No. 16-1446

In The
Supreme Court of the United States

SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC.,

Petitioner,

v.

JEAN CHARLES, JR., as next friend and duly appointed guardian of his sister, MARIE CHARLES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

RESPONDENTS' REDACTED BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner and Respondents completely settled this case almost eight months before Petitioner filed its petition with this Court. In the parties' confidential settlement agreement, Petitioner and Respondents agreed [redacted] In addition, the settlement agreement required Respondents [redacted] under the Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. § 299b-21 *et seq.* (the "Patient Safety Act"). The settlement agreement further required Respondents to [redacted] Petitioner does not claim that Respondents have breached this settlement agreement.

The question presented, as restated, is:

Whether, in light of the parties' settlement, a case or controversy exists under Article III of the U.S. Constitution that would permit this Court to decide whether adverse incident reports, mandated by state law, qualify as privileged patient safety work product under the Patient Safety Act simply because the hospital unilaterally decided to place the state-mandated reports in a patient safety evaluation system.

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JURISDICTION

This Court lacks jurisdiction. The parties settled this case; thus, there is no case or controversy as required by Article III of the United States Constitution. U.S. Const., art. III, § 2, cl. 1.

CONSTITUTIONAL PROVISIONS

The presentation of the constitutional provisions by Petitioner fails to include Article III.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers, and Consuls; to all cases of admiralty and maritime jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const., art. III, § 2, cl. 1.

INTRODUCTION

The parties settled this case on the eve of the oral argument before the Supreme Court of Florida, nearly

eight months before Petitioner filed its petition in this Court. Pet. App. 2a n.2. Yet, not until the second-to-last sentence of the petition does Petitioner admit that "a settlement ordinarily will prevent this Court's review." Pet. 34. Moreover, Petitioner's representation that the parties' settlement resolved "the underlying medical-malpractice claim," Pet. 13, is, at best, an incomplete and highly selective description of the agreement. The confidential settlement resolved It resolved Inexplicably, however, Petitioner has withheld the terms of the settlement from this Court. Respondents will not hide the settlement terms. They are filing the confidential agreement under seal so this Court can see for itself the true scope of the agreement.[1]

The parties agreed in their settlement S. App. 2. They further agreed S. App. 2, 4-5, ¶4. In settling, the parties expressly recognized in their agreement

[1] Petitioner's counsel has requested to Respondents' counsel that the terms of the confidential settlement not be made available to the public. Accordingly, Respondents have redacted quotes and paraphrases of the agreement's terms from the public version of this brief, while submitting a sealed, unredacted version of this brief for the Court to review.

S. App. 5, ¶5. The parties' settlement agreement deprives this Court of its Article III jurisdiction.

Petitioner's attempt to invoke this Court's equitable power to vacate a judgment in a moot case fails. Petitioner mooted this case by its own action – settling the case. And, as expressly recognized in the settlement agreement, S. App. 5, ¶5.

More fundamentally, this Court lacks the kind of supervisory jurisdiction over state courts that would allow it to vacate a judgment in this case. And although Article III limits the authority of this Court and other federal courts, it does not limit, in any way, the authority of the Supreme Court of Florida. Florida's doctrine of mootness is a prudential one; it is not a constitutional command like its federal counterpart that is rooted in Article III. The Supreme Court of Florida may – and here did – issue an opinion in a settled case when it concerns an issue of public importance. Nothing about Florida's different mootness doctrine, however, allows this Court to circumvent the constitutional limits placed on its power by Article III.

Even if this case were not moot, this Court should not grant certiorari. The Supreme Court of Florida's opinion does not conflict with any decision of a federal court of appeals or another state court of last resort. Indeed, as the Solicitor General pointed out to this

Court in a similar case just last year, only a single lower court had endorsed the view that Petitioner now takes before this Court: the Florida district court of appeal in its now-reversed decision in this very case, *Southern Baptist Hospital of Florida, Inc. v. Charles*, 178 So. 3d 102 (Fla. Dist. Ct. App. 2015), Pet. App. 34a. *See* Solicitor Gen. Br. at 21, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016). This Court followed the Solicitor General's recommendation and denied certiorari in *Tibbs v. Bunnell*, 136 S.Ct. 2504 (2016). Now that the Supreme Court of Florida has reversed the erroneous decision of the lower Florida court and eliminated any vestige of conflict among the lower courts, the issue merits review even less than it did last year.

In addition to posing no decisional conflict, the court's opinion in this case is consistent with the plain language and legislative intent of the Patient Safety and Quality Improvement Act of 2005 ("Patient Safety Act" or "Act"), 42 U.S.C. § 299b-21 *et seq.*, and guidance from the United States Department of Health and Human Services. Other non-settled cases are being litigated in Florida on the scope of the privilege under the Act, and nothing prevents litigants in the non-settled cases from presenting the same question to this Court. The question presented by the petition does not warrant this Court's review.

STATEMENT OF THE CASE

The Charles family, the Respondents here, sued Petitioner and others in Florida state court for medical malpractice that severely incapacitated the family's mother, Marie Charles. Pet. App. 56a. To prove liability Ms. Charles exercised her rights under Article X, section 25 of the Florida Constitution, commonly called Amendment 7, by requesting certain state-mandated records of adverse incidents. Pet. App. 56a-57a.[2] Petitioner acknowledged that it had potentially responsive documents, but claimed the documents were privileged under the Patient Safety Act. Pet. App. 58a. The trial court granted Respondents' motion to compel in part and concluded that "[a]ll reports of adverse medical incidents, as defined by Amendment 7, which are created, or maintained pursuant to any statutory, regulatory, licensing, or accreditation requirements are not protected from discovery under the [Patient Safety Act]." Pet. App. 54a, 66a.

Florida's First District Court of Appeal quashed the trial court's orders and held that the Patient Safety Act preempted Amendment 7. Pet. App. 47a-48a. The First District Court of Appeal determined the Act gave medical providers the "unilateral, unreviewable" discretion to make virtually any state-mandated record privileged by voluntarily storing it in a patient safety

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[2] Amendment 7 gives patients "a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." Fla. Const., art. X, § 25.

evaluation system for reporting to a patient safety organization. Pet. App. 45a. In its decision, the First District Court of Appeal agreed with the *dissent* in *Tibbs v. Bunnell*, 448 S.W.3d 796 (Ky. 2014). Pet. App. 45a. In *Tibbs*, the controlling opinion for the Supreme Court of Kentucky had held that "Congress did not intend for separately-mandated incident information sources to be able to acquire a federal privilege" simply because a provider chooses to place them in a patient safety evaluation system. 448 S.W.3d at 809. As the Solicitor General pointed out to this Court in its brief recommending denial of the certiorari petition in *Tibbs*, the First District Court of Appeal's decision in this case was an outlier in disagreement with the holding in *Tibbs*. Solicitor Gen. Br. at 21, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016).

Respondents appealed the decision to the Supreme Court of Florida, and Petitioner attempted to dismiss the appeal for a lack of jurisdiction. *Charles v. Southern Baptist Hospital of Florida, Inc.*, Case No. SC-2180, Notice of Appeal (Fla. S. Ct. Nov. 25, 2015), and Motion to Dismiss (Fla. S. Ct. Dec. 15, 2015). The Supreme Court of Florida denied Petitioner's motion and accepted the appeal under its "mandatory jurisdiction of appeals from a decision of a district court of appeal 'declaring invalid . . . a provision of the state constitution.'" Pet. App. 2a (quoting art. V, § 3(b)(1), Fla. Const.); *Charles*, Case No. SC-2180, Order Denying Motion to Dismiss (Fla. S. Ct. Feb. 5, 2015). After extensive briefing from the parties and multiple amici curiae, the Court scheduled the case for oral argument

on October 5, 2016. *Charles*, Case No. SC-2180, Order Scheduling Oral Argument (Fla. S. Ct. June 1, 2016).

The day before oral argument, the parties filed a Stipulation for Dismissal with the Supreme Court of Florida. *Charles*, Case No. SC-2180, Stipulation for Dismissal (Fla. S. Ct. Oct. 4, 2016). The parties gave notice to the court that "this cause, including the proceedings below and this appeal, ha[d] been settled." *Id.* Nevertheless, Petitioner recognized in the settlement agreement,

S. App. 5, ¶5.

The Supreme Court of Florida did exactly that. Pet. App. 2a n.2. It rejected the parties' stipulation and exercised its authority under the well-established body of Florida case law permitting the court to consider questions of "great public" and "statewide" importance. Pet. App. 2a-3a n.2. The court noted its "decision not to accept the stipulation of dismissal in this case is even more compelling when not only has briefing been completed, but when the stipulation was also filed on the eve of Oral Argument and the briefing includes several amici on both sides of the controversy who have important interests in the outcome of this case." Pet. App. 2a n.2.

The Supreme Court of Florida reversed the First District Court of Appeal's decision. Pet. App. 32a. The court concluded the Patient Safety Act did "not contain any express statement of preemption relating to

Amendment 7." Pet. App. 22a-24a. Nor did the Act impliedly preempt Amendment 7; "[r]ather, a review of the plain meaning of the . . . Act, coupled with the statements of Congress and the Department of Health and Human Services, . . . shows that the two systems can coexist harmoniously." Pet. App. 28a-29a. Based on the court's plain-language reading of the Act, it concluded the records requested by Respondents fell "squarely within the exception of information 'collected, maintained, or developed separately, or exist[ing] separately, from a patient safety evaluation system.'" Pet. App. 31a (quoting 42 U.S.C. § 299b-21(7)(B)(ii)).

The court's opinion rejected the First District Court of Appeal's outlier opinion. Notably, only two justices dissented from the court's majority opinion, and not based on a disagreement with the merits or the court's reading of the Patient Safety Act. Rather, the dissenters, Justices Canady and Polston, disagreed with the court's decision to decide the case notwithstanding the settlement:

> The decision of the majority here, which can have no impact on this settled case, is a purely advisory opinion. Our job is to decide live controversies presented by the parties to a case that is before us. It is not to opine on the issues in a case that has been settled and that the parties have agreed should be dismissed.

Pet. App. 33a.

Nearly eight months after Petitioner settled this case, it filed in this Court a petition for certiorari. The Supreme Court of Florida was not bound by Article III of the United States Constitution. This Court is. U.S. Const., art. III, § 2, cl. 1. For the reasons argued below, this Court should dismiss the petition for lack of jurisdiction or, alternatively, deny the petition.

REASONS FOR DISMISSING OR DENYING THE WRIT

This Court should dismiss the petition on jurisdictional grounds because there is no Article III case or controversy. Vacatur of the Supreme Court of Florida's judgment is not appropriate because Petitioner caused the mootness by voluntarily settling the case. More fundamentally, vacatur is inappropriate because this Court lacks the authority to vacate a state-court judgment where it does not have jurisdiction at the commencement of the case. Nor are there any "exceptional circumstances" that would warrant vacatur here.

Even if this Court had jurisdiction to consider the merits of the petition, the question presented does not warrant review. The Supreme Court of Florida's opinion is consistent with the plain language and legislative intent of the Patient Safety Act, and it does not conflict with any decision of a federal court of appeals or another state court of last resort. Moreover, the scope of the privilege under the Patient Safety Act is

being litigated in other Florida cases involving Amendment 7 discovery requests; those non-settled cases can provide a more appropriate vehicle for this Court to resolve the question presented, assuming *arguendo* the question warrants certiorari review.

ARGUMENT

I. Petitioner's settlement of this case deprives this Court of Article III jurisdiction to consider the merits of the petition.

Petitioner admits – on the last page of its petition – that "a settlement ordinarily will prevent this Court's review." Pet. 34. Petitioner is correct. There is no longer an Article III case or controversy because Petitioner has voluntarily settled this case. S. App. 1-7; *see U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 20 (1994) (acknowledging that settlement of case had mooted the case); *Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) (stating, in class action, that "[s]hould these substantive claims become moot in the Art. III sense, by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs"); *Buck's Stove & Range Co. v. American Fed'n of Labor*, 219 U.S. 581, 581 (1911) (dismissing cases where they "had become purely moot because of the settlement between the parties of every material controversy which the record presented").

