**IN THE DISTRICT COURT OF APPEAL**
**FIRST DISTRICT, STATE OF FLORIDA**

SOUTHERN BAPTIST HOSPITAL
OF FLORIDA, INC.,

Petitioner,

v.

Case No. 1D15-0109
L.T. Case No. 2012-CA-002677

JEAN CHARLES, JR., as next
friend and duly appointed guardian
of his sister, MARIE CHARLES,
and her children, ANGEL ALSTON
and JAZMIN HOUSTON, minors, and
ERVIN ALSTON, *et al*.,

Respondents.
_____/

**PETITIONER'S NOTICE OF SUPPLEMENTAL AUTHORITY**

Pursuant to Florida Rule of Appellate Procedure 9.225, Petitioner, Southern Baptist Hospital of Florida, Inc., respectfully submits as supplemental authority the following two orders in which circuit courts of this State concluded that provider records were privileged and confidential under the Patient Safety and Quality Improvement Act:

| | |
|---|---|
| Tab A | Order Denying Plaintiff's Renewed Motion to Compel and Sustaining Defendant Flagler Hospital's Objections to Plaintiff's First Request for Production, *Loyless v. Flagler Hosp., Inc.*, No. CA12-2401 (Fla. 7th Cir. Ct. May 8, 2015) |

| | |
|---|---|
| Tab B | Order on Plaintiffs' Motion to Compel Defendant Laser Spine Surgical Center, LLC's Production of Materials Requested in Amendment VII Request to Produce Dated March 4, 2014, *Petraskiewchz v. Laser Spine Inst., LLC*, No. 13-CA-14394 (Fla. 13th Cir. Ct. Aug. 10, 2015) |

The order attached at Tab A was entered in the same case and concerns the same discovery dispute that produced the earlier order referenced on pages 32 and 33 of Respondents' Response to Petition for Writ of Certiorari, dated April 27, 2015, and found at pages 213 through 221 of Respondent's Supplemental Appendix.

Respectfully submitted this third day of September, 2015.


*/s/ George N. Meros, Jr.*

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## CERTIFICATE OF SERVICE

I certify that the foregoing notice was served by electronic transmission (except where a different method is indicated) this third day of September, 2015, on the individuals identified on the Service List that follows.

*/s/ Andy Bardos*
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# Tab A

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA12-2401
DIVISION: 55

DEBORAH LOYLESS,
as Personal Representative of the
Estate of Charles E. Loyless, Jr.,

Plaintiff,

v.

FLAGLER HOSPITAL, INC., a Florida
Corporation, and ALLAIN GIROUARD, D.O.,

Defendants.
_____/

**ORDER DENYING PLAINTIFF'S RENEWED MOTION TO COMPEL AND SUSTAINING DEFENDANT FLAGLER HOSPITAL'S OBJECTIONS TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION**

This cause came on to be heard pursuant to the Plaintiff's Renewed Motion to Compel (Dkt. #237) and Defendant Flagler Hospital's Objections to certain items in the Plaintiff's First Request for Production. This Court, having considered the arguments of counsel and being fully advised in its premises, finds as follows:

The Plaintiff served its First Request for Production upon Defendant Flagler Hospital seeking production of several items. All items have been produced or addressed by this Court in other orders, except requests 9 and 10, which provide as follows:

9. Any and all records relating to any adverse medical incident involving Allain Girouard, M.D. while providing physician care at Flagler Hospital. Any responsive document should be redacted to remove patient information other than Charles E. Loyless, Jr.

10. Any and all records relating to any adverse medical incident involving Charles E. Loyless, Jr.

Defendant Flagler Hospital objected to these requests, asserting that the information sought is privileged, and thus, protected from disclosure under the Federal Patient Safety and Quality Improvement Act ("PSQIA") – 42 U.S.C. §299b-21, *et. seq.*

This Court has conducted an *in camera* review of documents produced by Flagler Hospital responsive to item 10. Flagler indicates there are no documents responsive to item 9. The Court has also reviewed the affidavit of Kevin Newman, Risk Manager for Flagler, provided pursuant to the Court's preliminary Order on this matter. (Dkt. #358) Upon review, the Court finds that the documents produced and reviewed *in camera* constitute Patient Safety Work Product, pursuant to 42 U.S.C. §299b-22 (a) and (b).

