IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1538
L.T. CASE NO. 1D14-3178

On Appeal from the First District Court of Appeal

EMMA GAYLE WEAVER, etc.,

Plaintiff-Appellant,

vs.

STEPHEN C. MYERS, M.D., et al.,

Defendants-Appellees.

AMICUS CURIAE BRIEF OF THE FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLEES

Mark K. Delegal, Esq.
Fla. Bar No. 989924
mark.delegal@hklaw.com
Tiffany A. Roddenberry, Esq.
Fla. Bar No. 92524
tiffany.roddenberry@hklaw.com
Holland & Knight LLP
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832

William W. Large, Esq.
Fla. Bar No. 981273
william@fljustice.org
Florida Justice Reform Institute
210 South Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 222-0170
Facsimile: (850) 222-1098

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Reform Institute ("Institute") is Florida's leading organization of concerned citizens, small business owners, business leaders, health care providers, and lawyers who are working towards the common goal of promoting predictability in Florida's civil justice system through the elimination of wasteful civil litigation and the promotion of fair and equitable legal practices. The Institute is the first independent organization focused solely on civil justice in Florida. Since its founding, the Institute has worked to restore faith in the Florida judicial system and to increase the affordability of health care in Florida by controlling malpractice insurance costs.

As an organization that represents a wide range of interests in the business and health care communities, and as an organization that was active in the public debate on these issues, the Institute can provide the Court with insight as to why the Legislature enacted these changes in 2013.

SUMMARY OF THE ARGUMENT

In 2013, the Florida Legislature amended the medical malpractice presuit notice statute to ensure that a prospective defendant or his or her legal representative may interview a medical malpractice claimant's treating health care providers prior to the claimant bringing suit. This and other reforms enacted in 2013 were necessary to ensure the medical malpractice presuit notice statute accomplishes the objective

of encouraging the early and inexpensive resolution of meritorious medical malpractice cases.

This additional method of informal discovery bears a logical connection to that objective. Informal interviews with treating health care providers give prospective defendants access to the information necessary to evaluate the merit of a claim. The prospective defendant and his or her attorney can use that information to decide whether the claim should be settled and for how much before the matter escalates to full-blown litigation. In turn, this earlier access to information ensures that more money reaches deserving plaintiffs and less money is spent litigating both meritorious and nonmeritorious claims. The Legislature enacted this provision and other reforms in 2013 to ensure that Florida's litigation environment is fair to health care providers and patients and that this State continues to be a magnet for attracting and retaining the best health care providers in the country. These reforms were adopted after considerable and thoughtful debate with input from various stakeholders, including health care providers and patients.

This reform does not encroach upon this Court's authority to adopt rules for practice and procedure in Florida's courts. Specifically, this reform does not conflict with this Court's prior codification of the medical malpractice presuit notice statute through Florida Rule of Civil Procedure 1.650. The Petitioner has taken the extraordinary position that if this Court adopts a rule to supplement a statute, the

statute may never be amended by the Legislature without violating separation of powers. That is not and cannot be the law. This Court has already held that the medical malpractice presuit notice statute is substantive and not procedural. Furthermore, the medical malpractice presuit notice statute and the privilege underpinning the issues in this case—the physician-patient privilege—are wholly legislative creations. It would be an odd result if the Court could insulate both from legislative amendment by declaring the reforms here procedural. The Legislature acted well within its constitutional authority in adopting the 2013 amendments.

Accordingly, the Court should affirm the First District's well-reasoned decision finding that the 2013 amendments to the medical malpractice presuit notice statute are constitutional.

ARGUMENT

A. The Legislature enacted the 2013 amendments to ensure fair and equal access to information which in turn promotes the early settlement of medical malpractice claims.

The Florida Legislature first created a presuit process for medical malpractice cases in 1985, with the stated goal of "establish[ing] a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." *Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991) (citing the predecessor statute, § 768.57, Fla. Stat.); *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993) ("[T]he purpose of the chapter 766 presuit requirements is to

alleviate the high cost of medical negligence claims through early determination and prompt resolution of claims . . . ."); *see also* § 766.106(3), Fla. Stat. Indeed, this Court has recognized that it is "the prevailing policy of this state relative to medical malpractice actions . . . to encourage the early settlement of meritorious claims and to screen out frivolous claims." *Cohen v. Dauphinee*, 739 So. 2d 68, 70 (Fla. 1999). The statute then and now creates a 90-day presuit period in which each side is required to make good faith efforts to conduct informal discovery and reasonable investigations, so that sufficient information may be gathered to permit early resolution of the claim without resort to the courts. § 766.106(6), Fla. Stat. This Court has held that, in enacting this statute, the Legislature was "address[ing] a legitimate legislative policy decision." *Williams*, 588 So. 2d at 983.