A. There is no case or controversy for this Court to decide.

Despite previously settling the Petitioner has asked this Court for certiorari review, while failing to disclose to this Court the terms of the settlement agreement. Pet.; S. App. 1-7. Contrary to Petitioner's representation, the settlement agreement did Pet. 13. It expressly settled S. App. 1-7. Specifically, S. App. 2, 4-5, ¶4.

As a result of the settlement, the parties are no longer adverse. Petitioner is not obligated and has neither been asked to do so nor suggested that it will do so. S. App. 2, 4-5, ¶4. Respondents are prohibited and have no intention to do so. S. App. 2, 4-5, ¶4. Thus, although this Court has recognized that in some circumstances a state-court judgment may create an Article III case or controversy where there otherwise would be none by imposing "a defined and specific legal obligation" on the defendant, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989), the court's opinion in this case does not have the effect of "altering tangible legal rights" as between

the parties and thus does not "constitute[ ] a cognizable case or controversy," *id.* at 619.

In contrast, the Supreme Court of Florida was not bound by Article III and had the authority to decide the settled case based on state jurisdictional principles. Pet. App. 2a n.2. Unlike its federal counterpart, the Florida Constitution does not expressly restrict the judicial power to "cases" or "controversies." *Compare*, U.S. Const., art. III, § 2, *with* Fla. Const., art. V. Florida's standing and mootness doctrines are instead grounded in judicial prudence, and Florida courts apply the doctrines in a more flexible manner than federal courts. *See Dep't of Rev. v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) (contrasting more "rigid" federal standing doctrine with its Florida counterpart).

This Court has long recognized that state courts may have mootness doctrines different than the federal doctrine. In *DeFunis v. Odegaard*, 416 U.S. 312, 315 (1974), this Court granted certiorari to review a decision from the Washington Supreme Court regarding the federal constitutionality of a law school's admission policy. During oral argument, counsel informed this Court of facts that rendered the case moot. *Id.* at 316. This Court described the dichotomy between federal and state jurisdictional principles:

> The inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." Although as a matter of Washington *state* law it appears

> the case would be saved from mootness by "the great public interest in the continuing issues raised by this appeal," the fact remains that under Article III, "(e)ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction."

Id. at 316 (emphasis added and internal citations omitted); *see also ASARCO Inc.*, 490 U.S. at 617 ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law. . . .").This Court then concluded that, because the case had been mooted, it could not consider the merits of the constitutional issues "consistent[ ] with the limitations of Art. III of the Constitution."[3] *Id.* at 319-20. Likewise, this Court cannot consider the merits of this moot case.

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[3] In contrast, on remand, the Washington Supreme Court did issue an opinion notwithstanding this Court's decision that the case was moot under Article III because, under Washington law, it was authorized to opine on a question of "substantial public interest." *DeFunis v. Odegaard*, 529 P.2d 438, 444-45 (Wash. 1974).

B. Petitioner has not provided any authority for this Court to ignore Article III's jurisdictional constraints.

Petitioner has failed to cite to any case in which this Court has departed from the obvious and fundamental principle that the settlement of all claims between parties renders a case moot under the jurisdictional limitation applicable to federal courts: Article III. Pet. 31-34. Petitioner instead relies on a qualified immunity case in which this Court held, in a case arising from a federal court, that it "may review a lower court's constitutional ruling at the behest of a governmental official." *Camreta v. Greene*, 563 U.S. 692, 698 (2011).

Camreta did not address mootness in the context of a parties' settlement; rather, it addressed the "special category" of qualified immunity cases where constitutional rulings by the lower court are designed, with the permission of the Court, to establish controlling law and prevent invocations of qualified immunity in future cases. *Id.* at 704-05. This Court's holding in *Camreta* that it retains Article III jurisdiction to review an immunized official's challenge to a constitutional ruling against its actions has no bearing on this case.

Petitioner also fails to acknowledge that in *Camreta*, this Court did not reach the merits of the Fourth Amendment question on mootness grounds. *See id.* at 698, 710 (case became moot because child plaintiff became an adult and moved across the country and

thus no longer retained a stake in the outcome of the case). *Camreta* recognized the general principle that, to satisfy Article III jurisdiction, "the opposing party also must have an ongoing interest in the dispute, so that the case features 'that concrete adverseness which sharpens the presentation of the issues.'" *Id.* at 701. Here, despite Petitioner's protestations to the contrary, Pet. 33, Respondents "plainly lack[] a continuing interest" due to the complete settlement of their claims. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (observing in standing context that "parties would plainly lack a continuing interest" in a case where the "parties have settled"). Indeed, the settlement agreement expressly obligates Respondents to [redacted] S. App. 4-5, ¶4.

Petitioner likewise lacks a continuing interest in this case due to the complete settlement of all claims between the parties and Respondents' agreement to [redacted] S. App. 2, 4-5, ¶4. [redacted] the Supreme Court of Florida's opinion, which addressed Respondents' motion to compel production of documents in this specific case, does not require Petitioner to do anything, [redacted] Nor can the issue ever arise again between these parties.

Petitioner is wrong that, despite the settlement, it nevertheless retains a sufficient Article III interest in the case because it is "barred from enforcing" its rights under the Patient Safety Act. Pet. 32 (quoting *City of*

Erie v. Pap's A.M., 529 U.S. 277, 288 (2000)). The Supreme Court of Florida's opinion does not have any effect, other than stare decisis, on any assertion of rights with respect to the particular documents formerly at issue in this case. The opinion's potential stare decisis effect on Petitioner in some future case against other persons, who are not parties to this case, is no greater than the effect that the opinion may have on any other Florida medical provider, and hence cannot suffice to create an Article III case or controversy.[4] Under Petitioner's expansive interpretation of Article III, any provider impacted by the stare decisis effect of the court's opinion could have brought this petition for review.

In any event, the Supreme Court of Florida's opinion, consistent with the plain language of the Act, only protects state-mandated reports. Pet. App. 31a; 42 U.S.C. § 299b-21(7). The opinion does not bar Petitioner from enforcing its rights under the Act to protect reports voluntarily produced by it and reported to a patient safety organization.

Nor has the opinion rendered the Patient Safety Act a "dead letter" in Florida, as Petitioner asserts. Pet. 28. Even after the court's opinion on January 31, 2017, Florida hospital defendants have continued to resist

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[4] To the extent Petitioner may assert the opinion binds it as a matter of collateral estoppel, that does not suffice to create a case or controversy here. Non-mutual, offensive collateral estoppel is not available in Florida. *See Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 502 (Fla. 2015). Regardless, the potential impact in a case involving some other adverse party cannot create a case or controversy between Petitioner and Respondents here.

Amendment 7 discovery requests and continued to assert their rights to protect patient-safety work product from discovery in medical malpractice litigation. App. 1-54. Indeed, *one of Petitioner's counsel*, after the court's opinion, has at least twice asserted the Patient Safety Act's privilege on behalf of Florida hospitals, including at least *once on behalf of Petitioner*. App. 39-54. And at least one Florida trial court has denied discovery based on a hospital's assertion of its rights under the Act. App. 1-12. Petitioner's "dead letter" representation to this Court is fanciful and not grounded in the present reality of medical-malpractice litigation in Florida.

Any decision by this Court will have no impact on this settled case. In light of the settlement agreement, "[t]he controversy between the parties has . . . clearly ceased to be 'definite and concrete' and no longer 'touch(es) the legal relations of the parties having adverse legal interests.'" *See DeFunis*, 416 U.S. at 317 (determining case was moot where petitioner had been accorded only remedy requested). This Court cannot, consistent with the limitations of its Article III jurisdiction, decide the merits of the petition.

II. Petitioner has forfeited any claim it may have had to the equitable remedy of vacatur.

Petitioner is wrong that this Court should nevertheless vacate the Supreme Court of Florida's opinion. Pet. 33-34. The very case cited by Petitioner for such relief bars vacatur in this case: "We hold that mootness

by reason of settlement does not justify vacatur of a judgment under review." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 29. Nor does this Court have the authority to vacate a state court judgment where it lacks jurisdiction at the commencement of the suit. Even if it did, Petitioner's one-sentence explanation of why this case is "not ordinary" does not rise to the level of an "exceptional circumstance" that would warrant the equitable remedy of vacatur after settlement. Pet. 34.

A. This Court's decision in *Bancorp* bars vacatur of the Supreme Court of Florida's judgment.

In *Bancorp*, the parties settled the case after this Court granted certiorari and received briefing on the merits. *Id.* at 20. Although the parties candidly recognized their settlement had mooted the case, the petitioner asked this Court to exercise its equitable power under 28 U.S.C. § 2106 to vacate the federal appellate court's judgment. *Id.* This Court acknowledged that "no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy," but recognized its previous holding in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) that, where review of a judgment is "prevented through happenstance," the Court may "reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 21-22.

This Court declined to extend *Munsingwear* to permit vacatur where the mootness results from a settlement. *Id.* at 23-25. This Court reasoned that, under such circumstances, "the losing party has voluntarily forfeited his legal remedy by the ordinary process of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his own choice." *Id.* at 25. The fact that the respondent had agreed to the settlement did not matter; "Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been." *Id.* at 26.

Bancorp controls here. "Happenstance" has not deprived this Court of its Article III jurisdiction to review the Supreme Court of Florida's opinion; a voluntary decision by Petitioner to settle the case has. Petitioner has forfeited any claim to the equitable remedy of vacatur. *Id.* at 25.

B. This Court lacks authority to vacate the Supreme Court of Florida's opinion.

Even if Petitioner had not forfeited any claim to vacatur, this Court lacks the authority to provide that remedy because it does not have jurisdiction at the commencement of this state-court case.

In *Bancorp*, this Court defined the question presented as "whether appellate courts in the *federal system* should vacate civil judgments of subordinate

courts in cases that are settled *after* appeal is filed or certiorari is sought." 513 U.S. at 19 (emphasis added). This Court then stated its "established practice . . . in dealing with a civil case from a court *in the federal system* which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id*. at 22 (emphasis added).

Bancorp relied on 28 U.S.C. § 2106 for its authority to vacate a moot case. *Id.* at 21. Section 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully* brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (emphasis added). This statute provides authority for this Court's "[broad] supervisory power over the judgments of the lower *federal* courts." *See Munsingwear*, 340 U.S. at 40 (citing 28 U.S.C. § 2106) (emphasis added); *U.S. Bancorp Mortg. Co.*, 513 at 22 ("As with other matters of judicial administration and practice 'reasonably ancillary to the primary, dispute-deciding function' of the federal courts, Congress may authorize us to enter orders necessary and appropriate to the final disposition of a suit that is before us for review.") (internal citation omitted).

It is obvious that the Supreme Court of Florida's opinion did not arise from the *federal* system. This distinction is critical. This Court does not exercise broad supervisory power over the Supreme Court of Florida: "It is beyond dispute that we do not hold a supervisory power over the courts of the several States." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (quoting *Dickerson v. U.S.*, 530 U.S. 428, 438 (2000). The supervisory-power rationale cannot support vacatur of the Supreme Court of Florida's opinion.[5]

Further, this case was settled *before* certiorari was sought. This Court has never had Article III jurisdiction over this case, even at its inception. Section 2106, to the extent it is applicable to state courts, thus cannot supply this Court's vacatur power because the order of the Supreme Court of Florida is not "lawfully before it for review." 28 U.S.C. § 2106. Indeed, this Court has explained very clearly why vacatur of a state-court judgment would not be appropriate if a case or controversy did not exist:

> It would be an unacceptable paradox to exercise jurisdiction to confirm that we lack it and

[5] Petitioner cites *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985) to support its claim that "unusual circumstances" warrant vacatur of a state court's judgment interpreting federal law. Pet. 34. *Lake Coal Co.* is a two-paragraph, *per curiam* opinion that preceded *Bancorp* and provides no rationale for its vacatur of a *federal* court of appeals' judgment; it articulates no basis for vacating a state court's judgment. 474 U.S. at 120; *see U.S. Bancorp. Mortg. Co.*, 513 U.S. at 25 (invoking this Court's "customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion.").

