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Jodi Benjamin v. Tandem Healthcare, Inc.

SC07-2423

FLORIDA SUPREME COURT
WEDNESDAY, SEPTEMBER 10, 2008

>> PLEASE RISE.

HEAR YE, HEAR YE, HEAR YE.

THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEA,
DRAW NEAR, GIVE ATTENTION, AND
YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,
THIS GREAT STATE OF FLORIDA,
AND THIS HONORABLE COURT.

>> GOOD MORNING.

>> LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING.

FIRST CASE ON THE DOCKET THIS
MORNING IS BENJAMIN v. TANDEM
HEALTHCARE.

ARE THE PARTIES READY TO
PROCEED?

YOU MAY PROCEED.

>> MAY IT PLEASE THE COURT.

MY NAME IS

REBECCA MERCIER-VARGAS.

I AM HERE ON BEHALF OF THE
PLAINTIFF MRS. BENJAMIN, AND

WITH ME TODAY IS HER TRIAL
ATTORNEY JEFFREY FENSTER.

THE VOTERS ENACTED AMENDMENT 7
TO CREATE A BROAD RIGHT TO
ACCESS PEER REVIEW RECORDS THAT
HAD PREVIOUSLY BEEN SHROUDED BY
PRIVILEGES.

THE FIRST AND FOURTH DISTRICTS
EVISCERATED THE INTENT OF THE
AMENDMENT BY NARROWLY
CONSTRUING IT TO INCLUDE
NURSING HOMES AND NURSES.

>> WHERE DID THE FOURTH
DISTRICT GO WRONG IN ITS
ANALYSIS HERE?

WHAT YOU'RE CONTENDING?

>> THAT IS CORRECT.

>> ABOUT THE VERY POINTEDLY
WAY YOU'RE MAKING YOUR CASE,
WHERE DID THEY GO WRONG?

>> YES, YOUR HONOR.

I'D LIKE TO START WITH THE
PLAIN LANGUAGE OF THE
AMENDMENT.

THE AMENDMENT PROVIDES THAT THE
TERMS HEALTH CARE PROVIDER AND
HEALTH CARE FACILITY HAVE THE
MEANING GIVEN IN GENERAL LAW
RELATED TO PATIENTS' RIGHTS AND
RESPONSIBILITIES.

AND THE FIRST AND FOURTH
DISTRICTS WENT WRONG BY
NARROWLY CONSTRUING THAT
PROVISION AS ONLY --

>> DIDN'T THE FOURTH DISTRICT
POINT TO A STATUTORY SOURCE FOR
AN EXPLANATION?

>> YOU'RE RIGHT, YOUR HONOR.
WHAT THEY DID WAS THEY
CONCLUDED THAT IT ONLY INTENDED
TO APPLY TO ONE SPECIFIC

STATUTE WHICH WAS SECTION
381.026, WHICH IS A LOT TITLED
-- IT'S RELATED TO A PATIENTS'
RIGHTS AND RESPONSIBILITIES;

HOWEVER, THERE ARE OTHER
STATUTES IN THE GENERAL LAW
THAT RELATE TO PATIENT'S RIGHTS
AND RESPONSIBILITIES.

>> WHICH ONE WOULD YOU --

>> -- DEAL WITH PROVISION IN
THE STATEMENT OF PURPOSE OF THE
PROPOSED AMENDMENT THAT REFERS
TO STATUTORY PROVISIONS

RELATING TO PATIENTS' BILL OF
RIGHTS ON -- THAT SEEMS TO BE
AN UNMISTAKABLE REFERENCE TO
THE STATUTORY PROVISION --

>> YOUR HONOR, I WOULD AGREE
THAT IT DOES REFER TO THAT
STATUTE, BUT IT'S NOT ONLY
REFERRING TO THAT STATUTE.

IT'S REFERRING ALSO, THE
AMENDMENT IS USING THE TERMS
GENERAL LAW WHICH MEANS TO
INCORPORATE THE ENTIRE BODY OF
GENERAL LAWS THAT RELATE TO
PATIENTS' LAWS AND
RESPONSIBILITIES, AND THERE'S A
PARALLEL STATUTE IN THE NURSING
HOME ACT WHICH CREATES VERY

SIMILAR RIGHTS TO PEOPLE WHO
HAVE BEEN ADMITTED TO NURSING
HOMES SPECIFICALLY TO RECEIVE
PROFESSIONAL NURSING CARE --

>> WHAT IS THAT STATUTE CALLED?

>> YOUR HONOR, THAT'S CALLED
RESIDENT'S RIGHT.

>> NOW, WE ARE -- IT MAY BE,
AND THERE ARE QUESTIONS AS TO
OBVIOUSLY PEOPLE THAT PREPARED
THE FINANCIAL IMPACT STATEMENT
THOUGHT THAT THIS WAS --

NURSING HOMES AND THE FIFTH
DISTRICT THOUGHT -- BUT LET'S
GET BACK TO THE LANGUAGE THAT
THE DRAFTERS CHOSE TO USE
SPECIFICALLY SAID HEALTH CARE
PROVIDER SHALL BE AS DEFINED IN
GENERAL LAW RELATING TO
PATIENTS' RIGHTS AND
RESPONSIBILITIES.

NOW THEY COULD'VE SAID HEALTH
CARE PROVIDER IS ANY -- THEY
COULD'VE LISTED IT BECAUSE THIS
WAS NOT IN THE BALLOT SUMMARY
AND THEY COULD SAID NURSING
HOME INCLUDES EVERYBODY WHO
PROVIDES HEALTH CARE, BUT THEY
DIDN'T, AND I AM -- AND THE
FACT THAT ALTHOUGH MAYBE
PATIENTS AND RESIDENTS ISN'T,
YOU KNOW, THEY'RE
INTERCHANGEABLE SOMETIMES BUT
JUST THE FACT THAT THE NURSING
HOME BILL OF RIGHTS REFERS TO
RESIDENTS VERSUS PATIENTS
SOMEWHAT PERSUADES ME THAT THE
LANGUAGE TENDED TO NARROW WHO
THIS PRIVILEGE WOULD APPLY TO
RATHER -- I MEAN, THE
EXEMPTIONS RATHER THAN SAY ANY
HEALTH CARE PROVIDER, SO IF YOU
COULD ANSWER HOW DO WE GET
AROUND THE FACT THAT 400
ACTUALLY DOES TALK ABOUT A
RESIDENT'S BILL OF RIGHTS.

IT DOESN'T SAY PATIENTS' RIGHTS
AND RESPONSIBILITIES.

>> YES, YOUR HONOR.

THERE IS A DIFFERENT
TERMINOLOGY IN THE NURSING HOME
STATUTE, AND IT'S IMPORTANT TO
EXAMINE THE REASON FOR THAT.
THE NURSING HOME STATUTE WAS

ENACTED TO PROVIDE ADDITIONAL REMEDIES BECAUSE THERE WAS RAMPANT ELDER ABUSE IN NURSING HOLES, AND SO THERE, THEY CREATED A PRIVATE CAUSE OF ACTION TO PROVIDE BASIC AND MINIMUM STANDARDS OF CARE TO PROTECT THE HEALTH OF PEOPLE IN NURSING HOMES.

AND SO THE USE OF THE DIFFERENT TERMS WASN'T INTENDED TO RESTRICT THE RIGHTS AVAILABLE TO NURSING HOME RESIDENTS IT WAS REALLY PROVIDED -- INTENDED TO PROVIDE A CUMULATIVE REMEDY.

AND IF YOU LOOK AT WHY --
>> BUT I THINK THAT STILL REQUIRES A JUMP BECAUSE YOU HAVE THIS, THE LANGUAGE THAT JUSTICE ANSTEAD POINTED TO IN THE FIRST AND THE FOURTH REALLY HAVE RELIED ON, WHICH SEEMS TO BE A REFERENCE, IF WE WERE DOING A STATUTORY CONSTRUCTION. AS DOING THE DEFINITION IN 381.026.

