IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

YOLIE N. BAUDUY, AS NEXT FRIEND AND GUARDIAN OF D. B., AND D. B., INDIVIDUALLY,

Appellants,

v.

Case No. 5D18-2678

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., D/B/A FLORIDA HOSPITAL,

Appellee.

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Opinion filed November 15, 2019

Appeal from the Circuit Court
for Orange County,
Renee A. Roche, Judge.

Jeremy K. Markman, of King & Markman, P.A., Orlando, for Appellants.

Dinah S. Stein, Amanda Forti and Mark Hicks, of Hicks, Porter, Ebenfeld & Stein, P.A., Miami and John W. Bocchino, Beytin, McLaughlin, McLaughlin, O'Hara, Bocchino & Bolin, P. A., Maitland, for Appellee.

SASSO, J.

This case presents the issue of whether the adoption of Article X, Section 25 of the Florida Constitution, commonly referred to as Amendment 7,[1] affects the statutory prohibition against the admissibility of certain incident reports set forth in section 395.0197, Florida Statutes (2018). Because we find no inconsistency between the language of Amendment 7 and section 395.0197(4)'s admissibility restrictions, we conclude the trial court properly relied on section 395.0197 in excluding the incident reports at trial. As a result, we affirm in all respects.

BACKGROUND

Appellants, Yolie N. Bauduy, as next friend and guardian of D.B., and D.B., individually, sued Appellee, Adventist Health Systems/Sunbelt, Inc., d/b/a Florida Hospital, for negligent security and breach of fiduciary duty. Appellants alleged that D.B., an involuntarily committed psychiatric patient, was sexually assaulted by another psychiatric patient at a behavioral health center. During discovery, Appellants requested copies of "any records made or received regarding prior adverse medical incidents consisting of sexual assaults, sexual relations between patients, aggression and/or coercive sexual misconduct" at the center. In response, they received twenty-four adverse medical incident reports from the hospital.

[1] "In the November 2004 election, the voters were tasked with deciding, among other things, whether the Florida Constitution should be amended to provide patients with '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.' Listed as Amendment 7 on the ballot . . ., it was approved by the electorate and is now Article X, Section 25 of the Florida Constitution." *Nemours Found. v. Arroyo*, 262 So. 3d 208, 210 n.1 (Fla. 5th DCA 2018).

Thereafter, the hospital filed a motion in limine regarding the use and admission of the adverse medical incident reports, contending, inter alia, that while the reports were discoverable pursuant to Amendment 7, they were still inadmissible at trial pursuant to section 395.0197(4). That statute states in relevant part:

> 395.0197 Internal risk management program.—
>
> . . . .
>
> (4) The agency shall adopt rules governing the establishment of internal risk management programs . . . . Each internal risk management program shall include the use of incident reports . . . . **The 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**.

§ 395.0197(4), Fla. Stat. (2018) (emphasis added). The restriction on admissibility contained in that section pre-existed the adoption of Amendment 7. *See, e.g.*, *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Meeks*, 560 So. 2d 778, 781-82 (Fla. 1990) (holding that trial court erred in allowing use of incident reports prepared as part of hospital internal risk management program in impeachment where section 395.041[2] provided such reports "shall be subject to discovery, but shall not be admissible as evidence in court").

Over Appellants' objection, the trial court granted the motion in limine, noting that the records, "while available under Amendment 7, statutorily are still not admissible at trial as evidence." At the June 2018 trial, Appellants again attempted to elicit testimony regarding and admit the adverse medical incident reports into evidence, but the successor judge ruled that they were inadmissible under the statute. The jury returned a verdict in

[2] Section 395.041, as referenced in *Meeks*, was renumbered section 395.0197. Ch. 92-289, § 15, Laws of Fla.

favor of Appellee, specifically finding no negligence on Appellee's part that was a legal cause of loss, injury, or damage to D.B.

Appellants now challenge the final judgment entered in favor of Appellee following the jury verdict. Among other arguments, Appellants contend the trial court erroneously relied on section 395.0197(4) in excluding certain adverse medical incident reports from trial.

STANDARD OF REVIEW

As a general rule, a trial court's ruling on the admissibility of evidence will not be reversed absent an abuse of discretion. *Globe v. State*, 877 So. 2d 663, 673 (Fla. 2004). However, a court's discretion is limited by the evidence code and applicable law. *Martin v. State*, 207 So. 3d 310, 319 (Fla. 5th DCA 2016). Because this issue involves a question of statutory and constitutional interpretation, we review the question de novo. *See W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 8 (Fla. 2012).

