this section and s. 381.0261, the term:

....

(b) “Health care facility” means a facility licensed under chapter 395.<sup>[6]</sup>

(c) “Health care provider” means a **physician** licensed under chapter 458, an osteopathic **physician** licensed under chapter 459, or a podiatric **physician** licensed under chapter 461.

Rather than incorporate section 381.026, Amendment 7 expressly states that the terms “health care facility” and “health care provider” both “have the meaning given in **general law** related to a patient’s rights and responsibilities.” Art. X, § 25(c)(1), Fla. Const. The term “general law” means the body of Florida statutes that operates uniformly throughout the state. See Schrader v. Fla. Keys Aqueduct Auth., 840 So. 2d 1050, 1055 (Fla. 2003) (“A general law operates universally throughout the state . . . .”); Vill. of Wellington v. Palm Beach County, 941 So. 2d 595, 599 (Fla. 4th DCA 2006) (same).

---

<sup>6</sup> Chapter 395 governs licensure of hospitals, ambulatory surgical centers and mobile surgical facilities. See § 395.003(1)(a), Fla. Stat. (2004).

Numerous general laws relate to patients' rights and responsibilities. Had the voters intended to incorporate a specific statutory definition, they could have done so. Instead, they adopted the phrase, "general law related to a patient's rights and responsibilities," which includes the statutory rights granted in section 400.022 to patients in nursing homes.

As defined by general law, nursing homes render health care and treatment to their residents. These nursing home residents fit the definition of "patient"--any person who has "undergone care or treatment in a health care facility or by a health care provider." Art. X, § 25(c)(2), Fla. Const. The term "adverse medical incident" is broadly defined as "medical negligence, intentional misconduct, **and any other act, neglect, or default** of a health care facility, or healthcare provider that **caused or could have caused injury to or death** of a patient." Art. X, § 25(c)(3), Fla. Const.

Sections 400.022 and 400.023 of the Nursing Home Act are general laws, uniformly applicable across the state, that address a patient's right to health care. Section 400.022(1) grants residents numerous statutory rights intended to protect their health. These include the "**right to receive adequate and appropriate health care** and protective and support services," to "be adequately informed of his



or her **medical condition and proposed treatment,**” to “participate in the planning of all medical treatment,” to “refuse medication or treatment and to be informed of the consequences of such decisions,” to “privacy in treatment,” to “be transferred or discharged only for medical reasons,” and to “freedom of choice in selecting a personal physician.” § 400.022(1)(j), (k), (l), (m), (p), (q). These resident’s rights are enforceable through a private cause of action. See § 400.023(1). Section 400.023 expressly makes nursing homes vicariously liable for a nurse’s failure to render professional nursing care. See § 400.023(4), (5).

Numerous other general laws include nursing homes in the definition of “health care facilities,” as both Tandem and Avante Villa recognized. See Tandem, 969 So. 2d at 521-22 (A-1); Avante Villa, 958 So. 2d at 1033-34. In fact, one of the statutes that Tandem relied upon as setting forth the privilege refers to a nursing home as a “health care facility.” See § 400.147(1)(d), Fla. Stat. (2004). The trial court cited this statute in recognizing that “chapter 400 contains its own internal risk management and quality assurance program referring to nursing homes as ‘health care providers.’” (A-2:4) (citing section 400.147).

Another set of general laws in chapter 408, Florida Statutes (2004), entitled the “Health Facility and Services Development Act,” defines a “health care