AND I AGREE IN ONE WAY THE VOTERS PROBABLY WOULD'VE SAID GET RID OF ALL PRIVILEGES IF IT WERE PUT BEFORE THEM, BUT IT DOES APPEAR THAT THE INTENT WAS, YOU KNOW, TO NARROWLY LOOK AT HOSPITALS AND DOCTORS AND PROBABLY -- IT PROBABLY DOES EXCLUDE, YOU KNOW, DENTISTS AND ALL THOSE OTHERS THAT THOUGHT IT INCLUDED THEM, SO IT IS A NARROW DEFINITION OF HEALTH CARE PROVIDERS.

>> WELL, THE DEFINITION -- WELL, AND YOU HAVE TO READ THE ENTIRE CONSTITUTIONAL AMENDMENT AS A WHOLE AND YOU ALSO NEED TO LOOK AT NOT JUST THE DEFINITIONS OF HEALTH CARE PROVIDER BUT THE DEFINITION OF ADVERSE INCIDENT, ADVERSE MEDICAL INCIDENTS WHICH IS REALLY MUCH BROADER THAN MEDICAL MALPRACTICE CLAIMS IT'S NOT JUST LIMITED TO DOCTORS AND HOSPITALS.

THE DEFINITION OF PATIENT IS EXTREMELY BROAD.

THE DEFINITION OF PATIENT IS SOMEONE WHO HAS, IS RECEIVING HEALTH CARE OR TREATMENT AND BASICALLY EVEN AN PROSPECTIVE PATIENT, SOMEONE WHO'S THINKING ABOUT PATIENT.

AND THOSE, THOSE DEFINITIONS ALSO ENCOMPASS SOMEONE MOO WHO'VE BEEN ADMITTED TO A NURSING HOME TO GET NURSING CARE BECAUSE THE REASON YOU ENTER A NURSING HOME IS TO GET A PROFESSIONAL STANDARD OF CARE BY DEFINITION THAT'S WHAT A NURSING HOME DOES.

IT PROVIDES PROFESSIONAL --

>> YOU ARE REALLY ARGUING THE GOOD POLICY THAT SHOULD ALSO BE THERE.

I, YOU KNOW, I MAY NOT DISAGREE WITH YOU.

THE ISSUE REALLY IS HOW YOU READ THAT INTO THE CONSTITUTIONAL AMENDMENT WITHOUT BROADENING IT BEYOND WHAT THE ACTUAL LANGUAGE SAYS.

>> WELL, YOUR HONOR, I THINK THAT THE FOCUS FOR THIS COURT WHEN YOU'RE CONSTRUING A CONSTITUTIONAL PROVISION IS TO KEEP IN MIND THE INTENT OF THE VOTERS TO KEEP A, TO CREATE A BROADS RIGHT OF ACCESS.

AND WHEN YOU LOOK AT THE BALLOT SUMMARY, WHICH IS WHAT THE VOTERS ACTUALLY SOUGHT BEFORE THEM, THE BALLOT SUMMARY SAID WE'RE CREATING A RIGHT TO ACCESS RECORDS, INCLUDING MEDICAL MALPRACTICE, THAT WERE NOT PREVIOUSLY AVAILABLE BY LAW AND A REASONABLE PERSON WHO'S SITTING IN THE VOTERS' BOOTH TRYING TO DECIDE WHETHER TO ENACT THIS AMENDMENT WOULD ASSUME THAT IF THEY HAVE A RELATIVE WHO'S LOOKING FOR NURSING HOME CARE BECAUSE THEY NEED A NURSE, THAT THAT WOULD INCLUDE THEM AND THAT THEY WOULD BE ABLE --

>> I BELIEVE JUSTICE LEWIS HAD A, A QUESTION.

>> SHE COVERED IT.

>> SHE COVERED IT.

>> MY CONCERN IS THAT IT IS SO VERY SPECIFIC WITH REGARD TO THE PATIENTS' RIGHTS AND RESPONSIBILITIES, THOSE KINDS OF THINGS, AND THAT AND WE OPEN THIS UP, IT SEEMS THAT YOU ARE GOING TO BE FISHING ALL OVER THE PLACE AND TRY AND CAPTURE THE DEFINITION OF WHAT A HEALTH CARE FACILITY MAY BE UNDER THESE CIRCUMSTANCES. AND THAT'S WHAT'S TROUBLING ME ON IT.

I MEAN, I DON'T KNOW THAT THEY ABSOLUTELY THOUGHT IT HAD TO BE JUST THIS ONE STATUTE BUT THAT'S WHAT IT IS NOW IN OUR STATUTORY SCHEME.

>> WELL, BUT I THINK IF YOU JUST TURN TO THE STATUTORY CONSTRUCTION PRINCIPLES, THEY USE THE TERMS GENERAL LAW RELATING TO A PATIENTS' RIGHTS AND RESPONSIBILITIES RESPONSIBILITY.

IF THEY HAD WANTED TO INCORPORATE A SPECIFIC STATUTE, THEY COULD'VE DONE THAT.

IF YOU JUST TURN TO ARTICLE 10 AND YOU LOOK TO THE PREGNANT PIG AMENDMENT, WHICH IS JUST A FEW, A FEW PROVISIONS ABOVE IT, THEY INCORPORATE A SPECIFIC STATUTE BY USING A SPECIFIC STATUTE NUMBER.

>> HOW ABOUT JUSTICE LEWIS -- THE IMPLICATION OF THE QUESTION, THAT IS THAT ON THE DAY'S MARKET, IMAGINATION OF BUSINESS PEOPLE OR OTHERS ARE OPERATING IN THIS FIELD, THERE ARE DAY CARE CENTERS, FOR PEOPLE, STILL OLD-FASHIONED, QUOTE REST HOMES, YOU KNOW FOR RETIREES, WE NOW HAVE ALL OF OUR HERE IN FLORIDA, OUR STATE UNIVERSITIES PROVIDING CARE ALL THE WAY FROM INDEPENDENT LIVING TO VIRTUALLY HOSPITAL STATUS. SO TALKING -- IF WE GO IN A BROAD DIRECTION HERE, WOULDN'T WE REALLY BE NOW POTENTIALLY EXTENDING MEANING OF THIS TO

CLEARLY CATEGORIES OF CARE THAT WERE NOT INTENDED TO BE COVERED?

>> WELL, YOUR HONOR, RESPECTFULLY, NO. NURSING HOMES ARE HISTORICALLY DEFINED AS HEALTH CARE PROVIDERS, AND MANY, MANY FLORIDA STATUTES --

>> WHY ISN'T THERE THE PROTECTION THAT IF YOU DO HAVE THE VERY SPECIFIC MEDICAL CARE, YOU KNOW, WITHIN ANY FACILITY, THAT THEN, THAT IT WOULD BE SUBJECT TO THE AMENDMENT PROTECTION?

-- SO YOU HAVE THAT PROTECTION WHEREAS THE BROADER THINGS SUCH AS INSTITUTIONS ALL BEING COVERED, THAT'S A MUCH MORE DRAMATIC STEP ISN'T IT, TO GO FROM THE SPECIFIC LANGUAGE THAT'S BEEN CITED AND DISCUSSED THAT THE FOURTH DISTRICT RELIED ON TO A BROAD COVERING HOLDING THESE INSTITUTIONS BROADLY.

>> WELL, YOUR HONOR, I DON'T THINK CONSTRUING A NURSING HOME AS BEING A HEALTH CARE FACILITY IS BY ANY STRETCH OF, A VERY BROAD READING OF THIS STATUTE. I THINK THAT'S SOMETHING THAT'S WELL WITHIN, WELL WITHIN THE INTENT OF THE VOTERS --

>> WHAT ABOUT THE RETIREMENT CENTERS, THE DAY CARE CENTERS, AND REST HOMES.

>> WELL, I THINK THOSE WOULD NOT BE COVERED BECAUSE YOU WOULD STILL HAVE TO BE CONSIDERED A HEALTH CARE PROVIDER UNDER GENERAL, AND I THINK YOU'D HAVE TO BE DEFINED IN GENERAL LAW RELATING TO PATIENTS' RIGHTS.

>> THE TROUBLE IT SEEMS TO ME WITH THAT IS THAT THIS COURT AND INTEGRATED, WHAT WAS THE NAME OF THE --

>> -- SIR.

