IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1538
L.T. Case Nos. 1D14-3178; 2013 CA 001714

EMMA GAYLE WEAVER, individually, and as Personal Representative of the Estate of THOMAS E. WEAVER, deceased,

Petitioner,

vs.

STEPHEN C. MYERS, M.D., WEST FLORIDA SPECIALTY PHYSICIANS, LLC d/b/a WEST FLORIDA CARDIOVASCULAR AND THORACIC SURGERY and d/b/a and a/k/a WEST FLORIDA MEDICAL GROUP, and WEST FLORIDA REGIONAL MEDICAL CENTER, INC. d/b/a WEST FLORIDA HOSPITAL,

Respondents.

ON DISCRETIONARY REVIEW OF AN OPINION
OF THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The patient/physician privilege is a creature of statute in Florida. The Legislature enacted statutory protections for health information in 1988 where none had existed before, and the Legislature has seen fit (as is its right) to adjust and modify the confidentiality protections it originally created, consistent with federal law. Similarly, Florida recognizes, like the vast majority of other states, that whatever privilege and confidentiality might otherwise exist is waived once the patient initiates a lawsuit putting her medical condition directly at issue, and that the claimant and the medical malpractice defendant should have equal access to relevant medical information. Equal access fosters an early and accurate assessment of the value of the case, thereby encouraging and facilitating presuit settlement and prompt dispute resolution.

Among the many ways that sister states have accomplished early and equal disclosure of medical information is to allow the defense to conduct ex parte interviews of the claimant's treating physicians, and Florida joined such states in 2013 through statutory amendment of its medical malpractice presuit laws. Such interviews cannot be initiated without giving notice to the claimant, the conversations are strictly limited to medical information relevant to the lawsuit as specifically identified by the claimant herself, and information obtained in such interviews cannot be used in any subsequent litigation in court. In addition, the ex

parte interviews were carefully crafted to be in full compliance with federal law relating to the confidentiality and disclosure of patient health information.

It is the Legislature's prerogative to make policy determinations, and in so doing to conclude that ex parte interviews would produce a net benefit to Florida's citizens. The Legislature made such a policy determination in 2013 when it amended the medical malpractice presuit statute to add ex parte interviews to the other methods of presuit disclosure that the Legislature had itself created decades earlier. It did so consistent with all constitutional requirements, while respecting the right to keep irrelevant medical information confidential. The statutory amendments are valid and constitutional in all respects.

A. Statutory Background

1. Prior to 2013

a. *Presuit Process to Encourage Settlement*

The Florida Legislature in 1985 created a presuit process with arbitration provisions in medical malpractice cases. § 766.202, Fla. Stat. (2003). Currently housed in Chapter 766, this statute "was intended to address a legitimate legislative policy decision relating to medical malpractice and established a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." *Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991).

It accomplished this goal by requiring that before filing suit, a claimant must first mail a notice of intent to each prospective defendant, accompanied by a verified medical opinion from an expert attesting that the prospective defendant's care fell below the standard of care and that this negligence caused harm to the patient. § 766.106(2), Fla. Stat. (2013); § 766.203(2), Fla. Stat. (2003). During the ensuing 90-day presuit period, each side was required to make good faith efforts to conduct informal discovery and reasonable investigations, so that sufficient information could be gathered to permit an early resolution of the claim. § 766.106(6), Fla. Stat. (2013). In direct response to the Legislature's adoption of these statutes, this Court adopted Rule 1.650 to implement certain aspects of the legislation. *See* Fla. R. Civ. P. 1.650; *In re Med. Malpractice Presuit Screening Rules Civil Rules of Procedure*, 536 So. 2d 193 (Fla. 1988). The methods of conducting presuit discovery implemented in Rule 1.650 exactly matched the methods adopted by the Legislature only a few months previously.

Several changes to Chapter 766 were made in 2003, including requiring that the notice of intent served by the claimant contain: (a) a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence; (b) a list of all known health care providers who treated or evaluated the claimant during the two-year period before the alleged act

of negligence; and (c) copies of all of the medical records relied upon by the expert in signing the affidavit. § 766.106(2)(a), Fla. Stat. (2003).

In 2011, the Legislature adopted the first version of the Authorization for Release of Protected Health Information (hereinafter "Authorization Form"), requiring that claimants include a signed form with their notices of intent. § 766.1065, Fla. Stat. (2013). This original Authorization Form was similar in most respects to the current version, except that it did not contain language allowing non-party treating physicians to disclose protected health information to their own attorney, nor did it explicitly allow for ex parte interviews of these same non-party treating physicians by the prospective defendant.

b. *Patient-Physician Confidentiality*

Prior to 1988, no Florida statute had extended blanket confidentiality protections to medical records or to discussions between physicians and their patients. *Coralluzzo v. Fass*, 450 So. 2d 858, 859 (Fla. 1984) ("No law, statutory or common, prohibits … respondents' actions [in conducting ex parte interviews] ... [and] no evidentiary rule of physician/patient confidentiality exists in Florida…."). In response to this Court's *Coralluzzo* decision, "the Legislature broadened the statutory protections for physician-patient confidentiality" by enacting the statutory precursor to what is now Section 456.057. *Hasan v. Garvar*, 108 So. 3d 570, 573 (Fla. 2012). Thus, until the Legislature acted in 1988, no common law or statute

prevented defendant physicians from conducting informal ex parte interviews with non-party treating physicians in Florida.

Section 456.057 generally provides that a patient's medical records "may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient." § 456.057(7)(a). Prior to the recent statutory changes in 2013, this Court had held that informal ex parte interviews between defendant physicians and treating physicians were not permitted under this statute. *See Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996). In December of 2012, this Court further stated that the patient-physician privilege under Section 456.057 "prohibits ex parte meetings between treating physicians and others outside the confidential relationship whether or not they intend to discuss privileged or non-privileged matters," which if strictly interpreted would prevent a non-party treating physician from meeting with his or her own attorney. *Hasan*, 108 So. 3d at 578.

c. *HIPAA*

In 1996, Congress enacted the Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended at 42 U.S.C. §§ 1320d to 1320d-8 (2006)) (hereinafter, "HIPAA") to

increase the portability of health insurance and to reduce health care costs by simplifying administrative procedures, and regulations setting out privacy rules were promulgated in 2003 as authorized under the statute. HIPAA and the associated privacy rules prohibit the disclosure of protected health information except in specified circumstances, and pursuant to certain procedural safeguards. Thus, as of 2003, the disclosure of confidential health information in Florida was governed by both state and federal statutory restrictions. As a result, to the extent that the Florida Legislature intends to loosen its own statutory restrictions on the means and methods by which health information can be disclosed, it must do so in ways that do not violate HIPAA.

One of the ways that protected health care information may be disclosed consistent with HIPAA is if the patient executes a valid written authorization in compliance with the regulations. The Department of Health and Human Services has specifically stated that its regulations were "not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information." *See* 65 Fed. Reg. 82,530 (Dec. 28, 2000). Nothing in HIPAA, the related regulations, or the legislative history specifically makes reference to ex parte interviews, let alone expresses any intention to prevent

such interviews from occurring to the extent they are permitted by state law and are consistent with HIPAA's procedural dictates.

2. The Changes Made By Chapter 2013-108

Signed by Governor Scott in June of 2013 and effective as of July 1, 2013, Chapter 2013-108 of the Laws of Florida (the "Act") made important changes to these Florida Statutes. First, in response to this Court's *Hasan* decision, the Act changed to Section 456.057 to allow non-party treating health care professionals to disclose patient information to their own attorneys under certain circumstances. Next, the Act made certain changes to Section 766.106(6)(b), which sets forth a number of ways that informal discovery can be obtained during the presuit phase of a medical malpractice claim. The legislation added a new subsection which allows for "interviews with treating health care providers" and, as a general matter, permits a prospective defendant and his or her attorney to "interview the claimant's treating health care providers consistent with the authorization for release of protected health information." § 766.106(6)(b)(5), Fla. Stat. (2013).

Finally, the Act also expressly authorizes ex parte interviews with a medical malpractice claimant's treating physicians, which was accomplished by amending Section 766.1065. The changes to the Authorization Form made in 2013 accomplished two discrete goals: (1) consistent with the amendments to Section 456.057, they authorize a subset of treating health care providers to disclose patient

information to their own insurers and attorneys; and (2) they allowed the defendant, and the defendant's attorneys and insurers, to conduct ex parte interviews with this same subset of treating health care providers "without the presence of the Patient or the Patient's attorney." § 766.1065(3), Fla. Stat. (2013).

