IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JASON PIERRE-PAUL, **Case No.: 1:16-cv-21156-COOKE/TORRES**

Plaintiff,

vs.

ESPN, INC., a foreign corporation;
and ADAM SCHEFTER, an individual,

Defendants.
_____/

DEFENDANT ESPN, INC.'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

Plaintiff, one of the National Football League's best-known defensive athletes, became the subject of intense, national public interest when he was injured in a fireworks accident on the fourth of July. Adam Schefter, one of ESPN's and the nation's most respected sports journalists, broke the news that Plaintiff's injury was sufficiently severe that it required one of his fingers to be amputated. Plaintiff acknowledges that Mr. Schefter's reporting was accurate, and that the information he reported about the specifics of Plaintiff's injuries and medical treatment was a matter of legitimate public concern. Under well-established Florida and federal constitutional law, that alone requires that this suit be dismissed.

Nonetheless, Plaintiff's lawsuit proceeds on the theory that while it was legitimate for Mr. Schefter to report the details of Plaintiff's medical treatment in the form of words contained in a news report, it was unlawful for him to definitively corroborate his reporting by also providing two photos of a small portion of a page of hospital records that contained essentially the same words. Put another way, Plaintiff's theory is that it is fine to quote from a document, but it is unlawful to attach a photo of similar words as they appear in the document. That proposition is meritless, as a matter of both law and common sense.

Specifically, Plaintiff pursues this theory under two causes of action. First, he contends that ESPN violated Florida's medical privacy statute. That claim fails for several reasons. Most importantly, Florida's medical privacy law does not apply to the general public, including

members of the media – it does not, as Plaintiff contends, essentially impose a world-wide prior restraint on the speech of any person who allegedly learns some medical information from a Florida-based health care provider. Plaintiff's statutory theory is also self-contradictory, because in the limited circumstances where the statute does apply it does not distinguish between a physical medical record and the information the record contains. Nor, in any event, does the statute create a private right of action. Finally, even if the statute were as broad as Plaintiff suggests, it could not be applied here because the First Amendment prohibits punishing truthful speech relating to matters of public concern.

Plaintiff's second cause of action, for the publication of private facts, fails for the same reason – under both Florida law and the First Amendment such a claim cannot succeed where, as here, the subject-matter of a news report is a matter of public concern.

Finally, the Florida Legislature recently enacted an important new statute to try to deter people from filing exactly this type of lawsuit: a meritless complaint that targets the free speech rights of journalists or other citizens. Fla. Stat. § 768.295. The statute targets "Strategic Lawsuits Against Public Participation" (known as "SLAPP" lawsuits), which it defines as lawsuits that take aim at "free speech in connection with public issues", including speech in the form of a "news report." *Id.* at § 768.295(1). To facilitate the "expeditious resolution" of such lawsuits, this State's anti-SLAPP law is the first of its kind in the country to provide for mandatory fee-shifting in the event a lawsuit fails to survive any dispositive motion. *Id.* at § 768.295(4). The instant case is exactly the kind of "SLAPP" lawsuit that the new law was passed to address. It should be dismissed expeditiously, and ESPN awarded its attorneys' fees and costs.

STATEMENT OF FACTS

A. The Complaint's Factual Allegations

Plaintiff is a professional football player for the New York Giants of the National Football League ("NFL"). Compl. ¶ 2. On July 4, 2015, he sustained a serious injury in a fireworks accident, which led to the amputation of his right index finger at Jackson Memorial Hospital in Miami. Compl. ¶¶ 12, 13, 16. According to the Complaint, the hospital then "disclosed Plaintiff's medical records, including a photograph/image of a chart reflecting the

amputation of Plaintiff's right index finger" to Defendant Adam Schefter, a reporter for ESPN. Compl. ¶ 16.[1]

On July 8, Mr. Schefter posted a tweet stating that "ESPN obtained medical charts that show Giants DE [Defensive End] Jason Pierre-Paul had right index finger amputated today." Ex. 1; Compl. ¶ 18.[2] Mr. Schefter included two photos of a corner of a page of a portion of Plaintiff's medical records documenting the fact that this amputation had taken place. Ex. 1; Compl. ¶ 17. The photos were literally pictures of words on the corner of a page of a document describing Plaintiff's procedure in technical parlance – such as, "amputation finger . . . skin graft split thickness to extremities." Plaintiff alleges that Mr. Schefter posted the photos "to prove the accuracy of his report that a surgery occurred." Compl. ¶¶ 1, 21.

The Complaint also quotes from an interview that Mr. Schefter gave to Richard Deitsch of *Sports Illustrated*, published on July 12 (Compl. ¶¶ 19-21), in which Mr. Schefter explained his decision to include the photos with his tweet. The published interview included the following:

> SI.com: Why did you decide to post images of what you reported were Jason Pierre-Paul's medical charts?
>
> Schefter: This was a public figure and franchise player involved in a widely speculated accident with potential criminal behavior in which there was a cone of secrecy that surrounded him for five days that not even his own team could crack. This wasn't as if some player were admitted to the hospital with a secret illness or disease – we've seen those cases over the years, as recently as this past year even. This one was different and unique for a variety of reasons. The extent of his injuries were going to come to light, maybe that day or later that week, but soon. They're horrific injuries, incredibly unfortunate for the player. But in a day and age in which pictures and videos tell stories and confirm facts, in which sources and their motives are routinely questioned, and in which reporters strive to be as accurate as possible, this was the ultimate supporting proof.

