IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC09-1997

WEST FLORIDA REGIONAL MEDICAL CENTER, INC. d/b/a WEST FLORIDA HOSPITAL,

Petitioner,

-vs-

LYNDA S. SEE and RODNEY C. SEE,

Respondents.
_____/

BRIEF OF RESPONDENTS ON JURISDICTION

On Discretionary Review From a Decision of the First District Court of Appeal

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PREFACE

This proceeding involves a Petition for review in which the Petitioner seeks this Court to exercise discretionary jurisdiction based on decisional conflict and on the grounds that the First District's decision misconstrued the Florida Constitution. The parties will be referred to by their proper names or as they appeared in the trial court. The following designation will be used:

(A) – Petitioner's Appendix – First District Decision

STATEMENT OF THE CASE AND FACTS

Respondents accept Petitioner's Statement of the Case and Facts with the following additions.

Prior to the First District's decision in this case, the Fourth District had addressed two of the arguments raised by the Hospital, i.e. that Amendment 7 was preempted by the Health Care Quality Improvement Act of 1986, 42 USC Sections 11101-11152 (hereafter "HSQIA"), and that §381.028(7)(b)1, Fla. Stat. limited the records obtainable under Amendment 7 to "Code 15" reports. Columbia Hospital Inc. of South Broward v. Fain, 16 So.3d 236 (Fla. 4th DCA 2009). The First District's decision reached the same conclusions as the Fourth District as to both arguments, and cited with approval the Fain decision.

The First District did, however, expressly disagree with the Fourth District's decision in Tenet Healthsystem Hospitals, Inc. v. Taitel, 855 So.2d 1257 (Fla. 4th DCA 2003), as to whether a blank hospital form used by a hospital quality assurance and peer review committee was privileged pursuant to §766.101(5), Fla. Stat.. The First District noted (quoted A24), "On the record before us, it has not been shown that the hospital's credentialing committee or review board created the form in question." The document at issue was simply the blank hospital application for medical staff privileges. As discussed in the argument section

supra, that factual distinction is significant and eliminates any potential conflict between the First District's decision and Tenet Healthsystem v. Taitel, supra.

SUMMARY OF ARGUMENT

This Court should decline to exercise its discretionary jurisdiction to review the First District's decision. While the First District disagreed with the Fourth District as to whether a blank application form for staff privileges was privileged under §766.101(5), Fla. Stat., no factual record had been made in this case linking that document to a medical review committee. As such, the case is factually distinguishable from the Fourth District's decision in Tenet Healthsystem Hospitals, Inc. v. Taitel, 855 So.2d 1257 (Fla. 4th DCA 2003), which involved a testing form created by a hospital review committee to evaluate the competency of nurses.

This Court should also decline to exercise its discretionary jurisdiction to review the First District's decision regarding the application of §381.028, Fla. Stat. The First District concluded that that statute could not restrict a patient's rights to documents under the State Constitution , i.e. Amendment 7, to simply Code 15 reports. Both the First District and the Fourth District in Columbia Hospital v. Fain, 16 So.3d 236 (Fla. 4th DCA 2009) unanimously concluded that a statute could not restrict the scope of a constitutional amendment. That is settled law and does not need to be reviewed by this Court.

This Court should also decline to exercise its discretionary jurisdiction as to the federal preemption argument. Both the First District and the Fourth District in

Fain, supra, unanimously rejected this argument as well. The HCQIA does not contain any provisions regarding confidentiality of peer review proceedings, and it does contain two "savings" provisions that reflect Congress' intent not to interfere with state law relating to health care, 42 USC §1115(a) and (d). The Hospital presented no empirical basis for concluding that compliance with Amendment 7 interfered with the policy or implementation of the HCQIA and, therefore, there is no need for this Court to review the First District decision.

ARGUMENT

I. THE FIRST DISTRICT'S DISAGREEMENT WITH TENET V. TAITEL DOES NOT WARRANT EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION.