Before the enactment of HIPAA, the Florida Legislature could have simply amended Sections 456.057 and 766.106 so as to expressly permit informal ex parte interviews between defendant physicians and non-party treating physicians, and adopt whatever form of procedural protections and limitations (if any) it saw fit. However, the Florida Legislature recognized that it could only permit ex parte interviews in a way that was consistent with HIPAA's procedural requirements. The Authorization Form enacted in 2011, and amended in 2013 to allow for ex parte interviews, was specifically and carefully crafted by the Florida Legislature to be completely consistent with HIPAA. Specifically, the wording of the Authorization Form incorporates all of the necessary language that HIPAA requires in order to constitute a valid written authorization under federal law.

B. Proceedings Below

Plaintiff brought suit for declaratory and injunctive relief against Dr. Myers, against whom she was contemplating asserting a medical malpractice action,

claiming that the Act was unconstitutional in four separate ways: (1) separation of powers; (2) special legislation; (3) access to courts; and (4) privacy. (R.1:1-18).[1]

In response, Dr. Myers filed a motion to dismiss Plaintiff's count related to the constitutional right to privacy. (R.1:25-37). The Honorable A. Scott Duncan agreed that Plaintiff could not assert a right to privacy claim against Dr. Myers as a matter of law. (R.1:152-57). Specifically, Judge Duncan determined that he could not find "a legal basis to support the proposition that an estate can assert state constitutional privacy rights on behalf of a deceased person," and that "a constitutional privacy action can only be asserted against a governmental entity or actor," and not a private citizen like Dr. Myers. (R.1:155-56). Judge Duncan granted Dr. Myers' motion to dismiss Plaintiff's privacy count. (R.1:157).

The parties then both moved for summary judgment on the remaining constitutional claims, and extensively briefed and argued the issues. (R.2:181-236, 273-347; R.3:348-416, 434-528). The successor judge, the Honorable Edward P. Nickinson, granted Dr. Myers' cross-motion for summary judgment on all

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[1] Plaintiff also claimed that the statute was preempted by HIPAA. This position was rejected by both the trial court and First District. (R.3:424-27; App. A); *Weaver v. Myers*, 170 So. 3d 873, 883 (Fla. 1st DCA 2015). In separate federal litigation between the same counsel involved in this appeal, the Eleventh Circuit likewise determined that the Act was not preempted by HIPAA. *See Murphy v. Dulay*, 768 F.3d 1360 (11th Cir. 2014). Plaintiff has not claimed federal preemption in this appeal.

remaining counts, finding that the Act did not run afoul of the Florida Constitution. (R.3:422-33; App. A).

Plaintiff appealed to the First District, which affirmed all aspects of the trial court's rulings. *Weaver v. Myers*, 170 So. 3d 873 (Fla. 1st DCA 2015); *see also* Pet.'s App. C. With respect to separation of powers, the First District held that the statutory amendment allowing ex parte interviews was substantive and not procedural, and more akin to "a form of investigation" than to court rules. *Id.* at 878. The First District further held that even if the statute could be said to be procedural, there was no conflict between the statue and Rule 1.650, because the latter does not limit the presuit discovery methods to those listed in the rule, and there is nothing that would prevent litigants from complying with both Rule 1.650 and Section 766.106. *Id.* at 879-80.

The First District determined that the statute was not an impermissible special law, because the classes it creates (litigants in medical malpractice lawsuits) are open and there "is a reasonable relationship between the class of potential malpractice parties and the statutes which govern the medical malpractice presuit notice periods, including the recent amendments." *Id.* at 880-81. No violation of access to courts was found by the First District, which held that the requirement to fill out and serve a form "is a reasonable condition precedent to filing suit" that created "no barrier to the courthouse doors for medical malpractice

plaintiffs," and that therefore "such plaintiffs' substantive rights of recovery against health care providers [are not] modified in any way." *Id.* at 881-82.

Finally, the First District rejected the notion that the statute implicated constitutional privacy concerns. It noted that in Florida and across the country, it is universally accepted that an individual waives his or her right to privacy in relevant health information that is placed at issue by the plaintiff's voluntary decision to bring a medical malpractice claim, and that this narrowly tailored and constitutionally valid waiver reflected in the Authorization Form does not violate Floridians' privacy rights. *Id.* at 883.

Plaintiff filed a notice to invoke the discretionary jurisdiction of this Court on the ground that the First District's opinion had declared a state statute constitutional, and this Court accepted jurisdiction on this basis.

SUMMARY OF ARGUMENT

The First District correctly determined that the Authorization Form is completely consistent with the Florida Constitution. This Court should likewise find that the Act is constitutional in every respect.

Sections 766.106 and 766.1065 do not intrude upon the rulemaking authority of this Court. The statutes are fundamentally substantive in nature because they are meant to facilitate the parties coming to an early assessment of the merits of each medical malpractice lawsuit and to encourage settlement prior to filing suit, and

were intended to reverse law that prevented ex parte interviews with treating physicians as a matter of public policy. There already exists controlling case law holding that Section 766.106 and other sections of the mandatory presuit investigation statute located in Chapter 766 are substantive in nature and not procedural, and this Court should follow such well-reasoned decisions here.

The statutes also do not impermissibly interfere or conflict with Rule 1.650 of the Florida Rules of Civil Procedure. There is nothing that would prevent litigants from complying with both Rule 1.650 and Section 766.106, since the latter merely adds an additional informal discovery tool to those that already exist under the former. Moreover, because the Act operates prior to the initiation of a lawsuit in court, and not "in the courts" or on the conduct of the lawsuit itself, there can be no constitutional violation under Art. V, § 2(a).

The Act does not violate the prohibition on special laws. The classes created by the Act are unquestionably open, satisfying the necessary prerequisite for a valid general law. Moreover, the Act makes a rational distinction between class members and non-class members, as among the purposes of the Act is to provide opportunities to settle meritorious cases by allowing all parties equal access to information, thereby reducing the number of meritless medical malpractice claims. Numerous Florida courts have found that regulating medical services, including

medical malpractice claims, and the insurance industry are matters of legitimate legislative concern, providing a rational basis for the distinctions made by the Act.

Access to courts is not denied because the Authorization Form merely imposes a simple and reasonable condition precedent to filing suit, which is well within the Legislature's power to impose and consistent with other preconditions and restrictions that have been expressly found to be constitutionally permitted. As long as the Authorization Form is filled out and served, there is no barrier to the courthouse doors for medical malpractice plaintiffs, nor are such plaintiffs' substantive rights of recovery against health care providers modified in any way.

Finally, the trial court appropriately determined that Plaintiff could not legally assert a right to privacy claim against Dr. Myers, because constitutional privacy rights terminate upon death, and Dr. Myers is not the state government. Even if the merits of Plaintiff's privacy claim are reached, there is no constitutional violation because plaintiffs who initiate medical malpractice lawsuits no longer have a "legitimate" expectation of privacy in their own relevant medical records, as such plaintiffs have voluntarily placed such information at issue by bringing suit.

STANDARD OF REVIEW

Dr. Myers agrees that the standard of review is *de novo* for the constitutional arguments raised in this appeal. However, "[i]t is well established that when the constitutionality of a statute is at issue, courts must find the statute valid if there is

any reasonable basis for doing so." *State Farm Auto. Ins. v. Warren*, 805 So. 2d 1074, 1077 (Fla. 5th DCA 2002). A court must start with the presumption that the statute is constitutionally valid. *See id.*

ARGUMENT

I. THE ACT DOES NOT INTRUDE UPON THE PROCEDURAL RULEMAKING AUTHORITY OF THE COURTS.

The First District correctly determined that "the statutory amendments to the medical malpractice presuit notice provision do not intrude upon [this Court's] procedural rule-making power because they are integral to other substantive portions of the statute, and they do not conflict with rule 1.650." *Weaver v. Myers*, 170 So. 3d 873, 880 (Fla. 1st DCA 2015); *see also* Pet.'s App. C. Article V, Section 2(a) of the Florida Constitution states that "[t]he supreme court shall adopt rules for the practice and procedure in all courts...." Art. V, § 2, Fla. Const. It "grants this Court the exclusive authority to adopt rules of judicial practice and procedure for actions filed in this State, while the Legislature is charged with the responsibility of enacting substantive law." *Se. Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 78 (Fla. 2012).

