UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

Jennifer Goodall Plaintiff,	)	
vs.	)	CASE NO. _____
Comprehensive Women's Health Center, Bayfront Medical Health Group; Bayfront Health Port Charlotte; Stephen B. Russell as the State Attorney for Florida's Twentieth Judicial Circuit; John Doe I in his or her official capacity as Special Assistant State's Attorney; John Doe(s) II, physicians providing obstetric car at Bayfront Health Port Charlotte. Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR TEMPORARY RESTRAINING ORDER AND COMPLAINT FOR PRELIMINARY INJUNCTION, DECLARATORY JUDGMENT, AND DAMAGES

STATEMENT OF FACTS

Plaintiff Jennifer Goodall is currently nearly 40 weeks pregnant with her fourth child (Goodall Decl. ¶ 1). Her estimated due date is tomorrow: July 18, 2014 (Goodall Decl. ¶ 1). Ms. Goodall gave birth via cesarean surgery in 2003, 2006, and 2010, and has been planning for her entire pregnancy to undertake a trial of labor after cesarean section (TOLAC) (Goodall Decl. ¶¶ 1-5). She wishes to avoid cesarean surgery to the extent possible to reduce the risks to her health during this labor and delivery as well as reduce the risks to her future fertility and to minimize her healing time so that she may care for her newborn and three small children (Goodall Decl. ¶ 2). Ms. Goodall will consent to medical interventions, including cesarean surgery, if they become medically necessary during her labor (Goodall Decl. ¶ 4).

From early June, 2014, Ms. Goodall had been receiving prenatal care at Comprehensive Women's Health Care. (Goodall Decl. ¶ 2). Ms. Goodall had communicated clearly with her treating obstetrician, Dr. Aimee Young, and later with Dr. Nay Hoche, another physician in that practice, that her wishes were to attempt a trial of labor. (Goodall Decl. p. 1-5). As of the morning of July 10th, 2014, Ms. Goodall believed that these doctors and their practice understood her decision and, while disagreeing with it, had assented to her plans for medical interventions during labor. (Goodall Decl. ¶ 7). That day, when Ms. Goodall was 38 weeks and 6 days into her pregnancy, a woman from Comprehensive Women's Healthcare unexpectedly came to Ms. Goodall's home. She hand-delivered a letter addressed to Ms. Goodall from Cheryl Tibbett, Chief Financial Officer of Bayfront Health Port Charlotte (hereinafter "the Letter," attached as Exhibit 1)

(Goodall Decl. ¶ 9). The Letter stated that the hospital's ethics committee had reviewed Ms. Goodall's case, and that Bayfront Health Port Charlotte (BHPC) intends to (1) "contact the Department of Children and Family Services about [Ms. Goodall's] refusal to undergo a Cesarean section," (2) "begin a process for an Expedited Judicial Intervention Concerning Medical Treatment Procedures . . . relating to the delivery of [her] child," and (3) perform a Cesarean section "with or without [Ms. Goodall's] consent" in the event that she presents to the hospital in labor. Without making a referral to any doctor or practice that would take her as a patient at this late point in her pregnancy, the letter also "encourage[d] Ms. Goodall to find another physician (Goodall Decl. ¶ 10; Exhibit 1).

Ms. Goodall has made numerous attempts to find an obstetrical practice that will accept her as a patient, but has been unable to do so because of her advanced stage of pregnancy (Goodall Decl. ¶ 12). Jennifer Goodall intends to deliver vaginally, unless a medical need for cesarean surgery arises, at BHPC.

Ms. Goodall understands the statements contained in the letter and described above to mean that BHPC has already or will institute a wrongful child welfare intervention through the Department of Children and Family Services, that BHPC has or will institute a wrongful Expedited Judicial Intervention Concerning Medical Treatment Procedures to force her to undergo cesarean surgery, and that, if she presents to BHPC in labor, the hospital will deprive her of her liberty and require her to submit to unwanted and possibly unnecessary medical intrusions by force and over her objection (Goodall Decl. ¶¶ 11-12).

ARGUMENT

Ms. Goodall has grounds for the immediate grant of a temporary restraining order. In order to obtain a temporary restraining order, a party must demonstrate "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that the entry of the relief would serve the public interest." *Schiavo ex. rel Schindler v. Schiavo*, 403 F.3d 1223, 1225-26 (11th Cir. 2005) (per curiam). Ms. Goodall meets these criteria.

