**IN THE SUPREME COURT OF FLORIDA**

JEAN CHARLES, JR., etc., *et al.*,

Appellants,

v.

Case No. SC15-2180
L.T. Case No. 1D15-0109
2012-CA-002677

SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC., *et al.*,

Appellees.
_____/

**BAPTIST'S MOTION TO DISMISS**

Appellee, Southern Baptist Hospital of Florida, Inc. ("Baptist"), respectfully moves the Court to dismiss this appeal for lack of jurisdiction.

**Introduction**

The decision below did not invalidate Article X, Section 25, Florida Constitution, which affords a right of access to records of adverse medical incidents. Rather, it held that the records that Appellants seek are within the scope of a federal law that makes them confidential. That conclusion does not invalidate Article X, Section 25 because the plain language of Article X, Section 25 ***expressly excludes*** from its own scope records protected by federal privacy restrictions. In effect, in holding that federal law protects Baptist's records and preempts Article X, Section 25, the court below found that Article X, Section 25 does not reach those records—

not that Article X, Section 25 is invalid. Far from being invalid, Article X, Section 25 remains in effect and continues to operate exactly as its own terms contemplate.

## Background

Appellants, who are plaintiffs in the medical-malpractice action below, served a request for production that sought an estimated 70,000 safety records in Baptist's possession. None of the disputed records relates to Appellants or to the incident that occasioned this litigation. Baptist produced all documents concerning the individual and the event in dispute, along with all records of adverse medical incidents reported to the State of Florida during the period specified by Appellants.

Despite the obvious irrelevance of the documents still in dispute and the enormous burdens that production would impose on Baptist, Appellants demanded production and insisted that Article X, Section 25 entitles them to those records.[1] Baptist asserted—and presented uncontradicted evidence—that the records were created and maintained in accordance with the federal Patient Safety and Quality Improvement Act of 2005 (the "PSQIA") and are therefore privileged and confidential under the PSQIA. The trial court nevertheless compelled their production.

Baptist petitioned for a writ of certiorari. On October 28, 2015, the First DCA had no trouble concluding that Baptist's records were confidential under the

[1] Relevance and undue burden have not been recognized as valid objections to a request for records under Article X, Section 25 of the Florida Constitution. *Bartow HMA, LLC v. Kirkland*, 171 So. 3d 783, 785 (Fla. 2d DCA 2015); *Baldwin v. Shands Teaching Hosp. & Clinics, Inc.*, 45 So. 3d 118, 124 (Fla. 1st DCA 2010).

PSQIA. Because those records were assembled or developed for submission to a patient safety organization ("PSO"), they satisfied the definition of "patient safety work product" and qualified for federal protection. *S. Baptist Hosp. of Fla., Inc. v. Charles*, No. 1D15-0109, 2015 WL 6499139, at *4 (Fla. 1st DCA Oct. 28, 2015).[2]

On November 2, 2015, Appellants moved the First DCA to certify conflict and a question of great public importance. The court denied that request on November 24, 2015. On the next day, despite previously seeking certification, Appellants filed a notice of appeal, claiming that the First DCA's decision had declared Article X, Section 25 of the Florida Constitution invalid and that this Court had mandatory jurisdiction under Article V, Section 3(b)(1) of the State Constitution.[3]

**Article X, Section 25 of the Florida Constitution**

Article X, Section 25 of the Florida Constitution authorizes patients to access "any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." It defines "adverse medical incident" to mean "medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused

[2] Appellants argued that the PSQIA does not protect documents created for multiple purposes and that Baptist's records therefore fall outside of the privileged and confidential status conferred by the PSQIA. The First DCA correctly rejected that argument, finding no such limitation in the statute's plain language. *Id*. at *5.

[3] In the alternative, Appellants invoked this Court's discretionary jurisdiction and requested this Court to permit them to file a jurisdictional brief within ten days after the Court determines that it lacks mandatory jurisdiction of this appeal.

or could have caused injury to or death of a patient." Art. X, § 25(c)(3), Fla Const.

Article X, Section 25 is broad but not boundless. It does not purport to allow access to documents that are privileged and confidential under federal law. In fact, it expressly states that "any privacy restrictions imposed by federal law shall be maintained." Art. X, § 25(b), Fla. Const. (the "Federal Privacy Exception"). As discussed below, the PSQIA is clearly a federal "privacy restriction" because it not only protects against the disclosure of certain documents that identify patients and their health information, but also requires that the identity and privacy of health care providers and reporters of patient safety issues be kept confidential. Once a document is determined to fall within the scope of the PSQIA's privileged and confidential status, it also falls within the Federal Privacy Exception in Article X, Section 25(b) of the Florida Constitution.

Thus, Article X, Section 25 itself recognizes that federal law protects certain records from disclosure and specifically directs that federal privacy restrictions "*shall* be maintained." (emphasis added). Through the Federal Privacy Exception, it makes clear that the state-law right of access does not extend to federally protected records. It anticipates and, in limiting its own reach, avoids potential conflict with federal law. The application of federal privacy restrictions, including the PSQIA, to limit the scope of production is not an impairment or invalidation of Article X, Section 25, but rather an *express command* of Article X, Section 25 itself.