A. The Act Does Not Directly And Substantially Conflict With Rule 1.650

Plaintiff's first argument is that the Act so directly and substantially conflicts with Rule 1.650 that it must be declared unconstitutionally null and void, regardless of the extent of its substantive provisions. IB at 10-15. Simply put,

there is no conflict at all between the Act and Rule 1.650. This is because there is nothing that would prevent litigants from complying with both Rule 1.650 and Section 766.106, since the latter (as amended by the Act) merely adds an additional informal discovery tool to those that already exist under the former.

Plaintiff incorrectly claims that Rule 1.650(c) "limits" the methods of conducting informal discovery to those listed in the rule. IB at 13. To the contrary, Rule 1.650 merely states that parties "***may*** obtain presuit discovery" using the identified methods, without stating that parties "may not" use any other methods.[2] As a result, there is nothing in this language to prevent the Legislature from adding another informal discovery tool as a means to implement its substantive changes to Florida law, as occurred here. The trial court agreed, concluding that "Rule 1.650 contains no prohibition on additional methods of presuit investigation." (R.3:428).

Plaintiff vastly understates the level of conflict required under Florida law before a statutory provision will be deemed unconstitutionally contrary to a rule of procedure. This Court recently held that a statute would only be unconstitutional if the "statutory modifications ***directly and substantially altered*** the procedural rules adopted by this Court." *Abdool v. Bondi*, 141 So. 3d 529, 539 (Fla. 2014). Moreover, a statute can permissibly "intrude" on a rule of practice and procedure,

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[2] All emphasis herein is supplied except as otherwise noted.

as long as it does not "impermissibly" do so. *State v. Raymond*, 906 So. 2d 1045, 1049 (Fla. 2005). As long as a statute does not unduly "interfere with" or "intrude upon" a rule of procedure to the point that a "conflict" inevitably arises, it is valid. *Jackson v. Fla. Dep't of Corrections*, 790 So. 2d 381, 385 (Fla. 2000). A statute crosses the line into unconstitutionality only if it "significantly changed" the procedures in question. *Looney v. State*, 803 So. 2d 656, 676 n.25 (Fla. 2001). The Act falls well short of the kind of interference and intrusion that would render it unconstitutional, as it is clear that the Act can easily coexist with Rule 1.650.

Kalway v. State, 730 So. 2d 861 (Fla. 1st DCA 1999) is instructive. At issue in *Kalway* was a statute requiring indigents to file certain financial information with their case management orders so as to proceed without payment of court costs and fees. After determining that the "thrust" of the statute was "undoubtedly substantive," the First District also noted that the statute "contains directives ... concerning the manner in which the substantive objectives are reached." *Id.* at 862. The statute was nonetheless upheld on the following rationale:

> The procedural aspects of the law under examination in this case are minimal and do not void the statute, because they are intended to implement the substantive provisions of the law. That is, the procedural portions of section 57.085 do not appear to conflict with any existing court rule or procedure.... If the procedural elements of the statute were found to ***intrude impermissibly*** upon the procedural practice of the courts, the legislative provisions would have to give way to the court rules and procedures.... In short, we do not view the subject legislative enactment as an intrusion into the practice and procedure of the Florida judiciary.

Id. (citation omitted). Similarly, any procedural aspects of the Act do not "intrude impermissibly" upon Rule 1.650 so as to prevent litigants from complying with both the Act and the rule, and therefore no conflict exists.

The fact that this Court adopted Rule 1.650 only months after the Legislature enacted a statute in 1988 listing the three original methods of informal presuit discovery, and that Rule 1.650 identifies these same three methods, strongly indicates that this Court was merely intending to "codify the medical malpractice presuit statute," and not forever bar the Legislature from adding additional methods in the future. *Weaver*, 170 So. 3d at 879. Adopting Plaintiff's argument would mean that the methods of informal presuit discovery would be locked in place for all time, consisting only of those methods set out in the original 1988 statute, simply because this Court, in an exercise of comity, decided to incorporate the statutory language in a rule. The more likely situation, and the one adopted by the First District, is that the "the rule was intended to mirror the statute rather than serve as a limitation on the Legislature's ability to adopt additional discovery methods." *Id.* at 880. That Rule 1.650 states that is was meant to apply to the methods "***prescribed by*** section 766.106" further supports the conclusion that the statute informs the rule, and is not limited by it.

In fact, the ***only*** method by which informal ex parte interviews during the presuit phase could be conducted without running afoul of federal law was to use

the kind of authorization form adopted by the Legislature in Section 766.1065, and challenged by Plaintiff in this appeal. Thus, if the Legislature's decision to allow ex parte interviews is to be implemented in Florida at all, it must take the current form. Certainly, it is within the Legislature's power to effectuate the policy goal of permitting ex parte interviews with treating physicians, as numerous other state legislatures have done. If Plaintiff's position is accepted, then the Legislature will be forever prevented from amending its own statute to adopt a HIPAA-compliant Authorization Form allowing ex parte interviews without running afoul of Article V, Section 2(a) of the Florida Constitution. This simply cannot be the outcome here, particularly where it was the Legislature itself that created the original presuit disclosure methods.

In addition, a statute can only "conflict" was a rule of procedure under the separation of powers doctrine if that rule is addressed to practices and procedures "in all ***courts***." Art. V, § 2(a), Fla. Const. Here, the Act operates ***prior*** to the initiation of a lawsuit in court, and ***not*** "in the courts" or on the conduct of the lawsuit itself. In fact, the statute makes perfectly clear that it was not intended to extend into the judicial realm, indicating that "[a] statement, discussion, written document, report, or other work product generated by the presuit screening process ***is not discoverable or admissible in any civil action for any purpose by the opposing party***." § 766.106(5), Fla. Stat. (2013).

As a result, even if there were a "conflict" between the Act and Rule 1.650 (which is denied), the Act's provisions would control over those contained in Rule 1.650 because the latter does not address procedures ***in Florida's courts***. *See, e.g.*, *Timmons v. Combs*, 608 So. 2d 1, 2-3 (Fla. 1992) (holding that where a statute and a rule conflict, the rule must give way to the statute in areas that fall outside of the judiciary's delegated power under Article V); *Jackson*, 790 So. 2d at 384 (statute must give way to a rule if it conflicts or interferes with "the procedural mechanisms ***of the court system***"); *see also Thomas v. Warden*, 999 So. 2d 842, 847 (Miss. 2008) (upholding 90-day presuit period as a substantive "prerequisite to a claimant's right to file suit," and observing that, like in Florida, "[t]he Legislature's authority to make law gives way to this Court's rule-making authority ***when the suit is filed, not before***").

This key difference renders Plaintiff's principle cases inapplicable. Thus, *Massey v. David,* 979 So. 2d 931 (Fla. 2008), is far from "on point," IB at 13, because *Massey* involved expert discovery ***as applied during the lawsuit itself***, and not (as here) to presuit procedures unrelated to the conduct of court proceedings. Similarly, as Plaintiff herself recognizes, *Knealing v. Puleo*, 675 So. 2d 593 (Fla. 1996), involved the timing of "***court-ordered*** mediation," IB at 13, and not investigations occurring entirely prior to the commencement of the lawsuit. This explains the distinction between the ***presuit*** investigation that the Act authorizes,

and the discovery procedures that apply after a lawsuit has been filed ***in court***. IB at 19-20. The former is an informal process to weed out meritless claims and settle meritorious claims without the necessity of a full adversarial proceeding, while the latter dictates the formal exchange of information for those cases that proceed to lawsuit. This important distinction is dispositive for purposes of Plaintiff's "conflict" argument.

B. The Act Is Substantive In Nature

Plaintiff is also misguided in arguing that the Act is not substantive in nature, and therefore allegedly "intrudes upon" this Court's rulemaking authority. IB at 16-22. A statute will only violate Article V, Section 2(a) of the Florida Constitution if it is fundamentally procedural in nature. If a "statute is 'substantive and ... it operates in an area of legitimate legislative concern,' then [the Court is] precluded from finding it unconstitutional." *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 51 (Fla. 2000), quoting *VanBibber v. Hartford Accident & Indem. Ins. Co.,* 439 So. 2d 880, 883 (Fla. 1983).

