IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC11-2208
CASE NO. SC11-2336
L.T. CASE NO. 3D11-34

MYRIAM AMPUERO-MARTINEZ,
as Personal Representative of the
ESTATE OF SERGIO AMPUERO,

Petitioner,

v.

CEDARS HEALTHCARE GROUP, LTD.
d/b/a CEDARS MEDICAL CENTER,

Respondent.
_____ /

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Discretionary Review From a Decision
of the Third District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

This lawsuit was filed against Cedars Healthcare Group, Ltd. ("CHG") in September of 2009. (R. II:369-70).[1] Plaintiff[2] claimed the decedent, Sergio Ampuero, received negligent care from Defendants following a surgery performed while he was a patient at Cedars Medical Center in January of 2007. (R. I:69; II:352-53, 366-69).

On November 19, 2009, Plaintiff served CHG with its First Request to Produce. (R. II:345-46). Plaintiff sought all records of "adverse medical incidents" as defined in Article X, section 25 of the Florida Constitution, commonly known as Amendment 7, regarding Ampuero (Item No. 1), as well as all records of adverse medical incidents regarding Co-Defendants, Drs. Legaspi, Gonzalez and Vilasuso (Item Nos. 2-4). (R. I:94; II:345-46). Significantly, there were no records of any adverse medical involving the care and treatment of Ampuero. (R. II:239). As for the physicians, these requests would necessitate a search for 22 years of records. (R. I:66-67; I:161).

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[1] The documents referenced in this brief correspond to the three volume index of the record of appeal that was sent to the parties by this Court in July of 2012. They will be referenced as (R. Vol. No.: Page No.).

[2] Petitioner Myriam Ampuero-Martinez will be referred to in this brief as "Plaintiff."

CHG objected to the requested discovery and moved for a protective order. (R. II:260-341). Among other objections, CHG objected on the basis that it was not a "health care facility" subject to Amendment 7. (R. II:261; II:338, I:84, I:146; II:346). CHG asserted that Amendment 7 provides that a patient may invoke the amendment to access records of a "health care facility," which is defined as having "the meaning given in general law related to a patient's rights and responsibilities." (R. II:265). CHG further asserted that section 381.026, Florida Statutes, the only statute addressing a "patient's rights and responsibilities" at the time Amendment 7 was adopted, limits the term "health care facility" to mean a facility licensed under chapter 395. (R. II:265-66), citing § 381.026 (2)(b), Fla. Stat. Amendment 7's enabling statute, section 381.028(3)(e) and (f), defines the term identically. (R. II:266).

CHG explained that it ceased to be a licensed heath care facility when the assets of Cedars Medical Center were sold to the University of Miami on December 1, 2007, almost two years before the complaint was filed and it received the discovery request at issue. (R. I:146; II:261; II:338; II:346; II:370). In support of this assertion, CHG filed the State of Florida Agency for Health Care Administration license issued to the University of Miami as the operator of the University of Miami Hospital, located at 1400 NE 12th Avenue, Miami, Florida, 33126, effective December 1, 2007. (R. II:232-36). CHG also filed an affidavit

from the **former** risk manager of the hospital previously licensed as Cedars Medical Center, attesting that the assets of the hospital were sold to the University of Miami and on December 1, 2007 that a new license under the name of University of Miami Hospital operated by the University of Miami was thereafter issued to University of Miami Hospital. (R. II:227-31). It was undisputed that Cedars Medical Center was no longer a hospital licensed in Florida under chapter 395, Florida Statutes effective December 1, 2007. (R. I:104; II:227-31, II:232-36).

CHG also objected to the requested discovery on the basis that Amendment 7 was preempted by the Federal Health Care Quality Improvement Act. (R. II:278-79).