>> DREW A VERY MUCH OF A DISTINCTION HERE BETWEEN ACTIONS UNDER 400.022. AND ACTIONS AGAINST HEALTH CARE

PROVIDERS.

ON A VERY IMPORTANT MATTER AND THAT'S WHERE YOU HAD TO GO THROUGH PRE-SUIT SCREENING. AND SO THE WHOLE THREAT -- AND THE WHOLE THRUST WE KNOW, ALL OF US HEARD ARGUMENT THE FIRST TIME WHEN WE WERE DEALING WITH THE INITIATIVE THAT CAME THROUGH THIS COURT THAT WHAT THE THRUST OF THIS WAS, IT WAS MEDICAL MALPRACTICE. AND, I MEAN, THAT WAS, THAT'S REALITY.

AND SO TO STRETCH IT OVER AND OBLITERATE THE DISTINCTION THAT WAS DRAWN IN INTEGRATED -- IN THE INTEGRATED CASE SEEMS TO ME TO BE A REAL STRETCH.

>> WELL, YOUR HONOR, I WOULD, I WOULD AGREE WITH YOU THAT THE THRUST OF THE AMENDMENT WAS TARGETING MEDICAL MALPRACTICE CLAIMS HOWEVER IT WASN'T INTENDED TO BE LIMITED.

IF YOU LOOK AT THE DEFINITION OF ADVERSE MEDICAL INCIDENTS IN THE AMENDMENT, IT'S BROADER THAN MEDICAL MALPRACTICE CLAIMS.

IT INCLUDES --

>> LET ME ASK.

HOW DO YOU FEEL ABOUT --

[INAUDIBLE]

LITIGATION -- FINANCIAL IMPACT

-- PHYSICALLY --

[INAUDIBLE]

NURSING HOMES WERE NOT COVERED BY THE AMENDMENT

[INAUDIBLE]

>> THAT'S TRUE, YOUR HONOR.

THE SPONSORS OF THE AMENDMENT DID TAKE THE POSITION THAT NURSING HOMES WERE NOT COVERED, AND THEY ASKED THIS COURT TO STRIKE THE FINANCIAL INFORMATION -- OR THE FINANCIAL IMPACT STATEMENT.

HOWEVER, THIS COURT LET THE FINANCIAL IMPACT STATEMENT GO ON THE BALLOT AND THE REAL QUESTION BEFORE THIS COURT IS TO DETERMINE --

>> MINIMAL IMPACT -- ACTUALLY

WENT ON THE BALLOT --

[INAUDIBLE]

>> THAT'S CORRECT BUT THERE WAS FINANCIAL INFORMATION STATEMENT THAT THE LONGER SUMMARY WHICH IS INCLUDED IN OUR REPLY BRIEF APPENDIX WHICH EXPLAINED THAT THE AGENCY FOR HEALTH CARE ADMINISTRATION, WHICH IS THE AGENCY THAT WAS GOING TO BE CHARGED WITH IMPLEMENTING THIS AMENDMENT, INTERPRETED IT AS APPLYING TO NURSING HOMES. IN FACT, THEY THOUGHT THEY WERE GOING TO NEED OVER \$400,000 TO RESPOND TO REQUEST.

AND FOUR ADDITIONAL STAFF PEOPLE WHICH IS FOUR TIMES MORE STAFF AND RESOURCES THAN THEY WERE GOING TO NEED TO RESPOND TO REQUESTS IN HOSPITALS.

AND --

>> LET ME ASK YOU THIS.

ARE NURSING HOMES DIFFERENT FROM SAY A REHAB CENTER? WE KNOW THAT MORE OFTEN AFTER YOU HAVE BEEN IN THE HOSPITAL, YOU MAY NEED TO GO TO A REHAB CENTER.

AND AT THOSE CENTERS, USUALLY YOU HAVE DOCTORS WHO COME TO CHECK ON YOU, NURSES WHO ARE THERE, BUT DO WE HAVE --, AND I DON'T KNOW, ARE REHAB CENTERS EVEN INCLUDED UNDER THIS DEFINITION OF A MEDICAL FACILITY?

DO YOU THINK SO?

>> YOUR HONOR, I'D HAVE TO TAKE A LOOK AT HOW, THEY'RE DEFINED IN THE STATUTE.

I'D HAVE TO --, BECAUSE, YOU KNOW, THERE ARE A LOT OF DIFFERENT TYPES OF FACILITIES, AND THEY HAVE DIFFERENT STATUTES GOVERNING EACH TYPE OF FACILITY.

BUT IF THEY ARE PROVIDING, IF THEY ARE PROVIDING MEDICAL CARE, THEN I THINK THAT THEY WOULD BE COVERED BY THIS. IF THEY HAVE A PEER REVIEW STATUTE --

>> BUT GENERALLY AT A NURSING

HOME --

>> THAT'S RIGHT.

>> YOU DON'T REALLY HAVE -- DO YOU HAVE MEDICAL DOCTORS WHO COME IN ON A REGULAR BASIS TO CHECK ON THE PATIENTS OR IS IT REALLY MORE A CARE YOU CAN'T REALLY TAKE CARE OF YOURSELF WHILE RIGHT AFTER YOU HAVE BEEN TO THE HOSPITAL.

YOU CAN'T REALLY TAKE CARE OF YOURSELF.

SO YOU'RE REALLY IN THERE MORE FOR SOME MAINTENANCE AS OPPOSED TO MEDICAL PURPOSES.

>> WELL, IN A NURSING HOME IT'S REAL AN INTERESTING HYBRID AND GOING BACK TO JUSTICE WELLS' QUESTION, THE REASON THAT THEY ENACTED -- THERE WAS A LONG, A BIG TENSION, YOU KNOW, DID ALL THE LIMITATIONS ON MEDICAL MALPRACTICE ACTS LIKE THE PRE-SUIT NOTICE, CAPS ON DAMAGES, ARBITRATION PROVISIONS, SHOULD THOSE APPLY TO NURSING HOME ACTIONS BECAUSE REALLY THE NURSING HOME ACTIONS ARE REALLY BASED, BASED ON VIOLATIONS OF NURSING CARE. THE NURSING HOME ACT MAKES CLEAR THAT NURSING HOMES ARE VICARIOUSLY LIABLE FOR NURSES FAILURE TO MAINTAIN A PROFESSIONAL STANDARD OF CARE GOVERNING NURSES.

HOWEVER, NURSING HOME ACTIONS ARE NOT ACTIONS FOR MEDICAL MALPRACTICE AND SO IT'S REALLY WAS INTENDED TO PROVIDE AN ADDITIONAL REMEDY BECAUSE EXISTING MEDICAL MALPRACTICE, WRONGFUL DEATH, AND NEGLIGENCE ACTIONS WERE NOT SUFFICIENTLY PROTECTING FRAIL AND ELDERLY RESIDENTS SO THE NURSING HOME ACT WAS NOT INTENDED TO TAKE AWAY YOU KNOW, RIGHTS BY USING DIFFERENT TERMINOLOGY.

IT WAS INTENDED TO ACTUALLY ENHANCE THE RIGHTS AVAILABLE AND TO HELP RESIDENTS REALLY PROTECT THEMSELVES.

>> WOULD YOU ANSWER JUSTICE

QUINCE'S QUESTION.

DO NURSING HOMES AND SOME OF US ARE FAMILIAR WITH THE NURSING HOME LITIGATION BUT DID MEDICAL DOCTORS COME TO SEE, YOU KNOW, THIS IS SOMEBODY THAT WAS APPARENTLY ACUTELY ILL --

>> YES, YOUR HONOR, THE NURSING HOME RESIDENTS HAVE THE RIGHT TO THEIR OWN PERSONAL PHYSICIAN, AND BUT, WHILE THEY'RE IN THE NURSING HOME SO THE STATUTORY CAUSE OF ACTION IN THE NURSING HOME ACT SAYS THAT THE NURSING HOME IS NOT LIABLE FOR MEDICAL MALPRACTICE OF A TREATING PHYSICIAN EXCEPT FOR THE MALPRACTICE OF THE, THE DIRECTOR OF THE NURSING HOME OR A MEDICAL DIRECTOR.

BUT THEY ARE --

>> THEY DON'T HAVE DOCTORS ON STAFF --

>> THAT'S CORRECT.
THAT'S CORRECT.