Therefore, it is ORDERED AND ADJUDGED that:

1. Plaintiff's Renewed Motion to Compel regarding items 9 and 10 of its First Request for Production is DENIED.

2. Defendant Flagler Hospital's objections to item 9 and 10 of the Plaintiff's First Request for Production is sustained.

DONE AND ORDERED in chambers, at St. Augustine, St. Johns County, Florida, this 6th day of May, 2015.

Howard M. Maltz, Circuit Judge

Copies to:
Michael Fox Orr, Esquire
Terese M. Latham, Esquire
Dr. Allain Girouard

# Tab B

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

JOHN PETRASKIEWCHZ and JUNE PETRASKIEWCHZ, his wife,

Plaintiff,

v.

LASER SPINE INSTITUTE, LLC;
LASER SPINE SURGICAL CENTER, LLC;
LASER SPINE MEDICAL CLINIC, LLC; and
CRAIG R. WOLFF, M.D.,

Defendants.
_____/

CASE NO.: 13-CA-14394

DIVISION: I

**ORDER ON PLAINTIFFS' MOTION TO COMPEL DEFENDANT LASER SPINE SURGICAL CENTER, LLC'S PRODUCTION OF MATERIALS REQUESTED IN AMENDMENT VII REQUEST TO PRODUCE DATED MARCH 4, 2014**

**THIS MATTER** is before the Court on Plaintiffs' Motion to Compel Defendant Laser Spine Surgical Center, LLC's Production of Materials Requested in Amendment VII Request to Produce Dated March 4, 2014 ("Motion to Compel"), filed on May 29, 2014. Having considered the Motion to Compel, Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion to Compel ("Memorandum in Opposition"), the authority cited by both parties, arguments of counsel at two hearings, testimony presented at the evidentiary hearing, the Court file, and the applicable law, the Court finds as follows:

## I. Procedural History

This is an action for medical negligence against Defendants. Plaintiffs allege that a spine surgeon employed by Laser Spine Surgical Center, LLC ("LSSC") and Laser Spine Institute, LLC ("LSI") negligently performed surgery.

On March 4, 2014, Plaintiffs propounded their Amendment VII Request to Produce to Defendant, Laser Spine Surgical Center, LLC (the "Requests"). LSSC is the surgical center that is managed by LSI and is the location of the surgery that is the subject of this litigation. In the Requests, Plaintiffs sought materials they argued are discoverable pursuant to Article X, Section 25 of the Florida Constitution, commonly known as "Amendment 7."

LSSC filed objections to the Requests, and Plaintiffs filed their Motion to Compel. In their Motion to Compel, Plaintiffs clarified that they were seeking "[1] documents relating to the policies and procedures, [2] adverse medical incidents and all the documents that entail such adverse medical incidents, as well as [3] the credentialing and re-credentialing process for several physicians." However, within their Motion to Compel Plaintiffs appeared to concede that the credentialing files of the health care providers other than Dr. Wolff (who are not named in the complaint) are not relevant at this juncture.

On August 18, 2014, the Court held a hearing on Plaintiffs' Motion to Compel. After hearing the parties' oral presentations, the Court allowed the parties to submit supplemental briefs on the issues raised at the hearing.

On August 26, 2014, Plaintiffs filed their Response to Defendant's Claim That Some of Plaintiffs' Requests to Produce Would Not Be Discoverable Pursuant to 42 U.S.C. § 299-22 ("Plaintiffs' Response").

On August 28, 2014, Defendant filed its Memorandum of Law in Opposition to Plaintiffs' Motion to Compel ("Memorandum in Opposition"). Defendant contended that much of the material sought by Plaintiffs was shielded from discovery by the federal Patient Safety Work Product ("PSWP") privilege.