The Magistrate, who was referred this issue, rejected CHG's position that it was not subject to an Amendment 7 request because it was not presently a "health care facility" within the meaning of Amendment 7 and was not one when the lawsuit was filed or the discovery was requested. (R. I:95-97). In the Report and Recommendation, the Magistrate found that CHG was subject to Amendment 7 on two alternative grounds. (R. I:97). The Magistrate found that Plaintiff has a right of access to any records made or received by Cedars Medical Center in the ordinary course of its business during the time it was a licensed health care facility, regardless of its sale. (R. I:97). Alternatively, the Magistrate found that CHG waived its objection by virtue of searching its historical records and responding (as

to Item No. 1) that it had no adverse medical incident records related to Ampuero's hospitalization. (R. I:94, 97). CHG's objection that Amendment 7 is unconstitutional was overruled. (R. I:97).

The trial court adopted the Magistrate's Report and Recommendation with limitations that are not at issue here. (R. I:49).

CHG petitioned for a writ of certiorari to the Third District. (R. I:1-45). Among other arguments, CHG raised the two arguments set forth above. Id. The Third District granted the petition in part and denied it in part. (R. III:439). Specifically, the Third District granted the petition and quashed the trial court's order on the basis "that the request to produce asks for records of adverse medical incidents involving patients other than the plaintiff but does not limit the production of those records to the same or substantially similar condition, treatment, or diagnosis as the patient requesting access. See § 381.028(7)(a), Fla. Stat. (2010)." (R. III:440). Cedars Healthcare Group, Ltd. v. Martinez, 88 So. 3d 190 (Fla. 3d DCA 2011). The Third District found that "by not limiting the request as required by the statute, the trial court departed from the essential requirements of law." Id. CHG never asserted this ground as a basis for relief either before the trial court or in its petition to the Third District.

Following the Third District's decision, CHG filed a pleading suggesting the court's decision relied on a statute that was invalidated by this Court's decision in

Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478, 492-93 (Fla. 2008). (III:418). The Third District treated the filing as a motion for rehearing and denied it. (III:441). Plaintiff's motion for rehearing was denied. (R. III:442). The parties appealed and cross-appealed to this Court and the matters were consolidated. The parties subsequently settled their underlying dispute in this case, and Plaintiff moved for this Court to retain jurisdiction over this appeal, which motion was granted. See Plaintiff's Notice of Partial Settlement and Motion for the Court to Retain Jurisdiction of Case (June 8, 2012); Order (December 10, 2012).

SUMMARY OF THE ARGUMENT

While CHG concedes that the Third District's decision conflicts with this Court's decision in Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478, 492-93 (Fla. 2008), the decision should be affirmed to the extent it quashed the trial court's order and reversed to the extent it did not quash the order as a whole for the following reasons.

First, the Third District erred in finding that CHG is subject to Plaintiff's Amendment 7 discovery requests because CHG was not a licensed health care facility when the lawsuit was filed and the discovery requests in this case were propounded. Second, this Court should revisit whether the Florida Legislature's "same or similar" requirement in section 381.028(7)(a), which the Third District relied upon in its opinion, is statutorily valid on the basis of due process as a reasonable enactment in the context of discovery requests in litigation. Finally, to preserve the issue for future review by the United States Supreme Court, CHG submits that contrary to this Court's decision in West Florida Regional Medical Center v. See, 79 So. 3d 1 (2012), Amendment 7 is preempted by the Health Care Quality Improvement Act ("HCQIA") of 1986.

ARGUMENT

I. THE THIRD DISTRICT'S OPINION CONFLICTS WITH BUSTER.

The Third District's opinion conflicts with Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478, 492-93 (Fla. 2008), which held that section 381.028(7)(a), Florida Statutes, was invalid. Nevertheless, the Third District correctly quashed the trial court's order, albeit for the wrong reason. Under the "tipsy coachman doctrine," the arguments raised by CHG in its petition to the Third District and in this brief provide the grounds to quash the trial court's order. See State Farm Fire & Cas. Co. v. Levine, 837 So. 2d 363, 365 (Fla. 2002) (stating "tipsy coachman" doctrine "permits a reviewing court to affirm a decision from a lower tribunal that reaches the right result for the wrong reasons so long as "there is any basis which would support the judgment in the record.").