---

[1] For the purposes of this motion only, ESPN assumes the truth of the facts alleged in the Complaint. ESPN notes, however, that it finds this allegation troubling, because it is not aware of any good-faith basis to support the allegation that the hospital, or anyone connected with it, provided the records or any photos of them to Mr. Schefter or anyone else at ESPN. Nor do any of the materials referenced by the Complaint substantiate this allegation.

[2] On a motion to dismiss, the court may consider a document not physically attached to the complaint "if it is central to the plaintiff's claims and is undisputed in terms of authenticity." *Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1340 n. 3 (11th Cir. 2005).

Ex. 2. Mr. Schefter also explained that in hindsight he thinks he should have talked more to ESPN editors before he posted the tweet:

SI.com: Prior to tweeting, how much contact did you have with ESPN editors and lawyers about whether the tweet was a HIPAA violation?

> Schefter: I know news organizations are not governed by HIPAA laws, but in hindsight I could and should have done even more here due to the sensitivity of the situation. We've got a great group of editors and production staff, and I could have leaned on them even more. ESPN has trusted me on any number of stories over the years, and granted me great latitude, fortunately. Sometimes in the fast-paced news world we live in, it's easy to forget you should lean on the knowledge and experience of the people surrounding you. They're always there for everything, but especially stories like this. On this one, there should have been even more discussion than there was due to the sensitivity of the story; that's on me.

Mr. Schefter further explained that:

> All I saw in that record was the name, the age, the gender, and the patient's finger amputated. It didn't look to me as if there was anything else in there that could be considered sensitive. NFL reporters report on all kinds of medical information on a daily basis. That's part of the job. The only difference here was that there was a photo. It came to me unexpectedly, and it was used as part of the reporting, same as OTL, 20/20, Dateline NBC or 48 Hours would do. . . My job is to be as thorough and accurate as possible. In this case, as tough as the injury is for the player, I didn't believe conveying the information about the unfortunate injury in words or a report caused additional harm. The information was going to come out soon. This was a very unique case, unlike many others. In trying to be thorough and accurate, we delivered that news as soon as possible with the supporting proof if it happened. To me, that's just doing my job.

Mr. Deitsch concluded by offering his own thoughts:

> To me, these were well-thought and expansive answers from a reporter who I believe cares about journalism ethics. Like Schefter, I would have encouraged SI to run the information if we procured it. One after-the-fact thought is ESPN would have been aided by an editor's note on the ESPN.com piece on Pierre-Paul to explain its thought process in running the piece and the image of the records. There's also a fair argument to make that had Schefter kicked around the implications of tweeting out the medical report with more ESPN editors, they might have made a consensus decision to merely run the information without the image. But this is all Monday morning quarterbacking. Reporters report, and that's what Schefter did.

B. Plaintiff's Alleged Legal Theories

Plaintiff's lawsuit is premised on asserting that not merely factually, but legally, there is a "difference between (a) reporting on Plaintiff's surgery and (b) disclosing Plaintiff's medical records." Compl. ¶ 20. Thus, the Complaint concedes that the information Mr. Schefter reported "about the amputation may have been of legitimate public concern", but it asserts that "the Chart itself was not." *Id.* ¶ 37. Based on those allegations, Count I of the Complaint alleges what it calls a "Violation of Fla. Stat. 456.057", the statute which governs whether, and under what circumstances, health care providers in Florida may disclose medical records and/or the information they contain.

Count II is labeled as "invasion of privacy", but the elements it alleges assert a claim for the publication of private facts, which is one theory of invasion of privacy that is recognized by Florida law. Both claims solely address Mr. Schefter's tweeting of "the Chart", but do not challenge his reporting the news about "the amputation of Plaintiff's right index finger." Compl. ¶ 30, 36. Finally, Count III simply alleges that, as Mr. Schefter's employer, Defendant ESPN is also liable for the claims alleged in Counts I and II against Mr. Schefter on the basis of *respondeat superior*. *Id*. at ¶¶ 39-43. [3]

ARGUMENT

A court should grant a motion to dismiss if, taking all the Complaint's well-pleaded allegations as true, a plaintiff has failed to state a viable claim for relief. *Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, 1257 (S.D. Fla. 2010). In *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the Supreme Court held that the "[t]hreadbare recitals of the elements of a cause of action" in a complaint, "supported by mere conclusory statements, do not suffice" to state a viable claim. *Id.* Moreover, a complaint can survive a motion to dismiss only if it "states a plausible claim for relief." *Id.* at 679. A court need not accept the truth of conclusions of law in

[3] Mr. Schefter is also named as a Defendant in the Complaint, but unlike ESPN he has not been served. Therefore, this motion to dismiss is filed on behalf of Defendant ESPN. However, the *respondeat superior* claim filed against ESPN in Count III is entirely derivative of the substantive claims filed against its employee Mr. Schefter in Counts I and II. As a result, if Counts I and II fail to state a claim against an employee, then the Defendant employer's motion to dismiss must be granted. *See, e.g., Flaherty v. Royal Caribbean Cruises, Ltd.*, 2016 WL 1158289 (S.D. Fla. Mar. 23, 2016); *Davis v. Broward Cty., Fla.*, 2012 WL 279433, at *7 (S.D. Fla. Jan. 31, 2012) (Cooke, J.); *Fontanez v. Lamberti*, 2011 WL 4499016 (S.D. Fla. Sept. 27, 2011).

the Complaint, and "[r]egardless of the alleged facts…a court may dismiss a complaint on a dispositive issue of law." *Fuentes*, 721 F. Supp. 2d at 1257; *Ortega Trujillo v. Banco Cent. del Ecuador*, 17 F. Supp. 2d 1340, 1342 (S.D. Fla. 1998).[4]

I. FLA. STAT. § 456.057 DOES NOT APPLY TO MR. SCHEFTER'S TWEET

Plaintiff's statutory claim is based on the proposition that Florida's medical privacy law restrains the speech of any "third party" anywhere in the world who learns information from a Florida health care provider. That construction of the statute is based entirely on a single clause within a single sub-paragraph of that legislation:

> Records owners are responsible for maintaining a record of all disclosures of information contained in the medical record to a third party, including the purpose of the disclosure request. The record of disclosure may be maintained in the medical record. The third party to whom information is disclosed is prohibited from further disclosing any information in the medical record without the expressed written consent of the patient or the patient's legal representative.

