IN THE SUPREME COURT OF FLORIDA

LENNOX WILES, a minor, by and through his parents and natural guardians, JADE WILES and JUSTIN WILES; and JADE WILES and JUSTIN WILES, individually,

Petitioners,

v. CASE NO. SC23-118

TALLAHASSEE MEMORIAL HEALTHCARE, INC.,

Respondent.
_____/

RESPONDENT'S AMENDED BRIEF ON JURISIDICTION

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STATEMENT OF THE ISSUES

There two issues over which jurisdiction may be invoked are (1) whether TMH's Safety Event Report is protected "patient safety work product" within the meaning of the federal Patient Safety Quality Improvement Act ("PSQIA") and, (2) if so, whether the PSQIA preempts Article X, Section 25 of the Florida Constitution (known as "Amendment 7") as to the discoverability of the report.

STATEMENT OF THE CASE AND FACTS

Petitioners JADE WILES and JUSTIN WILES sued Respondent TALLAHASSEE MEMORIAL HEALTHCARE, INC. ("TMH"), in circuit court for medical malpractice. In *Tallahassee Memorial Healthcare, Inc., v. Wiles*, 351 So. 3d 141 (Fla. 1st DCA 2022), the First District held on certiorari that (1) a certain report prepared by TMH constituted confidential "patient safety work product" under the federal Patient Safety Quality Improvement Act ("PSQIA"), 42 U.S.C. § 299b-21-26, and therefore was exempt from discovery; and (2) the PSQIA both expressly and impliedly preempts Article X, section 25 of the Florida Constitution (known as "Amendment 7") on the subject of the confidentiality of the report. *Wiles*, 351 So. 3d at 149, 151-52. TMH offers the following combined statement of the case and facts.

Petitioners sued TMH in circuit court, alleging that it negligently treated Jade Wiles during and after the May 2014, birth of her son Lennox, which injured him. *Wiles*, 351 So. 3d at 144. Twelve days after the birth, a TMH employee created a Safety Event Report which discussed Lennox's condition and medical treatment after birth. *Id.* TMH placed this report in a patient safety evaluation system and

submitted it to a patient safety organization. *Id.* at 144, 149. TMH did not submit this report to any state regulatory entity. *Id.* at 149.

TMH asserted below that the report is privileged pursuant 42 U.S.C. § 299b-21-26 because it is "patient safety work product" under 42 U.S.C. § 299b-21(7)(A) and therefore is not subject to discovery or court order. *Id.* at 144. Petitioners contested this and asserted that Amendment 7 made the report discoverable in any event. TMH maintained that the PSQIA preempts Amendment 7. *Id.*

After allowing Petitioners to depose a TMH corporate representative on certain subjects, the circuit court held a hearing, examined the report *in camera*, concluded without explanation that it was not privileged, and ordered TMH to produce it. *Id.*

TMH filed a petition for writ of certiorari in the First District, which quashed the circuit court order in a decision containing two main holdings. *Id.* at 149, 151-52.

First, the court held that the report is patient safety work product and is confidential under the PSQIA because it was submitted to a patient safety organization and was not created for the dual purpose of complying with Florida law since it did not document an "adverse incident" within the meaning of section

395.0197, Florida Statutes. *Id.* at 149. The First District distinguished *South Baptist Hosp. of Fla., Inc. v. Charles*, 178 So. 3d 102 (Fla. 2015) because the *Charles* reports were *not* submitted to a patient safety organization and *were* created for the dual purpose of complying with Florida law, which caused the *Charles* reports to lose the protection of the PSQIA privilege.[1] *Id.* at 148.

Second, the court held that the PSQIA expressly preempts Amendment 7 to the extent that state law may compel the disclosure of the report. *Id.* at 150-51. The district court surmised (but did not conclude) that the preemption discussion in *Charles* was dicta and distinguished *Charles* factually because the *Charles* reports were not patient safety work product in the first place. *Id.* The district court also held that the PSQIA impliedly preempts Amendment 7 because the two laws conflict such that it is impossible to comply with both. *Id.* at 152.

The First District certified two questions of great public importance: (1) whether this report is privileged and confidential "patient safety work product" under the PSQIA, and (2) if so, whether

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[1] The First District referred to this Court's decision as *Charles II* and its own prior decision as *Charles*. *Wiles*, 351 So. 3d at 147.

the PSQIA preempts the report's disclosure under Amendment 7. *Id.* at 143.

Petitioners' brief on jurisdiction contains several misstatements about the First District decision.

The district court did not hold that the PSQIA protects from disclosure any document simply "placed in a hospital's patient safety evaluation system and provided to a patient safety organization" or that a report created to comply with state recordkeeping requirements is protected by the PSQIA and only loses protection if it is submitted to AHCA. (Petitioner's Brief at 8, 9).