II. THE THIRD DISTRICT'S OPINION SHOULD BE AFFIRMED IN PART AND REVERSED IN PART BECAUSE CHG IS NOT A LICENSED HEALTHCARE FACILITY AND THUS IS NOT SUBJECT TO AMENDMENT 7.

The Third District properly quashed the trial court's order because Amendment 7 does not apply to CHG. Accordingly, any documents in its possession are not subject to disclosure under Amendment 7 and remain statutorily protected. See § 395.0191(8), 395.0193(8), 395.0197(4), 766.101(5), 766.1016, Fla. Stat. (providing for confidentiality of documents and information). See also

Cruger v. Love, 599 So. 2d 111 (Fla. 1992); Variety Children's Hosp. v. Mishler, 670 So. 2d 184 (Fla. 3d DCA 1996).

Amendment 7 provides that a patient may access records relating to any adverse medical incident of a "health care facility." See Art. X, § 25(a), Fla. Const. The amendment defines "health care facility" as having "the meaning given in general law related to a patient's rights and responsibilities." See Art. X, § 25(c)(1), Fla. Const.

As this Court held: "It is clear that article X, section 25 was drafted with the Florida Patient's Bill of Rights and Responsibilities, section 381.026, directly in mind." Benjamin v. Tandem Healthcare, Inc., 998 So. 2d 566, 571 (Fla. 2008). This Court explained that Amendment 7 incorporated the definitions contained in section 381.026, Florida Statutes, because, at the time Amendment 7 was adopted, section 381.026 was the only statute using the phrase "patient's rights and responsibilities" and the statement of purpose accompanying Amendment 7 refers to section 381.026 by name. Id. at 570-7 (agreeing with Avante Villa at Jacksonville Beach, Inc. v. Breidert, 958 So. 2d 1031, 1033 (Fla. 1st DCA 2007)). Section 381.026 defines a "health care facility" as "a facility licensed under chapter 395." Id. at 569; § 381.026 (2)(b), Fla. Stat.

CHG is not subject to Amendment 7 because it is not a licensed health care facility and was not a licensed health care facility at the time Plaintiff filed this

lawsuit and served CHG with the discovery requests at issue. Plaintiff does not dispute that before it filed this lawsuit and attempted to invoke Amendment 7 by serving CHG with the discovery requests at issue, CHG had already sold Cedars Medical Center and it was no longer a health care facility licensed under chapter 395. As such, CHG is not a health care facility subject to Amendment 7, and the trial court erred in ordering it to produce documents under the amendment. The Third District's decision should be affirmed to the extent it quashed the trial court's order, albeit for a different reason, though the decision did not go far enough in failing to quash the order as a whole.

Further, the trial court erred to the extent it found that CHG waived its objection that it is not subject to Amendment 7, because it responded to Item No. 1 of the First Request to Produce, by stating that it had no responsive documents pertaining to the decedent, Mr. Ampuero. First, Plaintiff never argued that there was a waiver. Second, in its correspondence to Plaintiff's counsel, counsel for CHG advised that the response was provided "without waiving any of the arguments made in Cedars Healthcare Group's pending Motion for Protective Order." (R. II:239). See § 90.507, Fla. Stat. ("[a] person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person . . . voluntarily discloses . . . any significant part of the matter or communication."); Paradise Divers, Inc. v. Upmal, 943 So. 2d 812, 814