> then to interfere with a State's sovereign power by vacating a judgment rendered within its own proper authority. This case is not one committed to the exclusive jurisdiction of the federal courts. *We have no authority to grant a writ only to announce that, solely because we may not review a case, the state court lacked power to decide it in the first instance.*

ASARCO Inc., 490 U.S. at 620-21 (emphasis added).

In contrast, this Court had Article III jurisdiction at the inception of *Bancorp* because it settled *after* this Court granted certiorari. 513 U.S. at 20. Similarly, in *DeFunis*, the case did not become moot until *after* the Supreme Court of Washington issued its decision and this Court granted certiorari. 416 U.S. at 315. Respondents are unaware of any case in which this Court has vacated a state-court judgment where the case became moot due to settlement *before* this Court had granted certiorari review. To do so here would be an overreach of this Court's power to vacate a moot case.

C. Petitioner has not articulated any "exceptional circumstances" that would warrant an exception to *Bancorp*'s holding.

In *Bancorp*, this Court stated in *dicta* that, because the vacatur determination is an equitable one, "exceptional circumstances may conceivably counsel in favor of such a course" despite mootness by settlement. 513 U.S. at 29. Petitioner has failed to articulate any

"exceptional circumstances." Pet. 34. Instead, Petitioner devotes a single sentence to explain why it is entitled to vacatur despite its voluntary settlement of this case: "While a settlement will ordinarily prevent this Court's review, the situation facing [Petitioner] is not ordinary: the parties' settlement *preceded* the Florida Supreme Court's decision that controls [Petitioner's] future conduct and restricts its federal rights." Pet. 34 (internal citation omitted).

There is nothing out of the ordinary, much less exceptional, about the Supreme Court of Florida's decision to exercise its discretionary jurisdiction to consider a question of statewide importance despite the parties' settlement on the eve of oral argument. Indeed, Petitioner anticipated this possibility S. App. 5, ¶5. Petitioner nevertheless made a voluntary decision to settle the case. By doing so, Petitioner knowingly forfeited any claim to the equitable remedy of vacatur by this Court. *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25.

Thus, while it could certainly have been "out of the ordinary," and likely impermissible under Article III, for a federal court to decide a case after settlement, there was nothing "unusual" about the Supreme Court of Florida's decision to do so. Pet. 34; *supra* at 11-12. The court's opinion on a question of statewide importance, notwithstanding the settlement of the case, was rather ordinary under Florida jurisprudence

Pet. App. 2a n.2; S. App. 5, 5; *see Pino v. Bank of New York*, 76 So. 3d 927, 927 (Fla. 2011) ("It cannot be disputed that our well-established precedent authorizes this Court to exercise its discretion to deny the requested dismissal of a review proceeding, even where both parties to the action agree to the dismissal in light of an agreed-upon settlement."); *see also State v. Schopp*, 653 So. 2d 1016, 1018 (Fla. 1995) ("Even where a notice of voluntary dismissal is timely filed, a reviewing court has discretion to retain jurisdiction and proceed with the appeal."); *Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984) ("It is well settled that mootness does not destroy an appellate court's jurisdiction . . . when the questions raised are of great public importance or are likely to recur.").

Permitting Petitioner to obtain vacatur of this case despite settlement would not be "consonant to justice." *See U.S. Bancorp. Mortg.*, 513 U.S. at 24 ("From the beginning we have disposed of moot cases in the manner 'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot."). Although the settlement preceded this petition, Pet. App. 2a n.2, Petitioner did not present the agreement to this Court and buried the fundamental jurisdictional question in a brief discussion at the end of its petition. Pet. 31-34. Petitioner's request for certiorari review is even more extraordinary in light of Petitioner's contractual agreement to

[redacted] and in light of Respondents' reciprocal contractual obligation to [redacted] S. App. 2, 4-5, ¶4.

Finally, the policy reasons discussed in *Bancorp* counsel against vacatur here. The parties in *Bancorp* did not settle the case until after certiorari was granted and briefing complete. 513 U.S. at 25. Despite having already deemed the case worthy of certiorari review, this Court still found it "inappropriate . . . to vacate mooted cases [] in which we have no constitutional power to decide the merits [] on the basis of assumptions about the merits." *Id.* at 27. This Court also rejected an argument that vacating a decision would foster "continued examination and debate" over the issue; the Court instead found that "[t]he value of additional intra-circuit debate" was "far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions." *Id.* Here, of course, there is no indication there would be any intra-court "debate" on the issue because there is no authority in conflict with the Supreme Court of Florida's opinion.[6] *See infra* at 27-29.

This Court has held "that mootness by reason of settlement does not justify vacatur of a judgment under review." *U.S. Bancorp Mortg. Co.*, 513 at 29. Even if

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[6] Petitioner has not addressed how vacatur of the Supreme Court of Florida's opinion would impact the underlying, reversed decision of the First District Court of Appeal. Presumably, Petitioner would argue vacatur "revives" the reversed decision as good law in Florida. This Court has no authority, in a moot case, to resolve a disagreement amongst Florida's courts on a point of law.

it had the authority to vacate the state-court judgment here, Petitioner has failed to present any "exceptional circumstances" warranting a departure from *Bancorp*'s holding. Pet. 34. This Court should deny Petitioner's request to vacate the Supreme Court of Florida's opinion.

III. Even assuming this Court had jurisdiction to consider the merits of the petition, the question presented does not warrant review.

In *Tibbs v. Bunnell*, 136 S. Ct. 2504 (2016), this Court denied a petition for a writ of certiorari to the Supreme Court of Kentucky on the following question:

> [W]hether an incident report that a hospital created to comply with a state recordkeeping requirement qualifies as privileged patient safety work product because it was prepared in a computer system used to collect information for reporting to a patient safety organization.

Solicitor Gen. Br. at (I), *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016).[7] This case presents a near-identical question. *See supra* at i. This Court should again deny certiorari review of that question.

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[7] The petitioner in *Tibbs* was represented by the same counsel of record as the Petitioner here, Carter G. Phillips. Petition for a Writ of Certiorari, *Tibbs v. Bunnell*, No. 14-1140 (March 18, 2015).

A. The decision below does not conflict with any decision of a federal court of appeals or another state court of last resort.

Petitioner is wrong that the Supreme Court of Florida's opinion conflicts with the Supreme Court of Kentucky's recent decision in *Baptist Health Richmond, Inc. v. Clouse*, 497 S.W.3d 759 (Ky. 2016). In *Clouse*, the court held "[t]he information that is usually contained in state-mandated reports is not protected by the patient safety work product privilege provided in the Act and will be discoverable." *Id.* at 766. *Clouse*'s holding is consistent with the Supreme Court of Florida's holding that "adverse medical incident reports are not patient safety work product because Florida statutes and administrative rules require providers to create and maintain these records and Amendment 7 provides patients with a constitutional right to access these records." Pet. 20a. Lest there be any doubt, the Supreme Court of Florida block quoted *Clouse*'s holding and stated that court had "reached the same conclusion." Pet. App. 21a (citing *Clouse*, 497 S.W.3d at 766). This Court should deny certiorari because the decision below does not conflict with any state court of last resort or federal court of appeals.

Nor does the opinion below conflict with decisions of lower courts. Pet. 25-26. Petitioner relies principally on the same cases cited by the petitioner in *Tibbs*, which, as the Solicitor General pointed out to this Court, either did not involve a claim of privilege under the Patient Safety Act or did not involve "documents

subject to external reporting or record keeping requirements." Solicitor Gen. Br. at 20, n.8, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016); *see Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 535 (Tenn. 2010) (involving claim of privilege under state law rather than the Patient Safety Act); *Dep't of Fin. & Prof'l Regulation v. Walgreen Co.*, 970 N.E.2d 552, 555 (Ill. Ct. App. 2012) (no suggestion that documents were subject to state reporting or recordkeeping requirements); *Tinal v. Norton Healthcare, Inc.*, No. 11-cv-596, at 21-22 (W.D. Ky. July 15, 2014) (same). The most recent case cited by Petitioner, *Willard v. State*, 893 N.W.2d 52, 63-64 (Iowa 2017), likewise does not involve a claim of privilege under the Patient Safety Act. Indeed, the *only* conflicting decision at the time of *Tibbs* was the Florida district court of appeals decision in this very case, which has now been reversed by the Supreme Court of Florida. Solicitor Gen. Br. at 21, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016); Pet. App. 3a. To repeat the Solicitor General in *Tibbs*, "[t]his case thus does not implicate the sort of conflict among the lower courts that warrants this Court's intervention." *Id.* at 20 (citing Sup. Ct. R. 10).

Finally, Petitioner makes no attempt to explain why a case interpreting 23 U.S.C. § 409, which governs "discovery and admission of certain reports and surveys" related to highway safety, creates the sort of conflict that would warrant this Court's intervention. Pet. 26-27 (citing *Lusby v. Union Pac. R.R.*, 4 F.3d 639, 641 (8th Cir. 1993)). It does not. Section 409 is not remotely comparable to the statutory scheme governing patient

safety work product. *Compare* 23 U.S.C. § 409 *with* 42 U.S.C. § 299b-21 *et seq.* Significantly, in contrast to the Patient Safety Act's clarification and exceptions to its definition of patient safety work product, section 409 creates a discovery privilege with no enumerated exceptions or clarifications. *Compare* 42 U.S.C. § 299b-21(7)(B) *with* 23 U.S.C. § 409. Likewise, any standard applicable to the attorney-client privilege, *see* Pet. 27, has no bearing on the interpretation of the Patient Safety Act.

B. The Supreme Court of Florida correctly held the adverse incident reports in this case were not privileged because they were created to comply with state-law recordkeeping and reporting obligations.

Petitioner contends that any record it creates and then places in a patient safety system for reporting to a patient safety organization is privileged, even where, as here, it was required to create, maintain, and disclose those records under state law. Pet. 15-22. The Supreme Court of Florida correctly rejected that contention, holding that the Patient Safety Act "expressly preserves and incorporates, rather than preempts, a provider's reporting and recordkeeping obligations under state law." Pet. App. 18a. This Court's review of that conclusion is unwarranted.

1. The decision accords with the plain language of the Patient Safety Act, legislative intent, and guidance from the Department of Health and Human Services.

The Patient Safety Act creates a privilege protecting "patient safety work product" as defined in the Act. The definition of "patient safety work product" specifically excludes "information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system." 42 U.S.C. § 299b-21(7)(B). "Such separate information or a copy thereof reported to a patient safety organization shall not by reason of its reporting be considered patient safety work product." 42 U.S.C. § 299b-21(7)(B)(ii). The Act further specifies that it shall not be construed to limit "the discovery of or admissibility of [such records] in a criminal, civil, or administrative proceeding," the "reporting" of such information to a "Federal, State, or local governmental agency," or "a provider's recordkeeping obligation with respect to [such records] under Federal, State, or local law." 42 U.S.C. § 299b-21(7)(B)(i)(iii).