There is abundant and controlling case law holding that Section 766.106 and other sections of the mandatory presuit investigation statute located in Chapter 766 are substantive in nature and not procedural. Thus, in *Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991), this Court addressed the plaintiff's contention that the predecessor to Section 766.106 (i.e., Section 768.57) was procedural and therefore

violated Article V, Section 2(a) of the Florida Constitution. In a holding directly on point and dispositive of this issue, this Court stated:

> ***We reject the contention that the notice requirement of section 768.57 is procedural and, as such, is an unconstitutional invasion of our exclusive rule-making authority***. The statute was intended to address a legitimate legislative policy decision relating to medical malpractice and established a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding.... ***We find that the statute is primarily substantive***....

Id. at 983. Other Florida courts have recently cited the *Williams* case, among others, to conclude that "the Florida Supreme Court has concluded on several occasions that ***presuit notice requirements are substantive in nature***." *Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.*, 88 So. 3d 269, 281 (Fla. 1st DCA 2012). *See also Cantres v. Bailey*, 2010 WL 3294348, *6 (M.D. Fla. Aug. 20, 2010) ("The presuit investigation requirements are substantive and not merely procedural").

The reasoning behind this conclusion is that the presuit notice and investigatory requirements are intended to facilitate the parties coming to an early assessment of the merits and to encourage settlement prior to filing suit. Such statutory presuit requirements are therefore "substantive, not procedural," because they "***create a valid condition precedent*** rather than an impermissible intrusion into the court's exclusive rulemaking power." *Splash & Ski, Inc. v. Orange Cnty.*, 596 So. 2d 491, 495 (Fla. 5th DCA 1992).

Moreover, section 766.106's right to interview is most akin to an investigative tool to aid the statute's purpose of promoting settlement. In *Petition of Ezell*, 446 So. 2d 253 (Fla. 5th DCA 1984), the plaintiff argued that the Florida statute authorizing the State Attorney General "to issue a civil investigative demand (C.I.D.) in an antitrust investigation" was a "legislatively promulgated rule of practice and procedure" and was therefore an unconstitutional "intrusion on the rule-making power of the supreme court." *Id.* at 255. The trial court held that it was not an unconstitutional intrusion, but rather "a legislatively defined investigative tool." *Id.* The Fifth District affirmed and explained that the statute did not "have anything to do with practice and procedure in the courts" and that "[a]n investigation ... is not a proceeding in court, and thus [the statute] does not regulate practice and procedure in the courts so as to conflict with Article V, section 2(a), Florida Constitution." *Id.* Similarly, the interview process section 766.106 authorizes is not a "legislatively promulgated rule of practice and procedure" but rather an investigative tool to equalize claimants' unfettered access to their own physicians and defendants' limited access to same, thus furthering the statute's purpose of promoting settlement and reducing the cost of medical claims.

Plaintiff unconvincingly claims that the Authorization Form requirement, when looked at in isolation, is somehow not an integral part of the "pretrial notice requirements" that Plaintiff herself admits have been found constitutional in the

face of a challenge under Article V, Section 2(a) of the Florida Constitution. IB at 17-19. Plaintiff is also critical of the First District's conclusion that the simple addition of ex parte interviews to the statute, taken in light of the statute as it previously existed, rendered the addition also substantive in nature. *Id.* These arguments are meritless.

For the same reasons that Florida case law has unanimously found the presuit notice and expert affidavit requirements to be "substantive" and therefore within the Legislature's authority to enact, so too must the closely related Authorization Form be similarly valid. Plaintiff simply provides no compelling reason to ignore the overwhelming weight of decisional authority, or to myopically focus on the recent amendments to the exclusion of the statute as a whole. Plaintiff cites *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991), but this case does not help Plaintiff. This Court in *Martinez* struck down an amendment to a statute that was "***only*** procedural and administrative," unlike the Act at issue here. *Id.* at 1173. Also, the amendment struck down in *Martinez* was not critical to accomplishing the "stated intent" of the statute, whereas here the Authorization Form is critical to the purpose of the Act – to allow physicians sued for malpractice to conduct ex parte interviews with treating physicians. *Id.*

Indeed, even if one wrongly examines the most recent amendments to Chapter 766 in isolation, as Plaintiff suggests, it is clear that they nonetheless are

substantive in quality. The Authorization Form is substantive because it is intended to facilitate the parties coming to an early assessment of the merits of each medical malpractice lawsuit and to encourage settlement prior to filing suit. Moreover, the Authorization Form was intended to reverse then-existing statutory law, as interpreted by *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996) and its progeny, that prevented ex parte interviews with treating physicians as a matter of public policy. The recent amendments extended to medical malpractice defendants the ***affirmative right*** to interview obliging treating physicians, which right had been denied to them prior to these amendments. Such aspects of the recent amendments to Chapter 766 are clearly substantive.

Courts outside of Florida that have examined similar presuit requirements in medical malpractice lawsuits have likewise determined that such statutes do not violate constitutional separation of powers provisions. *See, e.g., Webb v. Roberson*, 2013 WL 1645713 *9 (Tenn. Ct. App. Apr. 17, 2013) (holding that statute was "not entirely procedural," could be "harmoniously construed" with the rules of civil procedure, and that the statute was constitutional "[b]ased upon [the] Legislature's substantive policy concerns"); *Neal v. Oakwood Hosp. Corp.*, 575 N.W.2d 68, 78 (Mich. Ct. App. 1998) (finding "no conflict" between presuit notice provision in medical malpractice statute and rules of civil procedure because the statute did not "change the manner in which or how a civil action is commenced").

Even if there were some procedural aspects to the Act in addition to the substantive aspects (which Dr. Myers denies), there still cannot be a violation of Article V, Section 2(a) because those procedural aspects would be intertwined with the substantive provisions. Under Florida law, "there are circumstances where a legislative provision which would be deemed procedural ***if viewed in isolation*** will nonetheless be upheld against a challenge under article V, section 2(a) because of the connection between that provision and substantive provisions adopted by the Legislature." *Peninsular Props. Braden River, LLC v. City of Bradenton, Fla.*, 965 So. 2d 160, 161-62 (Fla. 2d DCA 2007) (citation omitted). Indeed, this Court emphasized that it has "consistently rejected constitutional challenges where the procedural provisions were intertwined with substantive rights." *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 54 (Fla. 2000).

The amendments made by the Act in 2013 clearly contain numerous substantive aspects. For example, the scope of the physician-patient privilege was narrowed to allow treating physicians to discuss patient information with their own attorneys, in response to this Court's decision in *Hasan v. Garvar*, 108 So. 3d 570 (Fla. 2012). The *Hasan* decision acknowledged that the definition and scope of this privilege is a substantive matter for the Legislature, given that it was created by statute in the first instance and subsequently interpreted by the courts. *See id.* at 572 ("[T]he Florida Legislature adopted a physician-patient confidentiality statute

for patient medical information in 1988."). Moreover, statutory provisions detailing ***to whom*** private health information can be disclosed are substantive and not procedural. *See Lemieux v. Tandem Health Care of Fla., Inc.*, 862 So. 2d 745, 748 n.1 (Fla. 2d DCA 2004). At ***worst***, therefore, the Act intertwines procedural and substantive rights together, and cannot be struck down.

II. THE ACT DOES NOT VIOLATE THE CONSTITUTIONAL BAR ON SPECIAL LEGISLATION.

The First District correctly determined that the Act is not an impermissible "special law," and therefore does not run afoul of Article III, Section 11(a) of the Florida Constitution. Art. III, § 11(a), Fla. Const. The Act adopts one additional method of disclosure of relevant information (ex parte interviews) as a means of encouraging and facilitating early settlement of such complex and time-consuming litigation. The classifications it creates are open to all Floridians, and such classifications are rationally related to the goals of the statute.

"A law that operates universally throughout the state, uniformly upon subjects as they may exist throughout the state, ***or uniformly within a permissible classification*** is a general law." *License Acquisitions, LLC v. Debary Real Estate Holdings, LLC*, 155 So. 3d 1137, 1142 (Fla. 2014), quoting *Dep't of Bus. Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155, 1157 (Fla. 1989). Here, the Act is clear on its face that it applies only to certain classes of persons, in that the law modifies the right of parties and potential parties to medical malpractice cases, as

well as health care practitioners who provided treatment to prospective or current medical malpractice claimants. However, this classification alone does not render the Act an invalid special law unless the "classification is not permissible or the classification adopted is illegal." *License Acquisitions*, 155 So. 3d at 1142.