(Fla. 3d DCA 2006) (employer's agreement to produce documents regarding its "advice of counsel" defense and its failure to provide maintenance and cure to injured seaman pursuant to express limited waiver of attorney-client and work product privileges did not constitute a waiver of privileges as to other portions of relevant files, mental impressions, or communications concerning counts other than failure to provide maintenance and cure); Procacci v. Seitlin, 497 So. 2d 969 (Fla. 3d DCA 1986) (client who waived attorney-client privilege as to particular transaction by suing attorney for malpractice in conduct of that transaction, and by voluntarily disclosing substance of communications as to that matter in instant suit against other party to transaction, did not waive privilege as to communications made during any other aspect of relationship between client and attorney); First Union Nat'l Bank of Fla. v. Whitener, 715 So. 2d 979, 984 (Fla. 5th DCA 1998) (earlier production of letters did not waive attorney-client privilege where voluntary disclosure specified that production was not waiver of attorney-client privilege). Here, CHG did not disclose any confidential matter or communication and specified in its correspondence to Plaintiff's counsel that it was not waiving any of the arguments raised in its motion for protective order.

Additionally, the Magistrate's finding that CHG "has the ability to search for records of adverse medical incidents for the three physician defendants" does not support the finding of a waiver. Whether or not Amendment 7 applies to a party is

not contingent on that party's ability to search for documents. The determinative issue is not whether CHG "has the ability to search for records of adverse medical incidents," but whether CHG is legally required to engage in such a search pursuant to Amendment 7. The applicability of Amendment 7 cannot be contingent on whether a party can ultimately perform a search for records of adverse medical incidents. There is no language in the amendment that would support such an interpretation. Rather, whether a party needs to comply with the amendment is dependent on whether the amendment applies to the party in the first instance.

Because CHG had already sold the assets of Cedars Medical Center and relinquished its license as a healthcare facility when this lawsuit was filed and these discovery requests were served,[3] it was no longer a health care facility licensed under chapter 395 and is consequently not subject to Amendment 7. Thus, the trial court erred in requiring CHG to produce documents under the amendment and the Third District erred to the extent it did not quash the trial court's order as a whole.

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[3] Furthermore, any argument made by Plaintiff below that if Cedars Medical Center is no longer a health care facility, then CHG has no peer review privilege to assert, must fail. This argument is misguided and akin to arguing that if a lawyer retires or surrenders her license, then the holder of those records can no longer assert the attorney-client privilege over communications made with clients when the lawyer was licensed.

III. THE THIRD DISTRICT DECISION SHOULD BE AFFIRMED BECAUSE THE "SAME OR SIMILAR" REQUIREMENT IN SECTION 381.028(7)(A), FLORIDA STATUTES, IS VALID.

The Florida Legislature's "same or similar" requirement in section 381.028(7)(a), which the Third District relied upon in its opinion, is a valid and reasonable enactment in the context of discovery requests in litigation, contrary to this Court's decision in Buster. This provision provides in pertinent part that, "the adverse medical incident records to which a patient is granted access are those . . . which pertain to any adverse medical incident affecting the patient or any other patient which involves the same or substantially similar condition, treatment, or diagnosis as that of the patient requesting access." Id. This Court previously struck down this provision in Buster, holding that this provision "contravene[d] the broad rights of access to adverse medical incident records granted by amendment 7." 984 So. 2d at 493.

This Court should revisit whether this provision is a reasonable enactment, at least as it pertains to cases in litigation. Specifically, Florida courts have found that considerations of relevance, overbreadth or burdensomeness are not taken into account in Amendment 7 requests. See Columbia Hosp. Corp. of So. Broward v. Fain, 16 So. 3d 236, 240 (Fla. 4th DCA 2009) ("A request for Amendment 7 materials is not an ordinary discovery request which can be subjected to overbreadth, irrelevance, or burdensomeness objections."); Amisub North Ridge

Hosp., Inc. v. Sonaglia, 995 So. 2d 999, 1001 (Fla. 4th DCA 2008), citing Morton Plant Hosp. Ass'n v. Shahbas, 960 So. 2d 820, 825 (Fla. 2d DCA 2007).