I. MS. GOODALL IS LIKELY TO PREVAIL ON THE MERITS OF HER CLAIMS

A. Deprivation of the Right to Due Process

"Governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause" must provide proper procedural safeguards against erroneous deprivations. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). To determine the sufficiency of procedural safeguards, courts employ a three-factor balancing test, considering:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Emergency judicial proceedings to compel Ms. Goodall to undergo unwanted medical procedures during childbirth, which is just days away, do not provide sufficient safeguards to protect against erroneous deprivations of liberty.

Judicial proceedings to force caesarean surgery infringe upon private interests that are of the greatest importance. These interests include fundamental rights, including the right to be free from bodily restraint and surgical invasion, the right to privacy in one's body and confidential medical information, and the right to determine one's own medical treatment. The strong private interests at stake in this case weigh heavily in favor of substantial procedural protections under *Matthews v. Eldridge*. *See Turner v. Rogers,* 131 S. Ct. 2507, 2518 (2011) ("The interest in securing . . . freedom 'from bodily restraint,' lies 'at the core of the liberty protected by the Due Process Clause.'") (internal citation omitted); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *United States v. Salerno*, 481 U.S. 739, 750 (1987); *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001) (recognizing the rights of privacy and bodily integrity); *see also Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 (1990) (recognizing the right to choose one's own medical treatment and to bodily integrity); *Moore v. East Cleveland*, 431 U.S. 494, 503-504 (U.S. 1977) (recognizing the individual's interest in familial sanctity).

An emergency judicial proceeding for forcible caesarean surgery entails an unacceptable risk of wrongful deprivation. The process by which such proceeding would be carried out is non-existent or vague. The Letter threatens Ms. Goodall with Expedited Judicial Intervention Concerning Medical Treatment (Goodall Decl. ¶ 9, Ex. 1). However, the procedures for Expedited Judicial Intervention Concerning Medical Treatment, described by Fla. Prob. R. 5.900, require that any petition for expedited judicial intervention contain "facts to support the allegation that the patient lacks the capacity to make the requisite medical treatment decision." Fla. Prob. R. 5.900(a)(5); *In re Amendments to Fla. Probate Rules*, 607 So. 2d 1306, 1307 (Fla. 1992) ("Rule 5.900 is

amended to clarify that a petition for expedited judicial intervention concerning medical treatment should include an allegation that the patient lacks the capacity to make the requisite medical treatment decision, and to require that the patient receive notice of the petition and hearing.").

There is, however, no indication that Ms. Goodall lacks capacity to make medical decisions on her own behalf. She is a conscious, adult woman, and no court or body has found her to be incompetent to make her own decisions. Her desire to attempt a trial of labor has been made clear and is understood by Bayfront Health Medical Group, even if her intent to consent to surgery should it become medically necessary has been misconstrued by the Letter as a "refusal to undergo Cesarean surgery." Absent a colorable allegation of lack of capacity to make medical decisions, an Expedited Judicial Intervention Concerning Medical Treatment Procedures petition will fail.

The State does not have an interest sufficient to save any proposed judicial action under *Matthews v. Eldridge*. While the State has a compelling interest in healthy pregnancies and the protection of potential life, the State has no interest whatsoever in failing to provide procedural protections at the cost of physically restraining and operating upon pregnant women against their will. The Letter's threats do not provide Ms. Goodall any of the necessary elements of procedural due process; no meaningful notice (the Letter contains no explanation of the proceeding, its date, or when and where it will occur, and the timing so close to the end of pregnancy is itself a procedural deficiency); and no opportunity to be heard (the Letter contains no suggestion that Ms. Goodall can protest or appeal the decision that she will be forced to have a c-section upon arrival in the hospital). Nor does the State have an interest in empowering a wide range of state authorities to

micromanage pregnant women's lives and deprive them of their right to make medical and life decisions.

For these reasons, the threatened judicial action, in whatever form it might take, would constitute a violation of the right to procedural due process because the state provides no procedural safeguards in the face of drastic deprivations of liberty.