The medical malpractice presuit notice statute did not entirely accomplish its stated goal because, as the result of this Court's interpretation of the statutory physician-patient privilege in *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996), the health care provider threatened with a lawsuit or his or her lawyer could not conduct a candid interview of the claimant's current treating health care provider without the claimant or his or her attorney present. *See id.* at 156-57.[1] Thus, the prospective

[1] At its heart, Chapter 2013-108, Laws of Florida, corrected the Court's interpretation of the statutory privilege. Even though the statute provided an express exception for a prospective defendant in "a medical negligence action," the Court construed the exception as limited and wholesale "reject[ed] the contention that ex

defendant was unable to fully evaluate the claim in order to determine whether it should be settled, while the claimant and his or her attorney had complete and unfettered access to such information, limiting the ability of the prospective defendant to settle the claim early.

Chapter 2013-108, Laws of Florida, solved that problem. The Legislature enacted Chapter 2013-108 after considerable debate and input from various stakeholders. The amendments made through Chapter 2013-108 were enacted to make certain that the medical malpractice presuit notice statute continues to provide a fair system for both health care providers and patients. Chapter 2013-108, § 4, codified at Section 766.1065(3), Florida Statutes, requires the presuit notice authorization form to include authorization of an ex parte interview with a treating health care provider, in compliance with the Health Insurance Portability and Accountability Act ("HIPAA"). *See* 766.1065(3), Fla. Stat. (2013). Chapter 2013-108 also created Section 766.106(6)(b)5., which authorizes the prospective defendant or his or her representative to interview the claimant's current treating health care providers consistent with the claimant's authorization form. Importantly, and at the request of plaintiff's attorneys, certain safeguards were added: a defendant must give notice of the intent to conduct an informal interview to the claimant, and

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parte conferences with treating physicians may be approved so long as the physicians are not required to say anything." *Acosta*, 671 So. 2d at 156.

the current treating health care provider may decline to submit to a request for an interview. *See* § 766.106(6)(b)5., Fla. Stat. (2013).

The Petitioner suggests that the 2013 amendments were adopted completely unmoored from any legislative findings apart from those offered in the 1980s to support initial enactment of the medical malpractice presuit notice statute. But this wholly ignores that the Legislature did justify the amendments in 2013. The Legislature carefully considered several proposed reforms prior to the beginning of the 2013 legislative session, debated the proposals at numerous committee meetings, and ultimately crafted legislation that reached a middle ground between proponents of civil justice reform and individuals supportive of increased access to courts for medical malpractice claimants.

Prior to the beginning of the 2013 regular legislative session, the Florida Senate Judiciary Committee convened a workshop regarding medical malpractice litigation reform on February 5, 2013, to examine a variety of issues presented to the Legislature by a number of constituents. Exhibit B, Fla. S. Judiciary Comm. Workshop, recording of proceedings (Feb. 5, 2013) (statements of Senator Tom Lee; transcript at 3:3-10).[2] The issues ranged from whether to permit informal interviews

[2] The entirety of the transcripts of the proceedings referenced in this amicus curiae brief are included in the appendix filed by Respondents in support of their Answer Brief on the Merits. The exhibits referenced are those contained in that appendix.

of treating health care providers to whether adult children may recover for the loss of a parent as the result of medical malpractice. *See, e.g.*, *id.* at 6:1-8:1; 30:14-21.

On the issue of treating health care provider interviews, the Senate Judiciary Committee heard testimony from stakeholders on both sides, including defense attorneys like Thomas Dukes and Cynthia Tunnicliff; plaintiff's attorneys like Stephen Cain, Ken Sobel, and Jimmy Gustafson; and a practicing physician. *See id.* at 4:1-7. Mr. Dukes testified before the committee, *id.* at 15:23-16:1, that the then-current situation barring these interviews "creates an asymmetry of information. That is, the plaintiffs' lawyers have the ability to conference ex parte, . . . with plaintiff's treating physicians who are unrelated to the litigation," *id.* at 16:5-11, while defense lawyers lack the same ability, *id.* at 16:12-13. This "asymmetry of information" necessarily drives up litigation costs because the only way for the defense to gather even the most routine information necessary to evaluate a medical malpractice claim is to engage in formal discovery. *See id.* at 16:17-17:23, 19:7-18. In turn, that "reduces the ability to resolve cases [and] it reduces the amount of money that an injured plaintiff receives." *Id.* at 19:9-11. To be sure, the committee also heard from stakeholders, including the Florida Justice Association, that expressed concerns with the proposals, including the proposal to authorize such informal interviews with treating providers. *See id.* at 30:8-13, 30:22-32:7.