Compl. ¶ 28, *quoting* Fla. Stat. § 456.057(11) (emphasis added). The Complaint alleges that pursuant to the last sentence of this subsection, *any* "third party" who allegedly receives a medical record from a health care provider may not disclose it without the patient's written consent. The Complaint thus alleges that "Schefter's disclosure of the Chart" violates the statute. Compl. ¶ 30.

Plaintiff's construction of the statute is patently unreasonable, and is based entirely on taking a single sentence within a single sub-paragraph of a lengthy statute completely out of context. Properly construed, the medical privacy statute only regulates health care providers and other very specific "third parties" that are enumerated elsewhere in the statute, who may utilize the statute to obtain access to medical information. The statute does not, and constitutionally could not, impose any obligations on members of the general public who may learn or obtain medical information from a health care provider.

[4] The Complaint invokes Florida law as the basis of its claims, and for purposes of this motion only ESPN has no basis to dispute that. In the event of any future motion practice in this case, ESPN reserves the right to seek a different choice of law if the facts were to support that.

A. The Statute Does Not Impose Any Obligations On All Members Of The General Public Who Allegedly Receive Medical Information and/or Records From a Health Care Provider

Plaintiff's claim for breach of Fla. Stat. § 456.057 first fails because that statute does not apply to the general public, including (but not limited to) members of the media. Rather, it only applies to a very limited category of third parties to whom, like physicians and patients, the statute provides a right to obtain medical records from a health care provider.

The medical privacy statute must be read as a whole, and "similar language contained within the same section of a statute must be accorded a consistent meaning." *Nat. Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501 (1998). Viewed as a whole, the statute's primary restriction is contained in § 456.057(7)(a), which prohibits a "records owner" – a defined term referring to a health care provider – from disclosing medical records to, or discussing the medical condition of a patient with, any person other than the patient or a legal representative without consent.

However, the statute also includes nine exceptions to this rule, which allow health care providers to disclose patient records or information to certain categories of third parties (hereinafter "Third Party Statutory Disclosures"). Some examples of the enumerated categories of third parties include attorneys and litigants in medical-related lawsuits, public health authorities such as poison control centers, scientific researchers in limited circumstances, and law enforcement authorities who have authority to issue subpoenas. *See* § 456.057(7)(a), (7)(d). In other words, the law gives certain enumerated categories of third parties the affirmative, statutory right to demand a patient's medical information from a health care provider, without the patient's consent.[5]

[5] The full list of Third Party Statutory Disclosures includes: (a) disclosure to anyone who has "procured or furnished such care with the patient's consent," § 456.057(7)(a)(1); (b) disclosure as part of a compulsory physical examination under the Florida Rules of Civil Procedure, § 456.057(7)(a)(2); (c) disclosure pursuant to a subpoena, § 456.057(7)(a)(3); (d) disclosure of anonymized medical information for research purposes, § 456.057(7)(a)(4); (e) disclosure to a poison control center in order to treat a poison episode or for certain other enumerated purposes, § 456.057(7)(a)(5); (f) disclosure in an ongoing or expected medical negligence action against the provider, § 456.057(7)(d)(1)); (g) disclosure as part of an interview provided for by statute with a prospective defendant in a medical negligence action, § 456.057(7)(d)(2); (h) disclosure as provided for by a patient in a statutory authorization for release of protected health information required as part of commencing an action for medical negligence, §

(footnote continued on next page)

In exchange for granting those enumerated third parties the affirmative right to utilize the statute to obtain medical information, the statute also imposes some confidentiality obligations on those third parties when they exercise that right. That is the function of § 456.057(11) – it provides that "[t]he third party to whom information is disclosed is prohibited from further disclosing any information in the medical record without the expressed written consent of the patient or the patient's legal representative." *Id.* Plaintiff, however, asserts that this clause, which is the entire basis of his statutory claim, is a standalone provision that literally prohibits *any* third party who ever receives medical information from a health care provider from disclosing it, even if the third party did not receive that information pursuant to any of the Third Party Statutory Disclosures contemplated by the rest of § 456.057. Compl. ¶¶ 28-29. That construction is completely divorced from the rest of the statutory framework, which sets out in great detail the circumstances in which third parties may invoke the statute to obtain medical information.

A court should also avoid interpreting the provision "in a manner which ascribes to the legislature an intent to create an absurd result." *Carnes v. State*, 725 So. 2d 417, 418 (Fla. 2d DCA 1999). Here, Plaintiff's construction of § 456.057(11) would produce absurd results, such as prohibiting a vast range of speech ranging from the innocuous to matters of overriding public interest. For example, if as Plaintiff alleges, § 456.057(11) applies to any "third party" anywhere in the world, then any person who happens to learn some medical information by chatting with a Florida physician at a cocktail party would become a lawbreaker if they repeated the conversation to anyone else. Likewise, if a journalist learned that Florida's governor was concealing from the public that he was gravely ill, unable to perform his duties and was putting the state's welfare at risk, the journalist would be strictly liable if he or she reported that information.[6]

456.057(7)(d)(3); and (i) disclosure as part of consultation with an attorney if the provider expects to be deposed, called as a witness, or to receive discovery requests in a lawsuit or administrative proceeding, § 456.057(7)(d)(4).