Historically, there had been two separate criteria that rendered a law general under Florida law when it operated on the basis of a classification system. First, the class affected or regulated must be open, meaning that it must be potentially applicable to people or entities in the future. *See Biscayne Kennel Club, Inc. v. Fla. State Racing Comm'n*, 165 So. 2d 762, 763-64 (Fla. 1964). This "openness" inquiry focuses on "whether there is a reasonable possibility that the class will include others in the future." *Fla. Dep't of Bus. & Prof'l Regulation v. Gulfstream Park Racing Ass'n, Inc.*, 967 So. 2d 802, 809 (Fla. 2007). In addition, Florida courts had been required to also determine whether there was a rational distinction between those in the class and those outside the class when the purpose of the legislation and the subject matter of the regulation were considered. *See Biscayne*, 165 So. 2d at 763-74.

However, this Court in *License Acquisitions* entirely dispensed with the need to apply the "rational distinction" analysis where the class created by the statute is determined to be open. This Court still observed that a classification is permissible if it bears "a reasonable relationship to the purpose of the statute." 155 So. 3d at

1143. Yet it clarified that "the criterion that ***determines*** if a reasonable relationship exists between the classification adopted and the purpose of the statute is whether the classification is potentially open to additional parties." *Id.* Therefore, if a class is "open to additional parties," then this alone "renders the statute a valid general law." *Id.* at 1148. Consistent with this new approach, this Court interpreted one of its previous decisions as standing for the proposition that "the ***controlling point*** in evaluating the statute's constitutionality was that 'even though this class did in fact apply to only one [entity], it is open and has the potential of applying to other [entities]." *Id.* at 1149-50, quoting *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983).

As a result, after *License Acquisitions*, if the class created by a statute is open, then it is also ***conclusively established*** that a reasonable relationship exists between the classification adopted and the purpose of the statute. This is fatal to Plaintiff's argument, since it is clear that the classes created by the Act are open.

Every citizen of Florida can potentially join the class of potential medical malpractice claimants to which the Act applies simply by being allegedly injured by a physician. Moreover, the universe of physicians (both treating physicians and potential defendants) is constantly changing as physicians leave and arrive in the state, and retire or graduate from medical school. As the First District correctly observed, "all citizens of the state are potential claimants, and the class of potential

defendants changes constantly as providers begin or cease the practice of medicine." *Weaver v. Myers*, 170 So. 3d 873, 881 (Fla. 1st DCA 2015); *see also* Pet.'s App. C. This proposition is so obvious that Plaintiff has not attempted to refute it on appeal, failing to raise any argument that the classes created by the Act are not "open" to vast numbers of future claimants and physicians in Florida. Therefore, because the Act indisputably creates classifications that are "open to additional parties," the statute is a general law that does not violate Article III, Sec. 11(a) of the Florida Constitution. *License Acquisitions*, 155 So. 3d at 1143.

Even if this Court were to examine the rationale behind the statutory classifications created by the Act, despite the fact that *License Acquisitions* has now made it unnecessary to do so, the statute still passes constitutional muster. The Legislature "has wide discretion in creating statutory classifications," and there is "a presumption in favor of the validity of a statute which treats some persons or things differently from others." *N. Ridge Gen. Hosp., Inc. v. City of Oakland Park*, 374 So. 2d 461, 464 (Fla. 1979); *see also Ocala Breeders' Sales Co., Inc. v. Fla. Gaming Ctrs., Inc.*, 731 So. 2d 21, 25 (Fla. 1st DCA 1999). Indeed, this Court has held that a law creating classifications "must be upheld unless the Legislature could not have ***any reasonable ground*** for believing that there were public considerations justifying the particular classification and distinction made." *License Acquisitions*, 155 So. 3d at 1149. Moreover, "one who

assails the classification has the burden of showing that it is ***arbitrary and unreasonable***." *Id.*, quoting *N. Ridge Gen. Hosp.*, 374 So. 2d at 465.

Plaintiff has not met this heavy burden here, because the Act makes a rational distinction between class members and non-class members. Among the Florida Legislature's purposes in enacting the Act and, before that, the statutes the Act amends, was to provide opportunities to settle meritorious cases by allowing all parties equal access to information, thereby reducing the number of meritless medical malpractice claims. Numerous Florida courts have found that regulating medical services, including medical malpractice claims, and the insurance industry are matters of legitimate legislative concern. *See, e.g.*, *Arch Plaza, Inc. v. Perpall*, 947 So. 2d 476, 478 (Fla. 3d DCA 2007); *Pearlstein v. Malunney*, 500 So. 2d 585, 586 (Fla. 2d DCA 1986); *VanBibber*, 439 So.2d at 883; *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 367-68 (Fla. 1981).

Given the Legislature's legitimate concern about the regulation of medical services, including medical malpractice claims, the classes of persons to which the Act applies are patently rational. *See Pinillos*, 403 So. 2d at 367-68. In this respect, Plaintiff is simply incorrect in asserting that there "is no reason" why the Act was limited to medical malpractice lawsuits, and did not include "all personal injury lawsuits." IB at 28. Medical malpractice claims are complex and potentially costly to litigate for both claimants and defendants, and encouraging the early resolution

of such claims in particular justifies the distinctions created by the Act. Moreover, the medical malpractice and insurance crisis which had originally informed the presuit notice and investigation requirement is most definitely limited to physician defendants, and therefore the solution crafted by the Act (and its predecessors) is based on a rational distinction between those in the class and those outside it.

The First District agreed, determining that a rational basis for the distinction was to "encourage[e] early settlement and negotiation of claims," and that the ex parte interview "allows the parties to collect the information necessary for settlement discussions prior to trial." *Weaver*, 170 So. 3d at 881. In addition, the Legislature could have reasonably concluded that medical malpractice lawsuits would impact malpractice insurance rates in ways that run-of-the-mill personal injury claims could not, and that the features of the statute meant to encourage early assessment, settlement and trial preparation of such claims (including permitting ex parte interviews) could reasonably impact the size of verdicts and insurance rates.

Indeed, the legislative history supports the finding that the Legislature's intent behind the classification was to promote fair and equal access to relevant information, and to encourage early settlement. Among the testimony heard by the Florida Senate and House regarding the bill that would eventually become the Act was that: (a) medical malpractice lawsuits are costly and complex; (b) defendants

in such cases are uniquely unable to gain presuit access to all relevant information; (c) the costs of such actions are driven higher by the inability to conduct informal interviews with treating physicians; and (d) that by "leveling the playing field," the Act would encourage the "inexpensive and expeditious administration of justice," leading to earlier resolution of medical malpractice cases and "more money in the hands of deserving plaintiffs."[3] This Court must not strain to manufacture an unconstitutional classification where reasonable distinctions exist, but instead must defer to the Legislature unless the record on appeal clearly demonstrates (which it does not) that the classification is "purely arbitrary in relation to the subject regulated." *Biscayne Kennel Club*, 165 So. 2d at 763; *see also License Acquisitions*, 155 So. 3d at 1149 (upholding classification by finding that "***the Legislature could have reasonably determined*** that a more consistent business model would generate more revenues than a constantly evolving one.").

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[3] *See, e.g.*, Fla. S. Judiciary Comm. Workshop, recording of proceedings (Feb. 5, 2013) (discussion and testimony on civil litigation reform), at 15-21; Fla. H.R. Civil Justice Subcomm., recording of proceedings (March 6, 2013) (testimony on House Bill 827), at 24-25, 74; Fla. S. Judiciary Comm., recording of proceedings (March 18, 2013) (testimony on Senate Bill 7073), at 2-7, 49-50, 54; Fla. S. Judiciary Rules Comm., recording of proceedings (April 2, 2013) (testimony on Senate Bill 1792), at 2-3; Fla. H.R. Judiciary Comm., recording of proceedings (April 9, 2013) (testimony on committee substitute for House Bill 827), at 2-6, 61-64; Fla. S., recording of proceedings (April 30, 2013) (discussion of Senate Bill 1792), at 2-4, 10-11, 14-20, 41-42, 62-63. For the Court's convenience, Dr. Myers has submitted an Appendix containing excerpts of these relevant portions of the legislative history indicating the bases for the passage of the Act (Tab A), as well as copies of the full transcripts from which the excerpts were taken (Tabs B-G).