The result of the February 5th workshop was Senate Proposed Committee Bill ("SPB") 7030, sponsored by the Senate Judiciary Committee, and which ultimately became Senate Bill 1792, which was passed into law as Chapter 2013-108. SPB 7030 addressed a number of issues raised in the workshop. Among other reforms, the bill allowed a prospective defendant to conduct an ex parte interview with a claimant's treating health care provider. The bill also revised the presuit authorization form for release of certain protected health information to ensure the new proposals complied with HIPAA. *See* Fla. SPB 7030 (2013). A few related and companion bills were introduced, including House Bill 827, which was sponsored by the House Judiciary Committee, the Civil Justice Subcommittee, and Representative Matt Gaetz.

In a committee hearing before the Senate Judiciary Committee on March 18, 2013, Senator Lee introduced SPB 7030 as the result of the February 5th workshop. Exhibit D, Fla. S. Judiciary Comm., recording of proceedings (March 18, 2013) (testimony of Senator Lee; transcript at 2:4-16). Although five reforms had been considered originally, after further discussion the proposed committee bill was introduced as a "middle ground," paring the list of reforms down to just three. *Id.* at 3:2-6. Senator Lee observed that the bill as drafted attempted to limit the opportunity for a prospective defendant or his or her representative to go on fishing expeditions and strived to be fair to potential claimants. *Id.* at 4:4-18. The Committee on March

18 again heard from numerous stakeholders, including members of the public, in deciding whether to move forward with the reforms.

At a March 6, 2013 hearing before the Florida House Civil Justice Committee concerning related bill House Bill 827, the committee heard from more interested parties, including members of the community affected by medical malpractice incidents. Although some testimony indicated that claims and lawsuits had decreased, and that Florida has a "healthier insurance market," House bill sponsor Representative Gaetz cautioned that the lesson to take from that testimony was that the system is "working." Exhibit C, Fla. H. Civil Justice Comm., recording of proceedings (March 6, 2013) (testimony of Representative Matt Gaetz; transcript at 74:14-18). The system in place "has regulated medical malpractice claims to the extent [that it] has led to an environment where more doctors want to practice here, more insurers want to write here. And that merely increases the quality of care." *Id.* at 74:19-24. But he cautioned that simply because the system has seen some success, "we ought not stop now and raise the white flag of surrender." *Id.* at 75:7-8. As the representative summed up, "I bring this bill not to limit access to courts, not to limit remedies, but to make sure that Florida is a place that is fair in the litigation process for physician[s] . . . ." *Id.* at 77:14-17.

SPB 7030 became Senate Bill 1792, and House Bill 827 was laid on the table in favor of Senate Bill 1792, which passed both chambers of the Florida Legislature.

Senate Bill 1792 in its final form included the added protections of requiring the claimant's attorney to have the first opportunity to set up the meeting between the potential defendant and the claimant's treating health care provider and requiring notice be given to the claimant and his or her attorney of that meeting. Exhibit G, Fla. H.R., recording of proceedings (April 30, 2013) (second reading of SB 1792) (testimony of Representative Gaetz; transcript at 16:2-11). These amendments were made at the request of plaintiff's attorneys who expressed concern that the original proposal would allow for secret meetings between treating health care providers and defense counsel. *See, e.g.*, Exhibit D, Fla. S. Judiciary Comm., recording of proceedings (March 18, 2013) (discussion by Alan McMichael regarding SPB 7030; transcript at 37:16-38:6); *see also, e.g.*, Exhibit B, Fla. S. Judiciary Comm. Workshop, recording of proceedings (Feb. 5, 2013) (discussion by Jimmy Gustafson; transcript at 44:23-45:5); Exhibit C, Fla. H. Civil Justice Comm., recording of proceedings (March 6, 2013) (discussion by Jimmy Gustafson; transcript at 54:10-15).

