IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-1997

L.T. CONSOLIDATED CASE NOS. 1D09-1055 and 1D09-1144

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

Petitioner/Defendant,

vs.

LYNDA S. SEE and RODNEY C. SEE,

Respondents/Plaintiffs. /

PETITIONER'S BRIEF ON JURISDICTION

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

CARLTON FIELDS, P.A.
Counsel for Petitioner
100 SE 2nd Street, Suite 4000
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055
By: STEPHEN J. BRONIS
WALTER J. TACHÉ
CRISTINA ALONSO
JESSICA ZAGIER WALLACE

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STATEMENT OF THE CASE AND FACTS

This case involves the production of records under Article X, Section 25 of the Florida Constitution ("Amendment 7"). (Op. at 2).[1] Respondents, Lynda and Rodney See, allege that Mrs. See's physicians improperly performed surgeries that resulted in the severing of her bile duct and damage to her liver. (Op. at 2, 3). Respondents' claims against Petitioner, West Florida Regional Medical Center, include vicarious liability for her physicians' negligence and direct liability for the negligent grant of medical staff privileges to her physicians. (Op. at 3).

Respondents requested, pursuant to Amendment 7, that Petitioner produce any and all adverse incident reports as to Mrs. See and the two physicians, pertaining to two surgical procedures. (Op. at 3). Respondents also sought a blank application for medical staff privileges. (Op. at 3-4).

Petitioner objected to these requests and moved for protective orders, arguing the requests should be denied because the requested documents were protected from discovery by statute. (Op. at 4). Petitioner acknowledged Amendment 7 abrogated the relevant statutes to a limited extent, but argued that Amendment 7 violates the United States Constitution. (Op. at 4). Petitioner also argued that, under section 381.028(7)(b)1, Florida Statutes (2006), it was not

[1] All facts are found within the four corners of the opinion on review, W. Fla. Reg. Med. Ctr. v. See, Nos. 1D09-1055, 1D09-1144, 34 Fla. L. Weekly D1947, 2009 WL 3047396 (Fla. 1st DCA September 25, 2009), and is referenced as "Op." in this jurisdictional brief. The Opinion is attached as Appendix 1 to this brief.

required to produce records other than those of “incidents in Code 15 reports and the annual reports,” required under section 395.1097(5) and (7). (Op. at 4). Petitioner objected to the request for the blank application for medical staff privileges. (Op. at 4). Finally, Petitioner claimed that if the trial court ordered production, Respondents must pay the costs of production in advance, under section 381.028(7)(c)1. (Op. at 4).

On February 6, 2009, the trial court issued its order granting, in part, and denying, in part, Petitioner's Amended Motion for Protective Order. (Op. at 5). The trial court rejected Petitioner's federal constitutional arguments and denied the motion as to “documents relating to adverse medical incidents,” as defined in Amendment 7, of the physicians for two years preceding the date of the first surgery performed on Mrs. See by the physicians. (Op. at 5). The order is silent as to Petitioner's arguments regarding section 381.028(7)(b)1 & (c)1. (Op. at 5).

On February 9, 2009, the trial court issued its “Order on West Florida Regional Medical Center, Inc.'s Amended Motion to Quash and for Protective Order.” (Op. at 5). In this order, the trial court denied the motion for protective order as to the blank application for medical staff privileges. (Op. at 5-6).

Petitioner filed separate petitions for writ of certiorari with the First District, challenging each order and the actions were consolidated. (Op. at 6). The First District held that it lacked certiorari jurisdiction to consider the trial court's denial

of Petitioner's request for an order requiring the prepayment of the costs of production. (Op. at 7).[2] With regard to section 381.028(7)(b)1, the court declined to limit the scope of Amendment 7 by adopting Petitioner's interpretation of the statute and held that to the extent the statute requires less of hospitals, it conflicts with Amendment 7. (Op. at 9). The court rejected Petitioner's argument that Amendment 7 violates the Supremacy Clause of the U.S. Constitution because it is impliedly preempted by the Health Care Quality Improvement Act ("HCQIA"). (Op. at 10). As to the blank application for medical staff privileges, the court disagreed with the Fourth District's decision in Tenet Healthsystem Hospitals, Inc. v. Taitel, 855 So. 2d 1257, 1258 (Fla. 4th DCA 2003), that the Cruger v. Love, 599 So. 2d 111 (Fla. 1992), standard requires its protection, stating that "although the trial court did depart from the essential requirements of the law in failing to follow Taitel, which was the only district court decision on point at the time, the departure was harmless." (Op. at 24-25).