B. Deprivation of the Right to Privacy

Article I, Section 23 of the Florida Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . ." Fla. Const. art. 1, § 23. This includes the "fundamental right to the sole control of his or her person," including the "integral . . . right to make choices pertaining to one's health, including the right to refuse unwanted medical treatment." *In re Guardianship of Browning*, 568 So.2d 4, 10 (Fla. 1990). This "inherent right to make choices about medical treatment . . . encompasses all medical choices." *Id.* Nothing in the Florida Constitution or in the *Browning* decision or its progeny indicates that women who become pregnant are excluded from these guarantees. In other words, a woman does not lose her constitutional right to make choices about her health and medical treatment solely because she becomes pregnant or continues that pregnancy to the point of labor and delivery.

The State of Florida accords the right of privacy a substantial degree of deference, requiring the state to bear the burden of proving not only that it has a compelling interest in intruding upon that right, but also that it "accomplishes its goal through the use of the least intrusive means." *Beagle v.*

Beagle, 678 So. 2d 1271, 1276 (Fla. 1996). This applies in cases relating to medical refusal as well. *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993) ("The state has a duty to assure that a person's wishes regarding medical treatment are respected.… The means to carry out any such compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual.").

The First District Court of Appeals recently addressed these issues in *Burton v. State,* 49 So. 3d 263 (Fla. Dist. Ct. App. 2010), recognizing that a pregnant woman has a "fundamental constitutional right to refuse medical intervention." The *Burton* court stated unequivocally that the "test to overcome a woman's right to refuse medical intervention in her pregnancy is whether the state's compelling state interest is sufficient to override the pregnant woman's constitutional right to the control of her person, including her right to refuse medical treatment." *Id.* at 266.

In dicta, the *Burton* court suggested that state action to deprive women of their constitutional rights might withstand scrutiny if the fetus at issue were "viable." *Id.* at 265. The court noted that the state's interest in the potentiality of the life of a fetus attaches at the point of fetal viability. *Id.* (citing *Roe v. Wade*, 410 U. S. 113, 163 (1973) and *In re T. W.*, 551 So. 2d 1186, 1193 (Fla. 1989)). The Florida Legislature has defined fetal viability as "that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb." Fla. Stat. § 390.0111(4). Notably, all of these references involve regulation of the abortion procedure. They do not speak to, much less address, the situation in this case, where a State is attempting to further a putative interest in the potential reduction of an estimated risk to a fetus by any means necessary, including the total deprivation of

women's rights to liberty, privacy, bodily autonomy, equal protection, medical decision making, due process, and even life. *See In re A.C.*, 573 A.2d 1235, 1243-44 (D.C. 1990) (posthumously vacating an order for a cesarean section that killed both the pregnant woman and her severely premature newborn).

Plaintiff acknowledges that the U.S. Supreme Court in *Roe v. Wade* recognized a state interest in potential life sufficient to allow states to regulate one procedure, abortion, after viability, and to ban such procedures unless necessary for the woman's life and health. The court in *Roe*, however, specifically ruled that fetuses, both before and after viability, are not persons legally separated from the pregnant women who carry, nurture, and sustain them. The pregnant woman, rather, is a full constitutional person throughout her pregnancy and during labor and delivery.

Indeed, the language of *Roe* is instructive: "If the State is interested in protecting fetal life after viability, *it may go so far* as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Roe v. Wade*, 410 U.S. at 163-164 (emphasis added). That is, the state may go so far as to regulate *abortion procedures*, not the lives, health, dignity and humanity of pregnant women in general, or those seeking to go to term in particular.

Justice Orfinger recognized this difference in his concurrence in *In re Guardianship of J.D.S.:*

> While the debate is typically framed in the context of the State's right to interfere with a woman's decision regarding an abortion, taking control of a woman's body and supervising her conduct or lifestyle during pregnancy or forcing her to undergo medical treatment in order to protect the health of the fetus creates its own universe of troubling questions. Should the State have the authority to prohibit a pregnant woman from smoking cigarettes or drinking alcohol, both legal activities with recognized health risks to the unborn? Could the Legislature do so constitutionally given our supreme court's broad interpretation of Florida's constitutional right of privacy and the limitations placed on the State's ability to act by *Roe?*

In re Guardianship of J.D.S., 864 So. 2d 534, 540-41 (Fla. Dist. Ct. App. 2004) (Orfinger, J. concurring).