The Patient Safety Act's plain language thus expressly preserves – rather than preempts – reporting and recordkeeping obligations under state law. 42 U.S.C. § 299b-21(7)(B)(iii)(II) & (III); *see id.* § 299b-22(g)(5). The Act's legislative history is in agreement. *See, e.g.*, H.R. Rep. No. 109-197, at 9 (2005) (stating the Act did not "prevent a provider from complying with

authorized requests for information that has been collected, developed, maintained, or exists separately from a patient safety evaluation system."); Pet. App. 27a (quoting 151 Cong. Rec. S8713-02 (daily ed. July 21, 2005) (statement of Sen. Kennedy) ("The legislation . . . upholds existing state laws on reporting patient safety information.")). And the Department of Health and Human Services ("HHS") has confirmed this plain-language reading: under its interpretation, the Act does not "relieve a provider of any [state-law] obligation to maintain information separately." *Patient Safety and Quality Improvement Act*, 73 Fed. Reg. 70,732, 70,742-43 (Nov. 21, 2008) (codified at 42 C.F.R. Pt. 3); *see also Patient Safety and Quality Improvement Act of 2005* – HHS Guidance Regarding Patient Safety Work Product and Providers' External Obligations, 81 Fed. Reg. 32,665, 32,655-56 (May 24, 2016) (explaining "the Patient Safety Act was not designed to prevent patients who believed they were harmed from obtaining the records about their care that they were able to obtain prior to the enactment of the Patient Safety Act.").

As the Supreme Court of Florida recognized, the Act's provisions required it to consider whether the documents at issue were created or maintained to satisfy an independent obligation under state law. Pet. App. 21a, 31a. The court then concluded the documents were not privileged "because Florida statutes and administrative rules require providers to create and maintain them, and thus, they were not created solely for the purpose of submission to a patient safety evaluation system." Pet. App. 31a. In other words, because

these documents were "collected, maintained, or developed separately, or exist[ing] separately, from a patient safety evaluation system," the Act exempted them from the definition of patient safety work product. Pet. App. 31a (quoting 42 U.S.C. § 299b-21(7)(B)(ii).

Petitioner wrongly attempts to cast the court's holding as a "sole purpose" test inconsistent with the Act. Pet. 15-22. Under the court's rationale, reporting to a patient safety organization need not have been the sole purpose for a document's creation; but if Florida's law independently requires a provider to create or maintain them, they do not qualify for protection. If Petitioner had not been required by state law to create and maintain the reports, but had instead created the reports voluntarily for reporting to a patient safety organization as well as for other, internal purposes, the federal privilege would have applied under the court's reasoning. Pet. App. 31a. The court did not negate federal protection for patient safety work product; its opinion fully accords with the Act, congressional intent, and HHS guidance. *Cf.* Solicitor Gen. Br. at 17, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016) (stating that the Supreme Court of Kentucky's holding did "not allow state law to 'nullify' a federal privilege; it simply recognizes that federal law defines the scope of the privilege so that records created to comply with a provider's external obligations are not privileged to begin with").

Indeed, Petitioner's "simple" approach to the Act is a single-factor test of its own creation – the federal privilege would turn solely on whether the document

exists inside the patient safety organization program. Pet. 16-17. If so, it is privileged; if not, then not. Pet. 16-17; *see also* Solicitor Gen. Br. at 14, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016). Convenient for Petitioner, this approach would permit it to shield from discovery documents that are "stored" in a patient safety system for reporting to a patient safety organization, even if the documents were created or maintained to comply with state-law obligations and discoverable under state law. As the Solicitor General pointed out to this Court in recommending that it deny certiorari in *Tibbs*, such an interpretation "contradicts the Act's text, purpose, and history." Solicitor Gen. Br. at 14, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016). Moreover, this approach has since been rejected by HHS, a unanimous Supreme Court of Kentucky, and the Supreme Court of Florida. *See* Solicitor Gen. Br. at 10, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016) (HHS adopted position consistent with *Tibbs* majority); *Clouse*, 497 S.W.3d at 766; Pet. App. 31a.

2. The decision is consistent with the Patient Safety Act's purpose.

It is Petitioner's interpretation of the Patient Safety Act, not the Supreme Court of Florida's, that would "threaten" an important federal program. Pet. 27-31. Petitioner's reading of the Act contravenes the plain language of the statute and legislative intent because it grants unprecedented, unchecked power to providers to conceal information. It empowers a

provider to unilaterally transform virtually any information – collected, maintained, or developed pursuant to a non-Patient Safety Act law – into privileged patient safety work product by simply reporting that information to the patient safety organization. This is an abuse of the federal privilege. *See, e.g.*, S. Rep. No. 108-196, at 4 (stating the Act does not allow "providers to refuse to comply with [non-Act] reporting requirements simply because they have reported the same or similar information through the reporting system contemplated by the Act"). Petitioner has offered no reason "why a Congress seeking to encourage the voluntary development of new information would have conferred privileged status on records that providers are already required to create and maintain." Solicitor Gen. Br. at 15, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016).

Petitioner's speculation about the "intense impact" of the court's opinion on providers is unfounded. Pet. 29. Providers have the flexibility to place collected information in their patient safety evaluation systems while "they consider whether the information is needed to meet external reporting obligations." 73 Fed. Reg. at 70,742. Providers should then "carefully consider" whether this information is needed "to meet their external reporting or health oversight obligations." *Id.* If the information was collected to comply with external obligations, then both the Act and the Supreme Court of Florida's opinion would require the provider to produce the information in discovery. *Id.*; Pet. App. 31a. If the information was instead developed

for reporting to a patient safety organization, then the provider should report the information to a patient safety organization and feel confident that the information is privileged. Pet. App. 20a. The fear described by Petitioner is unjustified.

Nor is there any basis for Petitioner's contention that patient safety organizations are now subject to conflicting legal obligations. Pet. 30-31. Those organizations are subject to the plain language of the Patient Safety Act. 42 U.S.C. § 299b-22(a)-(b). Although Petitioner claims a need for "federal uniformity," Petitioner has failed to identify any conflicting federal court decisions. Pet. 30. Rather, the Act has been interpreted uniformly by the HHS, the Supreme Court of Kentucky, the Supreme Court of Florida, and the Solicitor General of the United States.

Finally, the Supreme Court of Florida's opinion, and Amendment 7 in particular, have not stripped Petitioner of its "choice" to participate in the Patient Safety Act. Pet. 21. Compliance with both state and federal law is not "impossible." Pet. 21. As the court recognized, the clear intent of the Patient Safety Act, as evidenced by its plain language, "was for the voluntary reporting system to function harmoniously with existing state reporting and discovery laws." Pet. App. 32a. Going forward, Petitioner and other providers can assure protection of any patient safety work product "by satisfying their external obligations using separate recordkeeping systems, and by reserving their designated patient safety evaluation for privileged information created specifically for reporting to a patient

safety organization." Solicitor Gen. Br. at 19, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016) (citing 81 Fed. Reg. at 32,658-32,659). The decision below preserves the federal privilege and should not discourage providers from reporting information to patient safety organizations.

IV. Even if the question presented were worthy of certiorari review, other cases would provide a more appropriate vehicle for this Court to resolve the question.

The question presented by the petition is not worthy of this Court's review. *See supra* at 26-36. Even if it was, other non-settled cases would provide a more appropriate vehicle for this Court's review.

This Court will have other potential opportunities to address the question presented in the petition because Florida hospital defendants, including Petitioner, are continuing to resist Amendment 7 discovery requests in medical malpractice litigation even after the Supreme Court of Florida's opinion. App. 1-54. Indeed, as recently as August 15, 2017, Petitioner – represented by one of the law firms appearing in this Court – objected in a Florida trial court to a plaintiff's request for "adverse incident documents under [the] State Constitution" based on an assertion that certain documents constitute patient safety work product. App. 43-54. Further, at least one Florida trial court has denied discovery based on a hospital's assertion of its rights under the Act. App. 1-12.

The scope of the privilege under the Patient Safety Act is a live issue in Florida state courts. As demonstrated by the documentation in the appendix, multiple hospitals in Florida – after the Supreme Court of Florida's opinion – have been repeatedly invoking the Act to object to discovery requests. Nothing prevents the litigants in these non-settled cases, including Petitioner, from presenting to this Court the same challenges to the reasoning of the Supreme Court of Florida's opinion in this case in some future case where Article III jurisdiction lies. *See Mohawk Indus. v. Carpenter*, 558 U.S. 100, 109 (2009) (recognizing that privilege rulings can be reviewed in "postjudgment appeals").

The issue could also arise in any number of other states. If another state develops an approach that does in fact conflict with the one adopted by the Supreme Court of Florida and the Supreme Court of Kentucky, a petitioner could then present the issue to this Court. As the Solicitor General recognized in *Tibbs*, "[t]his Court should therefore have ample opportunities to take up the question presented if and when a genuine dispute develops in the lower courts." Solicitor Gen. Br. at 22, *Tibbs v. Bunnell*, No. 14-1140 (May 24, 2016). This moot case, however, is not the appropriate vehicle to do so.

CONCLUSION

The petition for certiorari should be dismissed for lack of jurisdiction or, alternatively, denied.

Respectfully submitted,

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Counsel for Respondents

August 22, 2017

**Counsel of Record*

**IN THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR BRADFORD COUNTY, FLORIDA**

**CASE NUMBER: 04-2016-CA-000589
Circuit Civil Division**

**EMMA DEAN and DEVON KELLY, her husband,
Plaintiff,**

-vs-

**STARKE HMA LLC DBA SHANDS STARKE REG MED CTR DERON OTTEY OTTEY BONE AND JOINT ASSOCIATES INC DEON SUTHERLAND ADVANCED CARE HOSPITALISTS PL,
Defendant.**

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL FROM SHANDS STARKE REGIONAL MEDICAL CENTER

THIS CAUSE came before the Court for review upon the Plaintiffs Motion to Compel from Shands Starke Regional Medical Center, and the Court having reviewed the specifics of said motion, it is hereby

ORDERED AND ADJUDGED that the aforesaid motion is hereby **DENIED**.

DONE AND ORDERED in Starke, Bradford County, Florida on this Tuesday, June 13, 2017.

/s/ Stanley H. Griffis III
Stanley H. Griffis III,
Circuit Judge
04-2016-CA-000589
06/13/2017 02:05:44 PM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies have been furnished by U.S. Mail or via filing with the Florida Courts E-Filing Portal on Wednesday, June 14, 2017 to the following:

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IN THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR BRADFORD COUNTY, FLORIDA

EMMA DEAN and DEVON KELLY, her husband,	CASE NO.: 2016-CA-000589

Plaintiffs,

vs.

STARKE HMA LLC DBA SHANDS STARKE REGIONAL MEDICAL CENTER; DERON OTTEY, M.D.; OTTEY BONE AND JOINE [sic] ASSOCIATES, INC; DEON SUTHERLAND, M.D. and ADVANCED CARE HOSPITALISTS, PL

Defendants.
_______________________________/

PLAINTIFFS' MOTION TO COMPEL FROM SHANDS STARKE REGIONAL MEDICAL CENTER

Pursuant to Fla. R. Civ. P. 1.380(a), the undersigned attorneys move to compel SHANDS STARKE REGIONAL MEDICAL CENTER to produce better/more complete responses to Numbers one and two of Plaintiff's 3rd Request to Produce dated March 13, 2017, and as grounds therefore state as follows:

FACTUAL BACKGROUND

1. This is a medical malpractice case that involves medical care and treatment provided to EMMA DEAN at Shands Starke Regional Medical Center during her June 22, 2015 admission for a right total knee replacement.

2. Post-operatively, Ms. Dean lost blood flow to her right lower extremity.

3. The nursing staff and attending physicians waited over a day to transfer her to another hospital for treatment by a vascular surgeon, but they were unable to save her leg. She had an above the knee amputation as a result of the delay in transferring/treating her.

4. On March 13, 2017, Plaintiff served its 3rd Request to Produce.

5. Number 1 requested the following:

> Please produce a complete copy of any/all internal risk management documentation, Code 15 reports, and/or "incident report" related to Emma Dean's 6/22/15 admission.

6. Number 2 requested the following:

> Please produce a complete copy of any/all documentation related to Emma Dean's 6/22/15 admission that was generated or created pursuant to Florida Statutes Section 395.0197, including, **but not limited**

> **to**, "adverse incident" reports, documentation regarding transfer to another hospital for a more acute level of care, etc.