Rather, the First District repeatedly recognized that if the state requires the creation of a certain record, that fact alone removes it from the PSQIA's definition of patient safety work product. *Wiles*, 351 So. 3d at 146, 148.

Often quoting language from *Charles*, the district court stated that (1) if any law requires a provider to document certain information, "then that information falls outside the definition of patient safety work product and no privilege attaches," (2) pursuant to *Charles*, adverse incident reports are not privileged under the PSQIA because Florida law requires medical providers to create and

maintain them, and (3) a document created for submission to a patient safety organization but also created for "other purposes under state law" is not privileged under the PSQIA. *Id.* at 146, 148. So, the First District's decision recognized *Charles*' pronouncement that a record which the state requires a provider to create is not patient safety work product under the PSQIA.

In addition, the district court did not determine by *in camera* review that the report "was not an adverse incident report under Florida law because it was not required to be submitted to AHCA." (Petitioner's Brief at 3-4). Rather, the court determined that the report was not an adverse incident report *because it did not document an event which constitutes an "adverse incident" under section 395.0197(5)* and therefore while TMH did not send the report to AHCA, it also was not required to. *Wiles*, 351 So. 3d at 149.

Finally, the district court did not conclude that TMH's corporate representative admitted that the report was created for dual purposes and hold that this fact was irrelevant. (Petitioner's Brief at 7-8). Rather the district court noted *Petitioners' argument that* TMH's corporate representative admitted that the document was not created

solely as patient safety work product under the PSQIA, and then rejected that argument for several reasons. *Wiles*, 351 So. 3d at 150.

ARGUMENT

The Court should elect not to review the decision below. As to the first certified question, the issue of whether this Safety Event Report meets the PSQIA definition of "patient safety work product" is not of great public importance. The second question is only reached if the Court decides the first question, which it should decline to do. Furthermore, the Court should decline Petitioners' invitation to "rephrase" the first certified question – Petitioners are seeking not to rephrase the question, but to alter it into a different question not certified by the district court.

In addition, there is no express and direct conflict between *Wiles* and *Charles*, which is factually distinguishable: the *Charles* report documented an "adverse incident" under Florida law and therefore its creation was legally required, whereas the instant report does not, and the *Charles* report was never submitted to a patient safety organization, whereas the instant report was. *Wiles*, 351 So. 3d at 149; *Charles*, 209 So. 3d at 1216. In other words, *Wiles* is just an application of the *Charles* rule to a different set of facts where a different outcome was warranted, not a decision which conflicts with *Charles*.

The Certified Questions

The Court has discretionary jurisdiction under the Florida Constitution to review any decision of a district court that passes on a question certified by it to be of great public importance. *Fla. Const. Art. V, § 3(b)(4).* After a question is certified, the Court must exercise its discretion to determine whether an opinion on its part is "justified or required" under the circumstances. *Novack v. Novack*, 195 So. 2d 199, 200 (Fla. 1967). Here the Court should deny review of these certified questions.

The first certified question is:

> Whether Tallahassee Memorial's "Safety Event Report No. 67593" is privileged and confidential "patient safety work product" under the Federal Patient Safety Act of 2005?

Wiles, 351 So. 3d at 143. TMH respects the First District's decision to certify this question, but it is not one of great public importance – it asks only whether this singular report is "patient safety work product" under the PSQIA. The public has no great interest in whether TMH Safety Event Report Number 67593 is a protected document under the PSQIA.

Petitioners expressly concede this point, which should end the Court's inquiry as to this first question. (Petitioner's Brief at 8 stating "the legal status of this report is not of great *public* importance" (emphasis in original)). However, Petitioners ask the Court to rephrase this question to this entirely different question not certified by the First District:

> whether the Patient Safety Act's definition of "patient safety work product" excludes only reports that are provided to state regulatory agencies, or whether it also excludes reports that are prepared to comply with state-law recordkeeping obligations.

(Petitioner's Brief at 8).

That is not the rephrasing of a certified question. It is the substitution of a different question not certified by the First District. The certified question was one of application of the PSQIA to the facts surrounding this TMH report, but Petitioners' rephrased question is one of pure law, of statutory construction, which asks how to construe the federal statute and broadens the inquiry far beyond the TMH report (and thus far beyond the certified question).

Furthermore, Petitioners' new question is not raised by the *Wiles* decision. The First District did not hold that a report only loses PSQIA protection if it is submitted to the state – this is Petitioners'

recurring misstatement of the *Wiles* holding. Indeed, the answer to Petitioners' suggested question is already clear from *Charles* – the PSQIA definition of patient safety work product excludes reports prepared to comply with the state record-keeping requirements. *Charles*, 209 So. 3d at 1211-12; *Wiles*, 351 So. 3d at 151-52.