Ms. Goodall does not argue that the state of Florida has no interest whatsoever in the health of fetuses and the reduction of infant mortality. However, such an interest, with all of its extraordinary implications for pregnant women's personhood and civil rights (as well as the actual health interests of fetuses and children) must, at a minimum, be narrowly tailored to actually further the state's interest. This is not accomplished by depriving pregnant women of their rights and creating situations like the one here, which places the pregnant woman under extraordinary stress (itself a factor recognized as contributing to low birth weight and other unhealthy pregnancy outcomes). Indeed, public health, as well as numerous state court decisions and international human rights principles all agree that such a state interest is served by refusing to legally separating the fetus from the pregnant woman and ensuring the health of both by respecting her and ensuring access to prenatal care, birthing options, and evidence-based maternity care. *See* Carol Sakala & Maureen P. Corry, *Evidence-Based Maternity Care: What It Is and What It Can Achieve* (2008) [hereinafter "Milbank Report"]. This interest is actively undermined (discussed more fully below) by permitting Defendants to invoke adversarial proceedings and legally segregate Plaintiff from the fetus which she carries, nurtures, and sustains, and to which she wishes to give birth in a manner that considers not only the baby's health, but her health and ability to care for her baby (and her other three children) once the baby is born.

The set of circumstances presented by this case have not yet been considered under the Florida Constitution, which provides greater protection for private medical and reproductive

decisions than the U.S. Constitution. *See, e.g., Beagle v. Beagle*, 678 So.2d 1271, 1276 (Fla. 1996); *B.B. v. State*, 659 So.2d 256, 259 (Fla. 1995); *In re T.W.*, 551 So.2d 1186, 1192, 1195 (Fla. 1989) ("[T]he Florida constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated."). Such cases have come before sister jurisdictions, however, and in every instance where courts have had the benefit of a full presentation of evidence, the courts have refused to compel treatment. They have done so based on the premise that courts may not "compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health." For example, the court in *In re A.C.*, 573 A.2d 1235, 1243-44 (D.C. 1990) admonished that a pregnant woman's wishes "must be followed in virtually all cases, unless there are truly extraordinary or compelling reasons to override them." The decision made clear that the fact that the fetus is viable and that the surgery is common do not qualify as "extraordinary or compelling reasons." That court relied in part on *McFall v. Shimp*, 10 Pa.D. & C.3d 90 (Allegheny County Ct. 1978) a case in which a court refused to order a man to donate bone marrow necessary to save the life of his cousin. *See also In re Fetus Brown*, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997) (holding that the "State may not override a pregnant woman's competent treatment decision, including refusal of recommended invasive medical procedures, to potentially save the life of the viable fetus"); *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994) ("[A] woman's competent choice to refuse medical treatment as invasive as a cesarean section during pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus."). Moreover, the single case—now widely repudiated—in which an appellate court has upheld an order for a cesarean section, *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (1981)

(denying motion for stay of order on appeal), did so on the basis of emergency proceedings, without participation of expert amici curiae, and with a factual outcome that seemingly proved the folly of trying to assure fetal health through deprivation of a pregnant woman's right to privacy, liberty and due process. In this case, the condition that led physicians to give a prognosis of certain death spontaneously resolved, and the woman gave birth to a healthy baby without incident in spite of doctors' claimed certainty that she and her baby would die.

A similar situation arose in another Florida hospital in 1996, which was the subject of a 42 U.S.C. §1983 civil suit, *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp 2d 1247 (N.D. Fla. 1999). A review of the records in that case indicates that a court order was granted on the basis of testimony by several doctors, none of whom had conducted a physical examination of Ms. Pemberton, and in the total absence of any signs of fetal distress. Ms. Pemberton was not assigned counsel, did not have the opportunity to call experts or present evidence-based research on her behalf, and was forced to argue her case in a bedside hearing while in active labor as she was being prepared for surgery. There was no participation by amicus, and no argument advanced to challenge the claim that the state's interest in fetal life could provide the basis for depriving a woman of her Constitutional personhood. Moreover, the Court did not consider the Florida Constitution's special protections of medical decision making and failed to appreciate the difference between prohibition of post-viability abortion and total control of pregnant women articulated by Justice Orfinger in *In re J.D.S., supra*.