7. Defendant responded to both Numbers 1 & 2 as follows:

> The Hospital objects to this Request to the extent it seeks confidential and privileged Patient Safety Work Product ("PSWP") pursuant to the Patient Safety and Quality Improvement Act of 2005 ("the PSQIA"), 42 U.S.C. Section 299b-22, *et seq*. and its attendant regulations.
>
> The hospital operates a Patient Safety Evaluation System ("PSES") and maintains a relationship with CHS PSO, LLC ("CHS PSO"), a Patient Safety Organization ("PSO"), for the purpose of improving patient safety and quality of care at its facility. The scope of Request No. 1 of the Request can be read to include data, reports, memoranda, analyses (including root cause analyses), and/or statements, which the Hospital assembled or developed for reporting to CHS PSO and which the Hospital reported to CHS PSO, or which were developed by CHS PSO for the conduct of patient safety activities; and which could result in improved patient safety, health care quality, or health care outcomes. Such materials would be confidential and privileged PSWP pursuant to the PSQIA. *See* 42 U.S.C. Section 299b-21b(7)(A)(i). Any items meeting this

> statutory definition of PSQP are confidential and privileged, and federal law prohibits the Hospital from choosing to disclose them. *See* 42 U.S.C. Section 299b-22(b) ("Notwithstanding any other provision of Federal, State, or local law . . . patient safety work product shall be confidential and shall not be disclosed.") Without waiving the above objection, please see the attached event report that is maintained outside of the Hospital's Patient Safety Evaluation System and is not Patient Safety Work Product.

See attached *Exhibit 1* – Defendant's Responses/ Objections to Plaintiffs' Third Request to Produce.

MEMORANDUM OF LAW

8. Article X, Section 25, of the Florida Constitution, which is generally referred to by its ballot designation – Amendment 7 – was proposed by citizen initiative and adopted in 2004. It provides patients "a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." Art. X, Section 25(a), Fla. Const.

9. "Adverse medical incident" is defined broadly to include "any other act, negliect [sic], or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient . . . " Art. X, Section 25(c)(3), Fla. Const.

10. Amendment 7 gives patients, including those who become medical malpractice plaintiffs, access to any adverse medical incident record, including incidents involving other patients, sometimes called occurrence reports, created by health care providers.

11. The Florida Supreme Court discussed in *Florida Hospital Waterman, Inc. v. Buster*, 984 So.2d 478 (Fla. 2008) that the purpose of Amendment 7 "was to do away with the legislative restrictions on a Florida patient's access to a medical provider's history of acts, neglect, or defaults' because such history 'may be important to a patient.'" *Id.* At 488.

12. Despite this ruling by the Florida Supreme Court in *Buster,* ***hospitals have continued to ignore this precedent*** and force Plaintiffs to seek redress through the Courts for these documents.

13. In this case, Shands Starke has now chosen to assert a privilege through a federal law called The Patient Safety and Quality Improvement Act of 2005, whereby hospitals are allowed to create voluntary, confidential, non-punitive systems of data sharing of health care errors for the purpose of improving the quality of medical care and patient safety.

14. This federal act allows a system where the hospital creates a patient safety evaluation system, where they collect and analyze relevant information.

15. Once this information is collected, the hospital forwards this information to its patient safety

organization, who then collects and analyzes the information and provides feedback and recommendations on how to improve patient safety and quality of care.

16. This information is also shared with a nationwide database that makes it available as an evidence based management resource.

17. In this case, apparently Shands Starke participates in this Federal Act having created a PSES that reports to its PSO.

18. Based on the above mentioned Federal Act, when Plaintiff requested all incident reports, which apparently include documents maintained in the PSES and/or PSO, Shands Starke asserted an objection.

CHARLES VS. SOUTHERN BAPTIST HOSPITAL OF FLORIDA

19. On January 31, 2017, the Florida Supreme Court issued its opinion on this exact issue in *Charles vs. Southern Baptist Hospital of Florida, Inc.*, 209 So.3d 1199 (Fla. 2017) where it considered an identical objection, yet held that "simply put, adverse medical incident reports are not patient safety work product because Florida statutes and administrative rules require providers to create and maintain these records and Amendment 7 provides patients with a constitutional right to access these records. Thus, they fall within the exception of information 'collected, maintained, or developed separately, or exists separately,

from a patient safety evaluation system.' " *See Charles* at 1212.

20. These records do not become patient safety work product simply because they were placed in a patient safety evaluation system or submitted to a patient safety organization because providers have an independent obligation under Florida law to create and maintain them, and Amendment 7 provides patients with a constitutional right to access them. *See Id.*

21. Consequently, adverse medical incident reports produced in conformity with state law and requested by patients under Amendment 7 cannot be classified as confidential and privileged patient safety work product under the Federal Act. *See Id.*

22. Finally, the Florida Supreme Court held that the Federal Act did *not* preempt the Florida Constitution. Specifically, it held that "Clearly, Congress did not intend to deprive Florida citizens of such an important constitutional measure. Rather, a review of the plain meaning of the Federal Act, coupled with the statements of Congress and the Department of Health and Human Services, which is in charge of implementing the Federal Act, in light of Florida's Amendment 7, shows that the two systems can coexist harmoniously . . . one does not necessarily make the other unworkable." *See Id.* at 1215.

23. If the Shands Starke's objection stood, then "medical providers would be free to determine for themselves what information was available in litigation through their own strategic use of the benefits in

the Federal Act by placing all of their reports, regardless of any other state requirements, in the patient safety evaluation system and therefore making them confidential patient safety work product. Allowing such an action would be antithetical not only to the purpose of Amendment 7, but also to the Congressional purpose of improving the health care system." *See Id.*

SHANDS STARKE'S OBJECTIONS IN THIS CASE

24. Plaintiff sent this Request to Produce **AFTER** the *Charles* decision came out on 1/31/17 because it now had the legal authority to request these documents. They were not requested prior to this decision, because the undersigned counsel knew that the 1st District Court of Appeals would not support production of these documents in *Charles vs. Southern Baptist Hospital of Florida, Inc.*, 178 So.3d 102 (Fla. 1st DCA 2015).

25. However, despite this ruling Shands Starke **STILL** made this objection – knowing that the Florida Supreme Court has already decided this issue.

26. Therefore, ***it is boldly made in bad faith*** and in direct contradiction of the binding decision on point by the Florida Supreme Court.

27. In addition, Shands Starke never filed any privilege log outlining the documents that it has, that it is refusing to produce – so it has further violated the required rules of discovery whereby if a document is

privileged then the Defendant must list it in a privilege log.

28. For that reason, Plaintiff hereby invokes Rule 1.380(a)(4) and seeks attorney's fees and costs related to having to research, draft and argue this motion to compel.

29. There are not many issues in the medical malpractice area of law that are as litigated as this issue by hospitals and medical providers. So when a decision on point comes out that requires production of these documents, it is very hard to believe that this Defendant would blatantly ignore this binding authority and continue to boldly assert this overruled objection.

30. Plaintiff hereby also represents to this Court that the undersigned counsel has made a ***good faith effort*** to resolve this objection and has asked for Defendant to withdraw its objection and produce these documents – to no avail.

WHEREFORE, pursuant to *Charles vs. Southern Baptist Hospital of Florida, Inc.*, 209 So.3d 1199 (Fla. 2017); and Fla. R. Civ. P. 1.380(a) & 1.380(a)(4), Plaintiffs seek an order to produce these documents along with a reasonable amount of attorney's fees and costs for having to research, draft and argue this Motion to Compel.

CERTIFICATE OF SERVICE

I CERTIFY that on **May 9, 2017**, a copy of the foregoing has been furnished through the Florida Court's Efiling Portal, by Electronic Mail only, to:

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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT IN AND FOR
BRADFORD COUNTY, FLORIDA

EMMA DEAN AND
DEVON KELLY,

Plaintiffs,

v.

CASE NO.
2016-CA-589

STARKE HMA LLC d/b/a
SHANDS STARKE REGIONAL
MEDICAL CENTER, DERON
OTTEY, M.D., OTTEY BONE
AND JOINT ASSOCIATES,
LLC, DEON SUTHERLAND,
M.D., and ADVANCED CARE
HOSPITALISTS, PL

Defendants.
______________________________/

DEFENDANT, STARKE HMA, LLC D/B/A SHANDS REGIONAL MEDICAL CENTER'S AMENDED RESPONSES TO NUMBERS ONE AND TWO OF PLAINTIFFS' THIRD REQUEST TO PRODUCE

Defendant, Starke HMA, LLC d/b/a Shands Starke Regional Medical Center, by and through the undersigned attorneys, and pursuant to the applicable Fla. R. Civ. P., files its Amended Responses to Numbers One and Two of Plaintiffs' Third Request to Produce dated March 13, 2017 as follows:

1. Please produce a complete copy of any/all internal risk management documentation, Code

15 reports, and/or "incident report" related to Emma Dean's 6/22/15 admission.

RESPONSE: The Hospital objects to this Request to the extent it seeks confidential and privileged Patient Safety Work Product ("PSWP") pursuant to the Patient Safety and Quality Improvement Act of 2005 ("the PSQIA"), 42 U.S.C. § 299b-22, *et seq.* and its attendant regulations.

The Hospital operates a Patient Safety Evaluation System ("PSES") and maintains a relationship with CHS PSO, LLC ("CHS PSO"), a Patient Safety Organization ("PSO"), for the purpose of improving patient safety and quality of care at its facility. The scope of Request No. 1 of the Request can be read to include data, reports, memoranda, analyses (including root cause analyses), and/or statements, which the Hospital assembled or developed for reporting to CHS PSO and which the Hospital reported to CHS PSO, or which were developed by CHS PSO for the conduct of patient safety activities; and which could result in improved patient safety, health care quality, or health care outcomes. Such materials would be confidential and privileged PSWP pursuant to the PSQIA. *See* 42 U.S.C. § 299b-21b(7)(A)(i). Any items meeting this statutory definition of PSWP are confidential and privileged, and federal law prohibits the Hospital from choosing to disclose them. *See* 42 USC § 299b-22(b) ("Notwithstanding any other provision of Federal, State, or local law . . . patient

safety work product shall be confidential and shall not be disclosed.") Without waiving the above objection, please see the attached event report that is maintained outside of the Hospital's Patient Safety Evaluation System and is not Patient Safety Work Product.

2. Please produce a complete copy of any/all documentation related to Emma Dean's 6/22/15 admission that was generated or created pursuant to Florida Statutes Section 395.0197, including, **but not limited to**, "adverse incident" reports, documentation regarding transfer to another hospital for a more acute level of care, etc.

RESPONSE: The Hospital objects to this Request to the extent it seeks confidential and privileged Patient Safety Work Product ("PSWP") pursuant to the Patient Safety and Quality Improvement Act of 2005 ("the PSQIA"), 42 U.S.C. § 299b-22, *et seq.* and its attendant regulations.

The Hospital operates a Patient Safety Evaluation System ("PSES") and maintains a relationship with CHS PSO, LLC ("CHS PSO"), a Patient Safety Organization ("PSO"), for the purpose of improving patient safety and quality of care at its facility. The scope of Request No. 1 of the Request can be read to include data, reports, memoranda, analyses (including root cause analyses), and/or statements, which the Hospital assembled or developed for reporting to CHS PSO and which the Hospital reported to CHS

PSO, or which were developed by CHS PSO for the conduct of patient safety activities; and which could result in improved patient safety, health care quality, or health care outcomes. Such materials would be confidential and privileged PSWP pursuant to the PSQIA. *See* 42 U.S.C. § 299b-21b(7)(A)(i). Any items meeting this statutory definition of PSWP are confidential and privileged, and federal law prohibits the Hospital from choosing to disclose them. *See* 42 USC § 299b-22(b) ("Notwithstanding any other provision of Federal, State, or local law . . . patient safety work product shall be confidential and shall not be disclosed.") Without waiving the above objection, please see the attached event report that is maintained outside of the Hospital's Patient Safety Evaluation System and is not Patient Safety Work Product.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been electronically served via Florida ePortal to: Grant A. Kuvin Esquire, GKuvin@forthepeople.com, RPBarnes@forthepeople.com; Kelly Hamer, Esquire, ocalaservice@bicecolelaw.com, kurtz@bicecolelaw.com, reese@bicecolelaw.com; Patrick H. Telan, Esquire, phtelan@growerketcham.com,

enotice@growerketcham.com, cboals@growerketcham@ com; on this 3rd day of May, 2017.