facility” as “a hospital, long-term care hospital, **skilled nursing facility**, hospice, or intermediate care facility for the developmentally disabled.” § 408.032(8), Fla. Stat. (2004); see also § 408.031, Fla. Stat. (2004). Other sections within chapter 408 refer to nursing homes as health care facilities. See § 408.07(23), Fla. Stat. (2004) (“‘Health care facility’ means . . . **a nursing home** . . . .”); § 408.033(2)(a), Fla. Stat. (2004) (funding local health councils by assessing “health care facilities subject to licensure by the Agency for Health Care Administration, including . . . **nursing homes**”); § 408.05(2)(e), Fla. Stat. (2004) (requiring AHCA to collect statistics on “[h]ealth resources, including . . . specific services provided by hospitals, **nursing homes**, home health agencies, **and other health care facilities**”). Other statutes echo this definition. See, e.g., § 159.27(16), Fla. Stat. (2004) (Florida Industrial Development Financing Act); § 440.13(1)(g), Fla. Stat. (2004) (Worker’s Compensation Act); § 765.101(6), Fla. Stat. (2004) (Health Care Advance Directives); § 806.01(1)(b), Fla. Stat. (2004) (defining “arson” as burning structures where people are usually present, “such as . . . hospitals, **nursing homes, or other health care facilities**”); § 817.505(2)(a), Fla. Stat. (2004) (criminalizing patient brokering and defining “health care facility” as any entity licensed by ACHA); § 1009.67(4)(b), Fla. Stat. (2004) (establishing a scholarship program for nursing students who agree to work in an eligible “health care facilities,” which “include nursing homes”).

The statutory codification of Amendment 7 in section 381.028 cannot restrict the broad right of access granted in the constitution. See Buster II, 33 Fla. L. Weekly at S158-59. As this Court recently held in Buster II, those provisions of section 381.028 that conflict with Amendment 7 are unconstitutional. 33 Fla. L. Weekly at S158-59. The decision states that the provisions in section 381.028 that do not conflict with Amendment 7, such as the definitions, can be severed from the unconstitutional provisions. See Buster II, 33 Fla. L. Weekly at S159. However, Buster II does not address the issue here--whether the narrow definitions of “health care facility” and “health care provider” in sections 381.028(3)(e) and (f) conflict with Amendment 7.

The Fourth and First Districts’ holdings ignore that the Legislature enacted chapter 400 precisely because existing remedies, like medical malpractice and wrongful death actions, were inadequate to protect frail and elderly nursing home residents. See, e.g., § 400.011; Estate of Jones v. Mariner Health Care of Deland, Inc., 955 So. 2d 43, 48 & n.4 (Fla. 5th DCA), review denied, 961 So. 2d 933 (Fla. 2007); Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296, 298 (Fla. 4th DCA 2005). They also lead to the absurd result of excluding all records related to **nurses** from Amendment 7. This is because sections 381.026(2)(b) and (c), which Tandem and Avante Villa rely upon, define a “**health care provider**” as a **doctor**

(“a physician licensed under chapter 458, an osteopathic physician licensed under chapter 459, or a podiatric physician licensed under chapter 461”), and a “**health care facility**” as “a **facility licensed under chapter 395**” (which governs licensure of hospitals, ambulatory surgical centers and mobile surgical facilities, see § 395.003(1)(a), Fla. Stat. (2004)). Under this cramped reading of Amendment 7, patients would never have a right to access records of adverse medical incidents involving nurses. But even the Fourth District recognized that “nurses are health care providers for purposes of the Medical Malpractice Act.” Tandem, 969 So. 2d at 521 (A-1).<sup>7</sup>

The Fourth District also reasoned that Amendment 7 does not apply because claims for violations of residents’ rights under sections 400.022 and 400.023 are not medical malpractice claims. See Tandem, 969 So. 2d at 521 (citing NME Properties, Inc. v. McCullough, 590 So. 2d 439 (Fla. 2d DCA 1991), and Integrated Health Care Services, Inc. v. Lang-Redway, 840 So. 2d 974 (Fla. 2002)). This rationale fails because Amendment 7 is not limited to medical

---

<sup>7</sup>Nurses provide medical care and are considered “health care providers” under the Medical Malpractice Act. See §§ 766.1115(3)(d)8., 766.1116(1), 766.202(4), Fla. Stat. (2004). Nurses must be licensed as professionals. See §§ 464.002, 464.008, Fla. Stat. (2004). If a nurse commits medical malpractice, the hospital or doctor employing the nurse is vicariously liable for the nurse’s negligence. See, e.g., Bradley v. S. Baptist Hosp. of Fla., Inc., 943 So. 2d 202, 205 (Fla. 1st DCA 2006).

malpractice claims.

