IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2423

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.
_____/

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

PETITIONER'S REPLY BRIEF

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ARGUMENT

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

Amendment 7 created a broad right to access records of "any adverse medical incident," which encompasses records from nursing homes otherwise shielded by peer review statutes. The narrow reading of the amendment, advocated by the nursing home and given by the Fourth and First Districts, eviscerates the intent of the voters in overwhelmingly adopting this constitutional right.[1]

A. The plain language of Amendment 7 demonstrates an intent to include nursing homes within the definitions of health care providers and facilities.

The nursing home primarily argues that Amendment 7 incorporates the narrow definition of "health care provider" and "health care facility" found in section 381.026(2), Florida Statutes (2004). The plain language of Amendment 7 demonstrates otherwise. See Art. X, § 25, Fla. Const.

Amendment 7 provides that the terms "'health care facility' and 'health care provider' have the meaning **given in general law** related to a patient's rights and responsibilities." Art. X, § 25(c)(1). Section 381.026 is **not** the **only** general law related to patients' rights and responsibilities. The citizens of Florida, who

[1] All emphasis is supplied unless otherwise stated. The abbreviations are used as stated in the Preface to the Initial Brief and (AR-___) refers to the appendix attached to this Reply Brief.

overwhelmingly[2] voted to adopt Amendment 7, intended that the terms be interpreted in accordance with all general laws related to patients' rights and responsibilities, not just one specific statute.

A reasonable voter would have read Amendment 7 as including nursing homes within this broad definition of health care provider or facility. Section 400.022, Florida Statutes (2004), a general law in chapter 400, is related to rights of residents in nursing homes. Section 400.022, like section 381.026, provides the resident with rights to adequate health care, privacy in treatment, information about his or her medical condition and treatment options, and to refuse treatment. See § 400.022(1)(j), (k), (*l*), (m), (p); see also § 381.026(4)(a)2., 3., (b)1.-4., (d). The Nursing Home Act refers to nursing homes as "health care facilities" in many sections, including the statutes addressing the peer review privilege, which the nursing home cites. See § 400.147(1)(d), Fla. Stat. (2004); see also § 400.011(1) Fla. Stat. (2004) (explaining the purpose of chapter 400 is to establish and enforce "basic standards" for "[t]he **health, care and treatment** of persons in nursing homes **and related health care facilities**"). Indeed, chapter 400 is titled, "Nursing Homes and **Related Health Care Facilities**." As more fully discussed in the Initial Brief, many general laws include nursing homes as "health care facilities." (IB:19-20).

[2] The citizens voted to adopt the amendment by a vote of 81.2 % in favor and 18.8 % against. See Fla. Hosp. Waterman, Inc. v. Buster, 33 Fla. L. Weekly S154, S162 n.1 (Fla. Mar. 6, 2008) ("Buster II").

This reading does not render superfluous the phrase, "related to a patient's rights and responsibilities." Instead, it gives meaning to all the phrases in the constitutional amendment, as required.

The nursing home also argues that Amendment 7 does not apply to nursing homes because the occupants of nursing homes are generally referred to as "residents," not "patients." This ignores that the definition of "patient" in Amendment 7 is extremely broad: "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." Art. X, § 25(c)(2). The occupants of nursing homes are "patients" under Amendment 7 because they receive professional nursing care and health care.

These residents have "the right to receive adequate and appropriate **health care**" while in the nursing home. § 400.022(1)(*l*). Nurses there have "the duty to exercise care consistent with the **prevailing professional standard of care for a nurse**." § 400.023(4), Fla. Stat. (2004). While nursing homes are not liable for the medical negligence of doctors, they are liable if they fail to "provide a resident with appropriate **observation, assessment, nursing diagnosis, planning, intervention, and evaluation of care by nursing staff**." § 400.023(5). Thus, a reasonable citizen voting for Amendment 7 would have assumed that frail and elderly nursing home residents, who receive medical care from nurses, are patients entitled to records of adverse incidents.

The nursing home also argues that nursing homes are not "health care providers" under the Medical Malpractice Act. This again ignores that both the Medical Malpractice Act and the Nursing Home Act recognize that nurses provide professional medical care to residents. See §§ 400.023(4)-(5); 766.1115(3)(d)8., 766.1116(1), 766.202(4), Fla. Stat. (2004).

The reach of Amendment 7 should not depend on where a patient received professional nursing care--in a hospital or in a nursing home. The same policy concerns supported all peer review statutes that, before Amendment 7, shielded discovery of these records. See 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). The voters who adopted Amendment 7 rejected the policy of secrecy that had supported all of the peer review statutes. See Buster II, 33 Fla. L. Weekly at S159. The voters concluded that access to peer review documents could improve the quality of health care by allowing patients to better evaluate the fitness and competence of health care providers. See id. These policy determinations apply with just as much force in nursing homes.