SUMMARY OF THE ARGUMENT

This Court has jurisdiction, because the First District's decision that a blank application for medical staff privileges is not privileged expressly and directly conflicts with the Fourth District's decision in Tenet Healthsystem Hospitals, Inc.

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[2] Petitioner also filed a petition for writ of mandamus, seeking review of the First District's determination herein that it lacked jurisdiction and asking this Court to compel the First District to review this issue.

v. Taitel, 855 So. 2d 1257, 1258 (Fla. 4th DCA 2003), which holds to the contrary on the same question of law. This Court should exercise jurisdiction to resolve this conflict between the district courts.

This Court also has jurisdiction, because the First District expressly construed provisions of the Florida and U.S. constitutions. The court construed Amendment 7 by determining it expressly provides that it is "not limited to" incidents that already must be reported under law and rejecting Petitioner's interpretation of section 381.028(7)(b)1 without giving guidance as to the proper interpretation or indicating what method of production should be used when responding to an Amendment 7 request. The court also construed the amendment and Supremacy Clause of the United States Constitution by finding that HCQIA did not preempt the amendment.

This Court should exercise jurisdiction, because the First District's interpretation of Amendment 7 raises significant issues, including what process health care facilities should use when responding to Amendment 7 requests, given the First District rejected Petitioner's interpretation of section 381.028(7)(b)1, and this Court declined to strike section 381.028(7)(b)1 in Florida Hospital Waterman v. Buster, 984 So. 2d 478, 494 (Fla. 2008). Indeed, this Court has jurisdiction because the decision effectively declares section 381.028(7)(b)(1) invalid. Also significant is the First District's interpretation of Amendment 7 and the Supremacy

Clause as to preemption, and whether the courts' construction of the Supremacy Clause precludes consideration of whether Amendment 7 constitutes an obstacle to the purpose under federal law of promoting quality health care through effective peer review.

ARGUMENT

I. THE DECISION CONFLICTS WITH TENET V. TAITEL

This Court has jurisdiction, because the First District's decision that a blank application for medical staff privileges is not privileged expressly and directly conflicts with the Fourth District's decision in Tenet Healthsystem Hospitals v. Taitel, 855 So. 2d 1257, 1258 (Fla. 4th DCA 2003), which holds to the contrary on the same question of law. See Fla. R. App. P. 9.030(a)(2)(A)(iv). Indeed, the First District acknowledged this conflict by stating that it did not agree with the Taitel court "that the Cruger, [599 So. 2d 111 (Fla. 1992)] standard requires the protection of blank forms." (Op. at 24). Additionally, the First District held that "although the trial court did depart from the essential requirements of the law in failing to follow Taitel, which was the only district court decision on point at the time, the departure was harmless." (Op. at 24-25). This Court should exercise jurisdiction to resolve this conflict between the district courts.

II. THE DECISION CONSTRUED ARTICLE X, SECTION 25 OF THE FLORIDA CONSTITUTION ("AMENDMENT 7")

In rejecting Petitioner's argument that section 381.028(7)(b)1 sets forth the

method by which a healthcare facility must produce records requested under Amendment 7, thereby limiting the records it must produce under Amendment 7 to the "Code 15" reports and annual reports required by subsections (5) and (7) of section 395.1097, the First District construed Amendment 7 as expressly provid[ing] that it is 'not limited to' incidents that already must be reported under law." (Op. at 9). The First District did not otherwise explain how section 381.028(7)(b)1 should be interpreted, other than to hold that if it requires less of healthcare facilities, then it conflicts with Amendment 7.