Ms. Pemberton, whose informed decision making was dismissed by the court and characterized as "bravado," went on to call into doubt the necessity of the cesarean surgery in her

case. After that birth, she left the jurisdiction and gave birth to more children, including a set of twins, in midwife-assisted home births. *See* Laura Pemberton, Public Statement at the National Advocates for Pregnant Women Summit to Ensure the Health and Humanity of Pregnant and Birthing Women (Jan 21, 2007), *available at* http://vimeo.com/4895023.

In sum, those appellate decisions addressing the merits of court orders and that were reached on the basis of full briefing "reject any notion that pregnancy somehow deprives a woman of legal protection from compelled physical sacrifice." *See* S.F. Adams et al., *Refusal of Treatment During Pregnancy*, 30 *Clinics in Perinatology* 127, 128 (2003).

In addition to her right to medical decision making, Ms. Goodall's right to privacy also encompasses her right to family relationships and parental decision making undisturbed by the state. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Moriarty v. Bradt*, 177 N.J. 84, 101 (2003) ("The right to rear one's children . . . has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment."). Moreover, Supreme Court jurisprudence recognizes "the sanctity of the family" as a unit. *Moore v. East Cleveland*, 431 U.S. 494, 503-504 (U.S. 1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); *see also*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting an "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment'). Collectively, this

jurisprudence stands for the proposition that, as in the case of other fundamental rights, state action must withstand strict scrutiny when it threatens to come between parents and their children.

The constitutionally protected right to family privacy may be intruded upon by child welfare investigations and court proceedings only under the limited circumstances permitted by Florida law. *See* Fla. Stat. § 39.001 *et seq*. However, that agency has no jurisdiction over the medical decisions that competent adults make on their own behalf, and there is no indication that the Legislature has granted the DCFS jurisdiction over fetuses in addition to children. *See* Fla. Stat. § 39.01. To the contrary, Florida courts have ruled that fetuses may not be encompassed within the term "child." *See, e.g., State v. Carter*, No. 89-6274 (Fla. Cir. Ct. Escambia County July 23, 1990) (dismissing criminal child abuse charges brought against a woman who continued to term in spite of a drug problem on the grounds that such application of the law violated legislative intent), *aff'd*, 602 So. 2d 995 (Fla. App. 1992). Fla. Stat. § 39.201, which lays out the requirements for mandatory reports of child abuse, neglect, or abandonment makes no mention whatsoever of reporting pregnant women who disagree with their doctors' proposed course of care for pregnancy, labor, and delivery. The threat of a report is not only wrongful because it was made in bad faith with the intent to either coerce Ms. Goodall into acquiescence or as a form of patient abandonment; it may even trigger an abrogation of reporter immunity, leaving the Defendants susceptible to criminal and civil liability, and a fine of up to $10,000. *See* Fla. Stat. § 39.205(9) ("A person who knowingly and willfully makes a false report of child abuse, abandonment, or neglect, or who advises another to make a false report, is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083."); Fla. Stat. § 39.206.

Here, in contravention of these principles of the sanctity of the body and family, BHPC seeks to use judicial process to force a woman into compliance with medical advice, wholly ignoring well-established Florida law protecting women's rights to privacy and self-determination. If Defendants are allowed to invoke a judicial process against Jennifer Goodall, as they claim they will, they will cause irreparable injustice and injury to her and her family. Their actions will also suggest to other doctors and health care officials that women who become pregnant and carry those pregnancies to term lose their common law, statutory, and constitutional rights, including the right to medical decision-making that encompasses the right to refuse invasive surgery. Ms. Goodall has already been subjected to extraordinary and entirely unnecessary stress and anxiety that her labor and delivery will precipitate emergency court proceedings in which she will be deprived of even the protections "to which she would be entitled as a matter of course in any controversy over even a modest amount of money." *In re A.C.*, 573 A.2d at 1248. Accordingly, the court should grant Ms. Goodall's request for a temporary restraining order.

C. Deprivation of the Right to Equal Protection of the Law

Ms. Goodall's constitutional right to equal protection of the law is violated by invocation of judicial proceedings that single her out, as a pregnant woman, for special regulation and penalty, and which would not be used against her as a competent adult but for the fact of her pregnancy. This uses the capacity for pregnancy to subject Ms. Goodall to a second-class status on the basis of her gender, and permits a host of intrusions, including potentially life-threatening bodily invasions, that would not be tolerated for any other class of person. Such discrimination is only permissible upon a showing of "exceedingly persuasive justification." *United States v. Virginia,* 518 U.S. 515, 531

(1996). The threatened action, which is the epitome of an invasion by the state, cannot be supported by exceedingly persuasive justification when there is no specific clinical indication that cesarean surgery in advance of labor is necessary, and is not in any event sufficiently narrowly tailored to meet constitutional muster. This is especially true given that Ms. Goodall has agreed to consent to surgery should it become medically necessary during labor.