The only Florida case cited by Plaintiff in support of her argument that the classification system that the Legislature implemented in the law (i.e., imposing presuit requirements only in medical malpractice lawsuits) has no rational basis is *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). IB at 24-25, 31. However, reliance on *McCall* is misplaced here.

McCall dealt specifically with an equal protection challenge to the "per survivor" cap on noneconomic damage awards in medical malpractice cases, and was not a challenge under Article III, Section 11(a), and thus is inapposite. Moreover, *McCall* has no precedential value regarding whether the statute as a whole, or the presuit procedures in particular, passes the rational basis test. There was no agreement by a majority of the justices in *McCall* that the statute ***as a whole*** fails the rational basis test. Such a monumental and sweeping decision advocated by Plaintiff, eradicating all aspects of the medical malpractice statute including those not even remotely discussed in *McCall*, would clearly be extending the holding in *McCall* well beyond the breaking point.

Plaintiff's cases from outside Florida can be easily distinguished. IB at 28-30. Initially, none of these out-of-state cases utilize the narrow test recently employed by this Court in *License Acquisitions*, and therefore they are irrelevant in assisting in the proper application of Florida law on this particular issue.

Even aside from this fundamental distinction, Plaintiff's cases are inapplicable. For example, in *Allen v. Woodfield Chevrolet, Inc.*, 802 N.E.2d 752 (Ill. 2003), the Illinois Supreme Court could not discover any rational justification for "discriminat[ing] in favor of vehicle dealers," whereas the Act was specifically intended to encourage the early resolution of medical malpractice cases, with the attendant hope of reducing litigation expenses and impacting malpractice insurance rates, and there was therefore significant justification for defining the classes as that statute did. Likewise, in *Grace v. Howlett*, 283 N.E.2d 478 (Ill. 1972), the Illinois Supreme Court held that a classification distinguishing injuries caused by "a park district truck" from those caused by "a school district truck" to be "arbitrary." The distinctions created by the Act are a far cry from the illogical divisions created by the statute in *Grace*.

The same distinction applies for *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006), where the Oklahoma Legislature attempted to change the pleading requirements for medical malpractice plaintiffs only, without enacting such a requirement as part of an overall package to encourage early assessment and resolution of claims, as Florida did. In this respect, the Oklahoma statute lacked a rational justification for the classification it attempted to create, whereas such a justification clearly exists for the Act. Moreover, Oklahoma has acknowledged that its constitutional restriction against special laws is "unique" because it is

"more detailed and restrictive than those of other states." *Wall v. Marouk*, 302 P.3d 775, 779 (Okla. 2013). Oklahoma's provision has been applied much more broadly than in Florida, essentially precluding any attempt to distinguish between medical malpractice claims and other tort claims, to the point where Oklahoma has struck down provisions that have survived constitutional challenges in Florida, like the presuit medical expert affidavit requirement. *See id.* As a result, Oklahoma's case law is particularly unhelpful here.

Moreover, while Plaintiff cites to a small handful of cases from states outside Florida striking down fundamentally dissimilar statutes, Plaintiff ignores a much larger cohort of cases from other states upholding closely related medical malpractice statutes as valid general laws. *See Baker v. Univ. Physicians Healthcare*, 296 P.3d 42, 53 (Ariz. 2013); *Breuer v. Presta*, 200 P.3d 724, 728 (Wash. Ct. App. 2009); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 67 (Neb. 2003); *Willis v. Mullett*, 561 S.E.2d 705, 711 (Va. 2002); *Clements v. Stewart*, 595 So. 2d 858, 862 (Ala. 1992); *Linder v. Smith*, 629 P.2d 1187, 1193 (Mont. 1981); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 597 (1980) *overruled on other grounds by In re Stephens*, 867 N.E.2d 148 (Ind. 2007); *Everett v. Goldman*, 359 So. 2d 1256, 1269-70 (La. 1978). Both Florida law and the balance of authority from outside Florida support a finding that the Act is a valid general law.

III. THE ACT DOES NOT VIOLATE ACCESS TO COURTS.

The First District correctly determined that requiring medical malpractice claimants like Plaintiff to fill out and serve an Authorization Form on each prospective defendant, along with the other documents that must already be served with a notice of intent to sue under Chapter 766 as part of the presuit process, does not violate access to the courts.

Article I, Section 21 of the Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), this Court held that a ***substantive right*** to redress for a particular injury cannot be "***abolish[ed]*** without providing a reasonable alternative" to that right, unless there is an "overpowering public necessity for the ***abolishment***" of that substantive right and "no alternative method of meeting such public necessity can be shown." *Id.* at 4. At the other end of the spectrum, this Court has also stated that the Legislature is free to "impose[] a reasonable condition precedent to filing a claim...." *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1097 (Fla. 2005). As a result, Florida law recognizes two distinct categories relating to the right to access to the courts: statutes that "concern access as it is affected by substantive rights and remedies," and statutes that concern "access as affected by procedural requirements." 10A Fla. Jur. 2d Constitutional Law, § 354 (2013).

Therefore, unless a given statute ***abolishes or eliminates a substantive right*** to redress of a specific injury, then the well-known two-part test established in *Kluger* and set forth by Plaintiff simply does not apply. IB at 33-34, 36. Instead, a court analyzing a statute that merely imposes conditions to the right to sue must uphold such a statute as long as it does not impose a hurdle that is either impossible to surmount, or so significantly difficult that it is the effective equivalent of a bar to suit. Consistent with this framework is *Jetton v. Jacksonville Elec. Auth.*, 399 So. 2d 396 (Fla. 1st DCA 1981), *rev. denied* 411 So. 2d 383 (Fla. 1981), wherein the First District "narrowly construed" *Kluger* as follows:

> ***The Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action***. As discussed in *Kluger* and borne out in later decisions, no substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action.

Id. at 398. Instead, a statute which only imposes a condition to suit, but does not abolish or eliminate a substantive right, must be upheld in the face of a constitutional challenge unless the statute creates a "significant impediment to the filing of nonfrivolous legal claims." *See Henderson v. Crosby*, 883 So. 2d 847, 854 (Fla. 1st DCA 2004) (statute which merely conditions but does not abolish the right to access courts is constitutional unless it "creates a 'significantly difficult' impediment to ... right of access"); *Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204, 209 (Fla. 1st DCA 1983) (same); *accord Spencer v. Fla. Dep't of Corrections*, 823

So. 2d 752, 756 n.6 (Fla. 2002) (positively citing U.S. Supreme Court language defining "access to courts" as the "avoidance of significant impediments to the filing of nonfrivolous legal claims").

Here, it is apparent that the requirement to serve an Authorization Form as part of the presuit process does not "abolish or eliminate" any substantive right that medical malpractice plaintiffs currently enjoy. Instead, all that is imposed is a small precondition to suit, in addition to those that currently already exist under Chapter 766. If the Authorization Form is served with the presuit notice of intent, there is no barrier to the courthouse doors for medical malpractice plaintiffs, nor are such plaintiffs' substantive rights of recovery against health care providers modified in any way. As a result, *Kluger* is simply inapplicable to this Court's analysis, and instead this Court should rely on *Warren* and other similar cases involving reasonable preconditions on the right to access to the courts.[4]

It is important to recognize that the presuit notice provisions as a whole have already been determined to be constitutional. *See Weinstock v. Groth*, 629 So. 2d 835, 836 (Fla. 1993). In addition, Florida's appellate courts have unanimously

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[4] This Court recently struck down a portion of the workers' compensation statute as a violation of access to courts. *See Westphal v. City of St. Petersburg*, --- So. 3d ---, 2016 WL 3191086 (Fla. June 9, 2016). However, like *Kluger*, *Westphal* involved a statute that ***eliminated*** a cause of action (tort claims for employment-related injuries) in favor of an administrative no-fault regime, and is similarly inapplicable to a statute (like the Act) that does not abolish or eliminate a cause of action, but merely places a reasonable precondition to accessing the court system.

determined that the presuit notice provisions requiring service of a notice of intent to sue and a supporting medical affidavit on each prospective defendant do not violate the right to access to the courts. *See Royle v. Fla. Hosp.-East Orlando*, 679 So. 2d 1209, 1212 (Fla. 5th DCA 1996); *Lindberg v. Hosp. Corp. of Am.*, 545 So. 2d 1384, 1386 (Fla. 4th DCA 1989); *Perlstein v. Malunney*, 500 So. 2d 585 (Fla. 2d DCA 1987), *rev. denied* 511 So. 2d 299 (Fla. 1987).