This Court in Buster, 984 So. 2d at 494, however, declined to strike section 381.028(7)(b)1 and severed it from other provisions found unconstitutional. This section provides that "[u]sing the process provided in s. 395.0197, the health care facility shall be responsible for identifying records as records of an adverse medical incident. . ." Petitioner's interpretation of the process for identifying records under this provision is based on a plain reading of the statute. To the extent the First District rejected Petitioner's interpretation of the statute, finding it in conflict with Amendment 7, without setting forth a constitutional interpretation, the decision conflicts with Buster in that it in effect finds section 381.028(7)(b)1 unconstitutional and invalidates it. The First District could not have reached its holding regarding the scope and method of production under Amendment 7 without the express construction of Amendment 7. This Court thus has jurisdiction.

See Fla. R. App. P. 9.030(a)(2)(A)(ii).

This Court should exercise jurisdiction because the First District's interpretation of Amendment 7 and rejection of Petitioner's interpretation of section 381.028(7)(b)1 as unconstitutional, raises significant issues, including what method of production health care facilities should use when producing records under Amendment 7, given that section 381.028(7)(b)1 sets forth the method of production and this Court found section 381.028(7)(b)1 constitutional in severing it from other provisions found unconstitutional in Buster.

This Court also has jurisdiction because in rejecting Petitioner's interpretation of section 381.028(7)(b)(1), which was based on its plain language, the decision effectively declares that section invalid. See Fla. R. App. P. 9.030(a)(1)(A)(ii). See also Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982) ("[O]nce we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and argued before this Court."); Russell v. State, 982 So. 2d 642, 645 (Fla. 2008).

III. THE DECISION CONSTRUED THE FLORIDA AND UNITED STATES CONSTITUTIONS

The First District held that Amendment 7 was not impliedly preempted by HCQIA, rejecting Petitioner's argument that Amendment 7 is an obstacle to HCQIA's full purpose and objective of providing for effective peer review. This holding could not have been reached without expressly construing Amendment 7

and the Supremacy Clause of the U.S. Constitution. This Court has jurisdiction.

This Court should exercise its jurisdiction because the court's construction of implied preemption under the Supremacy Clause has precluded consideration of the obstacle that Amendment 7's record access provision poses to HCQIA's purpose of promoting effective peer review. While the First District acknowledged that “[t]here is no dispute . . . the promotion of effective peer review is one of the purposes of the HCQIA,” (Op. at 12), because HCQIA did not provide for confidentiality of peer review records or communications, the First District found no obstacle preemption under the U.S. Constitution, (Op. at 12-16). The court held, “If Congress had found a peer review privilege necessary to the effectiveness of peer review processes, it would have included such a privilege in the HCQIA. Because Petitioner has not shown that effective peer review is **impossible** without the confidentiality of peer review materials . . . the HCQIA does not preempt Amendment 7.” (Op. at 16) (emphasis added).

The First District's construction interprets the Supremacy Clause as requiring a violation of an express provision of HCQIA, rather than as requiring an obstacle to HCQIA's full purposes and objectives. In truth, express intent to preempt state law is not required before conflict or obstacle preemption can be found. See Geier v. Am. Honda Motor Co., 529 U.S. 861, 884-85 (2000). Instead, the court is to look at “the relationship between state and federal laws as they are

interpreted and applied, not merely as they are written." Ting v. AT&T, 319 F.3d 1126, 1137 (9th Cir. 2002) (citations omitted).