The legislative members supporting the bill's passage reiterated numerous times throughout the deliberation of these reforms that the Legislature's goal was to address the asymmetry of information that existed between medical malpractice claimants on the one hand and prospective defendants on the other. *See, e.g.*, Exhibit F, Fla. H.R. Judiciary Comm., recording of proceedings (April 9, 2013) (CS for HB

827) (testimony of Representative Gaetz; transcript at 3:14-4:23, 62:8-64:4); Exhibit G, Fla. H.R., recording of proceedings (April 30, 2013) (second reading of SB 1792) (discussion at 13:9-19).

The Legislature carefully debated the issues and chose to improve the medical malpractice presuit notice statute by authorizing these informal interviews of treating health care providers to correct that asymmetry, among other reforms. The Legislature did not need more or different information in order to take that action. The Petitioner claims that the Legislature made no specific findings that these reforms would somehow alleviate problems (*see, e.g.*, Appellant's Br. at 24 & n.1), but that is patently false as shown above. There is a rational connection between authorizing informal interviews and early access to all relevant information on the one hand and encouraging early settlement of meritorious medical malpractice claims on the other.

The Legislature did not need to find a new "crisis" to justify reform. "A fundamental principle of legislation" is that the Legislature "is under no obligation to wait until the entire harm occurs but may act to prevent it." *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 212 (1997). Likewise, the fact that some contend that the system is working does not mean the Legislature should wait until new troubles arise before acting to improve that system. Subject to constitutional restraints, "the [L]egislature must be allowed leeway to approach a perceived problem

incrementally." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993); *see also id.* at 316 ("'Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955))).

Ultimately, this Court does not sit as a "superlegislature" charged with judging the wisdom or desirability of every policy decision made by the Legislature, absent the Legislature's encroachment upon constitutional rights or this Court's authority. *See Fla. Patient's Comp. Fund v. Von Stetina*, 474 So. 2d 783, 789 (Fla. 1985). Because the 2013 amendments do not violate any constitutional protections, the Court should not substitute its judgment in place of the Legislature's here.

B. The Legislature is authorized to define the contours of the medical malpractice presuit process and the physician-patient privilege.

Despite the fact that the medical malpractice presuit notice process has been a creature of statute and the prerogative of the Legislature since it was first enacted, the Petitioner contends that the 2013 amendments were an impermissible encroachment on this Court's authority to adopt rules of court practice and procedure under Article V, Section 2(a) of the Florida Constitution. Essentially, the Petitioner argues that because the Florida Supreme Court adopted a rule of civil procedure in response to the Legislature's creation of a medical malpractice presuit process, the

Legislature can never again amend that process or the statutorily-created physician-patient privilege without violating separation of powers. That is not and cannot be the law.

Not long after the Legislature's first enactment of the medical malpractice presuit notice statute, this Court adopted Florida Rule of Civil Procedure 1.650, which essentially tracked the medical malpractice presuit notice statute in implementing certain informal discovery methods. *See In re Med. Malpractice Presuit Screening Rules-Civil Rules of Procedure*, 536 So. 2d 193 (Fla. 1988). Indeed, despite its enactment of that rule, this Court has held that the statute is itself "primarily substantive" and Rule 1.650 is simply the manner in which the Court "procedurally implemented" that statute. *Williams*, 588 So. 2d at 983.

The Petitioner claims the 2013 amendments authorizing informal interviews conflict with this rule because the Rule lists several methods by which the parties may obtain pre-suit screening discovery and informal interviews are not one of the listed methods. Notably, however, Rule 1.650(c) says that, "[u]pon receipt by a prospective defendant of a notice of intent to initiate litigation, the parties *may* obtain presuit screening discovery by one or more of the following methods." Fla. R. Civ. P. 1.650(c) (emphasis added). The use of the term "may" in the rule is clearly permissive. Provisions from other civil procedure rules demonstrate that where the Court intends for a list to be exclusive and exhaustive, that intent is clearly expressed

in the rule. *See, e.g.*, Fla. R. Civ. P. 1.280(b)(4) (governing experts) ("Discovery of facts known and opinions held by experts, otherwise discoverable . . . may be obtained *only* as follows . . . ." (emphasis added)). There is nothing to prevent litigants from complying with both Rule 1.650 and Section 766.106(6)(b)5. The latter merely adds an additional informal discovery method to those that were mentioned in a non-exhaustive list under the former.