The First District disagreed with the Fourth District's decision in Tenet Healthsystem Hospitals, Inc. v. Taitel, 855 So.2d 1257 (Fla. 4th DCA 2003), as to whether a blank application for medical staff privileges was immune from discovery under §766.101(5), Fla. Stat. As noted by the First District, in Taitel, the Fourth District was addressing a blank hospital form used for testing the competency of nurses which had been "created by a hospital committee for the purpose of quality assurance and peer review" (855 So.2d at 1258) (A24). In the case sub judice, however, the First District noted that "on the record before us, it has not been shown that the hospital's credentialing committee or review board created the form in question" (A24). The First District also noted that only the information provided on the application forms, not the blank forms themselves, would be considered by the credentialing committee (A24). Based on that analysis, the court determined that §766.101(5), Fla. Stat. did not immunize from discovery the blank application form for medical staff privileges.

The factual distinction between the case sub judice and Tenet v. Taitel, i.e., the absence of a factual record relating to the creation of the blank form, distinguishes this case. Thus, while there may appear to be conflict between two

decisions, if there is a factual distinction between them, this Court should not accept jurisdiction. See Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983). In Johnston the Fourth District issued a decision construing a statute, and rejected the Fifth District's construction of the statute, noting that it would render the provision unconstitutional. Nonetheless, because there was a factual distinction between the two cases, this Court declined to exercise conflict jurisdiction over the Fourth District's decision. Similarly here, the lack of a factual record distinguishes this case from Tenet v. Taitel, and eliminates the need for this Court to exercise its discretionary jurisdiction.

Even assuming arguendo there is a sufficient conflict for this Court to exercise jurisdiction, it should decline to do so based on its discretionary authority. The question whether one particular type of document is immune from discovery, especially when it is a "blank" document, is not of sufficient significance to warrant the expenditure of this Court's resources.

II. THE FIRST DISTRICT'S CONSTRUCTION OF AMENDMENT 7 DOES NOT JUSTIFY THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION.

The Hospital argued in the trial court and in the First District that §381.028(7)(b)1, Fla. Stat. limits the documents available under Article X, §25 of the Florida Constitution (Amendment 7), solely to "Code 15" reports, as defined in

§395.1097, Fla. Stat. Both the First District, and the Fourth District in its prior decision in Fain, supra, expressly rejected this attempt to allow a statute to restrict the scope of a constitutional provision. The Fourth District rejected this argument as follows (Fain, supra, 16 So.3d at 241):

> [The hospital] also argues that language in section 381.028(7)(b)1 limits the types of records that it may be required to produce and provides the sole method through which the hospital must identify records of adverse medical incidents. [The hospital's] argument that pursuant to this statute it must provide only certain reports (Code 15" reports under section 395.0197) is expressly contrary to the amendment. The amendment provides that it is "not limited to" incidents that already must be reported under law. Art. X, § 25(c)(3), Fla. Const. (emphasis supplied). As the Florida Supreme Court held in *Buster*, the legislature may not limit the scope of discoverability of adverse incident reports in a manner inconsistent with the amendment. [The hospital's] argument calls for an unconstitutional application of the statute.

In the case sub judice, the First District expressly adopted that argument and concluded that if §381.028(7)(b)1, Fla. Stat. requires less of hospitals than Amendment 7 requires, it necessarily conflicts with the constitutional provision (A9).

The Hospital's contention that this conclusion conflicts with Florida Hospital Waterman, Inc. v. Buster, 984 So.2d 478 (Fla. 2008), is meritless. In Buster, this Court determined that six provisions of §381.028, Fla. Stat. were facially inconsistent with Amendment 7 and were therefore unconstitutional on their face (984 So.2d at 492-93). While it severed the remaining provisions of the

statute and concluded they were not unconstitutional on their face, that does not immunize them from future constitutional challenge, especially in the context of their application, as in the case sub judice. In fact, the First District would have conflicted with this Court's decision in Buster if it accepted the Hospital's position, because it would have had to reason that the legislature can limit a constitutional provision by statute, an argument this Court specifically rejected in Buster.