On November 19, 2014, the Court entered its Preliminary Order Requiring Evidentiary Hearing on Plaintiffs' Motion to Compel ("Preliminary Order"). In the Preliminary Order, the Court found that the parties primarily agreed as to what the law is, but disagreed on the application of the law to the requested discovery at issue. Therefore, the Court ordered an evidentiary hearing to determine whether the remaining documents sought were entitled to the PSWP privilege.

On March 31, 2015, the Court conducted an evidentiary hearing on the Motion to Compel. At the hearing, Defendant presented testimony from Nicole Gritton, RN, MSN, MBA, LHRM, the Vice President of Nursing and Ambulatory Surgical Center Service at Laser Spine Institute ("LSI"). Ms. Gritton provided

testimony regarding the categories of documents created and maintained at LSI. Plaintiffs cross-examined Ms. Gritton, but did not present any witnesses.

## II. Patient Safety Work Product and Amendment 7

The parties primarily agree as to what the law is – that if a document or information is developed by a provider for reporting to a Patient Safety Organization ("PSO"), the document or information is considered PSWP and is privileged from discovery. *See* 42 §§ 299-b-21 and 299b-22. However, if the document or information is collected, maintained, or developed separately from a patient safety evaluation system, the separate information or copy thereof reported to a PSO shall not by reason of its reporting be considered PSWP. *See* 42 U.S.C. § 299b-21(7). The parties disagree, however, on the application of the law to the requested discovery at issue.

### A. History and Background of the PSQIA.

The Patient Safety and Quality Improvement Act ("PSQIA") was signed into law on July 29, 2005, *after* the passage of Amendment 7. The purpose of the PSQIA is to "extend state peer review protections to data [that are] related to patient safety and quality improvement that are collected and analyzed by health care organizations for internal use or shared with others solely for purposes of improving safety and quality." 108 Sen. Rep. 108-196, 108th Cong., 1st. Sess. at 2 (2003); *see also K.D. ex. rel. Dieffenbach*, 715 F. Supp. 2d 595-96 (D. Del. 2010).

The PSQIA was designed to encourage a "culture of safety" by "providing for broad confidentiality and legal protections of information collected and reported voluntarily for the purposes of improving the quality of medical care and patient safety." *Id.* at 596 (quoting 108 Sen. Rep. 108–196, 108th Cong., 1st Sess. at 3 (2003)). In Senate Report 108-196, the scope and intent of the PSQIA legislation was clear:

> The legislation grants an evidentiary privilege for information collected and developed by providers and PSO's through this voluntary reporting system. The privilege encompasses not only the report to the patient safety organization but also all aspects of the analysis of, and subsequent corrective actions related to, adverse events, medical errors, and "near misses" reported as patient safety data. It covers all deliberations, including oral and written communications, and work products that meet the requirements for patient safety data. *This legislation also establishes confidentiality protections for this written and oral patient safety data to promote the reporting of medical errors.* ***As a result, health care providers will be able to report and analyze medical errors, without fear that these reports will become public or be used in litigation.*** *This nonpunitive environment will foster the sharing of medical error information that is a significant step in a process to improve the safety, quality, and outcomes of medical care.*

*Id.* at 5 (emphasis added).

Congress understood that in order to encourage providers to voluntarily identify errors, evaluate cases, and enact a system to prevent future errors from occurring, it had to make the process confidential and privileged. If the information

voluntary collected, analyzed, and reported was *not* privileged, and if such information was discoverable in litigation and could potentially be used against the provider in litigation, no rational provider would voluntarily participate in such a system, and patient safety would suffer as a result.

In the Final Rule on the implementation of the PSQIA, the Department of Health and Human Services also emphasized the impetus behind the PSQIA: "The statute attaches privilege and confidentiality protections to …'patient safety work product'… to encourage providers to share this information without fear of liability and creates PSOs to receive this protected information and analyze patient safety events." Fed. Reg. 70732-01, 70732 (2008). The Final Rule further stated: "*These protections will enable all health care providers, including multi-facility health care systems, to share data within a protected legal environment, both within and across states,* ***without the threat that the information will be used against the subject providers***." *Id.* (emphases added).