>> YOUR HONOR, YOU CAN -- YOUR OWN PERSONAL PHYSICIAN AND WHO YOU WOULD LIKE TO TREAT YOU, HOWEVER, THE NURSING HOME IS LIABLE FOR A PROFESSIONAL STANDARD OF CARE IF THE NURSE COMMITS MALPRACTICE, AND THAT'S THE STATUTORY CAUSE OF ACTION CHAPTER WHICH IS 400.0233 SUBSECTIONS 4 AND 5 WHICH IS CLEAR THAT YOU RECEIVE NURSING CARE IN A NURSING HOME AND BY DEFINITION THAT IS WHY YOU ARE IN A NURSING HOME.

IF YOU TURN TO THE DEFINITIONAL PORTION.

>> THE ALLEGATION IN THIS CASE WAS WHAT HAPPENED WAS A FAILURE OF THE NURSING HOME STAFF IN THE PROVIDING OF THE MEAL.

>> WELL, NO, YOUR HONOR, IT'S MORE OF A MEDICAL INCIDENT. WHAT YOU HAVE IS A NURSE'S FAILURE TO FOLLOW DOCTOR'S ORDERS.

THERE WERE DOCTOR'S ORDERS TO GIVE A SPECIAL DIET, TO HELP HER WHILE SHE WAS EATING, AND ALSO THERE'S ALLEGATIONS IN THE

COMPLAINT THAT ONCE, ONCE SHE CHOKED, SHE WAS NEGLIGENTLY RESUSCITATED. THEY DID A BAD JOB OF --

>> COVERED UNDER 400.022.

>> RIGHT THE CAUSE OF ACTION, THERE IS A STATUTORY CAUSE OF ACTION UNDER 400, ALSO NEGLIGENCE ACTION AND WRONGFUL DEATH ACTION.

>> WHAT ARE YOU ACTUALLY SEEKING IN THIS CASE THAT YOU THINK YOU CAN GET UNDER THE CONSTITUTIONAL AMENDMENT THAT YOU CAN GET NOT UNDER REGULAR AMENDMENT.

>> THE SMOKING GUN, YOUR HONOR. THERE ARE TWO DOCUMENTS THEY ARE OBJECTING TO.

ONE IS THE STATEMENT OF THE NURSE WHOSE ACTIONS ARE AT ISSUE IN THIS CASE, AND THE SECOND IS ON THE PEER REVIEW PRIVILEGE LOG IT JUST SAYS ADVERSE INCIDENT REPORT AND IT'S UNCLEAR EXACTLY WHAT THAT DOCUMENT IS.

BUT WE WOULD CERTAINLY LIKE TO READ IT.

>> SO THERE ARE PEER-REVIEWED REPORTS MADE FOR NURSES WHO ARE HIRED BY THESE NURSING HOME -- HOMES --

>> WELL, ONE JUST ON THE PRIVILEGE LAW WHICH IS IN THE APPENDIX IN THE FOURTH DISTRICT IT JUST SAYS STATEMENT OF NURSE AND IT'S THE NURSE WHOSE ACTIONS ARE AT ISSUE IN THIS COMPLAINT AND IT'S NOT CLEAR EXACTLY IF IT WAS A STATEMENT TO THE PEER REVIEW OR AN INCIDENT REPORT AND THERE'S DIFFERENT STATUTORY -- SECTION 400.147 WHICH IS THE STATUTORY PRIVILEGE AT ISSUE HERE IF IT HAS THE STATEMENT AT THE TIME THAT YOU MAKE TO YOUR, THAT YOU ARE REQUIRED TO REPORT TO YOUR RISK MANAGER.

THAT'S SOMETHING THAT CAN BE OBTAINED THROUGH DISCOVERY ON A SHOWING OF WORK PRODUCT PRIVILEGE.

BUT WE'RE NOT CLEAR EXACTLY
WHAT IT IS.

THERE HASN'T BEEN AN IN-CAMERA
INSPECTION AND YOUR HONOR, I
WOULD LIKE TO --

>> DON'T SIT DOWN.

I WANT YOU TO ASSUME THAT THIS
COURT WROTE AN OPINION THAT IT
IS LIMITED TO THE PARTICULAR,
NOT REFERENCE TO THE STATUTE
BUT THOSE COVERED BY THAT
PARTICULAR STATUTORY SECTION.
WHAT WOULD BE THE ADVERSE
IMPACT?

WHAT THINGS WOULD BE EXCLUDED
FROM THIS CONSTITUTIONAL
PROVISION THAT YOU WOULD LOOK
AT AND SAY, MY GOSH, THAT'S
JUST ABSOLUTELY CRAZY.

IS THERE SOMETHING THAT WOULD
BE ELIMINATED OTHER THAN THE
NURSING HOME FACILITY?

>> WELL, YOUR HONOR, FOR
EXAMPLE, DENTISTS WERE THE, IT
WAS THE DENTIST THAT ACTUALLY
BROUGHT THE CHALLENGE TO
PUTTING THIS AMENDMENT ON THE
BALLOT DENTISTS THOUGHT THEY
WERE COVERED AND THEY FELT
STRONGLY ENOUGH THEY BROUGHT A
PETITION ASKING THIS COURT TO
STRIKE AMENDMENT 7 FROM THE
BALLOT BUT DENTISTS WOULD NOT
BE COVERED IF THIS COURT WERE
TO --.

>> ACTUALLY IF WE FOLLOW 39846
AS I READ IT, I THOUGHT ONLY
PHYSICIANS AND HOSPITALS ARE
COVERED.

>> THAT'S RIGHT.

IT WOULD BE VERY --

>> SO IT WAS VERY --

>> IT WOULD BE VERY LIMITED AND
THE AMENDMENT COULD'VE JUST
SAID DOCTORS AND HOSPITALS.
THAT WOULD'VE BEEN A LOT EASIER
BUT THEY DID NOT DO.

YOUR HONOR, THANK YOU.

>> YOU HAVE USED MOST OF YOUR
TIME.

WE WILL GIVE YOU AN EXTRA
MINUTE OR SO.

>> THANK YOU.

>> MAY IT PLEASE THE COURT,

GOOD MORNING, YOUR HONORS.
MY NAME IS THOMAS VALDEZ, AND I
HAVE THE PRIVILEGE OF
REPRESENTING THE RESPONDENT IN
THIS MATTER, --

>> WOULD YOU JUST ASK THE LAST
QUESTION BECAUSE I KNOW I HAVE
STATUTE SOMEWHERE BUT IF WE
INTERPRET IT AS SPECIFICALLY
ONLY REFERRING TO HEALTH CARE
PROVIDERS UNDER 381.026, WHAT
IS -- COULD YOU JUST -- DO YOU
HAVE THAT HANDY?

WHO THEN IS THE ONLY -- WHO'S
COVERED BY IT AND WHO'S THEN
EXCLUDED?

OR JUST WHO'VE COVERED.

>> YOUR HONOR, IF, IF THE COURT
LOOKS AT THE EXPRESS LANGUAGE
OF THE AMENDMENT, AND
INCORPORATES SECTION 381.026,
THE FLORIDA PATIENTS' BILL OF
RIGHTS AND RESPONSIBILITIES,
SPECIFICALLY THE DEFINITIONS OF
THE TERMS HEALTH CARE FACILITY
AND PROVIDER CONTAINED IN THAT
STATUTE, THE AMENDMENT WILL BE
LIMITED AS IT WAS MEANT TO BE
TO DOCTORS AND HOSPITALS.

>> SO THE DENTISTS AND THE --
WHO ELSE WOULD ARE SOMETIMES IN
THE STATUTES REFERRED TO AS
HEALTH CARE PROVIDERS?

>> WELL, YOUR HONOR, THE, WHAT
THEY, WHAT THE STATUTE 381.026
REFERS TO AS DOCTORS, IT
SPECIFICALLY DEFINES DOCTORS
LICENSED UNDER CHAPTER 458.
THOSE ARE MEDICAL DOCTORS,
DOCTORS LICENSED UNDER CHAPTER
459, WHICH ARE DOCTORS OF
OSTEOPATHIC MEDICINE, AND
DOCTORS, AND PODIATRISTS,
DOCTORS OF PODIATRIC MEDICINE.