D. Deprivation of the Right to Privacy Under the Florida Constitution

Florida jurisprudence has made clear that the right to privacy, including the right to refuse unwanted medical services, is fundamental. The state may only interfere in circumstances in which the state's compelling interest is sufficient to override an individual's fundamental right to privacy.

The court in *Burton v. State*, 49 So. 3d 263, 265 (Fla. Dist. Ct. App. 2010) articulated Florida's protection of the right to privacy and to refuse unwanted medical treatments with respect to a pregnant woman who refused medical interventions that were forced upon her:

> The law in Florida is clear: Every person has the right "to be let alone and free from government intrusion into the person's private life." Art. I, sec. 23, Fla. Const. This fundamental right to privacy encompasses a person's "right to the sole control of his or her person" and the "right to determine what shall be done with his own body." *In re Guardianship of Browning,* 568 So.2d 4, 10 (Fla.1990). The Florida Supreme Court has specifically recognized that "a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health." *Browning,* 568 So.2d at 11.

As more fully described above, *see* Sec. I(B) *supra*, the threatened judicial actions entail a gross deprivation of Ms. Goodall's fundamental right to medical privacy protected under Article I, section 23 of the Florida Constitution. The threatened action is not sufficiently narrowly tailored to meet the strict scrutiny demanded by Florida case law, requiring her to undergo invasive, potentially

life-threatening surgery prior to a trial of labor. For this reason, Ms. Goodall has a high probability of success on the merits.

E. Deprivation of the Right to Due Process Under the Florida Constitution

Article I, section 9 of the Florida Constitution provides, "No person shall be deprived of life, liberty or property without due process of law…" Fla. Const. art. 1, § 9. This protection tracks that provided by the Fourteenth Amendment to the United States Constitution. *See N.C. v. Anderson*, 882 So. 2d 990, 993 (Fla. 2004). "Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991). Accordingly, proceedings that implicate "an individual's liberty interest in being free from physical restraint" must comply with the due process clauses of the Florida and United States Constitutions. *Kephart v. Hadi*, 932 So. 2d 1086, 1090 (Fla. 2006) (holding that due process requires a probable cause petition filed under state involuntary civil commitment statute be supported by sworn proof).

As more fully described above, *see* Sec. I(A) *supra*, the threatened judicial actions entail a deprivation of liberty of the most fundamental and egregious character, with little or no procedural protection provided by the states. For this reason, Ms. Goodall has a high probability of success on the merits.

F. Assault

The tort of assault is an intentional, unlawful threat of physical injury to another that creates a reasonable fear of imminent peril (i.e., physical harm) in the person to whom it is directed. *See, e.g.*, *Sullivan v. Atl. Fed. Sav. & Loan Ass'n.*, 454 So. 2d 52, 54 (Fla. Dist. Ct. App. 1984). The

threat must be communicated by an act, coupled with an apparent ability to carry out the threat. *See, e.g.*, *Geovera Specialty Ins. Co. v. Hutchins*, 831 F. Supp. 2d 1306, 1312 (M.D. Fla. 2011) aff'd, 504 F. App'x 851 (11th Cir. 2013).

Here, Defendants explicitly and intentionally threatened Ms. Goodall with an unlawful threat to do violence to her person, including all the bodily invasions of a forced surgery (cutting her with a knife, injecting her with anesthetic, inserting a catheter, and inserting an intravenous line), as well as the possible risks to her health and life of that surgery. That Defendants allegedly view these actions as medically necessary is immaterial because the element of intent requires only an intent to do the act which communicates the threat of imminent physical harm. *Id*. The intent need not be a hostile one, or a desire to do harm. *Spivey v. Battaglia*, 258 So. 2d 815, 816-17 (Fla. 1972). Here, Defendants took the action, cloaked in state authority, of sending a letter to Ms. Goodall, threatening to perform caesarean surgery on her against her will should she present herself to the hospital. The mantle of state authority, as well as Defendants' position as Ms. Goodall's health care provider and as the hospital where she has planned to give birth, ensured that Defendants had the apparent ability to carry out these threats. Because her baby was due in just eight days, and she could go into labor at any time, Ms. Goodall's fear of imminent violence was reasonable.