**B. Patient Safety Work Product Under the PSQIA.**

Under the PSQIA, documents that are developed by a provider for reporting to a PSO are referred to as PSWP and are privileged. The PSQIA specifically defines PSWP as:

> … any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements --
> (i) which--

(I) are assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization; or
(II) are developed by a patient safety organization for the conduct of patient safety activities; and which could result in improved patient safety, health care quality, or health care outcomes; or
(ii) which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system.

42 U.S.C. 299b-21(7)(A).

The PSQIA also has a clarification as to what is *not* PSWP:

Information described in subparagraph (A) does not include information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system. Such separate information or a copy thereof reported to a patient safety organization shall not by reason of its reporting be considered patient safety work product.
...

42 U.S.C. 299b-21(7)(B).

Based on this definition, documents and reports are considered PSWP if they are collected as part of a patient safety evaluation system. Data, reports, records, memoranda, analyses, and any written or oral statements (including but not limited to meeting minutes and recommendations) are part of a patient safety evaluation system if they are collected, maintained, and analyzed "for reporting to or by a patient safety organization." 42 U.S.C. § 299b-21(6). Therefore, reports and documents are PSWP if they are part of a system created for reporting to a PSO,

which is a "private or public entity or component thereof that is listed by the Secretary pursuant to [42 U.S.C. § 299b-24(d)]." 42 U.S.C § 299b-21(4).[1]

Other jurisdictions have analyzed the specific confines of PSWP under the PSQIA. In *Department of Financial & Professional Regulation v. Walgreen Co.*, 970 N.E.2d 552, 558 (Ill. App. Ct. 2d Dist. 2012), an Illinois appellate court affirmed a trial court finding that a report was considered PSWP under the PSQIA because the report was transferred to a PSO named the Patient Safety Research Foundation. In *K.D. ex. rel. Dieffenbach*, 715 F. Supp. 2d 587, 596-98 (D. Del. 2010), a federal court in Delaware held that the transfer of documents to the National Institutes of Health, which was not even a listed PSO, did not mean that the documents were not privileged under the PSQIA in light of Congress' intent of promoting a "culture of safety." The PSQIA itself also clearly defines PSWP and explicitly provides when it is protected.

As established in the Affidavit of Nicole Gritton, RN, MSN, MBA, LHRM ("Affidavit of Ms. Gritton") and through her testimony at the evidentiary hearing, LSI and LSSC are members of the ECRI Institute, which is a federally listed PSO.

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[1] It is not necessary for PSWP to be actually reported to a PSO in order to be privileged. The Final Rule states that PSWP is protected at the time of collection, *not* at the time of reporting to the PSO. 73 Fed. Reg. 70732-01, 70741 (2008) ("The final rule provides that information documented as collected within a patient safety evaluation system by a provider shall be protected as patient safety work product. A provider would document that the information was collected for reporting to a PSO and the date of collection. The information would become patient safety work product upon collection.")

LSSC voluntarily creates PSWP to improve patient safety, health care quality, and health care outcomes and submits PSWP to the ECRI Institute.

### C. Distinction Between State-Required Adverse Event Reports and Federally-Protected Voluntary PSWP.

As established in the Affidavit of Nicole Gritton, RN, MSN, MBA, LHRM ("Affidavit of Ms. Gritton") and through her testimony at the evidentiary hearing, LSSC creates and maintains two separate and distinct categories of documents that could potentially be classified as "adverse event" materials under the Plaintiffs' Requests: (1) adverse incident reports that are required by the State of Florida (i.e., Code 15 Reports and the Annual Reports); and (2) reports that LSSC voluntarily creates for PSO reporting (referred as "PSWP Reports") that are not required by law.