/s/ *Kevin G. Mercer* [KGM]
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March 2, 2017

M. Justin Lusko **VIA U.S. MAIL**
Levin, Papantonio, Thomas,
Mitchell, Rafferty & Proctor, P.A.
P.O. Box 12308
Pensacola, Florida 32591

Re: Request for Records Relating to Karen Dale

Dear Mr Lusko:

We represent West Florida Hospital (the "Hospital") on issues that relate to Article X, Section 25 of the Florida Constitution ("Amendment 7"). This letter serves to respond to the request for records relating to Karen Dale, dated January 11, 2017, as well as the second request dated February 22, 2017 (the "Request").

With respect to item 1 of the Request, Florida law is clear that "included within the attorney-client privilege are communications the insured makes to the insurer for its use to fulfill its obligation to defend on the insured's behalf." *See Reynolds v. State*, 963 So. 2d 908, 911 (Fla. 2d DCA 2007); *Staton v. Allied Chain Link Fence Company*, 418 So. 2d 404, 405-06 (Fla. 2d DCA 1982); *Grand Union Company v. Patrick*, 247 So. 2d 474, 475 (Fla. 3d DCA 1971); *see also* 17A Lee R. Russ,

et al., Couch on Insurance 3d § 250:19 (2000) (describing the majority view that the "attorney-client privilege applies to communications between an insured and its liability or indemnity insurer as to an incident possibly giving rise to liability."). Furthermore, where a client makes notes memorializing an event to consult an attorney for the purposes of defense in impending litigation, those notes are protected by the attorney client privilege. *See Lemonik v. Eastern Airlines, Inc.*, 632 So. 2d 239 (Fla. 3d DCA 1994); and *Merlin v. Boca Raton Community Hosp., Inc.*, 479 So. 2d 236 (Fla. 4th DCA 1985). Reports made in the STARS system are protected attorney client communications.

Items 2 through 11 of the Request seek records and testimony that is protected from discovery or admission into evidence in any civil of [sic] administrative action pursuant to Florida Statutes §§ 395.0191(8), 395.0193(8), 395.0197 and 766.101(5). The Hospital also objects to items 2, 4, 5, 7 and 8 of the Request to the extent that their scope includes records protected pursuant to 42 U.S.C. § 299b-22(a).

With respect to items 3 and 9 through 11 of the Request, without waiving any rights, objections, privileges or confidentialities, a diligent search of the Hospital has uncovered no responsive records.

To the extent you rely on Amendment 7 for access to records or information in response to these items, Amendment 7 only provides a patient a right to access to records of an adverse medical incident that are made or received in the course of business by a health

care facility or a health care provider, which right is defined as "making the records available for inspection and copying." *See* Fla. Const. art X, § 25(a) and (b)(4).

Because Amendment 7 only provides a patient a right to have access to records, Amendment 7 does not apply to requests for testimony via written response. Nothing in Amendment 7, the enabling statute or the Florida Supreme Court's ballot approval opinion suggests that Amendment 7 requires licensed facilities such as the Hospital to provide written responses to questions. *See Advisory Opinion to the Attorney General Re Patients' Right To Know About Adverse Medical Incidents*, 880 So. 2d 617 (Fla. 2004). Amendment 7 does not require the Hospital to provide testimony in the form of a written response to questions, such as item 6 of the Request.

Amendment 7 does not require the Hospital to produce records other than records of an adverse medical incident. *See Bartow HMA, LLC v. Kirkland*, 126 So. 3d 1247 (Fla. 2d DCA 2013) (quashing order requiring production and requiring the circuit court to "address whether the documents . . . contain reports of adverse medical incidents under Amendment 7; whether the privileges asserted are preempted by application of Amendment 7; or, in the case of a responsive document that is not discoverable under Amendment 7, whether the asserted privilege applies."); *Columbia Hospital Corporation of South Broward, d/b/a Westside Regional Medical Center v. Fain*, 16 So. 3d 236, 242 (Fla. 4th DCA 2009) (cautioning that "[c]are must be taken to remember that Amendment 7

affects only reports pertaining to *adverse medical incidents*."); *Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 827 (Fla. 2d DCA 2007) ("Amendment 7 does not require production of documents . . . that do not contain information about particular adverse medical incidents.").

The *See* court explained the limits of the term "adverse medical incident" in Amendment 7. Specifically, "the word 'incident' itself indicates an isolated event." *See*, 18 So. 3d at 690. The phrase "adverse medical incident" can only mean "a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient." *Id.* (*citing Shahbas*, 960 So. 2d at 827). The court explained that while an adverse medical incident may be a negligent act or omission, that "act or omission must be connected with a patient and must be the cause or near-cause of an injury or death." *See*, 18 So. 3d at 690. Moreover, the court in *See* explained that the privilege at issue was "still in effect to the extent that it does not prohibit the production of records relating to adverse medical incidents under Amendment 7." *See*, 18 So. 3d at 689. Accordingly, records within the scopes of Fla. Stat. §§ 395.0191(8), 395.0193(8), 395.0197, and 766.101(5) remain protected unless they are records of a specific incident involving a specific patient that caused or could have caused injury to or the death of that patient.

Furthermore, Amendment 7 does not entitle a patient access to records that were not made or received in the course of the Hospital's business. *See, e.g.*, *Forbes*

v. Dhillon, MD., et al., Case No. 51-2007-CA-3758-WS/G (Fla. 6th Cir. Ct. February 7, 2011) (defining a hospital's course of business as "the care and treatment of its patients, including records of such care and treatment, not the preparation of special reports and the conduct of special investigations."); *Bartow HMA, LLC v. Edwards*, 175 So. 3d 820, 824-825 (Fla. 2d DCA 2015) (concluding that external peer review reports were not made or received in the course of business under Amendment 7 because reports neither kept pursuant to statutorily mandated duty nor relied upon in the conduct of daily affairs). Here, STARS reports that may be responsive to item 1 of the Request are not made or received in the course of the Hospital's business and therefore fall outside of the scope of Amendment 7.

To the extent any records sought contain attorney-client communications or opinion work product, Amendment 7 does not entitle a patient access to either. *See Barron v. Sun City Hosp. d/b/a South Bay Hosp., et al.*, 08-CA-021348 (Fla. 13th Cir. Ct. Sept. 14, 2010); *Houze v. HCA Health Servs. of Fla., Inc. d/b/a St. Lucie Med. Ctr.*, Case No. 562009CA002596 (Fla. 19th Cir. Ct. May 24, 2010); *Harrell v. Bay Hosp. Inc.*, Case No. 02-3998-CA (Fla. 14th Cir. Ct. Oct. 5, 2009); *Ramirez-Elizondo v. Galencare, Inc. d/b/a Northside Hosp.*, Case No.: 09-9981-CI-8 (Fla. 6th Cir. Ct. Oct. 5, 2009); and *Mark v. Miami Beach Healthcare Group, Ltd.*, Case No. 10-18139 CA 09 (Fla. 11th Cir. Ct. Dec. 8, 2010); *but see Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d

949, 953 (Fla. 3d DCA August 17, 2011) (finding opinions of hospital personnel routinely contained within risk management reports were not protected as opinion work product). The Hospital objects to item 1 of the Request because STARS reports constitute privileged attorney-client communications.

With respect to items 2, 4, 5, 7 and 8 of the Request, the Hospital has not concluded that this patient was involved in an adverse medical incident. Accordingly, the Hospital takes the position that any statutorily privileged records that could be interpreted to be responsive to these requests are outside the scope of Amendment 7 and therefore remain protected from discovery.

The Hospital also objects to items 2, 4, 5, 7 and 8 of the Request, to the extent that the scopes of these requests can be read to include confidential and privileged Patient Safety Work Product ("PSWP") pursuant to the Patient Safety and Quality Improvement Act of 2005 (the "PSQIA"), 42 U.S.C. § 299b-22(a) and its attendant regulations.

The Hospital operates a Patient Safety Evaluation System ("PSES") and maintains a relationship with HCA PSO, LLC ("HCA PSO"), a Patient Safety Organization ("PSO"), for the purpose of improving patient safety and quality of care at its facility. Data, reports, memoranda, analyses, and/or statements, which the Hospital assembled or developed for reporting to HCA PSO, which the Hospital reported to HCA PSO, or which were developed by HCA PSO for the conduct of

patient safety activities, in order to improve patient safety, health care quality, or health care outcomes are confidential and privileged PSWP, pursuant to the PSQIA. *See* 42 U.S.C. § 299b-21b(7)(A)(i).

To the extent that you rely on *Charles v. Southern Baptist Hospital of Florida, Inc.,* ___ So. 3d ___, 2017 WL 411333 (Fla. Jan. 31, 2017), for the production of any PSWP, information and documents collected within the Hospital's PSES for submission to HCA PSO, as well as the information and documents created by HCA PSO for the improvement of patient safety and quality of care, both of which constitute patient safety work product under the PSQIA, does not fall within any exception to the PSQIA privilege identified in that opinion. While *Charles* held that the documents at issue in that matter were not PSWP, based on the court's finding that Florida law mandated separate creation and maintenance of those documents in particular, PSWP meeting the statutory definition remains privileged.

Furthermore, the information and documents created within the Hospital's PSES and submitted to the HCA PSO are not subject to review by the State Agency for Healthcare Administration. Therefore, these documents do not constitute records separately "collected, maintained, or developed." *Id.* at 8 (citing 42 U.S.C. § 299b-21(7)(B)).

Should a court find that *Charles* compels a finding that certain records within HCA PSO are no longer

protected PSWP, the Hospital argues that any responsive records that are not records of adverse medical incidents as defined by Amendment 7 remain protected patient safety work product.[1]

Notwithstanding any court order of production, the Hospital is not at liberty to choose to disclose any confidential and privileged PSWP by the plain language of the federal statute. 42 U.S.C. § 299b-22(a). The statute allows for no discretionary disclosure without an applicable exception, and provides that PSWP is not subject to any subpoena or order "notwithstanding any other provisions of Federal, state, or local law." 42 U.S.C. § 299b-22(a). Further, the statute additionally imposes fines and penalties for impermissible disclosures from the U.S. Department of Health & Human Services Office for Civil Rights of up to $11,000 for each act constituting a violation. *See* 42 U.S.C. § 299b-22(f)(1); 74 Fed. Reg. 42777 (Aug. 25, 2009).

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[1] Indeed, the Petitioner in *Charles* conceded that the defendant hospital "is free to voluntarily collect, maintain, or develop other information not required by state (or other) laws and store that information in its privileged PSES. For example, [the hospital] claims most of the 52,000 occurrence reports in the PSES do not relate to adverse incidents and thus do not contain state-mandated information. (Supp. App. 153, ¶ 14.) If [the hospital] is correct (which the Charles family does not assume), then much of the PSES information may be privileged." *See* Petitioner's Initial Brief, at 35-36.

Copies of supporting case law shall be provided upon request.

Very truly yours,

/s/ Paul R. Borr

Paul R. Borr
Co-counsel for W. Fla. Hosp.

IN THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

KENNETH MOSLEY, as Personal Representative of the Estate of ANNA MOSLEY, Deceased and KENNETH MOSLEY, individually, Survivor,

Plaintiffs,

vs.