## The Patient Safety and Quality Improvement Act of 2005

In 1999, the Institute of Medicine reported that each year as many as 98,000 Americans die from preventable medical errors, most of which are caused not by isolated mistakes, but by system failures. The Institute recommended the creation of a secure system in which information concerning medical errors might be confidentially shared and systematically evaluated, without fear of blame and litigation.

In 2005, in response to the Institute's report, Congress enacted the PSQIA, which created a new, nationwide patient safety system. Patient Safety and Quality Improvement Act of 2005, Pub. L. No. 109-41, 119 Stat. 424 (2005) (codified at 42 U.S.C. §§ 299b-21 to -26). Under the PSQIA, each participating provider establishes a mechanism known as a "patient safety evaluation system" within which information concerning medical errors is collected and reported to a PSO. PSOs assess the information, identify deficiencies, develop recommendations, and provide guidance to providers. They also reformat the information to remove identifying information and share contextually nonidentifiable information with a central clearinghouse—the Network of Patient Safety Databases—that evaluates the information to recognize national trends and disseminate best practices nationwide.

To encourage providers to participate in the patient safety analysis and reporting process established by the PSQIA, Congress also created a new privilege that protects and makes confidential certain information gathered by participants

about events that affect patient safety. It declared all "patient safety work product" to be privileged and confidential, *id*. § 299b-22(a), (b), and defined "patient safety work product" to include "any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements" that (1) are assembled or developed for reporting to a PSO; (2) are in fact reported to a PSO; and (3) could result in improved patient safety, health care quality, or health care outcomes, *id*. § 299b-21(7)(A)(i). Congress imposed significant obligations on participants to maintain the confidentiality of patient safety work product, and authorized the imposition of substantial penalties to guard against unauthorized disclosures. *Id*. § 299b-22(f).

Baptist voluntarily elected to participate and created its own patient safety evaluation system. It is that secure learning environment that Appellants hope to penetrate.

**This Court's Mandatory Jurisdiction**

Though this Court must "hear appeals . . . from decisions of district courts of appeal declaring invalid . . . a provision of the state constitution," Art. V, § 3(b)(1), Fla. Const., the decision below did not invalidate any state constitutional provision. It applied the plain language of the PSQIA and concluded that Baptist's records are within the scope of and therefore protected by the PSQIA. Article X, Section 25 in turn provides that "any privacy restrictions imposed by federal law shall be maintained" and disclaims any intent to permit access when a federal privacy restriction

applies. Art. X, § 25(b), Fla. Const. A number of provisions in the Florida Constitution reference and incorporate portions of federal law and federal court interpretations of federal law, *see* Art. I, §§ 12, 17, Art. II, § 1(b), Art. III, §§ 20(b), 21(b), Art. V, § 14, Art. VII, §§ 10(c), 18, Art. X, §§ 2, 16(c)(3), 22, 24, Fla. Const., and the courts of this State, including this Court, apply and follow those federal laws and federal court interpretations, *State v. Betz*, 815 So. 2d 627, 631 (Fla. 2002).[4]

The same is true here. The documents that Appellants seek simply fall within the Federal Privacy Exception, and therefore lie beyond Article X, Section 25's self-prescribed domain. Article X, Section 25 has not been invalidated; it operated in this case, and continues to operate, just as its own plain language contemplates.

The First DCA correctly concluded that federal law preempts contrary state law. *S. Baptist Hosp. of Fla., Inc.*, 2015 WL 6499139, at *6. Absent a state-law provision that expressly steers clear of conflicting federal law, a finding of preemption would have the effect of declaring the state law invalid and thus warrant this Court's exercise of mandatory jurisdiction. *See, e.g., State v. Harden*, 938 So. 2d 480 (Fla. 2006). Here, however, the state law in question expressly contemplates its interaction with federal law and, to ensure harmony, expressly yields to federal law. By its own terms, Article X, Section 25 does not confer a right of access to

[4] This is true even when the federal law or federal court decision was made after the affected state law was adopted. *Bernie v. State*, 524 So. 2d 988, 991 (Fla. 1988).

documents protected by federal privacy restrictions. Like other provisions of the Florida Constitution, *see supra*, it expressly excludes from its scope cases that federal law controls. When the First DCA held that the PSQIA protects Baptist's records, it also held, in effect, that those records fall within the Federal Privacy Exception to the right of access that Article X, Section 25 confers. The First DCA's conclusion that the PSQIA protects Baptist's records is consistent with—not contrary to—the limits that Article X, Section 25 places on itself. Its decision recognized preemption, but that recognition in no way invalidated Article X, Section 25.