#### i. Code 15 Reports and Annual Reports to AHCA

Pursuant to Section 395.0197(7), Florida Statutes, LSSC is required to file a report with Florida's Agency for Health Care Administration ("AHCA") within fifteen (15) days after the occurrence of an "adverse incident." Section 395.0197(7) provides as follows:

> (7) Any of the following adverse incidents, whether occurring in the licensed facility or arising from health care prior to admission in the licensed facility, shall be reported by the facility to the agency within 15 calendar days after its occurrence:
> (a) The death of a patient;
> (b) Brain or spinal damage to a patient;

(c) The performance of a surgical procedure on the wrong patient;
(d) The performance of a wrong-site surgical procedure;
(e) The performance of a wrong surgical procedure;
(f) The performance of a surgical procedure that is medically unnecessary or otherwise unrelated to the patient's diagnosis or medical condition;
(g) The surgical repair of damage resulting to a patient from a planned surgical procedure, where the damage is not a recognized specific risk, as disclosed to the patient and documented through the informed-consent process; or
(h) The performance of procedures to remove unplanned foreign objects remaining from a surgical procedure.

§ 395.0197(7), Fla. Stat.

These reports are known as "Code 15" reports.

LSSC is also required, pursuant to Section 395.0197(6), Florida Statutes, to file an Annual Report with AHCA of "adverse incidents," as narrowly defined by Section 395.0197(5), Florida Statutes. An "adverse incident" that is required to be summarized in an Annual Report is much narrower than an "adverse incident" as defined in Amendment 7 or in the Plaintiffs' Requests. The Annual Report is limited to serious events, such as death and brain or spinal damage to a patient. The Annual Report only contains a summary and does not include any LSSC PSWP. These Annual Reports are the *only* documents required by Florida statute to be reported to AHCA. They are not contained within the LSSC patient safety evaluation system.

In Plaintiffs' Response, Plaintiffs cite to a series of Florida statutes and administrative codes to perhaps suggest that LSSC is required to create or maintain more than just the Code 15 Reports and Annual Reports to AHCA. However, Plaintiffs have not provided any authority that states that LSSC is required to create or maintain any documents other than the Code 15 Reports and Annual Report to AHCA. Furthermore Plaintiffs have not established that they are *entitled* to anything other than the Code 15 Reports and Annual Reports to AHCA.

**ii. PSWP Reports**

LSSC also voluntarily creates separate PSWP Reports to improve patient safety, health care quality, and health care outcomes pursuant to its participation in the ECRI Institute, a federally listed PSO. These PSWP Reports document events LSSC considers "incidents" (more significant events) and events that LSSC considers "variances" (minor events that would not trigger Code 15 reporting). These reports do *not* include the Code 15 Reports or Annual Reports and are not required to be reported to the state under any Florida statute or regulation.

The overwhelming majority of PSWP Reports contain information about events that would not be considered "adverse events" under Amendment 7, would not constitute Code 15 events, and would not be reportable to AHCA. For example, an "incident," which is considered a more significant event, might include misplacing a patient's medical record. Such an event is considered

significant by LSSC, but would not trigger Code 15 reporting. An example of a "variance" is cancellation of a surgery because the patient ate food in the morning contrary to physician orders. Other examples of variances include humidity of over 60% in the operating room, damaged equipment, or an insect in an operating room. None of the "variance" events would qualify as an "adverse event" under Amendment 7 or a Code 15 event, but they could be the subject of a report to a PSO for health quality purposes. The PSWP Reports are reviewed and analyzed as part of LSSC's patient safety evaluation system, and changes are implemented to improve the quality of health care that LSSC provides.

When an event occurs that triggers a Code 15 Report, LSSC prepares the Code 15 Report outside of the patient safety evaluation system for mandatory state reporting, but may also voluntarily create a PSWP Report for the same event that is entirely separate and distinct from the Code 15 Report. These voluntarily-created PSWP Reports are in a different format and are voluntarily created by LSSC to improve patient safety, health care quality, and health care outcomes, and for reporting to a PSO. Only the Code 15 Reports are submitted to Florida's AHCA.