As a result, the narrow question before this Court is whether the new requirement imposed by the Act that a potential medical malpractice plaintiff serve an Authorization Form on each defendant at the outset of the presuit period – in addition to the constitutionally-approved notice of intent and supporting medical affidavit – creates such a "significantly difficult" impediment to sue under *Warren* and its progeny so as to effectively constitute a bar to bringing a lawsuit. The answer to this question, as confirmed by the First District and the trial court, is a resounding "no."

Completion of a short form and service of that form on each prospective medical malpractice defendant is such a minimal burden that it strains credulity to assert (as Plaintiff must) that such a requirement is so burdensome as to effectively preclude suit. Indeed, Florida's courts have not hesitated to reject access to court challenges to similarly undemanding preconditions to suit.

For example, this Court in *Warren* upheld a statute that required physicians to submit invoices for reimbursement of any treatment rendered to an injured insured within thirty days of the date of treatment in order to receive payment. This Court found that this statute merely "imposes a reasonable condition precedent to filing a claim for certain insurance benefits." 899 So. 2d at 1097. It found no constitutional defect because "[t]he statute places medical providers on notice of the thirty-day requirement, and compliance with the thirty-day requirement preserves access to courts." *Id.* The Fifth District opinion upheld by this Court noted that "[t]he requirement that a statement be rendered in a timely manner is satisfied by a simple management system...." *State Farm Auto. Ins. v. Warren*, 805 So. 2d 1074, 1079 (Fla. 5th DCA 2002). These decisions are directly on point, since the Act merely requires that medical malpractice plaintiffs satisfy the purely ministerial requirement of executing the Authorization Form, and doing so preserves their right of access to the courts.

Other courts have similarly upheld simple, uncomplicated and unburdensome requirements imposed by the Legislature on the right to bring a lawsuit in the face of an access to courts challenge. *See, e.g.*, *Bystrom v. Diaz*, 514 So. 2d 1072, 1075 (Fla. 1987) (upholding statute that "requires only that a taxpayer pay, prior to delinquency, the *undisputed* amount of taxes assessed while his suit is pending" because the requirement "does not unreasonably restrict a taxpayer's

access to court") (emphasis in original); *Strohm v. Hertz Corp./Hertz Claim Mgmt.*, 685 So. 2d 37, 39 (Fla. 1st DCA 1996) (upholding workers' compensation provision that "merely diminishes, after a certain point in time, the range of providers who can offer treatment..."); *Rucker v. City of Ocala*, 684 So. 2d 836, 842-43 (Fla. 1st DCA 1996) (rejecting challenge to portion of workers' compensation law that only "restrict[ed] the range of medical witnesses an injured employee may use to prove entitlement" to benefits); *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1198 (11th Cir. 2010) (finding no violation of access to courts for statute that required debt collectors register with the state because "[t]he registration process is not overly burdensome, rigorous, or costly" and is therefore "a reasonable condition precedent to filing a claim").

Plaintiff's reliance on *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987), is misplaced. IB at 34-35. Unlike here, the caps on the ***amount of damages*** that medical malpractice plaintiffs could recover were held to be so significant as to effectively "abolish" or "eliminate" the plaintiff's right to recovery, whereas a presuit form does not impact the extent of any plaintiff's substantive recovery. The caps in *Smith* were interpreted as a violation of access to courts because a plaintiff whose recovery was severely limited "has not received a constitutional redress of injuries." *Id.* at 1088. Here, as long as the Authorization Form is filled out and served, there is no barrier to the courthouse doors for

medical malpractice plaintiffs, nor are such plaintiffs' substantive rights of recovery against health care providers modified in any way.

Plaintiff is incorrect in claiming that statutes challenged under Article I, Section 21 are "presumed unconstitutional" and that the "functional equivalent" of the "strict scrutiny" test is applied. IB at 33-34. To the contrary, "legislative enactments are presumed constitutional" when challenged under the access to courts provision. *Sasso*, 431 So. 2d at 209-210. Moreover, because no suspect classification is involved, the rational basis applies here, and not "strict scrutiny" as Plaintiff suggests. *See Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 368 (Fla. 1981); *Berman v. Dillard's*, 91 So. 3d 875, 877 (Fla. 1st DCA 2012), *rev. denied,* 108 So. 3d 654 (Fla. 2012).

Also, Plaintiff conflates the ***procedure*** of the condition precedent at issue here (the simple act of executing an Authorization Form) with the ***substance*** of that form (HIPAA-compliant waiver of relevant medical information placed at issue by bringing the lawsuit and allowing ex parte interviews). IB at 36-38. ***Only the former is relevant to an access to courts challenge.*** The only question involved here is whether requiring a medical malpractice claimant to fill out and sign a simple form so significantly burdens that claimant's ability to bring a lawsuit that it effectively bars access to Florida's courts. The obvious answer (and

the one adopted by the First District and the trial court) is that it does not, based on common sense and the overwhelming weight of Florida law.

Plaintiff's criticism of the Legislature's policy decision to allow ex parte interviews is misplaced, since such an analysis is not required in a case that does not implicate the *Kluger* test, which is reserved only for statutes abolishing a substantive right, unlike the Act. Because the Authorization Form is a mere precondition to suit that does not abolish or eliminate a claim, the *Kluger* "overpowering necessity" test never comes into consideration. *See Purdy v. Gulf Breeze Enters., Inc.*, 403 So. 2d 1325, 1327 (Fla. 1981); *Sontay v. Avis Rent-A-Car Sys., Inc.*, 872 So. 2d 316, 319 (Fla. 4th DCA 2004). Instead, this Court must only decide whether the form is a reasonable condition precedent to suit. Based on the overwhelming weight of the case law concerning reasonable restrictions, the Authorization Form cannot possibly be found to violate access to courts.

IV. PLAINTIFF LACKS STANDING TO PURSUE HER PRIVACY CLAIMS, AND IN ANY EVENT THE ACT DOES NOT VIOLATE CONSTITUTIONAL PRIVACY RIGHT PROTECTIONS.

A. Plaintiff Lacks Standing Because She Cannot Assert The Privacy Rights Of Another, Nor Can She Claim The Violation Of Such Vicarious Rights Against A Private Person Like Dr. Myers.

Plaintiff asserts that the Act violated Mr. Weaver's constitutional privacy rights under Article I, Section 23 of the Florida Constitution. While the First District rejected this claim on the merits, this Court need not delve into the

substance of Plaintiff's arguments. This is because such claims cannot be asserted by Plaintiff as a matter of law based on two separate grounds, as the trial court properly found when it dismissed Plaintiff's right to privacy claim.

Florida's constitutional privacy right was adopted by referendum in 1980, and reads in pertinent part as follows: "Every ***natural person*** has the right to be let alone and free from ***governmental intrusion*** into ***the person's*** private life except as otherwise provided herein." Art I, § 23, Fla. Const. Thus, by its very language, the privacy protections are limited to "persons," and only protect against "government intrusion." Plaintiff satisfies neither of these threshold requirements.

An individual's right to privacy is personal and dies with the individual. *Williams v. City of Minneola*, 575 So. 2d 683, 689 (Fla. 5th DCA 1991). "[E]ven where a constitutional right to privacy is implicated, that right is a personal one, inuring solely to individuals." *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002). Thus, such privacy rights "may not be asserted vicariously." *Sieniarecki v. State*, 756 So. 2d 68, 76 (Fla. 2000). Moreover, this Court has declared unequivocally: "[W]e begin with the premise that a person's constitutional rights terminate at death." *State v. Powell*, 497 So. 2d 1188, 1190 (Fla. 1986).