CITRUS HMA, LLC d/b/a SEVEN RIVERS REGIONAL MEDICAL CENTER; CRYSTAL RIVER WOMEN'S HEALTH CENTER, P.A.; ROSE MARY SOBEL, M.D., ALICIA MARIE EASTER, RN; and TAMARA LYNN BEEMER, RN,

Defendants.
______________________________/

CASE NO.
2016 CA 000776 A

DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND REQUEST TO PRODUCE

Defendant, CITRUS HMA, LLC d/b/a SEVEN RIVERS REGIONAL MEDICAL CENTER, by and through the undersigned attorneys, and pursuant to the applicable Fla. R. Civ. P., responds to the Plaintiffs, KENNETH MOSLEY, as Personal Representative of

the Estate of ANNA MOSLEY, Deceased and KENNETH MOSLEY, individually, Survivor, Second Request to Produce dated January 17, 2017, as follows:

1. Pursuant to Section 25, Article X of the Florida Constitution (Amendment 7) Plaintiff is requesting any adverse medical incident documents pertaining to her admissions to Seven Rivers Regional Medical Center for dates of service 1/29/16 to present.

RESPONSE: Seven Rivers Regional Medical Center participates in a Patient Safety Organization, number P0122. Pursuant to the Patient Safety and Quality Improvement Act of 2005 (PSQIA), which takes precedent over Florida's Amendment 7, the documents and materials requested are subject to Federal confidentiality and privilege protections provided for in section 299b-22 of the PSQIA because the information sought is patient safety work product. This objection is based on the existence of the Patient Safety Organization and is not based on the PSQIA's HIPAA confidentiality provisions. These documents and information requested are created voluntarily by Seven Rivers Regional Medical Center for self-reporting purposes and are not documents required to

be produced, maintained, or otherwise submitted to any to any [sic] **federal agency or State of Florida agency for reporting purposes.**

2. Pursuant to Amendment 7 please provide any incident reports, code 15 reports, root cause analysis, peer review minutes or notes, risk manager investigations regarding the care and treatment provided to Anna Mosley, deceased, during these admissions.

RESPONSE: Seven Rivers Regional Medical Center participates in a Patient Safety Organization, number P0122. Pursuant to the Patient Safety and Quality Improvement Act of 2005 (PSQIA), which takes precedent over Florida's Amendment 7, the documents and materials requested are subject to Federal confidentiality and privilege protections provided for in section 299b-22 of the PSQIA because the information sought is patient safety work product. This objection is based on the existence of the Patient Safety Organization and is not based on the PSQIA's HIPAA confidentiality provisions. These documents and information requested are created voluntarily by Seven Rivers Regional Medical Center for self-reporting purposes and are not documents required to

be produced, maintained, or otherwise submitted to any to any [sic] **federal agency or State of Florida agency for reporting purposes.**

3. Pursuant to Florida Statute 381.028(7)(d)(2), the records shall be produced regarding deceased, Anna Mosley, for treatment at Seven Rivers Regional Medical Center for dates of service January 29, 2016 to present

RESPONSE: Seven Rivers Regional Medical Center participates in a Patient Safety Organization, number P0122. Pursuant to the Patient Safety and Quality Improvement Act of 2005 (PSQIA), which takes precedent over Florida's Amendment 7, the documents and materials requested are subject to Federal confidentiality and privilege protections provided for in section 299b-22 of the PSQIA because the information sought is patient safety work product. This objection is based on the existence of the Patient Safety Organization and is not based on the PSQIA's HIPAA confidentiality provisions. These documents and information requested are created voluntarily by Seven Rivers Regional Medical Center for self-reporting purposes and are not documents required to

be produced, maintained, or otherwise submitted to any to any [sic] **federal agency or State of Florida agency for reporting purposes.**

WE HEREBY CERTIFY that a copy hereof has been electronically served via Florida ePortal to: Richard D. Schuler, Esquire, rschuler@shw-law.com, jdever@shw-law.com, cpassman@shw-law.com; Louis J. LaCava, Esquire, llacava@lacavajacobson.com, IValtcheva@LaCavaJacobson.com, ELopez@LaCavaJacobson.com; on this 2d day of March, 2017.

/s/ Raymond E. Watts, Jr.
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A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW

MEMBER OF CLM
(CLAIMS & LITIGATION MANAGEMENT ALLIANCE)

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June 2, 2017

E. Rose Kasweck, Esq.
Barrett Fasig & Brooks
3360 Capital Circle, ME., Suite B
Tallahassee, FL 32308

Re: Request for Records on Behalf of Kamille Mosley

Dear Rose:

Capital Regional Medical Center (the "Hospital") has received your request for records on behalf of Kamille Mosley, seeking records of adverse medical incidents pursuant to Article X, section 25 of the Florida Constitution (commonly known as "Amendment 7") involving Ms. Mosley and Lori Hearne, ARNP.

As an initial matter, the Hospital would require you to pre-pay its estimated costs to search for, review, redact, and photocopy any records responsive to the

request before beginning any search. This is the Hospital's right under section 381.028(7)(c)1, Florida Statutes. Here, the Hospital would have to review all risk management, credentialing, peer review, and quality assurance-related records created at the Hospital that relate to injuries sustained as a result of falls, over an unlimited time period, in order to identify all responsive records. Someone with knowledge regarding the scope of Amendment 7 would then have to determine which responsive records were made or received in the course of business and relate to an adverse medical incident. The Hospital would also have to redact any responsive records of protected health information of Hospital patients other than the subject patient pursuant to HIPAA. The cost to search for records of adverse medical incidents, including item 12(b) of the request which is only limited by the time during which Nurse Hearne has had privileges at the Hospital, could be quite high.

In order to avoid such a high cost, the Hospital invites you to contact the undersigned to discuss providing a request compliant with section 381.028, Florida Statutes, and narrowing the scope of your requests.

Second, please note that by its terms, Amendment 7 provides patients "a right to access to records made or received in the course of business by a health care facility or a health care provider relating to any adverse medical incident." That is all. Please be advised that the Hospital objects and will not provide the following categories of records:

- Any records that contain opinion work product which is defined as the mental impressions, conclusions and opinions of a representative of the Hospital or an attorney.
- Any records that are protected by the attorney-client privilege, including but not limited to communications between the Hospital and its insurer.
- Any records that were not made or received in the course of business. *See* Art. X, sect 25(a), Fla. Const. Specifically, while records created routinely as part of a hospital's efforts in providing care and treatment to patients or in following state and federal reporting or documentation requirements may be made or received in the course of business, records outside of such practice are not and thus would fall outside the scope of Amendment 7.
- Any records that contain privileged information that survives Amendment 7 under State of [sic] Federal law. *See* §§ 395.0191, 395.0193, 395.0197, and 766.101, Fla. Stat. (2016); *see also* 42 U.S.C. § 299b-22(a) (2005). By way of example, the Hospital would redact from any record it would produce the names of the individuals providing information to any committee of the hospital or who conducted a review of any incident pursuant to sections 395.0191, 395.0193, 395.0197, and 766.101, Florida Statutes (2016); *see also*

> *Palms of Pasadena Hosp. v. Rutigliano*, 908 So. 2d 594 (Fla. 5th DCA 2004).; *All Children's Hosp., Inc. v. Davis*, 590 So. 2d 546 (Fla. 2d DCA 1991).

Finally, the Hospital objects to the extent that the request seeks records that are confidential and privileged Patient Safety Work Product ("PSWP") pursuant to the Patient Safety and Quality Improvement Act of 2005 (the "PSQIA"), 42 U.S.C. § 299b-22, et seq. and its attendant regulations.

The Hospital operates a Patient Safety Evaluation System ("PSES") and maintains a relationship with HCA PSO, LLC ("HCA PSO"), a Patient Safety Organization ("PSO"), for the purpose of improving patient safety and quality of care at its facility. The scope of the request may include data, reports, memoranda, analyses, and/or statements, which the Hospital assembled or developed for reporting to HCA PSO, which the Hospital reported to HCA PSO, or which were developed by HCA PSO for the conduct of patient safety activities; in order to improve patient safety, health care quality, or health care outcomes. Such records would be confidential and privileged PSWP pursuant to the PSQIA. *See* 42 U.S.C. § 299b-21b(7)(A)(i). To the extent such records were not collected, maintained, or developed separately, and do not exist separately, from the Hospital's PSES, the records would not meet any statutory exception of PSWP enumerated in the PSQIA. Further, there is no allegation that the Hospital has not complied with any reporting or recordkeeping obligation under state or other law. Federal law prohibits

the Hospital from choosing to disclose confidential and privileged PSWP.

To the extent that Claimant relies on *Charles v. Southern Baptist Hospital of Florida, Inc.*, 209 So. 3d 1199 (Fla. Jan. 31, 2017), for the production of any PSWP, information and documents collected within the Hospital's PSES for submission to HCA PSO, as well as the information and documents created by HCA PSO for the improvement of patient safety and quality of care, both of which constitute patient safety work product under the PSQIA, do not fall within any exception to the PSQIA privilege identified in that opinion. While *Charles* held that the documents at issue in that matter were not PSWP, based on the court's finding that Florida law mandated separate creation and maintenance of those particular documents, PSWP meeting the statutory definition remains privileged.

Furthermore, the information and documents created within the Hospital's PSES and submitted to HCA PSO are not subject to review by the State Agency for Healthcare Administration. Therefore, these documents do not constitute records separately "collected, maintained, or developed." *Id.* at 1211 (citing 42 U.S.C. § 299b-21(7)(B)).

Should a court find that *Charles* compels a finding that certain records within HCA PSO are no longer protected PSWP, the Hospital argues that:

(a) As articulated above, the Hospital is first entitled to be pre-paid its costs of a search for responsive records;

(b) Any responsive records that are not records of adverse medical incidents as defined by Amendment 7 remain protected patient safety work product; and

(c) Notwithstanding any order to produce, the Hospital is not at liberty to choose to disclose any confidential and privileged PSWP by the plain language of the federal statute. 42 U.S.C. § 299b-22(a). The statute allows for no discretionary disclosure without an applicable exception, and provides that PSWP is not subject to any subpoena or order "notwithstanding any other provisions of Federal, state, or local law." 42 U.S.C. § 299b-22(a). Further, the statute additionally imposes fines and penalties for impermissible disclosures from the U.S. Department of Health & Human Services Office for Civil Rights of up to $11,000 for each act constituting a violation. *See* 42 § 299b-22(f)(1); 74 Fed. Reg. 42777 (Aug. 25, 2009).

Without waiving any of the objections set forth above, a diligent search has revealed no documents responsive to items 8 through 10 of the request.

Please contact me if you wish to discuss this matter any further.

Very truly yours,

ANDREWS, CRABTREE, KNOX
& ANDREWS, LLP

/s/ Jeannette Andrews
Jeannette M. Andrews
For the Firm

JMA:kn

SMITH HULSEY & BUSEY

ANDREW H. SAUER, M.D., J.D.

DIRECT 904.359.7792 June 9, 2017

ASAUER@SMITHHULSEY.COM

Via Email and U.S. Mail
Raymond M. Ravis, Esq.
Dunlap, Ravis & Miller
629 Lomax Street
Jacksonville, FL 32204

Re: Notice of Intent to Initiate Litigation for Medical Malpractice on behalf of James Lynn

Dear Ray:

In January 2015, St. Vincent's Medical Center Riverside utilized event reporting software to comply with § 395.0197, Fla. Stat., and 59A-10.0055, F.A.C. This software contained multiple data fields beyond what was required by Florida law. All of the data has been placed in the hospital's Patient Safety Evaluation System in accordance with the Federal Patient Safety and Quality Improvement Act.

When the hospital transitioned to new software, data from the existing software was archived by Ascension Health. However, not all of the data was archived. Prior to the archiving of the data, all of the data contained in the event reporting software regarding James Lynn was printed out on January 14, 2015.