LSSC conceded, and the Court agrees, that the Code 15 Reports and Annual Reports that exist separately from its patient evaluation system are not entitled to

PSWP privilege.[2] However, the Court finds that LSSC's voluntarily created PSWP for PSO reporting is entitled to the federal PSWP privilege, which, as explained below, expressly preempts Amendment 7.

**D. Federal Law Expressly Preempts Amendment 7.**

Under the Supremacy Clause of the United States Constitution, a federal law may expressly or impliedly preempt state law. *State v. Harden*, 938 So. 2d 480, 485-86 (Fla. 2006). "A state cannot assert jurisdiction where Congress clearly intended to preempt a field of law." *Id.* at 486 (citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981)). There are three categories of preemption recognized by The United States Supreme Court:

> (1) express preemption where a federal statute contains ***"explicit pre-emptive language"***; (2) implied field preemption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and (3) implied conflict preemption, in which "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

*Id.* (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 98 (1992) (plurality opinion) (explaining categories of preemption recognized in Supreme Court case law)).

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[2] The reports have been produced pursuant to a confidentiality order with patient private health information redacted.

The PSQIA, which became effective on July 29, 2005, contains explicit language expressly preempting state law. The PSQIA provides, in pertinent part:

> (a) Privilege
> ***Notwithstanding any other provision of Federal, State, or local law***, and subject to subsection (c) of this section, *patient safety work product shall be privileged and* ***shall not*** *be* —
> (1) subject to a Federal, State, or local civil, criminal, or administrative subpoena or order, including in a Federal, State, or local civil or administrative disciplinary proceeding against a provider;
> (2) ***subject to discovery in connection with a Federal, State, or local civil, criminal, or administrative proceeding, including in a Federal, State, or local civil or administrative disciplinary proceeding against a provider***;
> (3) subject to disclosure pursuant to section 552 of Title 5 (commonly known as the Freedom of Information Act) or any other similar Federal, State, or local law;
> (4) ***admitted as evidence in any Federal, State, or local governmental civil proceeding***, criminal proceeding, administrative rulemaking proceeding, or administrative adjudicatory proceeding, including any such proceeding against a provider; or
> (5) admitted in a professional disciplinary proceeding of a professional disciplinary body established or specifically authorized under State law.

42 U.S.C. 299b-22 (emphasis added).

In short, the PSQIA states that despite any other state law (including Amendment 7) PSWP shall not be subject to discovery in any civil proceeding against a provider. The PSQIA also mandates a civil monetary penalty of not more

than $10,000 for anyone who discloses PSWP in a knowing or reckless violation of the PSQIA. 42 U.S.C. § 299b-22(f)(1).

Amendment 7, on the other hand, provides that "patients have a right to have access to any records made or received in the course of a business by a health care facility or provider relating to any adverse medical incident." Art. X., § 25(a), Fla. Const. Under Amendment 7, "adverse medical incident" records include "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 such committees." Art. X, § 25(c)(3), Fla. Const. Therefore, the language of PSQIA expressly and explicitly states that items that would be discoverable under Amendment 7 are *not* discoverable regardless of any provisions of State law. Thus, the PSQIA expressly preempts Amendment 7 with regard to documents that are also PSWP.

Even if not expressly preempted by the PSQIA, Amendment 7 would be impliedly preempted by the PSQIA because it is physically impossible to comply with both the federal law and the state law. *See Harden*, 938 So. 2d at 486. Here, if LSSC produced all of the documents requested by Plaintiffs, it would produce PSWP in violation of the PSQIA. Thus, it is physically impossible for LSSC to comply with the Plaintiffs Requests under Amendment 7 and the PSQIA.