By its phraseology (and by logic), the second certified question is only to be answered if the subject report is privileged under the PSQIA. The second certified question is:

> If the report is privileged and confidential under the [PSQIA], whether that federal law preempts the report's disclosure under Article X, Section 25 of Florida's Constitution (Amendment 7)?

Wiles, 351 So. 3d at 143.

Here, since the first question is not of great public importance, the Court should not exercise its discretion to decide it, and the second question falls by the wayside.

Express and Direct Conflict

The Court has discretionary jurisdiction under the Florida Constitution to review any decision of a district court that expressly and directly conflicts with a decision of this Court on the same question of law. *Fla. Const. Art. V, § 3(b)(4).* This is a "strict standard

that requires either the announcement of a conflicting rule of law or the application of a rule of law in a manner that results in a conflicting outcome despite substantially the same controlling facts. Because the facts in the second situation are of utmost importance, there can be no conflict on this basis when the cases are easily distinguishable." *Kartsonis v. State*, 319 So. 3d 622, 623 (Fla. 2021) (internal citations and quotations omitted).

Here, there is no express and direct conflict between *Wiles* and *Charles*. The *Wiles* court recognized *Charles*, followed its rule of law concerning dual-purpose documents, and distinguished *Charles*. The *Wiles* court did not conclude that the PSQIA automatically protects from disclosure "any document that was placed in a hospital's patient safety evaluation system and provided to a patient safety organization." (Petitioners' Brief at 8).

The rule of law established by *Charles* is that if a medical provider prepares a record for submission to a patient safety organization, and actually submits it, the record is confidential "patient safety work product" under the PSQIA unless it was also required to be created by state law or is an original patient or provider record (or meets some other exception not discussed here). *Charles*,

209 So. 3d at 1211-12. That is the rule the district court applied. Thus, there is no direct and express conflict between *Wiles* and *Charles*.

Second, *Charles* is factually distinguishable from *Wiles*. In *Charles*, the pertinent reports were not submitted to a patient safety organization and were not created for the dual purpose of complying with Florida record-keeping laws, so they were not "patient safety work product." *Wiles*, 351 So. 3d at 149; *Charles*, 209 So. 3d at 1216. *Wiles* is just an application of the *Charles* rule to a different set of facts where a different outcome was warranted, not a decision which conflicts with *Charles*.

This is also why Petitioners are incorrect when they assert that the *Charles* reports are "materially identical" to the *Wiles* report. (Petitioners' Brief at 11-13). The *Wiles* report did not document an "adverse incident" under section 395.0197 and therefore was not required to be created or submitted to the state. *Wiles*, 351 So. 3d at 149. The *Charles* report, on the other hand, did document an "adverse incident" under section 395.0197 (and so it was required to be created and kept), was submitted to the state of Florida, and was

not submitted to a patient safety organization. *Charles*, 351 So. 3d at 1216. That is what makes the two cases distinguishable.

In addition, the *Wiles* decision does not expressly and directly conflict with *Charles* about preemption. While the *Wiles* court did hold that the PSQIA preempts Amendment 7, the discussion of preemption in *Charles* is dicta and therefore cannot be the subject of a conflict. *Wiles*, 351 So. 3d at 150-51.

In *Charles*, the Court held that the documents at issue were not patient safety work product. Therefore, there was no need to address the issue of preemption. *Id.*; *Florida Health Sciences Ctr., Inc. v. Azar*, 420 F. Supp. 3d 1300, 1306-07 (M.D. Fla. 2019) (holding after *Charles* that PSQIA preempts Amendment 7), *vacated on other grounds*, 844 Fed. Appx. 217 (11th Cir. 2021). In other words, because the *Charles* documents were not protected by the PSQIA at all, there was no need for the Court to determine whether the PSQIA did or did not preempt Amendment 7. Thus, the *Charles* discussion of preemption is dicta. *Lewis v. State*, 34 So. 3d 183, 186 (Fla. 1st DCA 2010) ("When a court makes a pronouncement of law that is ultimately immaterial to the outcome of the case, it cannot be said to be part of the holding in the case…the[se] statements are dicta and

not binding on this court"). And therefore, the First District's conclusion that the PSQIA preempts Amendment 7 does not conflict with the holding of *Charles*.

Even if the *Charles* preemption discussion is not dicta, the *Wiles* court determined that the subject report is patient safety work product, which distinguishes *Charles* on its facts. *Wiles*, 351 So. 3d at 150.

CONCLUSION

For the reasons expressed above, the Court should decline to exercise its discretionary jurisdiction over this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was filed electronically on April 5, 2023, with the Clerk of Court and sent via the court's e-service system to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font type and size requirements of Florida Rules of Appellate Procedure 9.045(e) and 9.210(a)(2)(A). It is submitted in Bookman Old Style 14-point font and consists of 2480 words.

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