[6] Indeed, under Plaintiff's construction, the statute would apply even if the third party who learns and shares medical information has nothing to do with Florida, which would conflict with the rule that "[g]enerally, Florida statutes have no force beyond the limits of this state." *Arthur v. JP Morgan Chase Bank, NA*, 569 F. App'x 669, 681 (11th Cir. 2014) (citation omitted). By

(footnote continued on next page)

Finally, Plaintiff's construction of § 456.057(11) does not even make sense when it is applied to his own theory of this case. Even Plaintiff seems to recognize that it would go too far to suggest that the Florida Legislature, through a medical privacy statute, intended to impose a prior restraint on the ability of sports reporters to report the details of an NFL player's injuries whenever the reporter's source is allegedly someone connected to a hospital. Instead, Plaintiff maintains that Mr. Schefter's "disclosure of the Chart" itself is what violated the statute. Compl. ¶ 30. But the very statutory subsection he invokes recognizes no distinction between disclosing a physical record and the information it contains. To the contrary, it expressly applies broadly to the disclosure of "any *information in the medical record*."

Florida courts have likewise construed the statute in a manner that is consistent with the common-sense conclusion that it applies only to health providers and other enumerated parties whom the statute authorizes to access patient information. Courts have repeatedly recognized that the statute's "major purpose…is to restrict *a physician* from disclosing personal information." *Estate of Stephens ex rel. Clark v. Galen Health Care Inc.*, 911 So. 2d 277, 280 (Fla. 2d DCA 2005) (citation omitted) (emphasis added); *accord Limbaugh v. State*, 887 S. 2d 387, 393-94 (Fla. 4th DCA 2004) (the "primary thrust" of the legislation "is to require health care providers to recognize their patients' right of privacy in the records they create and maintain."); *Hargrave v. GE Aviation Systems*, 2009 WL 2340654, at *5 (M.D. Fla. July 29, 2009) ("A review of Fla. Stat. 456.057…demonstrates that it governs health care professions, regulated by the Florida Department of Health," and not others).

Moreover, the only "third parties" to whom Florida courts have ever suggested that § 456.057 might apply are those who have a right to Third Party Statutory Disclosures. For example, in *Mullis v. State*, 79 So. 3d 747 (Fla. 2d DCA 2011), the court granted a motion to suppress medical information that was obtained by law enforcement investigators without obtaining a subpoena, as they are authorized to do by the statute. In *Daw v. Cowan*, 2013 WL 5838683 (N.D. Fla. Oct. 30, 2013), the court observed that the statute might potentially apply to two investigators working under contract with the State's Department of Children and Family

---

contrast, sensibly construing § 456.057(11) to apply only to "third parties" who obtain medical information by invoking the Florida statute raises no such problem.

Services who likewise did not obtain a subpoena, but did not reach that question because they did not actually obtain any medical information. *Id.* at *9.

Consistent with statute's intended purpose, however, Florida courts have indicated that even enumerated third parties who obtain medical records from health care providers are not subject to § 456.057 if they do not invoke the statute to get the records, as long as they use other lawful means such a valid search warrant. *State v. Crumbley*, 143 So. 3d 1059, 1068 (2d DCA 2014) ("Once the original medical records are seized under a search warrant, they are no longer in the possession of a health care practitioner. § 456.057 would not seem to apply directly to records in the possession of law enforcement."). Most importantly, whatever application the statute may or may not have to state actors who may seek Third Party Statutory Disclosures, *Crumbley* noted that the statute "does not prevent *an ordinary citizen* from exercising his or her First Amendment right to call a doctor's office seeking information about a patient." *Id.* at 1067 (emphasis added). Yet under Plaintiff's interpretation, the law would prohibit such a citizen from talking about any information he or she might learn, rendering meaningless the "First Amendment right" recognized by *Crumbley*. In short, none of the case law construing Florida's medical privacy statute supports Plaintiff's extraordinarily expansive interpretation of its reach.

Finally, courts in other jurisdictions construing medical confidentiality statutes have uniformly rejected the proposition that they may be construed to impose restrictions on the speech of the public at large, including journalists. *See White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990) (D.C. medical confidentiality statute "does not restrict the press."); *Logan v. D.C.*, 447 F. Supp. 1328, 1333 (D.D.C. 1978) (holding that confidentiality provisions of the federal Drug Abuse Office and Treatment Act of 1972 "do not apply directly to the press…[but] are aimed at the disclosure of information from official records by employees and officials of the programs and agencies," and noting that plaintiff's arguments to the contrary "must be weighed against the First Amendment rights of the press."); *Cruz v. Latin News Impacto Newspaper*, 216 A.D.2d 50, 51 (N.Y. App. 1995) ("The [New York] statutes relating to confidentiality of AIDS and HIV diagnoses apply to health care providers and certain others, not the news media."); *Van Straten v. Milwaukee Journal Newspaper Pub.*, 447 N.W.2d 105, 112 (Wisc. App. 1989) (Wisconsin medical confidentiality statute "is directed toward health care providers and blood banks, and not toward newspapers."); *see also Morgan By and Through*

Chambon v. Celender, 780 F. Supp. 307, 310 (W.D. Pa. 1992) (Pennsylvania statute restricting disclosure of identity of sex abuse victims "does not relate to news gatherers.").