In their Motion to Compel, Plaintiffs cite a litany of cases for the proposition that Plaintiffs are entitled to *all* of LSSC's adverse event reports pursuant to Amendment 7. However, none of the cases cited by Plaintiffs address whether Amendment 7 is preempted by PSQIA. By using the language "***[n]otwithstanding*** any other provision of Federal, State, or local law....patient safety work product shall be privileged and shall not be...subject to discovery in connection with a Federal, State, or local civil, criminal, or administrative proceeding...," Congress could not have been any clearer that it intended to preempt any state law that conflicts with the federal statute. [3] The legislative history of the PSQIA also indicates that Congress intended to preempt state law. *See* 108 Sen. Rep. 108-196 108th Cong., 1st Sess. (2003).

**E. Additional Documents Sought by Plaintiffs Are Not Discoverable**

The Court finds that the additional reports and documents sought by Plaintiffs are privileged PSWP under the PSQIA. Because federal law preempts Amendment 7, those reports and documents are not discoverable. Furthermore, any external peer review reports that are being sought by Plaintiffs do not fall within the ambit of Amendment 7 and are, therefore, not discoverable. *Bartow*

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[3] The Florida Supreme Court *has* held that the Health Care Quality Improvement Act of 1986 ("HCQIA") does not impliedly preempt Amendment 7. *See W. Florida Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 20 (Fla. 2012). However, the express language of the HCQIA reveals the intent of Congress was *not* to preempt state law in the HCQIA.

*HMA, LLC v. Edwards*, No. 2D14-3450, 2015 WL 4154180, *4-5 (Fla. 2d DCA 2015) (holding that external peer review reports of a hospital were not "made or received in the course of business" under Amendment 7 and, therefore, were not discoverable).

## III. Policies and Procedures Relating to Adverse Event Reporting Are Outside of the Scope of Amendment 7

In Plaintiffs' first four Requests, Plaintiffs additionally seek all of LSSC's policies and procedures for the five (5) years prior to January 19, 2012, and for any time thereafter, involving the investigation of adverse medical incidents, health care quality improvement, risk management, peer review, handling of adverse medical incidents, and credentialing issues.

In Plaintiffs' Response, Plaintiffs only ask that the Court grant their Motion to Compel as to Requests 9-11 and Requests 13-14. Therefore, it appears Plaintiffs have conceded that they are not entitled to the policies and procedures requested in Requests 1-4. On this basis, the Court could deny Plaintiffs' Motion to Compel production as to Requests 1-4.

However, even if Plaintiffs contend that they have not receded from their earlier Requests for production of LSSC's policies and procedures relating to adverse medical incidents, the law in Florida is clear that those documents are outside of the scope of Amendment 7 and are not discoverable.

Plaintiffs' first four Requests are nearly identical to the requests made in *Morton Plant Hosp. Ass'n, Inc. v. Shahbas ex rel. Shahbas*, 960 So. 2d 820 (Fla. 2d DCA 2007). In *Shahbas*, the Second District Court of Appeal found that "Amendment 7 ***does not*** require production of documents relating to general policies and procedures of [health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees] or other documents that do not contain information about particular adverse medical incidents." *Id.* at 827 (emphasis added). Thus, the Second District held that documents sought in requests "***relating to policies and procedures are by their nature outside of the scope of Amendment 7***," and that the trial court departed from the essential requirements of law in ordering their production. *Id* (emphasis added).

Similarly, the documents sought by Plaintiffs here relating to the policies and procedures of adverse medical incidents are outside of the scope of Amendment 7 and not discoverable.

## IV. Credentialing Files of Providers are Outside of the Scope of Amendment 7

In Request 12, Plaintiffs sought "each and every document created five (5) years prior to January 12, 2012, up to and including the present date, related to the credentialing and re-credentialing process for [every provider who treated Plaintiff]."

Plaintiffs appear to acknowledge in their Motion to Compel that the credentialing files of the providers who are not named in the complaint are not relevant to the claims asserted. In Plaintiffs' Response, Plaintiffs only asked that the Court grant their Motion to Compel as to Requests 9-11 and Requests 13-14. Therefore, it appears Plaintiffs have conceded that they are not entitled to the credentialing file of Dr. Wolff.