In view of the fact that two district courts have unanimously rejected the argument that Amendment 7 only requires production of Code 15 reports, there is no need for this Court to exercise its discretionary jurisdiction to address this issue. This is clear from this Court's decision to decline jurisdiction to answer the question to be of great public importance in Lakeland Regional Medical Center v. Neely, 8 So.3d 1268 (Fla. 2d DCA 2009). In that decision, the Second District determined that Amendment 7 eliminated fact work product privilege with respect to reports of adverse medical incidents, but certified the question to this Court. Soon after that decision, however, the Fifth District reached the same conclusion in Florida Eye Clinic, P.A. v. GMach, 14 So.3d 1044 (Fla. 5th DCA 2009). Soon after GMach, this Court entered an order declining to exercise jurisdiction in Neely, apparently on the rationale that since two Florida District Courts of Appeal had unanimously reached the same conclusion, there was no compelling need to address the issue again. Similarly here, two district courts have concluded that

hospitals must produce more than Code 15 reports in order to comply with Amendment 7, and there is no need for this Court to utilize its scarce resources to address the issue.

III. THE FIRST DISTRICT'S REJECTION OF THE HOSPITAL'S FEDERAL PREEMPTION ARGUMENT DOES NOT WARRANT SUPREME COURT REVIEW.

As with Point II, supra, this federal preemption issue has now been separately addressed by both the Fourth District and the First District, resulting in two unanimous panel decisions rejecting the Hospital's argument. As such, there is no need for this Court to exercise its discretionary jurisdiction to address this issue.

The First District's rejection of the Hospital's argument cannot be construed as requiring a violation of an express provision of the HCQIA as a pre-requisite to preemption. The First District specifically noted that the issue was whether Amendment 7 was impliedly preempted by the HCQIA, and noted that in making that analysis "courts consider congressional intent, which should be gleamed from 'the explicit statutory language and the structure and purpose of the statute,'" citing Gade v. National Solid Waste Management Assoc., 505 US 88, 96 (1992). Thus, the First District recognized that the structure and purpose of the Federal Act must be considered, and that is evidence in the court's discussion of the issue.

The First District noted that while Congress provided immunity from liability for damages for participants in peer review proceedings, it did not provide for confidentiality of peer review records or communications (A13-14). It recognized that the latter decision was a conscious policy choice by Congress, as noted by several federal court decisions (A13-14). The First District also noted two separate "savings" clauses reflecting Congress' intent not to alter related provisions of state law, see 42 USC §1115(a) and (d) (quoted A13). The First District concluded that Congress had "carefully limited the amount of protection to be accorded the peer review process to account for competing interest, including 'a patient's interests in seeking redress for malpractice'" (A15).

Therefore, consistent with the Fourth District's decision in Fain, supra, the First District concluded that Amendment 7 was not impliedly preempted by the HCQIA. There is no need for this Court to utilize its scarce resources to reevaluate this argument again, when two district courts have issued unanimous panel decisions reaching the identical conclusion.

CONCLUSION

For the reasons stated above, this Court should decline to exercise jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to STEPHEN J. BRONIS, ESQ., 4000 International PL, 100 S.E. 2nd Ave., Miami, FL 33131-2114; JAMES M. WILSON, ESQ., P.O. Box 13430, Pensacola, FL 32591-3430; S. WILLIAM FULLER, JR., ESQ., 2565 Barrington Cir., Tallahassee, FL 32308; JAMES J. EVANGELISTA, ESQ., P.O. Box 3914, Tampa, FL 33602; and HONORABLE TERRY D. TERRELL, M.C. Blanchard Judicial Bldg., 190 Governmental Center, Pensacola, FL 32501, by mail, on December 23, 2009.

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CERTIFICATE OF TYPE SIZE & STYLE

Appellants hereby certify that the type size and style of the Respondent's Brief is Times New Roman 14pt.

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