For all of these reasons, the Complaint should be dismissed as to ESPN with respect to its *respondeat superior* claim premised on Count I.

B. The Statute Does Not Create A Private Right Of Action

Plaintiff's statutory claim must also fail because § 456.057 creates no private right of action. Nothing in the statute authorizes a party harmed by the unauthorized disclosure of medical information to bring a civil lawsuit, and Plaintiff cites no statutory basis for his cause of action in his Complaint.

There is also no basis on which to recognize an implied private right of action. "[W]hether a statutory cause of action should be judicially implied is a question of legislative intent." *Horowitz v. Plantation Gen. Hosp. Ltd. P'ship*, 959 So .2d 176,182 (Fla. 2007). In ascertaining whether the Legislature intended to permit private enforcement of the legislation, courts should look "to the ordinary tools for discerning statutory meaning: text, context, and purpose." *Id.* (citation omitted). However, because "courts cannot provide a remedy where the Legislature has failed to do so," *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541, 552 (Fla. 2012), they should not infer a private right of action "without strong indication" that the Legislature intended to create one. *Fla. Physicians Union v. United Healthcare of Fla.*, 837 So. 2d 1133, 1157 (Fla. 5th DCA 2003). Federal courts "should be particularly reluctant to read private rights of action in state laws where state courts and state legislatures have not done so." *Zarella v. Pac. Life Ins. Co.*, 755 F. Supp. 2d 1218, 1228 (S.D. Fla. 2010).

It is clear that the Legislature did not intend to permit private enforcement of § 456.057. The Legislature intended that the statute would be enforced by the State, which is consistent with its primary focus on the professional regulation of health care providers. In fact, the Legislature specifically provided that Chapter 456 "applies only to the regulation by the [Florida Department of Health] of professions." Fla. Stat. § 456.002. The chapter appears in Title XXXII of the Florida Statutes, entitled "Regulation of Professions and Occupations." *Cf. Braham v. Branch Banking and Trust Co.*, 170 So. 3d 844, 847 (Fla. 5th DCA 2015) ("The entire chapter merely establishes 'codes' for financial institutions and empowers the Office of Financial Regulation to

enforce the codes. Because it merely makes provision to secure the safety or welfare of the public, it will not be construed as establishing civil liability.")

The Legislature's focus on public enforcement and professional regulation is confirmed by its decision to include in the statute an explicit scheme for public enforcement. The scheme provides for enforcement of § 456.057 only through state action: professional discipline against licensees, and litigation brought by the Attorney General against others. § 456.057(15)-(16). The Legislature's decision to adopt an explicit enforcement scheme is strong evidence that it did not intend to permit enforcement by other means. *See Horowitz*, 959 So. 2d at 185 (where statute explicitly imposed one set of obligations on hospital, "the failure to impose additional duties on hospitals in [the statute], such as notifying the department when one of its staff-privileged physicians is out of compliance with the statutory financial responsibility requirements, further indicates that the Legislature did not intend to impose civil liability on hospitals."); *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.")

For this reason, courts have declined to infer a private right of action to enforce § 456.057's federal equivalent, the Health Insurance Portability and Accountability Act of 1996, 110 Stat. 1936 (HIPAA). *See Acara v. Banks*, 470 F.3d 569, 571 (5th Cir. 2006) ("Because HIPAA specifically delegates enforcement [to the Secretary of Health and Human Services], there is a strong indication that Congress intended to preclude private enforcement."); *Dodd v. Jones*, 623 F.3d 563 (8th Cir. 2010) (citing *Acara* for proposition that HIPAA does not create private right of action); *Crawford v. City of Tampa*, 397 F. App'x 621, 623 (11th Cir. 2010) (same).[7]

C. Fla. Stat. 456.057 Could Not Constitutionally Be Applied to ESPN Because Mr. Schefter's Speech Was True and Related to a Matter of Public Significance

Plaintiff's broad interpretation of § 456.057 would violate the First Amendment by prohibiting the publication of truthful information relating to a matter of public concern. At the outset that is yet one more reason to reject his construction of the law, because "[w]henever

[7] Moreover, because the statute does not and could not apply to ESPN in the first place, any attempt to amend the Complaint to allege a statutory violation as a basis for some other tort theory would be futile.

possible…a statute should be construed so as not to conflict with the constitution," *Fla. Dep't of Children and Families v. F.L.*, 880 So. 2d 602, 607 (Fla. 2004); *see also id.* ("To uphold a statute in the face of a constitutional challenge, a court may place a saving construction on the statute when this does not effectively rewrite the statute.") (citation omitted).

On numerous occasions the United States Supreme Court and lower courts have addressed cases in which a civil plaintiff, or the State in a criminal matter, sought to hold a journalist liable for allegedly violating a state law that restricted the dissemination of some form of confidential information. Even where there was no question that a state law *expressly* barred the general public from publishing such information – which is certainly not the case here – the Supreme Court has consistently held that such laws violate the First Amendment because "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star v. BJF* , 491 U.S. 524, 533 (1989) (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979)). Moreover, the Court has consistently done so in cases that involved far more obviously private information than the injuries suffered by a national sports celebrity – such as the identities of rape victims and juvenile offenders. That principle would squarely bar any effort to apply § 456.057 to ESPN and its reporter Mr. Schefter.