>> SO IF I WAS TO GO TO THE
HOSPITAL BECAUSE I HAVE REAL
SERIOUS DENTAL PROBLEMS AND A
DENTIST IS ACTUALLY COMES AND,
AND GIVES ME SOME KIND OF
SERVICE, THEN THAT DENTIST
WOULD BE EXCLUDED FROM -- AND
SOMETHING GOES WRONG, AND I
FILE SOME KIND OF ACTION, THAT
DENTIST WOULD BE EXCLUDED FROM

ME GETTING ADVERSE REPORTS ABOUT HIM?

>>> YOUR HONOR, I'M NOT SURE THAT DENTIST WOULD SEE YOU UNLESS THEY WERE A MEDICAL DOCTOR IN THE CONTEXT OF THE HOSPITAL BUT I THINK THE ONLY WAY THAT YOU COULD GET TO INFORMATION REGARDING THE DENTIST UNDER THE AMENDMENT UNDER THE AMENDMENT, IT WAS WRITTEN IF YOU WERE TO SUE THE HOSPITAL AND ASK THEM IF THEY HAD ANY ADVERSE MEDICAL INCIDENT REPORT DOCUMENTATION. DENTISTS ARE CLEARLY EXCLUDED FROM THIS.

>> CAN WE GO BACK --

>> DO YOU THINK THAT PEOPLE, WHEN THEY READ THIS AMENDMENT ACTUALLY BELIEVED THAT THEY WERE GOING TO BE LIMITED TO JUST MEDICAL DOCTORS AND THAT ALL THESE OTHER AND ALL THESE PEOPLE WHO PROVIDE THEM WHAT THEY CONSIDER TO BE MEDICAL CARE WOULD BE EXCLUDED?

>> I ABSOLUTELY BELIEVE THAT, YOUR HONOR.

I DON'T THINK THERE IS ANY, ANY OTHER REASONABLE INTERPRETATION.

I MEAN, CERTAINLY THERE MAY HAVE BEEN SOME VOTERS IN THE STATE WHO WALKED INTO THE BALLOT COMPLETELY UNINFORMED BUT AS THIS COURTS, I THINK THEY WERE THE EXCEPTION, NOT THE RULE.

THIS COURT HAS NOTED IN, IN OTHER OPINIONS THAT IT MUST PRESUME THAT WE HAVE AN INTELLIGENT AND INFORMED ELECTORATE IN THIS STATE, AND I THINK THAT WE DO.

PEOPLE WHO WALKED INTO THE VOTING BOOTH TO VOTE ON AMENDMENT 7 WHAT THEY HAD BEFORE THEM WAS A STEADY STREAM OF INFORMATION ON THE AMENDMENT WHICH WAS PROVIDED BY THE PROPONENTS OF THE AMENDMENT, FLORIDIANS FOR PATIENT PROTECTION WHICH WAS A GROUP

THAT WAS SET UP BY THE ACADEMY OF FLORIDA TRIAL LAWYERS AND THE STEADY DRUM BEAT THAT THEY HEARD FROM THE PROPONENTS OF THE AMENDMENTS WAS THAT IT WAS GOING TO BE APPLY TO DOCTORS AND HOSPITALS.

>> WOULD YOU ADDRESS THE QUESTION THAT JUSTICE QUINCE WAS TALKING ABOUT BEFORE? AND THAT IS, ARE THERE CATEGORIES OF, OF AFTER CARE, FOR EXAMPLE.

THE REHAB TYPE FACILITY THAT A HOSPITAL PATIENT, YOU AGREE THE HOSPITAL'S GOT TO GIVE THOSE RECORDS.

>> YES, SIR.

>> BUT THE PATIENT'S NOT READY TO GO HOME SO THEY ARE THEN SENT TO A, QUOTE, REHABILITATION AND THE PROBABLY MORE INTENSE THAN JUST A CUSTODIAL TYPE THING.

IS THAT TYPE OF FACILITY COVERED UNDER THIS OR NO IT WOULD STRICTLY BE A HOSPITAL?

>> THAT WOULD NOT BE COVERED.

>> NOT BE COVERED.

>> IF IT IS A SKILLED NURSING FACILITY BECAUSE THERE ARE DIFFERENT LEVELS OF SKILLED NURSING, CUSTODIAL CARE OR HIGHER LEVEL, IF IT'S A SKILLED NURSING FACILITY THAT'S LICENSED UNDER CHAPTER 400, WHICH IS MENTIONED NOWHERE IN THE AMENDMENT, IS IN THE STATEMENT AND PURPOSE, AND IN ANY OF THE MATERIALS DISSEMINATED TO THE PUBLIC PRIOR TO THE PASSAGE OF THE AMENDMENT, THEN IT WOULD NOT BE INCLUDED.

>> LET ME ASK YOU SOME EXCEPTIONS, BECAUSE I THINK THIS IS ACTUALLY, -- QUESTIONS BECAUSE I THINK THIS IS ACTUALLY -- I THINK THIS IS A DIFFICULT CASE, AND PART OF THE REASON IS THAT, YOU KNOW, I TRY TO THINK BACK TO OUR OWN ORAL ARGUMENT, AND I KNOW THAT WE SAID, WELL, THE TRIAL LAWYERS

WANTED THIS AMENDMENT BECAUSE THERE WAS THE PARALLEL AMENDMENT THAT WAS GOING TO RESTRICT ATTORNEYS FEES, NOT NURSING HOME CASES, BUT IN MEDICAL MALPRACTICE THEY SAID WELL THAT'S WHERE THEY WERE PROBABLY GOING BUT THEN IT'S DRAFTED AND IT'S NOT DRAFTED WITH REFERENCE TO A STATUTE WHICH WOULD'VE BEEN SO EASY. IT'S DEFINED -- HEALTH CARE PROVIDERS ARE DEFINED IN 381.026, SO ANY VOTER WHO WANTS TO SEE WELL WHAT IS THAT COULD GO AND LOOK AT THAT STATUTE. OR YOU COULD'VE SAID HEALTH CARE PROVIDER IS A HOSPITAL OR A DOCTOR, HOW EASY IS THAT. TO SAY OR THEY COULD NAME THE PRIVILEGES AND NAME THE TWO STATUTES THAT IT WAS GOING TO. TO THE PROBLEM WITH THE AVERAGE VOTER, WHO DO WE THINK AN AVERAGE VOTER BY SAYING HEALTH CARE PROVIDER IS DEFINED AS BY GENERAL LAW RELATING TO PATIENTS' RIGHTS AND RESPONSIBILITIES. THINKS THAT, OH, THAT MUST BE 381.026, WHICH IS THE BILL OF RIGHTS. THAT -- THAT TO ME IS WHERE I HAVE DIFFICULTY WITH YOUR ARGUMENT ABOUT, YOU KNOW, YOU MIGHT BE RIGHT THAT THE PROPONENTS THOUGHT THAT IT WAS NARROW. OR WANTED IT TO -- OR DIDN'T -- JUST WANTED TO PUT THIS ON THE BALLOT BUT IN READING IT YOU REALLY HAVE TO SAY OH, WELL THEY MUST'VE REFERENCED THAT WHEN THEY COULD'VE EASILY REFERENCED A STATUTE OUR JUST THE TWO CATEGORIES YOU COVERED. NOW WHERE DOES THAT FIT IN IN TERMS OF STATUTORY CONSTRUCTION. YOU SAY IT'S CLEAR IT MUST'VE BEEN 381.026 BUT HOW IS IT CLEAR?

>> YOUR HONOR, YOU HAVE TWO QUESTIONS WITHIN THAT QUESTION.

ONE, WOULD IT HAVE BEEN EASIER IF THE FLORIDIANS WITH PATIENT PROTECTION WITH THE ASSISTANCE OF THE FLORIDA TRIAL LAWYERS ASSOCIATION HAD JUST CITED THE STATUTE, YEAH, THAT WOULD'VE BEEN --

>> NOT EASIER.

IT WOULD'VE BEEN -- YOU ARE SAYING WE LOOK AT WHAT THE VOTERS THOUGHT THEY WERE VOTING ON.