The PSQIA is clearly among the federal "privacy restrictions" to which Article X, Section 25 yields. The PSQIA not only clothes patient safety work product with a federal privilege, 42 U.S.C. § 299b-22(a), but also provides that patient safety work product is "confidential and shall not be disclosed." *Id*. § 299b-22(b). It authorizes the imposition of heavy penalties against any person—including the provider itself—that improperly discloses those records. *Id*. § 299b-22(f). Thus, the confidentiality provisions of the PSQIA were not designed merely to protect providers and to encourage their participation in the federal patient safety process, but also to protect the *privacy* of patients, providers, and reporters of information who are identified in patient safety work product. *See, e.g.*, *id*. § 299b-21(2) (defining "identifiable patient safety work product" to mean patient safety work product that constitutes "individually identifiable health information" under HIPAA or

enables the identification of providers or individuals who reported information).

The agency that enforces the PSQIA—the U.S. Department of Health and Human Services ("HHS")—has noted that "one of the core principles underlying the [PSQIA] is the protection of the privacy and confidentiality concerns of certain persons in connection with specific patient safety work product (*i.e.*, providers, patients and reporters)." Patient Safety and Quality Improvement, 73 Fed. Reg. 8112, 8144 (Feb. 12, 2008). Notably, HHS has delegated the authority to enforce the privilege and confidentiality protections of the PSQIA to its Office for Civil Rights. Office for Civil Rights; The Patient Safety and Quality Improvement Act of 2005; Delegation of Authority, 71 Fed. Reg. 28701, 28701 (May 17, 2006). The Office for Civil Rights also promulgates, interprets, and enforces HIPAA's confidentiality regulations, and it treats the confidentiality provisions of both statutes as federal privacy restrictions. *See* Office of Civil Rights; Statement of Organization, Functions and Delegations of Authority, 75 Fed. Reg. 60757, 60757 (Oct. 1, 2010) (explaining that the Director of the Office for Civil Rights is HHS's "chief officer and advisor to the Secretary for the enforcement of civil rights and privacy and security rules, including the HIPAA Privacy and Security Rules and the [PSQIA]").

Not only does the same agency enforce the PSQIA and HIPAA as related statutes, but the two statutes contain several points of congruity. Recognizing that both the PSQIA and HIPAA impose similar obligations of confidentiality, Con-

gress provided that, where a single act or omission violates both statutes, penalties may not be imposed under both statutes. 42 U.S.C. § 299b-22(f)(3). Similarly, the PSQIA requires PSOs to be treated as business associates for purposes of HIPAA's confidentiality regulations, *id*. § 299b-22(i), and thus requires providers and their PSOs to enter into business-associate agreements in accordance with HIPAA regulations and to comply with the privacy and confidentiality obligations that such agreements impose, *see* 45 C.F.R. pts. 160, 162, 164. HHS recently amended its HIPAA regulations to harmonize them with the new privacy protections of both the PSQIA and the federal Health Information Technology for Economic and Clinical Health (HITECH) Act, 42 U.S.C. §§ 17921–53. *See* Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules; Final Rule, 78 Fed. Reg. 5566, 5570, 5586, 5591-92 (Jan. 25, 2013). Clearly, federal enforcement authorities regard the PSQIA and HIPAA as similar and related statutes, *see* Patient Safety and Quality Improvement, 73 Fed. Reg. at 8140 ("[T]hroughout our discussion we note the relationship between the [PSQIA] and the HIPAA Privacy Rule. Several provisions of the [PSQIA] recognize that the patient safety regulatory scheme will exist alongside other requirements for the use and disclosure of protected health information under the HIPAA Privacy Rule."),

and the two statutes reflect considerable overlap, *see* 42 U.S.C. § 299b-21(2) (incorporating HIPAA's definition of "individually identifiable health information" into the definition of "identifiable patient safety work product"); *id*. § 299b-22(c)(2)(C) (authorizing disclosure of patient safety work product for research purposes to the extent disclosure is "allowed for such purpose under the HIPAA confidentiality regulations"); *id*. § 299b-22(g)(3) (providing that Section 299b-22 does not "alter or affect the implementation of any provision of the HIPAA confidentiality regulations"); *id*. § 299b-22(i)(2) (providing that a PSO's patient safety activities are deemed "health care operations" as defined by HIPAA's confidentiality regulations); 42 C.F.R. § 3.210 (mandating disclosure of patient safety work product to HHS as necessary to evaluate compliance with the PSQIA and HIPAA).

Article X, Section 25 continues to operate as its own provisions contemplate. Indeed, in this litigation Baptist has produced many records pursuant to Article X, Section 25—records not protected by any federal law. That some of Baptist's records *are* protected by a preemptive federal statute and thus fall within the Federal Privacy Exception does not invalidate Article X, Section 25. Because the decision below did not invalidate Article X, Section 25, that decision is not appealable.

**WHEREFORE**, Appellee, Southern Baptist Hospital of Florida, Inc., respectfully moves the Court to dismiss this appeal for lack of jurisdiction.

Respectfully submitted this fifteenth day of December, 2015.


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

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## CERTIFICATE OF SERVICE

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

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