However, even if Plaintiffs contend that they have not receded from their earlier Request for Dr. Wolff's credentialing file, the law in Florida is clear that Dr. Wolff's credentialing file is outside of the scope of Amendment 7 and is not discoverable. In *Baptist Hosp. of Miami, Inc. v. Garcia*, 994 So.2d 390, 392 (Fla. 3d DCA 2008), the plaintiffs sought production of a complete list of each and every document contained in physicians' credentialing files and a general description of those documents and any claims of privilege. The hospital objected on the grounds that descriptions of the contents of the credentialing files are not discoverable pursuant to sections 395.0191(8) and 766.101(5), Florida Statutes.[4] The trial court overruled the hospital's objections, and ordered production of information requested along with a privilege log describing all documents contained within the credentialing files of all the doctors, including the date of the

[4] It should be noted that the plaintiffs in *Garcia* were only seeking descriptions of the credentialing files, not the actual contents of the files that the Plaintiffs in this matter are seeking here.

documents, the nature of the documents, the identity of the person who sent or received the documents, and anyone copied with the documents. *Id.* at 392-93.

The Third District Court of Appeal quashed the trial court's order, holding that:

> the trial court departed from the essential requirements of law by ordering the overly broad disclosure of a list of all of the documents contained in the physicians' credentialing files, which would necessarily include the disclosure of documents not discoverable pursuant to sections 395.0191(8) and 766.101(5), and by ordering the compilation and production of a privilege log detailing and disclosing confidential information that is a part of those files.

*Id.* at 393.

The Third District Court of Appeal relied on the Second District's decision in *Shahbas*, which held that the statutory exemptions from discovery of the contents of a hospital's credentialing files still apply even after Amendment 7, and that credentialing files are documents "beyond the scope of Amendment 7 and not subject to discovery." *Id.* (citing *Shahbas*, 960 So.2d at 827). The Third District emphasized that "[t]o permit blanket disclosure of a list of all documents contained in doctors' credentialing files and the production of a privilege log necessarily would require Baptist to divulge names and confidential information, which not only have nothing to do with adverse medical incidents discoverable under Amendment 7, but which remain exempt from discovery under sections

395.0191(8) and 766.101(5)." *Id.* The Third District further stated that "[s]uch a result would violate sections 395.0191(8) and 766.101(5), the very purpose of the statutory exclusions from discovery enacted pursuant to Florida Statutes (2007)."

In *Brandon Regional Hosp. v. Murray*, 957 So.2d 590 (Fla. 2007), the Florida Supreme Court similarly held that the plaintiffs were not entitled to the records of the peer review credentials committee within the hospital that may have been involved in the process of determining those privileges, although the Court did hold that the plaintiffs were entitled to a list of privileges granted to the target physician.

Here, Plaintiffs have requested *all* documents relating to the credentialing and re-credentialing of Dr. Wolff and the other providers who treated Plaintiff. The request is contrary to sections 395.0191(8) and 766.101(5) and is beyond the scope of Amendment 7.

## V. Conclusion

LSSC has already produced the Code 15 Reports and Annual Reports responsive to Plaintiffs' Requests. The Court finds that the remaining adverse incident materials sought from LSSC are PSWP privileged from discovery under PSQIA.

To the extent Plaintiffs are still seeking LSSC's policies and procedures relating to adverse medical incident reporting, the Court finds that those documents

are outside of the scope of Amendment 7 and are not discoverable pursuant to *Shahbas*.

Finally, to the extent Plaintiffs are still seeking the complete credentialing file of Dr. Wolff, the Court finds it is also outside the scope of Amendment 7 and not discoverable, as established by *Shahbas*, *Garcia*, and *Murray*.

It is therefore **ORDERED AND ADJUDGED** that Plaintiffs' Motion to Compel is hereby **DENIED**.

DONE AND ORDERED, in Chambers in Tampa, Hillsborough County, Florida, this ____ day of _____, 2015.

Electronically Conformed 8/10/2015
The Honorable Paul L. Huey
Circuit Court Judge

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