Essentially, the above Florida appellate courts have interpreted Amendment 7 to eviscerate Rule 1.280(c) of the Florida Rules of Civil Procedure, which permits parties to litigation to request that a court enter an order to protect them from discovery on the basis of "annoyance, embarrassment, oppression, or undue burden." In this case, Plaintiff's requests for records relating to three physicians would require CHG to search 22 years of records. (R. I:66-67; I:161).

In the absence of the protection of Rule 1.280(c), a party is free to use the discovery process in litigation for an improper purpose: to request unnecessary records for purposes of harassment, to increase the costs of litigation, to pressure for an offer of settlement, or simply to conduct a fishing expedition.

To the extent these Florida decisions have created a category of discovery that can be imposed for improper purposes without any discretion by the trial court, there is a significant due process concern.

Amendment 7 was not written in the context of litigation. Instead, it was billed as a consumer information provision, to allow patients and prospective patients to obtain information about their physician or health care facility. See In re Advisory Opinion to the Atty. Gen. re Patients' Right To Know About Adverse

Med. Incidents, 880 So. 2d 617, 619 (Fla. 2004) (describing ballot title and summary of proposed amendment as patient's—not plaintiff's—right to know).

The Second District has previously recognized that Amendment 7 must be implemented differently inside and outside of litigation due to the rules of civil procedure and the discretion of the trial judge. Specifically, the court in Wellner v. East Pasco Medical Center, Inc., 975 So. 2d 442, 444 (Fla. 2d DCA 2007), held in the context of an untimely request for records of adverse medical incidents:

> Outside this lawsuit, Mr. Wellner was free to demand compliance with the new constitutional right and to bring a separate lawsuit if he concluded that the relevant health care providers did not fulfill his right. Inside this lawsuit, any such request needed to be made within the confines of the relevant court orders.

Given the broad manner in which Amendment 7 is interpreted by appellate courts, section 381.028(7)(a)'s "same or similar" requirement is a reasonable enactment that promotes due process at least as it pertains to cases in litigation. The Third District's opinion below should be affirmed on that basis.

IV. ALTERNATIVELY, AMENDMENT 7 IS PREEMPTED BY THE FEDERAL HEALTH CARE QUALITY IMPROVEMENT ACT OF 1986.

For the reasons stated in CHG's petition for writ of certiorari to the Third District, (I:23-39) and its Reply Brief (II:402-08), Amendment 7 is preempted by the federal Health Care Quality Improvement Act of 1986 (HCQIA). Because Amendment 7's elimination of state-law confidentiality constitutes an obstacle to

the purpose and objective of HCQIA, Amendment 7 is unconstitutional. The Third District's decision should be reversed on that basis to the extent it failed to quash the trial court's order requiring production as a whole.

CHG recognizes that this argument was rejected by this Court in West Florida Regional Medical Center v. See, 79 So. 3d 1 (2012). CHG believes that See was wrongly decided, and raises this argument here in order to preserve the issue for future review by the United States Supreme Court.

CONCLUSION

The Third District's decision should be affirmed to the extent it quashed the trial court's order of production and reversed to the extent it failed to quash the order as whole because CHG is not a health care facility subject to Amendment 7 and because Amendment 7 is preempted in that it poses an obstacle to HCQIA. The Third District's decision should also be affirmed because the "same or similar" requirement in section 381.028(7)(a) is a reasonable enactment that promotes due process in the context of litigation.

	Respectfully submitted,
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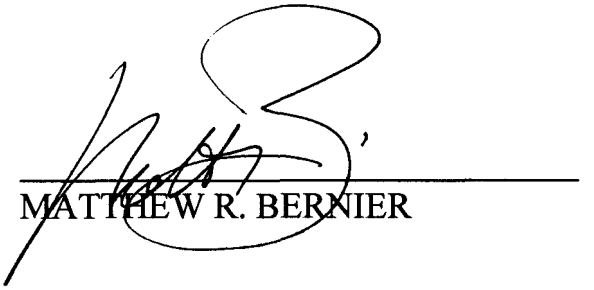
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.



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