The *Williams* case is most directly on point here. In *Williams*, the mother and sister of the deceased – fourteen year old Glen Williams – appealed the trial

court's order granting summary judgment in favor of the defendants on their right of privacy claims. 575 So. 2d at 685. The appellants' right of privacy claims arose out of the display of video and photographs of Glen's autopsy by police officers. *Id.* at 690. The Fifth District held that any claim for invasion of privacy was personal to the deceased and could not be maintained by the deceased's relatives:

> [A]n invasion of privacy action of the category involved here can be brought only by a living person whose own privacy is invaded.... [T]he action is a personal right, peculiar to the individual whose privacy is invaded, and ... the cause of action cannot be maintained by members of the individual's family unless their own privacy is invaded along with his. Furthermore, ... the action for invasion of privacy cannot be maintained after the death of the individual whose privacy is invaded.

Id. at 689. The Fifth District concluded that the trial court's grant of summary judgment against the plaintiffs was proper "as to their right of privacy claims, whether common law, ***constitutional***, or under 42 U.S.C. § 1983." *Id.* at 690; *see also Nestor v. Posner-Gerstenhaber*, 857 So. 2d 953, 955 (Fla. 3d DCA 2003); *Loft v. Fuller*, 408 So. 2d 619, 620 (Fla. 4th DCA 1981).

Here, Plaintiff has attempted to assert Mr. Weaver's constitutional privacy rights in his medical records, and not her own privacy rights. While Plaintiff certainly has the right to assert a loss of consortium claim in the underlying medical malpractice lawsuit (assuming it ultimately proceeds), it is only the late Mr. Weaver's medical records and information that are addressed by the Authorization Form. Because Mr. Weaver is deceased, his privacy rights are

extinguished, and the trial court correctly concluded that Plaintiff could not vicariously assert them on his behalf.

Just as in Florida, the concept that an individual's constitutional privacy rights expire upon death is well accepted across the country. *See, e.g.*, *Helmer v. Middaugh*, 191 F. Supp. 2d 283, 285 (N.D.N.Y. 2002); *Guyton v. Phillips*, 606 F.2d 248, 250 (9th Cir. 1979); *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979); *Ravellette v. Smith*, 300 F.2d 854, 855 (7th Cir. 1962). Given the default rule in Florida and across the country that the deceased lose their constitutional protections, and the decisions in *Williams*, *Alterra Healthcare* and *Sieniarecki*, the trial court correctly determined that Plaintiff could not prosecute her deceased husband's constitutional privacy claims, a finding which this Court should affirm.

In addition, a constitutional privacy action can only be asserted against a state actor. As noted above, Article I, Section 23 of the Florida Constitution only protects against "government intrusion." The very first comment to the 1980 amendment adding the constitutional provision states: "Section 23 was added to the Florida Constitution in 1980 to provide a state right of privacy, requiring ***the state*** to justify the reasonableness of intrusions into personal privacy."

This provision has been interpreted to mean that it can only be enforced "against the government rather than against a private person." *Tucker v. Resha*, 634 So. 2d 756, 759 (Fla. 1st DCA 1994). In *Tucker*, the plaintiff brought suit

against a government employee alleging defamation, and that the employee used her official position as executive director of the Florida Department of Revenue to improperly investigate and audit plaintiff's businesses, thereby violating Florida's constitutional right to privacy. After the jury found that the employee did not act in her official capacity, the First District reversed the jury's award of damages pursuant to Article I, Section 23, holding that "the privacy provision of the Florida Constitution obviously creates no cause of action against private persons." *Id.*

This Court affirmed this Court's decision in *Tucker*, and in so doing sweepingly held that Article I, Section 23 "clearly provides that it applies only to government action." *Resha v. Tucker*, 670 So. 2d 56, 58 (Fla. 1996). This Court observed that "no cause of action for government intrusion exists in this case because [plaintiff's] claim alleging that Tucker acted beyond the scope of her duties was against Tucker individually rather than against the state." Thus, constitutional privacy rights cannot even be asserted against a ***government employee*** when that individual's actions cannot be directly attributable to the state. As a private citizen with no connection whatsoever to the state, Dr. Myers is far more removed from any alleged "governmental intrusion" than in *Tucker*.[5]

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[5] While the First District in *Tucker* focused primarily on whether an action for monetary damages could arise from Article I, Section 23, this Court's affirmance in *Resha* is much broader and not so limited, ruling in no uncertain terms that a private citizen's actions "do not amount to government intrusion and, consequently, cannot violate article I, section 23." *Resha*, 670 So. 2d at 59.

Another decision supporting the trial court's dismissal is *Gilbert v. Sears, Roebuck & Co.*, 899 F. Supp. 597 (M.D. Fla. 1995). In *Gilbert*, the plaintiff alleged that Sears has coordinated with the Tampa Police Department ("TPD") to violate his constitutional rights, including the right to privacy, by allowing TPD to install video cameras in the changing rooms to address alleged illegal activity in that location, and in working with TPD in monitoring and operating those cameras. Sears moved to dismiss the plaintiff's count for violation of the Florida Constitution's privacy right, and the Middle District of Florida, applying Florida law, granted that motion. Citing to *Tucker*, the federal court held that "[p]laintiff has no cause of action against Sears for violation of his right to privacy" because Sears was a "private person" and not the government. *Id.* at 599-600.

The federal court made this determination in *Gilbert* despite the fact that Sears fully cooperated with the Tampa Police Department in setting up the video cameras in the men's bathroom, and in allowing the police to use their facilities for an improper sting operation. This decision thus contradicts any claim Plaintiff might make that Dr. Myers is somehow transformed into a state actor merely by following the letter of a state statute passed by the Florida Legislature, and nothing more. Situations where private actors are deemed to be agents of the state involve much more machinery of the state, such as conscripting or selling private property in concert with the use of the enforcement powers of the state itself.

B. The Act Does Not Violate Constitutional Privacy Rights.

Even if the merits are reached, Plaintiff has not demonstrated that the Act violated constitutional privacy protections. This is because plaintiffs who initiate medical malpractice lawsuits no longer have a "legitimate" expectation of privacy in their own relevant medical records, because these plaintiffs have voluntarily placed such information at issue by bringing suit.

Under analogous circumstances, Florida's courts have held that when a claimant pursues a workers' compensation claim, the claimant no longer has any expectation of privacy in his or her relevant medical records that might support the claim. *See S & A Plumbing v. Kimes*, 756 So. 2d 1037, 1041-42 (Fla. 1st DCA 2000); *Poston v. Wiggins*, 112 So. 3d 783, 785-86 (Fla. 1st DCA 2013). It is well established in Florida, and across the country, that any privacy rights that might attach to a claimant's medical information are waived once that information is place at issue by filing a medical malpractice claims. *See, e.g.*, *Barker v. Barker*, 909 So. 2d 333, 337 (Fla. 2d DCA 2005); *Andreatta v. Hunley*, 714 N.E.2d 1154, 1157 (Ind. Ct. App. 1999).

Indeed, well before the statutory changes that Plaintiff challenges here, claimants in Plaintiff's position already had to disclose and produce relevant medical records to the defense team during the presuit period. *See* § 766.106(2)(a), Fla. Stat. (2013) (requiring disclosure of "copies of all the medical records" relied

upon by claimant and claimant's expert). Just as these older statutory provisions have never been found invalid for infringing on the constitutional right to privacy, the most recent changes to statute also satisfy constitutional privacy protections.

While Plaintiff raises the spectre that the Authorization Form would somehow allow the disclosure of "irrelevant information," IB at 40, such concerns are unfounded. In fact, the Authorization Form specifically limits disclosure to health information related to "the injuries complained of" by the prospective-plaintiff/patient. *See* §766.1065(3)(B). The Authorization Form essentially places the patient in the role of "gatekeeper" directing the patient to list the names of the physicians who have health information relevant to the patient's injuries (who ***may*** disclose such relevant information) as well as the name of physicians who do not have relevant information (who ***may not*** disclose such relevant information). *See id.* at (B) & (C). As a result, *ex parte* interviews are limited to matters pertinent to the potential medical-negligence claim, and the statute is specifically tailored to allow claimants to ***prevent*** the disclosure of irrelevant information. This aspect of the statute therefore enhances privacy, rather than undermines it.

CONCLUSION

Based on the foregoing arguments and authorities, Dr. Myers respectfully requests that this Court affirm the First District's conclusions and find the Act constitutional in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **30th** day of **June, 2016**, a copy of the foregoing was e-filed with the Florida Supreme Court via the Florida Courts E-Filing Portal and served via e-mail to all parties listed on the attached Service List.

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CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements. It is typed in Times New Roman 14 point, proportionately spaced type.

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