IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
CASE NO: 1D15-0109

SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC. d/b/a Baptist Medical Center-South.

Petitioner,

vs. L.T. Case No.: 2012-CA-002677

JEAN CHARLES, JR., as next friend and duly appointed Guardian of his sister, MARIE CHARLES, and her minor children, ANGEL ALSTON, and JAZMIN HOUSTON, minors, and ERVIN ALSTON, KRISTIN FERNANDEZ, D.O., YUVAL Z. NAOT, M.D., SAFEER A. ASHRAF, M.D., INTEGRATED COMMUNITY ONCOLOGY NETWORK, LLC, ANDREW NAMEN, M.D., GREGORY J. SENGSTOCK, M.D., JOHN D. PENNINGTON, M.D., and EUGENE R. BEBEAU, M.D.,

Respondents.

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CHARLES RESPONDENTS'
MOTION FOR CERTIFICATION

This Court should certify: (i) a direct conflict with a decision of another district court of appeal and (ii) a question of great public importance.[1] *See* Fla. Const. Art. V(b)(4); Fla. R. App. P. 9.030(a)(2)(A)(v)&(vi); Fla. R. App. P. 9.320(a); Fla. R. App. P. 9.330.[2]

Direct Conflict with Decision of Another District Court of Appeal

In construing the federal Patient Safety Quality Improvement Act (PSQIA or the Act), this Court has expressly adopted and relied on the dissenting opinion in *Tibbs v. Bunnell*, 448 S.W.3d 796, 809 (Ky. 2014) (Abramson, J., dissenting). (Op. 14-15.) In contrast, in construing the same Act, the Fourth District has expressly relied on the majority opinion in *Tibbs*. *See Bethesda Hosp., Inc. v. Gomez-Colombo*, Case No. 4D15-1080, Order (Fla. 4th DCA April 22, 2015) (located at Respondent Supp. App. 212) ("The trial court's interpretation of the Patient Safety and Quality Improvement Act is not a departure from the essential requirements of law. 42 U.S.C. § 299b-21(7)(B)(ii); *see Tibbs v. Bunnell*, 448 S.W.3d 796 (Ky. 2014).")

[1] The Charles Respondents do not, and will not, request rehearing or rehearing en banc. By filing this motion, the Charles Respondents do not concede – and Petitioner should not suggest – that certification by this Court is required for the Supreme Court of Florida to review this Court's decision.

[2] This motion for certification is expressly made under Fla. R. App. P. 9.330 and thus expressly invokes Fla. R. App. P. 9.030(j), which delays rendition of this Court's written order and decision issued on October 28, 2015.

The fact that the Fourth District's decision in *Bethesda Hospital* was in an unpublished order is of no consequence. A decision in an unpublished order is a "decision" under both sections 3(b)(3) (express and direct conflict) and 3(b)(4) (certified direct conflict) of Article V of the Florida Constitution. *Sutton v. State*, 975 So. 2d 1073, 1074 n.1 (Fla. 2008) (citing *Dep't of Law Enforcement v. House*, 678 So. 2d 1284, 1284 (Fla.1996) and *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378, 1379 (Fla.1993)). The brevity of the Fourth District's decision also is of no consequence. The supreme court recently accepted express-and-direct-conflict jurisdiction of a decision of a district court of appeal that consisted of a single sentence citing two cases. *See Miles v. Weingrad*, 164 So. 3d 1208, 1210-11 (Fla. 2015), *reviewing* 103 So. 3d 259 (Fla. 3d DCA 2012).

Question of Great Public Importance

This Court has declared that that "the Act expressly preempts any broad discovery right under Amendment 7 to documents meeting the definition of PSWP." (Op. 16.) The great public importance of this ruling cannot be overstated. Indeed, the papers filed by the forty plus amici *supporting Petitioner* demonstrate the great public importance of this decision. *See, e.g.*, PSOF Mot. for Leave to Appear as Amicus Curiae ¶ 2 (filed 1/9/15) (arguing this case "has the potential to carry statewide and national impact" because this case "will impact the way [PSOs] investigate and improve the safety and quality of health care"); Clarity

PSO *et. seq*. Mot. for Leave to Appear as Amici Curiae ¶ 4 (filed 1/13/15) (arguing "[t]his case is of significant importance to health care providers and PSOs serving the State of Florida" and "is also important to PSOs and providers nationwide"); Joint Commission Mot. for Leave to Appear as Amicus Curiae, at 3 (filed 1/21/15) (stating that their amicus brief "would address the national policies underlying the adoption and implementation of the PSQIA and the potential impact of this Court's decision on PSOs and providers throughout the State of Florida and the United States"); AQIPS Mot. for Leave to Appear as Amicus Curiae (filed 1/20/15) (arguing this case "has broad implications on the delivery of health care and the ability of health care organizations to improve patient safety" and that this case would "impact the way providers and PSOs share, investigate, and analyze serious events and systems process failures").