According to the Restatement (Second) of Torts, upon which Florida courts have relied in evaluating assault claims (*see, e.g.*, *Abella v. Simon*, 831 F. Supp. 2d 1316, 1342 (S.D. Fla. 2011)), "imminent" does not mean immediate, in the sense of instantaneous contact; it means rather that there will be *no significant delay*. Restatement (Second) of Torts § 29 (1965), Comment on Subsection (1). Moreover, what is imminent depends upon the circumstances of the particular case.

Restatement (Second) of Torts § 29 (1965), Comment on Subsection (2). For a woman who may enter labor at any moment, any delay that might occur until she must go to the hospital - where she has planned, for months, to give birth - cannot be regarded as a significant one. Nor can she be regarded, so late in her pregnancy, as having any alternative to presenting herself at the hospital once she goes into labor, other than foregoing medical care, as she is unable, at this time, to obtain an alternative provider. She must either present herself at the hospital once she goes into labor or risk her own health and that of her fetus. Certainly, her fear, resulting from Defendants' letter, that physical harm is imminent is a reasonable one. Moreover, reasonableness is a question for the jury. *See*, *e.g.*, *Lay v. Kremer*, 411 So. 2d 1347, 1349 (Fla. Dist. Ct. App. 1982).[1]

II. MS. GOODALL FACES THE POSSIBILITY OF AN IMMEDIATE AND IRREPARABLE INJURY BECAUSE BECAUSE CESAREAN SURGERY IS AN INVASIVE AND LIFE-THREATENING INTERVENTION

The Supreme Court of the United States made clear its opinion on the threat of injury: "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008). Additionally, the Eleventh Circuit has concluded that the alleged future injury must be "actual and imminent." *Siegel v. LePore,* 234 F.3d 1163, 1176 (11th Cir., 2000).

Because Ms. Goodall is at full term in her pregnancy, she may deliver at any moment. She faces a possibility of unwanted surgery through forcible, unconsented means that is so imminent that

[1] Ms. Goodall has also pleaded claims for negligent and intentional infliction of emotional distress. As those harms have already occurred and cannot be remedied by injunctive relief, they are not argued here. However, Ms. Goodall preserves those claims for later adjudication.

notice and hearing on the application for preliminary injunction is impractical, if not impossible. Cheryl Tibbett, in her capacity as an officer of Bayfront Health Port Charlotte, has articulated the hospital's intention to disregard Ms. Goodall's medical decisions and refusal to have a caesarean surgery absent a complication during labor. Ms. Goodall may reasonably assume that there is an inevitable action that will be taken against her body if the injunction is not granted. The U.S. Constitution and the Florida Constitution both recognize a fundamental right to privacy that will be violated in the absence of an temporary restraining order to preserve the status quo. The harm to Ms. Goodall is therefore "likely," as demanded by the Supreme Court. *Winter*, 555 U.S. 7, 22 (2008). Further, the injury is "actual," as the BHPC has articulated exactly what they will do to Ms. Goodall: force a cesarean section on her and call the Department of Child and Family Services. The injury is "imminent" because BHPC has either already falsely reported Ms. Goodall to the Department of Child and Family Services or plans to do so at any moment, and has made clear its threat to perform an unwanted surgery on her when she goes into labor.

The threat that Ms. Goodall faces is the clearest possible example of irreparable damage: a major surgical intervention with serious risks. For pregnant women those risks include infection, hemorrhage, thromboembolism, bladder and uterine lacerations, and even death. WILLIAMS OBSTETRICS 592 (22nd ed. 2005). Evidence suggests that cesarean delivery is more dangerous than vaginal delivery. *See id*. (noting that with cesarean surgeries "[m]aternal morbidity is increased dramatically" and "rehospitalization in the 60 days following cesarean delivery was nearly twice as common as after vaginal delivery").