Amendment 7 confers a broad right to access to records related to “**any** adverse medical incident.” Art. X, § 25(a), Fla. Const. The term “adverse medical incident” includes “medical negligence, intentional misconduct, **and any other act, neglect, or default** of a health care facility or health care provider” that injures a patient. Art. X, § 25(c)(3), Fla. Const. The “statement and purpose” provided for Amendment 7 explained that its purpose was to create a right to access “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.” Buster II, 33 Fla. L. Weekly at S157. A request for records under Amendment 7 does not have to be made in the context of any specific type of pending litigation. See Morton Plant Hosp. Ass’n v. Shahbas ex rel. Shahbas, 960 So. 2d 820, 825 (Fla. 2d DCA 2007).

The term “adverse medical incident” is broad enough to include the allegations here: that Tandem violated Mrs. Gagnon’s right to adequate health care under section 400.023(1)(l) by failing to follow doctors’ orders requiring a special diet of soft or chopped food, failing to assist Mrs. Gagnon while eating, and negligently attempting to resuscitate Mrs. Gagnon (AA-1:2-4, 7-8, 10-15).

Certainly, her death is an “adverse medical incident.”

Plaintiff is entitled to review all records related to this adverse medical incident, which killed Mrs. Gagnon. The Fourth District’s contrary interpretation frustrates the voters’ intent in adopting Amendment 7. It also deprives nursing home residents of their constitutional right to access these records.

**CONCLUSION**

This Court should answer the certified question in the affirmative. The Fourth District’s decision should be quashed and remanded with directions to enforce the trial court’s order compelling production of Amendment 7 materials.

JANE KREUSLER-WALSH and  
REBECCA MERCIER VARGAS of  
KREUSLER-WALSH, COMPIANI & VARGAS, P.A.  
501 South Flagler Drive, Suite 503  
West Palm Beach, FL 33401-5913  
rmercier@jkwpa.com  
(561) 659-5455

and

JEFFREY M. FENSTER and  
STACIE L. COHEN  
FENSTER, COHEN & SOBOL, P.A.  
1391 Sawgrass Corporate Parkway  
Sunrise, FL 33323  
(954) 473-1500

By \_\_\_\_\_  
REBECCA MERCIER VARGAS  
Florida Bar No. 0150037

**CERTIFICATE OF SERVICE**

I CERTIFY that a true and correct copy of the foregoing has been mailed  
this \_\_\_\_ day of March, 2008, to:

JOHN A. BREKKA, JR.  
SCOTT TEICH  
QUINTAIROS, PRIETO, WOOD  
& BOYER, P.A.  
One East Broward Boulevard, Suite 1400  
Fort Lauderdale, FL 33301  
Counsel for Respondent, Tandem

JONATHAN S. GROUT  
KAREN L. GOLDSMITH  
GOLDSMITH, GROUT & LEWIS, P.A.  
2160 Park Avenue North  
Winter Park, FL 32789  
Counsel for Amicus Curiae, Florida  
Health Care Association

PHILIP M. BURLINGTON  
BURLINGTON & ROCKENBACH, P.A.  
2001 Palm Beach Lakes Boulevard  
Suite 410  
West Palm Beach, FL 33409-6516  
Attorneys for the Amicus Curiae,  
Florida Justice Association

By: \_\_\_\_\_  
REBECCA MERCIER VARGAS  
Florida Bar No. 0150037

**CERTIFICATE OF FONT**

Petitioner's Initial Brief has been typed using the 14-point Times New  
Roman font.

By: \_\_\_\_\_  
REBECCA MERCIER VARGAS  
Florida Bar No. 0150037

**Appendix**

**Tab**

---

<u>Tandem Healthcare, Inc. v. Benjamin</u> , 969 So. 2d 519 (Fla. 4th DCA 2007)	1
Circuit Court Order Granting Plaintiff's Motion to Compel Production of Amendment 7 Materials (2/7/07)	2