Before Amendment 7, residents of nursing homes had the right to receive a copy of the nursing home's records, including medical records,[3] **except** for those

[3]§§ 400.0234(1), Fla. Stat. (2004) ("Failure to provide complete **copies of a resident's records**, including, but not limited to, **all medical records and the resident's chart**, within the control or possession of the facility" constitutes failure to

records shielded by the peer review privilege. See §§ 400.119, 400.147(4), Fla. Stat. (2004). The Fifth District included section 400.147 as among the peer review statutes Amendment 7 abrogated. See Buster I, 932 So. 2d at 351 n.6. A reasonable voter would have thought so too, based on the plain language.

These constitutional provisions must be given "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). Hence, this Court 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.

There is no reason to believe that reasonable voters would have thought that Amendment 7 excluded frail and vulnerable nursing home residents. The certified question should be answered in the affirmative.

B. The plain language of the constitutional amendment makes it unnecessary to resort to historical materials, which do not support the nursing home's argument.

The nursing home contends that the language of Amendment 7 is plain and unambiguous, but then discusses historical materials that allegedly support its

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comply with discovery that waives presuit requirements); 400.145(1), Fla. Stat. (2004) (requiring nursing homes to provide residents with "a copy of that resident's records," including medical records, within 7 days of a request).

position. It is not necessary to consider these materials, which, if anything, show that a reasonable voter would have believed Amendment 7 applies to nursing homes.

The thrust of the nursing home's argument is that the group that sponsored Amendment 7, Floridians for Patient Protection, did not intend for it to apply to nursing homes. The nursing home relies on arguments made by Floridians for Patient Protections during the proceeding to determine whether Amendment 7 could be placed on the ballot, Advisory Opinion to the Attorney Gen. re Patients' Right to Know About Adverse Med. Incidents, 880 So. 2d 617 (Fla. 2004) (case no. SC04-777). The nursing home also argues that newspaper articles show that the Academy for Florida Trial Lawyers, n/k/a, the Florida Justice Association[4] intended for Amendment 7 to target doctors.

The intent of either group is irrelevant. The determinative question is the intent of the voters who overwhelmingly adopted the constitutional amendment. As this Court previously explained, "[i]n analyzing a constitutional amendment adopted by

initiative rather than by legislative or constitutional revision commission vote, the **intent of the framers should be accorded less significance than the intent of the voters** as evidenced by **materials they had available** as a predicate for their collective decision." Williams v. Smith, 360 So. 2d 417, 420 n.5 (Fla. 1978); see

[4] The Florida Justice Association filed an amicus brief in this case arguing that

Myers v. Hawkins, 362 So. 2d 926, 930 (Fla. 1978). The initiative process is marked by "[a]n absence of debate and recorded discussion." Williams, 360 So. 2d at 420 n.5. Giving weight to the sponsor's view of the amendment would impermissibly allow the **sponsor "to shape constitutional policy as persuasively as the public's perception** of the proposal." Id.

Instead of examining the sponsor's interpretation of the amendment, this Court may "look to the **explanatory materials available** to the people as a predicate for their decision as persuasive of their intent." Plante v. Smathers, 372 So. 2d 933, 936 (Fla. 1979). The "explanatory material[]" that voters actually see when voting on a citizen's initiative is the ballot, which contains the title of the amendment, a summary of its text, and a financial impact statement estimating the cost to state and local governments (AR-1). See §§ 100.371(6)(a), (c); 101.161(1), Fla. Stat. (2004); see also Buster II, 33 Fla. L. Weekly at S157 & S163 n.5 (considering the language of the amendment, its "Statement and Purpose" section, and the ballot summary). Voters also have access to a more detailed financial information statement and summary (AR-2). See § 100.371(6)(d)3.-5., Fla. Stat. (2004). This financial information statement is available on the websites of the Florida Department of State and each supervisor of elections that has a website. See id. The Legislature requires this detailed financial

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Amendment 7 applies to nursing homes.

information statement to better inform the citizens of the potential impact of the citizens' initiative. See id.

The Financial Information Statement for Amendment 7 advised citizens that, if it passed, the Agency for Health Care Administration ("AHCA") estimated that it would need four additional staff and $440,000 "for additional records requests associated with adverse incidents **for nursing homes and assisted living facilities**." (AR-2:5). AHCA estimated only needing an additional half-time position and $25,600 to respond to requests related to hospitals (A-2:5). Thus, AHCA, an agency charged with implementing the amendment, interpreted it as applying to nursing homes. A reasonable voter would have also.