IT WOULD'VE MADE IT CLEAR TO EVERYBODY.

>> WELL, AND, AND THAT WAS THE, THAT WAS THE SECOND PART OF YOUR QUESTION THAT I WANTED TO GET TO.

WHAT WOULD A REASONABLE VOTER THINK?

THE PETITIONER HAS SAID THAT THE INTENT OF THE DRAFTERS OF THIS AMENDMENT, THE PROPONENTS OF THIS AMENDMENT IS IRRELEVANT AND DOESN'T MATTER.

THE DECISIONS OF THIS COURT SAY DIFFERENT.

THE DECISIONS OF THIS COURT SAY THAT YOU LOOK AT THE INTENT OF THE DRAFTERS AND THE VOTERS. YOU GIVE MORE DEFERENCE OR LITTLE BIT MORE WEIGHT TO THE INTENTION -- TO INTENT OF THE VOTERS.

NOW WHAT WAS THE INTENT OF THE MAJORITY OF VOTERS IN THIS CASE?

WELL, AFTER LOOKING AT THE, THE VAST AMOUNT OF MATERIALS THAT WERE DISSEMINATED ABOUT AMENDMENT SEVEN ON STATE WEB SITES, DIVISION OF ELECTIONS WEB SITES LIKE THE VOLUSIA COUNTY WEB SITE WOULD SAY THIS IS AN AMENDMENT DEALING WITH DOCTORS AND HOSPITALS LOOKING AT --

>> I GUESS YOU HAVEN'T REALLY -- YOU AGREE THAT IT COULD BE PUT VERY SIMPLY SAID DOCTORS AND HOSPITALS SAID 381.026.

>> I THINK THE DRAFTERS COULD'VE SAID THAT.

>> I'M SAYING THEN IT WOULD'VE

BEEN UNAMBIGUOUS, IT WOULD'VE BEEN CLEAR.

>> I DON'T THINK IT IS UNAMBIGUOUS.

>> IT WOULD'VE BEEN MORE CLEAR THAN YOU THINK IT IS BY THIS REFERENCE TO SOMETHING, AND YOU THINK VOTERS WOULD KNOW THAT HAD TO BE 381.026.

>> WELL, I THINK THE RESPONSE IS TWOFOLD, YOUR HONOR. ONE, THERE IS A VERY CLEAR REFERENCE TO THE PATIENTS' BILL OF RIGHTS AND RESPONSIBILITY BY TITLE, AND, AND AND THAT'S WHAT GOVERNS.

BUT, YOU KNOW, IF WE WERE, IF WE'RE LOOKING AT THE VOTERS AND SAYING WELL WHAT DID THE VOTERS THINK ABOUT THIS, AGAIN, THERE WERE NUMEROUS NEWSPAPER ARTICLES, WEB SITES,.

>> LET'S GO INTO RATHER THAN TALKING ABOUT THE TALKY TALK STUFF, LET'S HOW ABOUT THE, THE FREE STANDING SURGICAL FACILITIES THAT WE SEEM TO SEE, YOU KNOW, POPPING UP, POPPING UP.

ARE THOSE HOSPITAL LICENSED SO THEY COME UNDER THE HEALTH CARE FACILITY OR ARE THOSE NOT LICENSED UNDER THAT STATUTE SO THAT THIS STUFF DOESN'T APPLY TO THEM EITHER?

>> YOUR HONOR, I DON'T KNOW THE, I DON'T KNOW THE ANSWER TO THAT QUESTION.

>> I'M TRYING TO GET A HANDLE ON IF YOU CAN SEE WHAT I AM TROUBLED WITH IS TO BE SURE WE HAVE A PRACTICAL IMPACT OF THIS THING BECAUSE YOU KNOW I UNDERSTAND YOUR ARGUMENT. AND, AND AND IT HAS SOME, SOME CERTAINLY SOME VALIDITY TO IT BUT I AM LOOKING AT THE CONCEPT OF WHAT IS REALLY A HEALTH CARE FACILITY AND, AND THEN THE GENERAL LAW.

WE HAVE TO READ THAT WITH IT, I'M TRYING TO DETERMINE WHAT WE ARE ELIMINATING.

IF WE ARE SAYING JUST HOSPITALS

WHAT DO WE MEAN BY THAT?
IS IT JUST THE STANDING
TALLAHASSEE MEMORIAL HOSPITAL
OR IS IT THE --

>> IS IT ANY HOSPITAL, ANY
FACILITY THAT IS LICENSED UNDER
CHAPTER 395 FLORIDA STATUTES.
WHICH DEALS WITH HOSPITAL
LICENSING AND REGULATIONS.
HOSPITALS AND OTHER LICENSED
FACILITIES ARE COVERED IN PART
ONE OF THAT CHAPTER.
THE PART TWO DEALS WITH TRAUMA.
PART THREE, RURAL HOSPITALS.
PART FOUR, PUBLIC MEDICAL
ASSISTANCE TRUST FUND.
PART FIVE, FAMILY PRACTICE
TEACHING HOSPITALS.
SO THERE ARE SOME BREADTH AND
SOME SCOPE TO THE, TO THE, TO
THE CHAPTER THAT DEALS WITH
HOSPITAL --

>> SO IF WE ADOPT THAT
INTERPRETATION THEN, THEN WE
ARE LOOKING TO THOSE ARE THE
KINDS OF, QUOTE, HEALTH CARE
OF US ITS THAT ARE REFERRED TO,
IN THE QUOTE, GENERAL LAW ON
PATIENTS' RIGHTS AND
RESPONSIBILITIES, AND SO THE
REST OF THE THINGS ARE NOT
COVERED?

>> NO, YOUR HONOR.
IT MEANS -- WHEN YOU'RE, WE'RE
NOT JUST LOOKING AT THE GENERAL
LAW.

WE'RE LOOKING AT THE GENERAL
LAW RELATED TO PATIENT -- THE
PATIENTS' BILL OF RIGHTS.

>> THAT'S WHAT I MEAN, THE
PATIENTS' BILL OF RIGHTS.

>> LOOKING AT THAT, THESE ARE
THE THINGS THAT ARE COVERED,
FACILITIES LICENSED UNDER
CHAPTER 395, INDIVIDUAL DOCTORS
LICENSED UNDER CHAPTERS 458,
459, 461.

IT'S VERY SPECIFIC, AND IT
GIVES THE COURT GUIDANCE ON HOW
THIS SHOULD BE APPLIED.

>> SO YOUR ANSWER YES, WALK-IN
CLINICS WOULD BE ELIMINATED?

>> IF THEY -- IF THEY ARE NOT
LICENSED UNDER CHAPTER 395, I

THINK THEY WOULD BE ELIMINATED.
HOWEVER, TO THE EXTENT THAT
THAT THEY ARE, TO THE EXTENT
THAT THEY OPERATE BASICALLY
THROUGH ONLY THROUGH A
PHYSICIAN THEN YOU MAY HAVE A,
A SEPARATE ARGUMENT THERE
RELATING TO THE PHYSICIAN.

>> JUSTICE ANSTEAD HAS A
QUESTION.

>> LET ME ASK JUSTICE
PARIENTE'S EARLIER QUESTION
WHEN YOU BEGAN AND REALLY IN
THE CONTEXT OF DISCUSSION THAT
WE HAVE BEEN HAVING IS THAT
REALLY EXTREMELY TECHNICAL
DISCUSSION -- TALKED ABOUT THE
PARTICULAR LICENSING, YOU KNOW,
FOR HOSPITALS AND RELATED
FACILITIES AND THE EXCLUSION OF
OTHERS BECAUSE THEIR LICENSED
SOMETHING ELSE.

AND WE KNOW THAT THERE'S JUST
THIS ENORMOUS VARIETY --

[INAUDIBLE]

THINKING, QUOTE, AVERAGE VOTER,
THAT YOU'RE SAYING THE AVERAGE
VOTER WOULD BE SUPER INFORMED
ABOUT ALL THESE TECHNICALITIES.
BUT THE AVERAGE VOTER IS
TALKING ABOUT RECEIVING HEALTH
CARE WOULDN'T DICE AND SLICE
ALL OF THESE THINGS.