Indeed, *Florida Star* is squarely on point. In that case, a newspaper published the identity of a sexual assault victim after receiving a police report from a county clerk. The victim sued the newspaper for negligence *per se* based on the violation of a Florida statute that, unlike the medical privacy law, expressly prohibited the publication by anyone of information identifying sexual assault victims. There was no dispute that the statute barred the clerk who provided the police report from doing so.

The Supreme Court held that the statute could not constitutionally be applied to the publication of the victim's name by the newspaper, because it was accurate information about a matter of public concern. *Id*. at 533. The Court noted that the police report at issue had been "lawfully obtained", since nothing in the statute barred a reporter from merely requesting, or receiving the information from the court clerk. The same is true here, even under Plaintiff's expansive construction of the medical privacy law. *Crumbley*, 143 So. 3d at 1067 (the statute

"does not prevent an ordinary citizen from exercising his or her First Amendment right to call a doctor's office seeking information about a patient.").

Moreover, the Court made clear that in assessing whether "a matter of public significance" is involved, the relevant question is whether the subject-matter "of the article generally" implicates a matter of public concern, not whether a specific fact such as the rape victim's "specific identity" would, in isolation, be significant. *Florida Star*, 491 U.S. at 536-37. That disposes of Plaintiff's effort to distinguish, under any legal theory, between "the Chart" and the information contained within the Chart. Rather, because Plaintiff concedes (and indeed, could not credibly dispute) that the subject-matter of Mr. Schefter's tweet is a matter of public concern, that ends the inquiry. [8] In fact, the notion that the law would protect Jason Pierre Paul's fractional medical record merely because it is a physical piece of paper, but would not protect the identity of a rape victim, is not one that even merits serious discussion.

In fact, *Florida Star* makes clear that Plaintiff's effort to distinguish the Chart from the words it contains would violate the First Amendment in yet one more respect, because it would render the medical privacy statute facially under-inclusive. Under Plaintiff's construction of the Florida law, any third party remains free to disclose a patient's medical information as long as (1) they do not disclose the physical record, *or* (2) they obtain a medical record from someone other than a medical provider. But as *Florida Star* noted, if the Legislature really believed that patient confidentiality was so important that it justified imposing restrictions on speech by the general public, the Legislature could be expected to prohibit *all* forms of such dissemination, regardless of the source or form of a patient's information. *Id.* at 541-542 (Scalia, J., concurring) ("[A] law cannot be regarded as protecting an interest 'of the highest order,' and thus justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital

[8] It is clear that football, including a serious injury suffered by a professional football player, is of legitimate public concern. *See, e.g., Dryer v. Nat. Football League*, --- F.3d ----, 2016 WL 761178, at *3 (8th Cir. Feb. 26, 2016) (NFL-produced films about football games "represent speech of independent value and public interest"); *Marshall v. ESPN*, 111 F. Supp. 3d 815, 831 (M.D. Tenn. 2015) (describing sporting events as "important matters of public interest."); *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1336 n. 11 (N.D. Ind. 1997) ("Certainly, Notre Dame football, and college football in general, is a matter of public interest."); *Bell v. Associated Press*, 584 F. Supp. 128, 131 (D.D.C. 1984) ("There is today considerable public interest, concern, and controversy with respect to off-the-field misconduct of professional athletes.").

interest unprohibited.").[9] Because Plaintiff's construction of the statute leaves so many avenues to disclose patient information open, this under-inclusiveness would "raise[] serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests" it purports to protect, and about whether the prohibition "satisfactorily accomplishes its stated purpose." *Id.* at 540. Notably, although *Florida Star* only held the Florida statute at issue in that case unconstitutional as applied to the newspaper defendant, subsequently the Florida Supreme Court held the same statute to be facially unconstitutional in all respects because "a state may not automatically impose liability for the publication of lawfully obtained truthful information about a matter of public concern." *State v. Globe Comms. Corp.*, 648 So. 2d 110, 112 (Fla. 1994).

Numerous other cases, both before and after *Florida Star*, have applied the same principles to hold that the press may not be held liable for allegedly violating a state-law confidentiality provision by publishing accurate information about a matter of public significance. In *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979), the Supreme Court held that a state could not constitutionally bar a reporter from publishing the name of a juvenile defendant – even though the identify of juvenile offenders is surely far more worthy of protection than the details of Mr. Pierre-Paul's career-threatening injuries. In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the Court held that a state could not apply its statute protecting the confidentiality of proceedings concerning complaints about judges to bar a newspaper from reporting the identity of a judge whose involvement in such a proceeding had been leaked to a reporter. Likewise, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court held that the First Amendment prohibited applying the civil damages provisions of state and federal wiretapping laws to a radio host who published a recording that had been illegally made by a third party, even though the host had reason to know recording was illegal. Moreover, in more recent years, the Court has gone even further and struck down statutes that, in its view, inhibit speech too broadly even when the speech is admittedly *false*. *See, e.g., U.S. v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (invalidating a federal statute prohibiting citizens from falsely claiming to have earned military honors, because "[t]he sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment.").

[9] That statute applied only to publication in "instruments of mass communication." *See Florida. Star*, 491 U.S. at 540.