Pursuant to your request, we are producing the information from this printout that was required by Florida law and therefore cannot be Patient Safety Work Product according to the Florida Supreme Court's ruling in *Charles v. Southern Baptist Hospital of Florida, Inc.* The remainder of the data (which was not required to be created or maintained by Florida law) is protected from disclosure as Patient Safety Work Product ("PSWP").

Enclosed please find a document that contains the statutorily-required/non-PSWP data. We created this document by cutting and pasting from the abovementioned printout and redacting the remaining data that is PSWP.

There are no Code 15 Reports or Annual Reports concerning James Lynn. You are already in possession of Mr. Lynn's medical record and bills.

Please contact me if you have any questions.

Very truly yours,

/s/ Andrew H Sauer
Andrew H. Sauer

AHS/sj/00962370
Enclosure

c: Richard E. Ramsey, Esq.

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The Foundation for The Gator Nation

Health Science Center
Self-Insurance Program
P.O. Box 112735
Gainesville, Florida
32611-2735
Tel: (352) 273-7006
Fax: (352) 273-5424

Shands Jacksonville
Medical Center, Inc.,
Box 261
580 W. 8th Street, T-35
Jacksonville, Florida
32209-6511
Tel: (904) 244-9070
Fax: (904) 244-9081

Reply to: Gainesville

June 19, 2017

D. Andrew Vloedman, Esq.
2790 NW 43rd Street
Gainesville, FL 32606

CERTIFIED 7014 0150 0001 6045 7290 RETURN RECEIPT REQUESTED

RE: George L. Martin

Dear. Mr. Vloedman:

Shands Teaching Hospital and Clinics, Inc. (Shands) is in receipt of your request dated May 30, 2017 directed to Edward Jimenez, CEO. Shands objects to the request as overly broad and is unable to respond to the extent you seek information protected from disclosure as confidential and privileged Patient Safety Work Product, pursuant to the Patient Safety Quality Improvement Act of 2005 (PSQIA), *see* 42 U.S.C. §§ 299b-21 – 299b-26, and its implementing regulations, *see* 42 CFR Part 3. As a participant in a listed Patient Safety Organization regulated by the Federal

Agency for Health Care Research and Quality, Shands is prohibited from and ***subject to penalties for*** disclosing Patient Safety Work Product, except in connection with Patient Safety Activities or as otherwise provided by the federal PSQIA. *See* 42 U.S.C. § 299b-22.

Please contact me if you have questions regarding this response.

Sincerely,

/s/ Stephanie L. Mullins
Stephanie L. Mullins
Senior Litigation Attorney

SLM/tle

IN THE CIRCUIT COURT OF
THE FOURTH JUDICIAL
CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 2015-CA-006506
DIVISION CV-G

WENDELL B. HULSEY,)
Personal Representative of
the Estate of John C. Hulsey,)

Plaintiff,)

vs.

SOUTHERN BAPTIST)
HOSPITAL OF FLORIDA,
WILLIAM M. GILL, M.D.,)
and RESPIRATORY
CRITICAL CARE AND)
SLEEP MEDICINE
ASSOCIATES, INC.,)

Defendants.)

<u>SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC.'S RESPONSE TO PLAINTIFF'S THIRD REQUEST FOR PRODUCTION</u>

Pursuant to Rule 1.350, Fla R. Civ. P., the defendant Southern Baptist Hospital of Florida, Inc. d/b/a Baptist Medical Center – Jacksonville ("BMC") responds as follows to Plaintiff's Third Request for Production to Southern Baptist Hospital of Florida dated July 11, 2017:

1. Any and all documents considered adverse incident documents under our State Constitution relating to the care and treatment of John C. Hulsey at any time.

> *RESPONSE*: BMC does not possess any Code 15 Reports regarding Mr. Hulsey. BMC will produce the statutorily-required Incident Report relating to Mr. Hulsey. A Root Cause Analysis is by definition Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and, therefore, cannot be produced. However, one does not exist regarding Mr. Hulsey. BMC has designated the contents of its peer review files as Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and placed them in the hospital's Patient Safety Evaluation System for submission to the PSO. Therefore, the contents of the files cannot be produced. With respect to the risk management file concerning Mr. Hulsey, either BMC designated the contents as Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and placed them in the hospital's Patient Safety Evaluation System for submission to the PSO or it contains attorney-client communications and/or attorney work product. Either way, the contents of the file cannot be produced. As for any responsive documents which may be contained in the hospital's credentialing files, BMC will produce them once the plaintiff pays the estimated cost for identifying, redacting, and copying the

records pursuant to § 381.028(7)(c)(1), Fla Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla 2012)). BMC has previously produced Mr. Hulsey's medical record. If this request seeks the files of its attorneys, BMC objects on the grounds that the documents are protected by the attorney-client and/or work product privileges.

2. Any and all documents considered an adverse incident document under our State Constitution relating to William M. Gill, M.D., at any Southern Baptist Hospital/Baptist Medical Center facility for a three (3) year period of time prior to Decedent's care and treatment up through to date.

RESPONSE: BMC will produce all Code 15 Reports and Annual Reports for the requested time period. BMC will also produce all statutorily-required Incident Reports for the required time period once the plaintiff pays the estimated cost for redacting and copying them pursuant to § 381.028(7)(c)(1), Fla Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla 2012)). Any Root Cause Analyses involving a patient under Dr. Gill's care are by definition Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and, therefore, cannot be produced. BMC has designated the contents of its peer review files as Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and placed them in

the hospital's Patient Safety Evaluation System for submission to the PSO. Therefore, the contents of the files cannot be produced. With respect to any risk management files which may exist relating to Dr. Gill's care, either BMC has designated the contents as Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and placed them in the hospital's Patient Safety Evaluation System for submission to the PSO or they contain attorney-client communications and/or attorney work product. Either way, the contents of any such files cannot be produced. BMC will produce any responsive documents contained in the credentialing file of Dr. Gill for the requested time period once the plaintiff pays the estimated cost for identifying, redacting, and copying the documents pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla. 2012)). If this request seeks medical records of patients to whom Dr. Gill provided care during the requested time period, BMC will produce them once the plaintiff pays the estimated cost for identifying, redacting, and copying the records pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla. 2012)). If this request seeks the files of its attorneys, BMC objects on the grounds that the documents are protected by the attorney-client and/or work product privileges.

3. Any and all documents considered adverse incident documents as defined by the Florida Constitution relating to any physicians working for Baptist Medical Center for three (3) years prior to John C. Hulsey's care and treatment up through to date.

RESPONSE: BMC will produce all Code 15 Reports and Annual Reports for the requested time period. BMC will also produce all statutorily-required Incident Reports for the required time period once the plaintiff pays the estimated cost for redacting and copying them pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla. 2012)). All Root Cause Analyses are by definition Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and, therefore, cannot be produced. BMC has designated the contents of its peer review files as Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and placed them in the hospital's Patient Safety Evaluation System for submission to the PSO. Therefore, the contents of the files cannot be produced. With respect to any risk management files relating to any physician's care, either BMC has designated the contents as Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and placed them in the hospital's Patient Safety Evaluation System for submission to the PSO or they contain attorney-client communications and/or attorney work

product. Either way, the contents of any such files cannot be produced. BMC will produce any responsive documents contained in the credentialing files for the requested time period once the plaintiff pays the estimated cost for identifying, redacting, and copying the records pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla. 2012)). If this request seeks medical records from the requested time period, BMC will produce them once the plaintiff pays the estimated cost for identifying, redacting, and copying the records pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla. 2012)). If this request seeks the files of its attorneys, BMC objects on the grounds that the documents are protected by the attorney-client and/or work product privileges.

4. Any and all documents considered adverse incident documents as defined by the Florida Constitution relating to any adverse incidents arising from critical care and treatment for three (3) years prior to John C. Hulsey's care and treatment up through to date.

RESPONSE: BMC will produce all Code 15 Reports and Annual Reports for the requested time period. BMC will also produce all statutorily-required Incident Reports for the required time period once the plaintiff pays the estimated cost for redacting and copying

them pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla. 2012)). All Root Cause Analyses involving patients in a critical care unit are by definition Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and, therefore, cannot be produced. BMC has designated the contents of its peer review files as Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and placed them in the hospital's Patient Safety Evaluation System for submission to the PSO. Therefore, the contents of the files cannot be produced. With respect to any risk management files relating to any patients in a critical care unit, either BMC designated the contents as Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and placed them in the hospital's Patient Safety Evaluation System for submission to the PSO or they contain attorney-client communications and/or attorney work product. Either way, the contents of any such files cannot be produced. BMC will produce any responsive documents concerning any patients in a critical care unit, which are contained in its credentialing files for the requested time period once the plaintiff pays the estimated cost for identifying, redacting, and copying the file pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla.

> 2012)). If this request seeks the medical records of any patients in a critical care unit during the requested time period, BMC will produce them once the plaintiff pays the estimated cost for identifying, redacting, and copying the file pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla. 2012)). If this request seeks the files of its attorneys regarding any patients in a critical care unit, BMC objects on the grounds that the documents are protected by the attorney-client and/or work product privileges.

5. Any and all documents considered adverse incident documents as defined by the Florida Constitution relating to any adverse incidents arising from care and treatment for Baptist Medical Center for three (3) years prior to John C. Hulsey's care and treatment up through to date.

> *RESPONSE*: BMC will produce all Code 15 Reports and Annual Reports for the requested time period. BMC will also produce all statutorily-required Incident Reports for the required time period once the plaintiff pays the estimated cost for redacting and copying them pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla. 2012)). All Root Cause Analyses are by definition Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and, therefore, cannot be

produced. BMC has designated the contents of its peer review files as Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and placed them in the hospital's Patient Safety Evaluation System for submission to the PSO. Therefore, the contents of the files cannot be produced. With respect to risk management files, either BMC has designated the contents as Patient Safety Work Product pursuant to the Federal Patient Safety and Quality Improvement Act and placed them in the hospital's Patient Safety Evaluation System for submission to the PSO or they contain attorney-client communications and/or attorney work product. Either way, the contents of these files cannot be produced. BMC will produce any responsive documents which are contained in its credentialing files for the requested time period once the plaintiff pays the estimated cost for identifying, redacting, and copying the file pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla. 2012)). If this request seeks patient medical records during the requested time period, BMC will produce them once the plaintiff pays the estimated cost for identifying, redacting, and copying the file pursuant to § 381.028(7)(c)(1), Fla. Stat. (held constitutional in *West Florida Regional Medical Center, Inc. v. See*, 79 So.3d 1, 14 (Fla. 2012)). If this request seeks the files of its attorneys,

BMC objects on the grounds that the documents are protected by the attorney-client and/or work product privileges.

6. Please provide any and all files kept relating to William M. Gill, M.D., including but not limited to credentialing files and education, training or discipline files.

RESPONSE: BMC's credentialing files are protected from disclosure pursuant to § 395.0191(8), Fla. Stat. BMC does not maintain education, training, or discipline files on the members of the medical staff at the hospital, including Dr. Gill.

7. Any and all documents addressing in any way the expected standard of care of hospital personnel from 2011 to present.

RESPONSE: BMC objects to this request on the grounds that it is vague and overly broad in time and scope.

8. Please produce any and all root cause analysis documents relating to John C. Hulsey.

RESPONSE: None.

9. Please produce any and all notes, memorandum, documents generated from the Morbid [sic] & Mortality Conference relating to John C. Hulsey.

RESPONSE: None.

10. Please produce any and all documents relating to John C. Hulsey, which have been produced to any governmental and/or oversight agency.

RESPONSE: See the response to request #1 above.

SMITH HULSEY & BUSEY

By: */s/ Michael H. Harman*
William E. Kuntz
Earl E. Googe, Jr.
Michael H. Harmon

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Attorneys for Southern Baptist
Hospital of Florida, Inc.

Certificate of Service

I certify that on August 15, 2017, a copy of the foregoing has been furnished through the Court's ePortal electronic notification system to:

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/s/ Michael H. Harmon Attorney

00967384/sj