The amicus brief filed by the Florida Health Care Association misleadingly states that "[t]his court recognized that nursing homes are not covered under Amendment 7," citing "Advisory Opinion to the Attorney General v. Patient's Right to Know About Adverse Medical Incidents, 2004 WL 1574738 (Fla.)." (Fla. Health Care Ass'n Amicus Br. at 10). Actually, the cited document is not an order of this Court. It is a brief filed by Floridians for Patient Protection asking this Court to strike the financial impact statement for Amendment 7 because it improperly included the costs for responding to records of adverse medical incidents in nursing homes. See Brief of Floridians for Patient Protection in Opposition to the Proposed Financial Impact Statement, Advisory Opinion to the Attorney Gen. re: Patient's Right to Know

About Adverse Med. Incidents (Financial Impact Statement), No. SC04-1052 (Fla. July 6, 2004), available at 2004 WL 1574738 or http://www.Floridasupremecourt.org/clerk/briefs/2004/1001-1200/04-052_ini_FlaPatProt.pdf. This Court disagreed and found "**no basis for rejecting** the financial impact statement" (AR-3). Advisory Opinion to the Attorney Gen. re: Patients' Right to Know About Adverse Med. Incidents (Finanical Impact Statement), No. SC04-1052 (Fla. July 15, 2004), available at http://www.Floridasupremecourt.org/clerk/disposition/2004/7/04-1052.pdf.

To the extent this Court considers historical materials, they demonstrate that a reasonable voter would have believed that Amendment 7 created a right to access records of adverse medical incidents in nursing homes.

C. The statutory "codification" of Amendment 7 in section 381.028 cannot restrict the constitutional right to access records.

The nursing home also relies upon the statutory "codification" of Amendment 7 in section 381.028, Fla. Stat. (2005). The citizens directly adopted Amendment 7 through an initiative, so "the Legislature is in no position to claim superior interpretive knowledge." Buster I, 932 So. 2d at 353. Further, as this Court recognized in Buster II, the Legislature cannot restrict the broad right of access granted in the constitution. 33 Fla. L. Weekly at S158-59. Indeed, this Court observed that "in its efforts to implement amendment 7 [in section 381.028], it appears the Legislature **has substantially limited the right of access** granted pursuant to the amendment." Buster II, 33 Fla. L. Weekly S158. This Court expressly held that section 381.028

unconstitutionally conflicted with Amendment 7 in six ways. See id. 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.

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 because they do not include nursing homes or nurses. For the reasons discussed above in point I.A, the narrow definitions of health care facility and provider in section 381.028 unconstitutionally conflict with Amendment 7.

D. This Court should decline to consider the nursing home's federal preemption argument, which is unpreserved and without merit.

This Court should decline to consider the nursing home's federal preemption argument, which was not raised in the trial court or addressed by the Fourth District in this case or the First District in Avante Villa at Jacksonville Beach, Inc. v. Breidert, 958 So. 2d 1031 (Fla. 1st DCA 2007). This Court routinely declines to consider issues that were not first addressed by the district court and are outside the scope of the certified question. See, e.g., Chames v. DeMayo, 972 So. 2d 850, 853 n.2 (Fla. 2007); Metro. Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494, 499 n.7 (Fla. 1999) (declining to address an issue that "was neither raised in the trial court nor addressed

by the Third District").[5]

In addition, the nursing home did not preserve this issue for certiorari review because it never raised this argument in the trial court (AA-3; AA-4; AA-6; AA-7:3-4; AA-9). The nursing home cannot raise a new argument supporting its claim of privilege for the first time in a petition for certiorari. See, e.g., Jenney v. Airdata Wiman, Inc., 846 So. 2d 664, 668 (Fla. 2d DCA 2003) (refusing to consider a claim of privilege that was raised for the first time in the appellate court); Dade County Sch. Bd. v. Soler ex rel. Soler, 534 So. 2d 884, 885 (Fla. 3d DCA 1988) (same); see also Fla. R. Civ. P. 1.280(b)(5) ("When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party **shall make the claim expressly** . . . .").

On the merits, the nursing home now cites federal laws and a federal regulation that require nursing homes participating in Medicare or Medicaid to maintain a "quality assessment and assurance committee," which meets at least quarterly to correct quality deficiencies. 42 U.S.C. §§ 1395i-3(b)(1)(B), 1396r(b)(1)(B). These statutes provide that "[a] State . . . may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such

[5] For example, a similar federal preemption argument was raised in Buster II, but this Court did not address it. See, e.g., Initial Brief of Notami Hosp. of Fla., Inc., Notami Hosp. of Fla., Inc. v. Bowen, No. SC06-912, at 38-42 (Fla. June 27, 2006), available at http://www.floridasupremecourt.org/clerk/briefs/2006/801-1000/06-912_ini.pdf.

committee with the requirements of this subparagraph." 42 U.S.C. §§ 1395i-3(b)(1)(B), 1396r(b)(1)(B); see 42 C.F.R. § 483.75(o)(3).