Numerous lower courts, both in Florida and elsewhere, have reached similar results in analogous cases. *See, e.g., Globe Comms. Corp.*, 648 So. 2d at 112; *S.E.C. v. Lauer*, 2004 WL 2931398, at *1 n. 2 (S.D. Fla. Nov. 18, 2004) ("In the absence of extraordinary circumstances, the Court cannot prohibit those who lawfully receive information about matters of public concern from disseminating it further."); *Palm Beach Newspapers, LLC v. State*, 183So. 3d 480,484(Fla. 4th DCA2016) (trial court erred in prohibiting a newspaper from publishing the transcript of inmate's telephone conversations based on finding that newspaper "got the information through the Government's violation of [the inmate's] right to privacy" because "if a publisher lawfully obtains truthful information about a matter of public concern, its right to publish the information is protected by the First Amendment, even if the source of the information obtained it unlawfully.") (citing *Bartnicki*, 532 U.S. at 527-35).[10]

In summary, it is not necessary for this Court to reach any First Amendment issue to dispose of the statutory claim, but even if it was necessary Plaintiff's claims against ESPN premised on Count I must be dismissed because Plaintiff's attempt to apply Florida's medical privacy laws to these Defendants would plainly be unconstitutional.

II. PLAINTIFF'S PUBLICATION OF PRIVATE FACTS CLAIM MUST BE DISMISSED BECAUSE MR. SCHEFTER'S TWEET RELATES TO A MATTER OF PUBLIC CONCERN

There is no single cause of action for "invasion of privacy" under Florida law. Florida actually "recognizes three distinct torts for invasion of privacy: (1) appropriation of a person's name or [likeness], (2) intrusion upon seclusion, and (3) public disclosure of private facts." *Comprehensive Care Corp. v. Katzman*, 2010 WL 1433414, at *5 (M.D. Fla. Apr. 9, 2010) (citation omitted). Although Plaintiff does not specify which tort he relies on, he pleads the elements of the public disclosure of private facts tort, so his claim must be addressed as such.

[10] *See also Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007) (the First Amendment protected the Internet posting of an video that was illegally recorded); *Zarrilli v. Evening News Ass'n*, 628 F.2d 217, 222-24 (D.C. Cir. 1980) (no *Bivens* claim lay against a newspaper reporter who published confidential transcripts of illegal wiretaps); *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 64 (Cal. Ct. App. 1986) (holding that the First Amendment precludes tort claims against the press for publishing confidential information about attorney grievance proceedings).

See Compl. 32-38; *Cape Publications v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (listing elements).

A claim for public disclosure of private facts cannot succeed if the facts allegedly disclosed are of public concern. While the *Florida Star* line of cases mandates that principle as a matter of First Amendment law, here too it is unnecessary to reach any constitutional issue because Florida law imposes the same requirement as an element of the tort. *Hitchner*, 549 So. 2d at 1377 (one element of tort is that the facts disclosed "are not of public concern.") The Florida Supreme Court has emphasized that this requirement is "a formidable obstacle," which "has been recognized by commentators as being so broad as to nearly swallow the tort." *Id.* In assessing whether a matter is of public concern, courts should recognize that "the judgment of what is newsworthy is primary a function of the publisher, not the courts." *Heath v. Playboy Enterprises*, 732 F. Supp. 1145, 1149 n. 9 (S.D. Fla. 1990).

In fact, the Florida Supreme Court's decision in *Hitchner* is squarely on point. In that case, the plaintiffs were parents who had been acquitted on charges of criminal child abuse. After the trial, a reporter obtained and published details from the records of the underlying child abuse investigation. The confidentiality of child welfare records is protected by law (at the time by Fla. Stat. § 827.07), and on that basis the child's parents sued the newspaper for the publication of private facts. *Hitchner*, 549 So. 2d at 1377. The Florida Supreme Court held that the claim must be dismissed, because regardless of the statute the information in the records was pertinent to the criminal case and so were "clearly a matter of legitimate public concern." *Id.* The Court also noted that the *Florida Star* decision, which had just been issued by the U.S. Supreme Court, required the same result. *Id.* at 1378-79.

As noted above, Plaintiff admits that his injuries, including the specifics of the medical treatment he received for them, are a matter of public concern. *See also Thomas v. Catlin*, 141 F. App'x 673, 673 (9th Cir. 2005) (holding that athlete's use of steroids was a matter of public concern, and upholding judgment for defendants on public disclosure of private facts and invasion of privacy claims); *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1099 (D. Haw. 2007) (granting summary judgment on private facts claim because article about professional surfer "addresses a legitimate and newsworthy topic of public interest."); *Holt v. Cox Enterprises*, 590 F. Supp. 408, 414 (N.D. Ga. 1984) (no claim for publication of private facts because article about football player was newsworthy). So here too, Plaintiff's claim rests

entirely on the proposition that while the information contained in his medical records are a matter of public concern, showing an actual picture of the same information embodied in a document is not. This distinction is groundless on its face, because Plaintiff does not even allege that the photos contain any private information about him that is materially different from the news about the amputation. They amount to no more than photographs of words on a piece of paper and a computer screen stating that Plaintiff's finger had been amputated. Nothing in decisions such as *Hitchner*, for example, suggest that it would have mattered if the reporter in that case had, in addition to quoting from or summarizing child welfare records, also included a photo of the same words to substantiate the story.

In any event, as *Hitchner* recognized, the private facts torts applies the same principle as the First Amendment privilege recognized in *Florida Star*. Thus, if "the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy." *Restatement of Torts (Second) §* 652D, cmt. c. As a result, courts applying the private facts tort have consistently recognized that a journalist is entitled to include visual evidence corroborating a report on a matter of public concern for exactly the reasons the Complaint alleges Mr. Schefter did so here: to "heighten[] the report's impact and credibility by demonstrating that the allegations rested on a firm evidentiary foundation and that [he] had access to reliable information." *Anderson v. Suitors*, 499 F.3d 1228, 1236 (10th Cir. 2007) (videotape of Plaintiff's alleged rape was "substantially relevant to a matter of legitimate public interest."). This is true even if the court might think that the visual evidence was unnecessary to the report, or in bad taste. *See Heath v. Playboy Enterprises*, 732 F. Supp. at 1149 n. 9 ("[T]he judgment of what is newsworthy is primary a function of the publisher, not the courts.").