The First District's construction of the Supremacy Clause precludes consideration of the obstacle Amendment 7 presents to the full purpose and objective of HCQIA to provide effective peer review. While HCQIA and Florida's statutory provisions regarding peer review attempt to improve the quality of health care by facilitating the frank exchange of information among professionals conducting peer review inquiries without fear of reprisals, Ming Wei Liu v. Bd. Of Trustees Of The Univ. of Alabama, No. 09-10011, 2009 WL 1376498, *2 (11th Cir. May 19, 2009), Amendment 7 attempts to improve quality of health care through medical choice by opening access to "information concerning a particular health care provider's or facility's investigations, incidents or history of acts, neglects, or defaults that have injured patients or had the potential to injure patients." Advisory Opinion Re Patients' Right To Know, 880 So. 2d 617, 618 (Fla. 2004). The First District's construction of the Supremacy Clause did not allow it to consider the obstacle that Amendment 7's methods pose to HCQIA's objective of effective peer review. See, e.g., Cruger, 599 So. 2d at 113 ("to make meaningful peer review possible, the legislature provided a guarantee of confidentiality for the peer review process."); Dade County Med. Ass'n v. Hlis, 372 So. 2d 117, 120 (Fla. 3d DCA 1979) ("Confidentiality is essential to effective functioning of these staff

meetings; and these meetings are essential to the continued improvement in the care and treatment of patients."); see also Advisory Opinion, 880 So. 2d at 622.

This Court recognized this policy conflict in Buster, 984 So. 2d at 494, as to Amendment 7:

> It is not for us to judge the wisdom of the constitutional amendments enacted or the change in public policy pronounced through those amendments, even in instances where the change involves abrogation of long-standing legislation that establishes and promotes an equally or arguably more compelling public policy.

This Court in Buster did not address the conflict between effective peer review and Amendment 7 because it was unnecessary to determine the issues in that case, i.e. retroactivity of the amendment, whether it was self executing and constitutionality of the enabling statute. In this case, by contrast, Petitioner argued that based on the Supremacy Clause, Amendment 7 is an obstacle to the full purpose and objective of effective peer review under HCQIA, which squarely presents this issue.

Because the First District's construction of the Supremacy Clause requires a statutory mandate for obstacle preemption, and fails to assess the obstacle that Amendment 7 presents to effective peer review, this Court should accept jurisdiction.

CONCLUSION

Based on the foregoing, Petitioner, Westside Regional Medical Center, respectfully requests that this Court review the district court's decision.

CARLTON FIELDS, P.A.
Counsel for Petitioner
100 SE 2nd Street, Suite 4000
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055

By:______________________________
STEPHEN J. BRONIS
Florida Bar No. 0145970
WALTER J. TACHÉ
Florida Bar No. 0028850
CRISTINA ALONSO
Florida Bar No. 327580
JESSICA ZAGIER WALLACE
Florida Bar No. 0956171

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this ___ day of November, 2009, to the following:

H.E. Ellis, Jr., Esq.
Staples, Ellis & Associates, P.A.
P.O. Box 12786
Pensacola FL 32591
Counsel for Respondents

James J. Evangelista, Esq.
Bush Ross, P.A.
P.O. Box 3914
Tampa FL 33602
Co-Counsel for Petitioner West Florida Regional Medical Center, Inc. d/b/a West Florida Hospital

James M. Wilson, Esq.
Wilson, Harrell, Farrington & Ford, P.A.
P.O. Box 13430
Pensacola FL 32591-3430
Counsel for West Florida Medical Center Clinic, P.A.

Philip M. Burlington, Esq.
Burlington & Rockenbach, P.A.
Courthouse Commons/Suite 430
444 West Railroad Avenue
West Palm Beach, FL 33401
Co-Counsel for Respondents

S. William Fuller, Esq.
Fuller Mitchell Hood & Stephens
2565 Barrington Circle
Tallahassee FL 32308
Counsel for George C. Rees, M.D. and George C. Rees, M.D., P.A.

Honorable Terry D. Terrell
M.C. Blanchard Judicial Building
190 Governmental Center
Pensacola, FL 32501
Circuit Court Judge

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

By:______________________________
CRISTINA ALONSO

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APPENDIX

W. Fla. Reg. Med. Ctr. v. See,
Nos. 1D09-1055, 1D09-1144, 34 Fla. L. Weekly D1947,
2009 WL 3047396 (Fla. 1st DCA September 25, 2009)