This Court's decision is not only greatly important to the hospitals, medical providers, and PSOs in Florida and elsewhere. It is also greatly important to Florida's citizens, voters, and patients. Over 5.8 million Floridians – more than eighty percent (80%) of the electorate – voted in favor of Amendment 7 in November 2004.[3] The amendment's clear purpose, as reflected in the ballot summary, was to do away with laws restricting patients' right to know information

[3] Fla. Dep't of State, Division of Elections, Patients' Right to Know About Adverse Medical Incidents, 03-07, located at http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=35169&seqnum=3 (last visited on Oct. 30, 2015).

about adverse medical incidents. *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 489 (Fla. 2008). Florida voters overwhelmingly approved an amendment to the Florida Constitution designed to tear down all legal barriers impeding patients from knowing about adverse medical incidents. *Id.*

Nevertheless, in the last eleven years, Amendment 7's opponents repeatedly tried to thwart the will of Florida voters. First, the Legislature passed statutes to limit Amendment 7's impact; the Supreme Court of Florida invalidated most of those statutes. *See generally id.* at 484-94. Next, Amendment 7's opponents argued that: such information should be produced only if it was relevant to the patient's pending suit; the production of such information would be too burdensome; and such information was protected by a privilege or the work product doctrine. The courts uniformly rejected these arguments because they were irreconcilable with Amendment 7's broad purpose of tearing down barriers to information. *See generally id.* at 491; *Morton Plant Hosp. Ass'n., Inc. v. Shahbas*, 960 So. 2d 820 (Fla. 2nd DCA 2007); *Lakeland Reg'l Med. Ctr. v. Neely*, 8 So. 3d 1268 (Fla. 2d DCA 2009); *Fla. Eye Clinic v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009); *Columbia Hosp. Corp. of S. Broward v. Fain*, 16 So. 3d 236 (Fla. 4th DCA 2009); *Baldwin v. Shands Teaching Hosp. and Clinics, Inc.*, 45 So. 3d 119 (Fla. 1st DCA 2010). Then, Amendment 7's opponents raised their first federal preemption argument based on a different federal statute; that effort failed. *See W.*

Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 15 (Fla. 2012) (rejecting argument that the HCQIA preempted Amendment 7).

Now, however, Amendment 7's opponents have effectively re-erected the barriers to critical information about adverse medical incidents that Florida voters overwhelmingly tore down eleven years ago. Adopting the arguments of Petitioner and its forty plus amici, this Court has declared Amendment 7 dead, or at least on life support. The Court's decision returns substantial control of disclosure of information regarding adverse medical incidents to the healthcare profession, contrary to the terms of Amendment 7. (*See* Op. 16 ("[T]he Act expressly preempts any broad discovery right under Amendment 7 to documents meeting the definition of PSWP.") The PSQIA – an act shepherded through Congress with virtually no attention or input from the general public – has been interpreted to thwart the clear will of over 5.8 million Floridians. This Court's interpretation may be right. Respectfully, however, we submit that it is wrong. *See Bethesda Hosp., Inc. v. Gomez-Colombo*, Case No. 4D15-1080, Order (Fla. 4th DCA April 22, 2015); *Tibbs v. Bunnell*, 448 S.W.3d 796 (Ky. 2014).

For reasons that should be self-evident, the Supreme Court of Florida is the most appropriate court within this state to decide this case. It should decide whether the PSQIA kills Amendment 7, impeding the will of 5.8 million Floridians, or whether the PSQIA does not impair Amendment 7, so that it remains

a viable right in Florida. District courts of appeal routinely certify questions of great public importance on whether federal law preempts state law. *See, e.g.*, *Acosta v. Kraco, Inc.*, 448 So. 2d 562, 564 (Fla. 1st DCA 1984); *Vargas v. Enter. Leasing Co.*, 993 So. 2d 614, 624 (Fla. 4th DCA 2008) (en banc). This Court should do the same here. It should certify the following question of great public importance on which this Court has already passed:

> Does the Patient Safety Quality Improvement Act of 2005, Pub. L. No. 109-41, 119 Stat. 424, codified at 42 U.S.C. §299b-21 *et seq*., preempt, under the Supremacy Clause of the U.S. Constitution, Article VI, the broad discovery rights guaranteed to Florida patients by Amendment 7, codified at Article X, Section 25 of the Florida Constitution?

Conclusion

This Court should certify: (i) a direct conflict with the decision of the Fourth District Court of Appeal in *Bethesda Hosp., Inc. v. Gomez-Colombo*, Case No. 4D15-1080, Order (Fla. 4th DCA April 22, 2015) and (ii) the question of great public importance stated immediately above.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail, to the following on this 2nd day of November, 2015:

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