WOULD THEY?

WOULDN'T THEY JUST BE THINKING,
MY GOSH, ANYTIME I RECEIVE CARE
FROM A NURSE OR A WALK-IN
CLINIC OR WHATEVER, THAT I'M
RECEIVING HEALTH CARE.

AND THAT, YOU KNOW, BY HEALTH
CARE PROVIDER, SO HELP ME WITH
THE FACT THAT AVERAGE VOTER
WOULDN'T THINK THAT -- IN MUCH
BROADER TERMS SAYING AND IF
THAT HAPPENS I AM GOING -- I
KNOW I AM GOING TO HAVE ACCESS
TO THE PREVIOUS RECORD OF THOSE
PEOPLE WHO PROVIDED THIS CARE.

HELP ME WITH THAT BECAUSE I, I,
I WASN'T SATISFIED WITH THE
RESPONSE YOU GAVE TO JUSTICE
PARIENTE BEFORE IN TERMS OF
AGAIN, THIS AVERAGE VOTER NOT
THINKING IN TERMS OF THE, OF

ALL OF THIS COMPLICATED
STATUTORY REGULATORY SCHEME.
MY GOSH, IF I RECEIVE SOME FORM
OF TREATMENT, NOW I AM GOING TO
HAVE ACCESS TO THE RECORDS OF
WHOEVER PROVIDED ME THAT.

>> WELL YOUR HONOR I THINK IT
WAS NOT SO COMPLICATED BECAUSE
IN THE LEAD UP TO --

>> YOU DISAGREE THAT THE
AVERAGE VOTER WOULD HAVE A
BROADER CONCEPT THAN YOU'RE
ADVANCING TO US?

>> I DO, YOUR HONOR.

>> AND WHAT'S THE BASIS OF
THAT?

>> WELL, THE BASIS OF THAT IS
THAT IF, IF, IF THE, THERE ARE
GOING TO BE TWO TYPES OF
VOTERS.

ONE WHO'S GOING TO LOOK AT THIS
AND SAY WHAT DOES IT MEAN WHEN
IT REFERENCES PATIENTS' RIGHTS
AND RESPONSIBILITIES AND MAYBE
IS THAT HYPER INFORMED VOTER.
THE OTHER ONE IS GOING TO LOOK
AT THE NEWSPAPER, LISTEN TO THE
NEWS, AND SAY, WHAT DOES THIS
AMENDMENT MEAN.

AND THE STEADY DRUM BEAT --

>> WHY DO THEY NEED TO LOOK IN
THE NEWSPAPER OR LOOK AT THIS
OTHER STUFF?

AREN'T THEY JUST APPLYING THEIR
COMMON SENSE TO WHAT THEY
BELIEVE THESE TERMS MEAN?

>> CERTAINLY VOTERS WANT TO USE
COMMON SENSE BUT IF THEY WALK
INTO THE VOTING BOOTH USING
NOTHING BUT COMMON SENSE AND
DON'T READ THE LANGUAGE.

IN FACT, I THINK THAT FALLS
OUTSIDE OF, OF THE BOUNDARIES
OF COMMON SENSE IF YOU WALK
INTO THE VOTING BOOTH
UNINFORMED YOU DON'T READ THE
TERMS OF WHAT IT IS YOU'RE
ABOUT TO --

>> I'M NOT TALKING ABOUT
READING THE TERMS BUT ALSO
TAKING THEM IN A VERY COMMON,
BROAD MEANING.

>> WELL, YOUR HONOR, I THINK
THAT IT DOES IT DOES TALK ABOUT

LIMITING IT TO PATIENTS' RIGHTS AND RESPONSIBILITIES SO TO THE EXTENT THAT THEY BELIEVE THAT IT, THAT AS A PATIENT THEY WOULD, THAT THEY WOULD HAVE RIGHTS, I THINK THEY WOULD HAVE TO, YOU KNOW, I THINK THAT THEY WOULD HAVE TO LOOK INTO THAT.

>> YOU KNOW, THE PROBLEM I HAVE IS THAT IN TERMS OF AGAIN WHAT WE'RE LOOKING AT, THE MOST SOPHISTICATED OF THE AGENCIES, THE AGENCY FOR HEALTH CARE ADMINISTRATION TOLD THIS COURT, AND IT WAS FILED WITH THIS COURT, THAT IN ORDER TO COMPLY WITH THIS REQUEST, IT WOULD ESTIMATE THAT IT NEEDED FOUR STAFF AND \$440,000 FOR ADDITIONAL RECORDS REQUESTS ASSOCIATED WITH ADVERSE INCIDENTS FOR NURSING HOMES AND ASSISTED LIVING FACILITIES. NOW, SO THAT WHAT YOU'RE REALLY TELLING US, AND THE COURT, ALTHOUGH THE PROPONENT SAID NO THEY WOULDN'T HAVE THAT, THE COURT HAD THAT UNDER CONSIDERATION. SO, WE'RE NOW SAYING THAT AHCA GOT IT COMPLETELY WRONG. THEY READ THIS AMENDMENT, AND IT WAS SO SIMPLE. BUT THEY THOUGHT IT APPLIED TO NURSING HOMES. THEN WE HAVE THE FIFTH DISTRICT'S OPINION THAT PRECEDED BUSTER. IN FOOTNOTE 6 ASSUMED THAT IT WAS ELIMINATING BROAD PRIVILEGES. AND AS I RECALL AS MY MEMORY IS REFRESHED, THE WHOLE IDEA OF THIS WAS THAT PATIENTS, YOU KNOW, BEFORE YOU ARE GOING TO GO AND GO TO A HOSPITAL, A DOCTOR, OR TO ANY KIND OF HEALTH CARE PROVIDER, REALLY, NOT JUST FOR THE ONE THAT'S ALREADY A VICTIM OF THE INCIDENCE. WANTS TO KNOW WHAT'S THE TRACK RECORD. YOU KNOW, WHETHER THEY ARE

GOING TO AN AMBULATORY CENTER,
A WALK-IN CLINIC THEY WANT TO
KNOW IS THIS A PLACE THAT HAS
BEEN SUED A WHOLE LOT OR THIS
SOME PLACE I CAN RELY ON AND WE
ARE LOOKING AT HERE A NARROW
SITUATION OF A, OF A NEGLIGENCE
CASE BUT REALLY THE PROTECTION
WAS TO BE MUCH BROADER SO THAT
A PATIENT HAD A RIGHT TO KNOW
BEFORE THEY GO SOMEPLACE
WHETHER THIS IS A PLACE THAT IS
AT LEAST SAFE ENOUGH BECAUSE
THEY HAVEN'T HAD A WHOLE LOT OF
ADVERSE MEDICAL INCIDENTS.
WHY ISN'T THAT A MORE LOGICAL
EXPLANATION OF WHAT THE VOTERS
THOUGHT ESPECIALLY CONSIDERING
THE NEWSPAPER ARTICLES I CAN'T
IMAGINE WE WOULD USE THAT BUT
THE DOCUMENT THAT WE HAD
SPECIFICALLY SAID IT'S GOING TO
IMPACT NURSING HOME REQUESTS.

>> IN MY LINE OF WORK I FIND
THAT AHCA MAKES MISTAKES ALL
THE TIME.

IN FACT YOU NEED TO GO NO
FURTHER THAN THE DIVISION OF
ADMINISTRATIVE HEARING TO
COLLECT A STACK OF ORDERS THAT,
THAT SHOWS THE STAKES THAT THEY
HAVE MADE AND INTERPRETING THE
REGULATIONS THAT THEY INTERPRET
EVERY DAY.

I CAN'T GET INSIDE THE HEADS
OF, OF AHCA AND EXPLAIN WHY IT
IS THAT THEY THOUGHT THIS
APPLIED.

OTHER THAN TO SAY RARELY HAVE I
EVER SEEN A GOVERNMENT ENTITY
THAT WHEN ASKED WOULD YOU NEED
MORE MONEY TO DO THIS HAS SAID
NO.