Courts presume that state laws protecting the health and welfare of its people are not preempted unless a contrary Congressional intent is clear and manifest. See, e.g., Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). The federal privileges in sections 1395i-3(b)(1)(b) and 1396r(b)(1)(B) are extremely narrow. See Missouri ex rel. Boone Ret. Ctr., Inc. v. Hamilton, 946 S.W.2d 740, 743 (Mo. 1997); In re Subpoena Duces Tecum to Jane Doe, Esq., 787 N.E.2d 618, 623 (N.Y. 2003). As the Missouri Supreme Court explained, this privilege is "exceedingly narrow" and only protects "the committee's own records--its minutes or internal working papers or statements of conclusion--from discovery." Boone Ret. Ctr., 946 S.W.2d at 743. The New York Court of Appeals reached a similar conclusion and described the privilege as "narrow." In re Jane Doe, 787 N.E.2d at 623. It only encompasses the "records of such committee," meaning "reports generated by or at the behest of a quality assurance committee for quality assurance purposes" and the committee's internal working papers. Id. "Of course, where the committee simply duplicates existing records from clinical files, no privilege will attach." Id.

The records at issue here do not fall within this narrow federal privilege because they do not appear to be the records of the committee or its working papers. The nursing home's privilege log lists only two documents: an Adverse Incident Report

and a Statement of Dorothy Inman, RN (AA-4). It is unclear what these are exactly, but they do not appear to be records of the quality assurance committee. See Boone Ret. Ctr., 946 S.W.2d at 743; In re Jane Doe, 787 N.E.2d at 623. At a minimum, an in camera review is required before a court could conclude that these documents are privileged under federal law. See, e.g., Mariner Health Care of Metrowest, Inc v. Best, 879 So. 2d 65, 67 (Fla. 5th DCA 2004) (requiring an in camera inspection where "the precise nature" of the documents and whether they were subject to the peer review privilege was unclear). If this Court reaches this issue and finds a federal privilege may be applicable, it should remand to the trial court for an in camera review.

E. If this Court disagrees with plaintiff's construction of Amendment 7, it should remand for an in camera review to determine whether the documents are privileged under state law.

In the unlikely event that this Court disagrees with plaintiff's construction of Amendment 7, it should remand to the trial court with directions to conduct an in camera review to determine whether the documents are privileged under sections 400.119 and 400.147. It is unclear whether either privilege applies.

The first statute the nursing home cites, section 400.119(1), provides that:

> Records of meetings of the risk management and quality assurance committee of a long-term care facility licensed under this part . . . , as well as incident reports filed with the facilities' risk manager and administrator, notifications of the occurrence of an adverse incident, and adverse incident reports from the facility are **confidential and exempt from**

s. 119.07(1) and s. 24(a), Art. I of the State Constitution.
. . .

The Second District held that section 400.119 is only an exemption from public records laws and does **not** shield documents from discovery in litigation. See Tampa Med. Assocs., Inc. v. Estate of Torres ex rel. Bank, 903 So. 2d 259, 262 (Fla. 2d DCA 2005). The decision recognized that the Fourth District may have taken a contrary view in 1620 Health Partners, L.C. v. Fluitt, 830 So. 2d 935, 938 (Fla. 4th DCA 2002). However, the Second District criticized 1620 Health Partners as failing to analyze the language of the statute. See Tampa Med. Assocs., 903 So. 2d at 262. As the Second District recognized, the plain language of the exemption provides that it only applies to public records requests, not discovery requests. See id.

The other statute the nursing home cites, section 400.147, requires nursing homes to establish a risk management and quality assurance program and develop a system for reporting adverse incidents. See § 400.147(1)(d). This statute provides that "[t]he incident reports are part of the workpapers of the attorney defending the licensed facility in litigation relating to the licensed facility and **are subject to discovery**, but are not admissible as evidence in court." § 400.147(4). Courts interpreting this statute have concluded that incident reports are discoverable as attorney work product upon a showing of "need and inability to obtain without undue hardship." Tampa Med. Assocs., 903 So. 2d at 262; see Mariner Health Care of

Metrowest, Inc. v. Best, 879 So. 2d 65, 67 (Fla. 5th DCA 2004); 1620 Health Partners, 830 So. 2d at 938. Plaintiff can make this showing. Thus, even if this Court concludes that Amendment 7 does not apply, it should remand for the trial court to conduct an in camera inspection to determine whether these documents are shielded by the statutory peer review privilege. If they are not privileged, they must be produced.

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.

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