ANALYSIS

We now consider the effect, if any, the adoption of Amendment 7 has on section 395.0197(4). "[I]n considering the effect of constitutional amendments upon existing statutes, the rule is that the statute will continue in effect unless it is completely inconsistent with the plain terms of the Constitution." *In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 807 (Fla. 2014) (quoting *In re Advisory Op. to Gov.*, 132 So. 2d 163, 169 (Fla. 1961)). If by any fair course of reasoning the statute can be harmonized or reconciled with the new constitutional provision, then it is the duty of the courts to do so. *In re Advisory Op. to Gov.*, 132 So. 2d at 169.

Under this framework, we begin our analysis by reviewing the text of Article X, Section 25 of the Florida Constitution, entitled "Patients' right to know about adverse medical incidents." It states in relevant part:

> (a) In addition to any other similar rights provided herein or by general law, patients have 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.
>
> . . . .
>
> (c) For purposes of this section, the following terms have the following meanings:
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> . . . .
>
> (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.
>
> (4) The phrase "**have access to any records" means**, in addition to any other procedure for producing such records provided by general law, **making the records available for inspection and copying** upon formal or informal request by the patient or a representative of the patient, provided that current records which have been made publicly available by publication or on the Internet may be "provided" by reference to the location at which the records are publicly available.

Art. X, § 25, Fla. Const. (emphasis added).

Appellants argue that because Amendment 7 allows "access" to the documents at issue, they have a corresponding right to use the documents at trial, both by eliciting testimony regarding the substance of the documents and by admitting the documents as evidence for review by the jury. They argue that access without use renders the

constitutional amendment meaningless. Thus, they assert that the admissibility provision of section 395.0197(4) was "abrogated" by the constitutional amendment.

Contrary to Appellants' conclusion, Amendment 7 does not establish any right to a specific "use" of Amendment 7 documents at all. Rather, by its plain terms, the amendment's legal effect is to provide patients the right to access documents that were previously unavailable to them. *See, e.g.*, *Edwards v. Thomas*, 229 So. 3d 277, 285–86 (Fla. 2017) ("[T]he chief purpose of amendment 7 was to do away with the legislative restrictions on a Florida patient's access to a medical provider's 'history of acts, neglects, or defaults' because such history 'may be important to a patient.'" (quoting *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 488 (Fla. 2008))). To that end, Amendment 7 defines what it means by access. And "use" is neither included in the definition of, nor a necessary predicate to, the term as defined.

The plain language of Amendment 7 simply does not support Appellants' argument. We cannot conclude that "use" is somehow subsumed by the term "access." While we are careful to give constitutional provisions their full meaning, we cannot go beyond the meaning and infuse a positive right that the Florida voters did not enact. *See Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions [to a statute] transcends the judicial function."); *Pleus v. Crist*, 14 So. 3d 941, 945 (Fla. 2009) ("We remain mindful that in construing a constitutional provision, we are not at liberty to add words that were not placed there originally or to ignore words that were expressly placed there at the time of adoption of the provision.").

Despite this textual impediment, Appellants argue that we need not insert words into Amendment 7. In Appellants' view, the admissibility restriction of section 395.0197(4)

undermines the intent of Amendment 7, and this Court can achieve Appellants' desired result by examining and then effectuating the amendment's underlying intent.

The problem with this argument is twofold. First, intent is determined from text. *Accord Israel v. Desantis*, 269 So. 3d 491, 495 (Fla. 2019) ("Where the language of the Constitution 'is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written,' as the 'constitutional language must be allowed to "speak for itself."'" (quoting *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986))). And, as discussed, the text of Amendment 7 forecloses a positive right to use.

Second, we do not apply tools of construction to otherwise unambiguous text with the goal of excavating some perceived policy objective. *See Brinkmann v. Francois*, 184 So. 3d 504, 510 (Fla. 2016) (noting that "extrinsic guides to construction are not allowed to defeat the plain language" (quoting *Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992))). We recognize that Amendment 7, while defining access, is silent as to use and admissibility. But in this context, that silence does not create an ambiguity. Instead, it only demonstrates that use and admissibility are beyond the amendment's scope.

Because we conclude that nothing in Amendment 7's text addresses the admissibility at trial of adverse medical incident reports produced pursuant to its dictates, we find no inconsistency with the prohibition against admissibility contained in section 395.0197. *See generally State ex rel. Askew v. Thomas*, 293 So. 2d 40, 42 (Fla. 1974) (holding that provision of 1968 constitution did not repeal by implication existing statute delineating qualifications of school board members; constitutional provision only addressed manner of choosing school board members, not qualifications, and therefore

was not inconsistent with statute's requirements). As a result, we determine that the trial court properly excluded the documents at issue.

AFFIRMED.

ORFINGER, J., and TATTI, A.M., Associate Judge, concur.