In *Cape Pubs. v. Bridges*, for instance, the Fifth District Court of Appeal held that the plaintiff had no claim for invasion of privacy over a newspaper's publication of a photograph of her being carried to safety wearing only a dishtowel after being held hostage, because the photograph was of public concern. 423 So. 2d 426 (Fla. 5th DCA 1982). According to the court, "[a]although publication of the photograph…could be considered by some to be in bad taste, the law in Florida seems settled that where one becomes an actor in an occurrence of public interest, it is not an invasion of her right of privacy to publish her photograph with an account of such occurrence." *Id.* at 427. It emphasized that "[c]ourts should be reluctant to interfere with a newspaper's privilege to publish news in the public interest." *Id.* at 428. *See also Cinel v.*

Connick, 15 F.3d 1338, 1346 (5th Cir. 1994) (rejecting plaintiff's attempt to distinguish between public interest in story of clergyman's sexual activities with young men and videotapes of those activities, because the videotapes "were substantially related to Appellant's story," and "we are not prepared to make editorial decisions for the media regarding information of public concern."); *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 229 (1998) ("That the broadcast *could* have been edited to exclude some of [plaintiff's]s words and images and still excite a minimum degree of viewer interest is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press.") (emphasis in original); *Logan v. D.C.*, 447 F. Supp. 1328, 1333 (D.D.C. 1978) (holding that "the First Amendment rights of the press" barred a claim for the publication of private facts based on an alleged violation of the medical confidentiality provisions of federal drug treatment laws).

Notably, none of the above cases involved public figures like Plaintiff, and the type of physical evidence they held was protected – including videotapes or photos of sexual assaults, partially nude plaintiffs, and the administration of actual medical treatment – presented far greater privacy concerns that the fractional page of a highly technical document of words only that Mr. Schefter tweeted. Count II therefore fails to state a claim against Mr. Schefter, and a result the complaint against ESPN on the grounds of *respondeat superior* must be dismissed.

III. ESPN IS ENTITLED TO ATTORNEY'S FEES AND COSTS PURSUANT TO FLORIDA'S ANTI-SLAPP LAW

Fla. Stat. § 768.295 prohibits strategic lawsuits against public participation ("SLAPP" suits). The law prohibits anyone from bringing a lawsuit (a) that is "without merit," and (b) because the Defendant "has exercised the constitutional right of free speech in connection with a public issue," which the statute defines as any written or oral statement "made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work." Fla. Stat. § 768.295(2)(a), (3). The statute provides that a defendant faced with a SLAPP suit may move for dismissal or summary judgment, and that "[t]he court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section." Fla. Stat. § 768.295(4).

Here, ESPN is entitled to recover reasonable attorney's fees and costs. This case meets both requirements of Florida's anti-SLAPP law. First, as detailed above, Plaintiff's lawsuit is "without merit." Fla. Stat. § 768.295(3). Second, this lawsuit arises out of ESPN's exercise of its "constitutional right of free speech in connection with a public issue," Fla. Stat. § 768.295(3), because the tweet at issue constitutes a "written or oral statement that is protected under applicable law" and was "made in or in connection with" an "audiovisual work . . . . news report, or similar work." Fla. Stat. § 768.295(2)(a). Under the anti-SLAPP law, an award of reasonable attorney's fees and costs is mandatory in these circumstances. Fla. Stat. § 768.295(4). Therefore, in the event that the Court grants this motion to dismiss, ESPN will file a timely motion for its attorneys' fees and costs pursuant to Fed. R. Civ. Pr. 54(d).

CONCLUSION

For the foregoing reasons, Defendant ESPN respectfully requests that its motion to dismiss be granted.

Dated: April 7, 2016

Respectfully submitted,

THOMAS & LoCICERO PL
Attorneys for Defendant ESPN, Inc.
401 SE 12th Street, Suite 300
Fort Lauderdale, FL 33316
Phone: (954) 703-3416
Fax: (954) 400-5415

By: */s/ Deanna K. Shullman*
Deanna K. Shullman
Florida Bar No. 514462
Allison S. Lovelady
Florida Bar No. 70662

and

Nathan Siegel
(pro hac vice forthcoming)
Adam Lazier
(*pro hac vice forthcoming)*
Levine Sullivan Koch & Schulz LLP
1899 L Street, NW
Suite 200
Washington, DC 20036

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss and Incorporated Memorandum of Law was served by CM/ECF on **April 7, 2016** on all counsel in the below service list.

/s/ Deanna K. Shullman
Deanna K. Shullman

SERVICE LIST

John C. Lukacs, Sr., Esq.
jlukacs@hinshawlaw.com
Hinshaw & Culbertson LLP
2525 Ponce de Leon Blvd
4th Floor
Coral Gables, Florida 33134
Telephone: 305-358-7747
Facsimile: 305-577-1063

Mitchell Schuster, Esq.
ms@msf-law.com
Kevin Fritz, Esq.
kaf@msf-law.com
Meister Seelig & Fein LLP
125 Park Avenue, 7th Floor
New York, NY 10017
Telephone: 212-655-3570
Facsimile: 212-655-3535