As the First District Court of Appeal correctly stated, "it appears that [Rule 1.650] was intended to mirror the statute rather than serve as a limitation on the Legislature's ability to adopt additional discovery methods." *Weaver v. Myers*, 170 So. 3d 873, 880 (Fla. 1st DCA 2015). Particularly here—where the Court included permissive language in the rule and indicated its intent to merely give life to the medical malpractice presuit process created by the Legislature—it makes little sense to conclude that the Court's action forever removes the originating statute from the purview of the Legislature.

Moreover, this reform concerns the reaches of the legislatively-created physician-patient privilege of confidentiality. Prior to 1988, neither Florida statute nor common law extended a privilege to medical records or to discussions between physicians and their patients. *Coralluzzo v. Fass*, 450 So. 2d 858, 859 (Fla. 1984). Thus, before 1988, such ex parte communications were freely permitted, a fact that formed the basis for the holding in *Coralluzzo*. *See id.* The Florida Legislature

created that privilege in 1988 through Section 455.241, Florida Statutes, now codified at Section 456.057. *See Hasan v. Garvar*, 108 So. 3d 570, 573 (Fla. 2012). In *Acosta*, this Court construed that statute to bar informal ex parte interviews between defendants and treating health care providers. 671 So. 2d at 156-57. The 2013 statute was designed to reverse the *Acosta* case. But the Court did not find in either *Acosta* or *Hasan* that the creation of such a privilege or the Legislature's definition of the contours of such a privilege was beyond the Legislature's power. It would be untenable for the Court to deem the reforms at issue here procedural, effectively removing from the Legislature the authority to amend either the medical malpractice presuit notice statute or the physician-patient privilege when both are creatures of statute and not court rule. Indeed, it would be tantamount to encroaching upon the power of the Legislature to decide these matters of fundamental policy. *See* Art. II, § 3, Fla. Const.; *see also Fla. House of Representatives v. Crist*, 999 So. 2d 601, 611-12 (Fla. 2008).

CONCLUSION

For all these reasons and those presented by the Appellees, this Court should affirm and uphold the 2013 amendments to the medical malpractice presuit notice statute which authorize a prospective defendant and/or his or her legal representative to conduct informal interviews of treating health care providers.

Respectfully submitted on July 11, 2016.

HOLLAND & KNIGHT LLP

/s/Mark K. Delegal
Mark K. Delegal, Esq.
Fla. Bar No. 989924
mark.delegal@hklaw.com
Tiffany A. Roddenberry
Fla. Bar No. 92524
tiffany.roddenberry@hklaw.com
Holland & Knight LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301

-and-

William W. Large
Fla. Bar No. 981273
william@fljustice.org
Florida Justice Reform Institute
210 S. Monroe Street
Tallahassee, Florida 32301

Counsel for Amicus Curiae Florida Justice Reform Institute

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been electronically filed and that a copy has been served by e-mail to the following on July 11, 2016:

Virginia M. Buchanan
Levin, Papantonio, Thomas, Mitchell, Rafferty, & Proctor, P.A.
316 South Daylen Street, Suite 600
Pensacola, Florida 32502
vbuchanan@levinlaw.com

Robert S. Peck
Center for Constitutional Litigation, P.C.
777 6th Street NW, Suite 250
Washington, D.C. 20001
robert.peck@cclfirm.com

Counsel for Petitioner

Philip M. Burlington
Adam J. Richardson
Burlington & Rockenbach, P.A.
Courthouse Commons/Suite 350
444 West Railroad Avenue
West Palm Beach, Florida 33401
pmb@FLAppellateLaw.com
ajr@FLAppellateLaw.com
kbt@FLAppellateLaw.com

Counsel for Amicus Curiae Florida Justice Association

Mark Hicks
Erik P. Bartenhagen
Hicks, Porter, Ebenfield & Stein, P.A.
799 Brickell Plaza, Suite 900
Miami, Florida 33129
mhicks@mhickslaw.com
ebartenhagen@mhickslaw.com

Counsel for Respondents

Andrew S. Bolin
Beyton, McLaughlin, McLaughlin, O'Hara, Bocchino & Bolin
201 N. Franklin Street, Suite 2000
Tampa, Florida 33602
asb@law-fla.com

Counsel for Amici Curiae Florida Hospital Association, Florida Medical Association, and American Medical Association

/s/Mark K. Delegal
Attorney

CERTIFICATE OF RULE 9.210 COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/Mark K. Delegal
Attorney