UNDER THE FIFTH DISTRICT'S
READING IN BUSTER A SPRING SIDE
NURSING HOMES THEY DIDN'T
SPECIFICALLY TAKE ON THE ISSUE
OF WHETHER NURSING HOMES WERE,
WERE TO BE UNDER THIS --

>> WELL, WHAT I AM SAYING ABOUT
IT IS THEY ASSUMED AGAIN WE
HAVE GOT A LOT OF PRIVILEGE
STATUTES AND THEY ASSUME THAT
THE PRIVILEGE STATUTES PEER

REVIEW RECORDS WERE GOING TO BE ELIMINATED BY THIS AMENDMENT? WOULD YOU AGREE WITH THAT WE ARE JUST HERE TALKING ABOUT NURSING HOMES BUT I AM ASKING YOU WHETHER THE FIFTH DISTRICT THOUGHT IT WAS A BROAD ELIMINATION OF PRIVILEGES.

>> I DON'T KNOW THAT THE FIFTH DISTRICT THOUGHT THAT OR NOT OR IF IT WAS CAUGHT UP IN A STRING SIGHT A COUPLE OF NURSING HOME PRIVILEGES.

>> THEY ARE JUST DOING IT BUMBLING ALONG.

>> NO, THERE IS NO BUMBLING ALONG.

THEY DIDN'T ADDRESS NURSING HOMES BECAUSE NURSING HOMES DON'T FALL UNDER THIS.

THERE WERE PRIVILEGES MENTIONED IN THE DISCUSSION OF PEER REVIEW, OF PEER REVIEW CONTEXT AND WE CAN'T TAKE FROM THAT -- WE HAVE TWO WELL REASONED OPINIONS BY THE FIRST DISTRICT COURT OF APPEALS AND FIFTH.

>> DID THIS COURT MAKE A DETERMINATION EITHER ON THAT FOOTNOTE?

DID THIS COURT SAY ANYTHING ABOUT --

>> IT, IT, IT, IT ACTUALLY, ACTUALLY I BELIEVE IT DID, YOUR HONOR.

WHEN IT TOOK UP THE BUSTER CASE, WHICH I REFERRED TO AS BUSTER TWO IN MY MEMORANDUM, IT EFFECTIVELY ABROGATED THAT PORTION OF THE OPINION BECAUSE THIS, THIS COURT SAID THE SECTION 381.028, WHICH WAS THE STATUTE THAT IMPLEMENTED AMENDMENT 7 AND HAD THE EXACT SAME DEFINITIONS IN IT, THAT ARE IN 381.026, THIS COURT SAID THOSE DEFINITIONS ARE FINE. IN FACT, IT POINTED TO THEM AS AN EXAMPLE OF ONE OF THE THINGS THAT WAS RIGHT ABOUT THE STATUTE.

>> WHAT DID THIS COURT DO IN RESPONSE TO THE ARGUMENTS MADE ABOUT FINANCIAL DISCLOSURE?

WHAT WAS THE ULTIMATE -- DID WE ACCEPT?

>> ULTIMATELY, YOUR HONOR, THE COURT ACCEPTED THE FINANCIAL IMPACT STATEMENT AND THEY PUT OUT A VERY NARROW FINANCIAL IMPACT STATEMENT THAT SAYS THAT THEY WERE ACCEPTING -- THAT DID NOT MENTION NURSING HOMES AT ALL.

SO ABOUT A PARAGRAPH LONG, IT CITED ACTUALLY AT -- TAB ONE OF PETITIONER' REPLY BRIEF.

IT WAS A VERY, AND IT IS THAT THE COURT WAS NOT PASSING ANY JUDGMENT ON THE SUBSTANTIVE CORRECTNESS OF THE, THE FINANCIAL IMPACT INFORMATION IT HAD RECEIVED.

IT IS THAT IT MET THE TECHNICAL REQUIREMENTS.

IT WAS GOING TO ALLOW IT TO STAND ON THAT BASIS.

>> WITH THAT YOU HAVE USED UP YOUR TIME.

IF YOU WOULD LIKE TO MAKE A CONCLUDING STATEMENT.

>> YOUR HONORS, I THINK THE STATUTE IS, IS VERY CLEAR IN TERMS OF ITS REFERENCE TO, TO SECTION 381.026 FLORIDA STATUTES.

THAT ONLY DOCTORS AND HOSPITALS WERE MEANT TO BE INCLUDED UNDER THIS AMENDMENT.

I THINK THAT THE INFORMATION, AN UNPRECEDENTED AMOUNT OF INFORMATION WAS RELAID TO THE PUBLIC ABOUT THIS AMENDMENT BEFORE THEY VOTED ON IT.

ALL THAT INFORMATION SAID IT APPLIES TO DOCTORS AND HOSPITALS, AND I THINK THAT THE VAST MAJORITY OF FLORIDIANS KNEW WHEN THEY WERE WALKING INTO THE VOTING BOOTH THAT THEY WERE VOTING ON AN AMENDMENT THAT APPLIED TO DOCTORS AND HOSPITALS.

THANK YOU VERY MUCH.

>> THANK YOU VERY MUCH.

>> THANK YOU, YOUR HONORS IN BRIEF REBUTTAL I JUST WOULD LIKE TO TURN TO THE BALLOT

SUMMARY VERY BRIEFLY.

THAT WAS THE INFORMATION THAT WAS MOST IN THE MINDS OF THE VOTERS THAT WAS WHAT WAS BEFORE THEM IN THE VOTING BOOTH AND ALL IT SAYS IS THIS, CURRENT FLORIDA LAW RESTRICTS INFORMATION AVAILABLE TO PATIENTS RELATED TO INVESTIGATIONS OF ADVERSE MEDICAL INCIDENTS SUCH AS MALPRACTICE.

EXTREMELY BROAD LANGUAGE, AND IT WOULD MAKE A REASONABLE PERSON SITTING IN THE VOTERS BOOTH THINK THAT ALL PEER REVIEWED STATUTES, INCLUDING THOSE RELATED TO NURSING HOMES, WERE GOING TO BE ABROGATED ABROGATED BY THE AMENDMENT AND THAT'S WHAT THE FIFTH DISTRICT SAID IN BUSTER.

AND IT HAS A CITATION OF ALL THE PEER REVIEW STATUTES THAT IT SAYS -ELIMINATED AND THAT INCLUDES THE NURSING HOME STATUTE.

>> WHAT DO YOU DO THOUGH THEN WITH THE, IF YOU DIDN'T HAVE THAT, THAT, THE GENERAL LAW RELATING TO PATIENTS' RIGHTS AND RESPONSIBILITIES IS WHAT THROWS US THOUGH BACK INTO THIS FUSS THAT'S GOING ON, CORRECT THERE AND --

>> I, I UNDERSTAND THAT, YOUR HONOR.

>> SO THAT'S THE PROBLEM.

>> BUT I THINK YOU JUST NEED TO READ THAT PROVISION IN LIGHT OF THE AS YOU DO MOST CONSTITUTIONAL PROVISIONS AND THAT TO GIVE IT BROAD EFFECT EFFECTUATE THE RIGHT INTENDED BY VOTERS BECAUSE CONSTITUTIONS ARE LIVING DOCUMENTS THEY ARE NOT EASILY AMENDED AND THEY CAN'T BE CONSTRUED TO FRUSTRATE THE WILL OF THE PEOPLE.

AND I THINK IF YOU READ THAT TERM, GENERAL LAW RELATED TO PATIENTS' RIGHTS AND RESPONSIBILITIES, IT'S VERY REASONABLE TO READ IT BROADLY

AS INCLUDING ALL PATIENTS, ALL LAWS RELATED TO PATIENTS' RIGHTS AND THERE ARE NUMEROUS LAWS RELATED TO PATIENTS' RIGHTS, MOST NOTABLY, SECTION 400.022 THAT DEFINE A NURSING HOME AS A NURSING HOME FACILITY.

WITH THAT, I'D ASK THIS COURT TO QUASH THE DECISION OF THE FOURTH DISTRICT, TO DISAPPROVE THE DECISION OF THE FIRST DISTRICT, AND REMAND WITH DIRECTIONS TO LET US HAVE THESE DOCUMENTS.

THANK YOU, YOUR HONOR.

>> THANK YOU.

AND THANK BOTH OF YOU FOR YOUR ARGUMENTS AND HELP TODAY.