In fact, a comprehensive, nationwide analysis of modern maternity care released by the

Milbank Memorial Fund and others found that "cesarean section has potential for great harm when overused." Milbank Report, *supra*, at 44. That report noted that "maternal death, emergency hysterectomy, blood clots and stroke . . . poor birth experience, less early contact with babies, intense and prolonged postpartum pain, poor overall mental health and self-esteem, poor overall functioning" were more likely to occur with cesarean surgeries than vaginal birth. *Id*. Cesarean surgery also poses risks for a woman's future reproductive life, increasing the risk of involuntary fertility and future deliveries marked by low birth weights, preterm births, and stillbirths. *Id.* at 46. Cesarean surgery presents significant risks to fetuses as well: babies born after cesarean surgery are more likely than vaginally born babies to experience respiratory problems, surgical injuries, and problems with breastfeeding. *Id.* at 44.

In light of the serious risks associated with cesarean surgery to both the mother and fetus, Plaintiff's decision to withhold her consent to surgery until it becomes necessary is eminently prudent, and should not constitute grounds for the Defendants to seek a court order for what may ultimately amount to a death sentence for Jennifer Goodall.

And, to the extent that Defendant the State's Attorney presumes that Defendant BHPC and its physicians would not recommend cesarean surgery unless its benefits outweighed its risks, ample evidence-based research undermines that assumption as well. Plaintiff Jennifer Goodall acknowledges gratefully that cesarean surgery can be a beneficial and life-saving procedure in certain circumstances; nevertheless evidence-based research makes clear that cesarean surgery is often performed in many non-emergent situations and is often unnecessary. *See* Milbank Report, *supra*, at 41-48. In fact, cesarean surgery rates in the United States have reached levels far beyond

those recommended by national and international health organizations. *See* World Health Organization, United Nations Children's Fund, United Nations Population Fund, *Guidelines for Monitoring the Availability and Use of Obstetric Services* 25 (1997); *see also* Milbank Report, *supra*, at 42 ("Recent analyses substantiate the World Health Organization's recommendation that optimal national cesarean rates are in the range of 5 percent to 10 percent of all births and that rates above 15 percent are likely to do more harm than good.") (internal citations omitted). The number of cesarean surgeries in the United States increased by 50 percent between 1996 and 2006 and a "new record level has been reached every year in the present century"—with the trend only continuing. Milbank Report, *supra*, at 41.

Those rates suggest that cesarean surgeries are likely being performed in circumstances under which they may not be medically necessary or even advisable. *See, e.g.*, MICHELLE OBERMAN, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 Nw. U.L. Rev. 451, 452-53 (2000); Milbank Report, *supra*, at 41 ("The absolute indications for cesarean section apply to a small proportion of births, yet rates of cesarean section are steadily increasing in the United States."); Howard Minkoff, MD & Frank A. Chervenak, M.D., *Elective Primary Cesarean Delivery*, 348 NEW ENG. J. MED. 946 (2003) (describing risks and benefits of "elective" cesarean delivery). Indeed, some experts have suggested that increased rates of cesarean surgery are the result of a belief among hospitals and medical professionals that the procedure is "efficient and lucrative." Milbank Report, *supra*, at 44 (internal citations omitted). Others note that cesarean surgeries are "widely viewed as reducing risk for malpractice claims and suits" even if such practices are not in the interests of pregnant women and

their children. *Id.* (citing C.J. Lockwood, *Why the CD Rate Is on the Rise (Part 1)*, 49 CONTEMPORARY OB/GYN 8 (2004)

While there is much debate within the medical and public health community about the reason for the high rate of cesarean surgery in the United States, there is no disagreement that cesarean surgery is a major surgical intervention with significant consequences for pregnant women and their fetuses. Given that such surgery is an invasive procedure with a host of potential risks and negative consequences, Defendants err in any attempt they may make to force Jennifer Goodall to undergo such surgery.

Allowing Defendants to follow their claimed course of action does nothing but punish Jennifer Goodall for wishing to avoid unnecessary surgery. Accordingly, this court should grant an injunction prohibiting Defendants from continuing to follow through on their threats.

III. THERE IS NO RISK OF POTENTIAL HARM TO OPPOSING PARTY OR OTHERS IF THIS ORDER IS ISSUED

When considering the grant of a temporary restraining order, similarly to considering grant of a preliminary injunction, the court must balance the potential for harm of *not* granting the injunction against the harm of granting it. *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991). The Eleventh Circuit has also articulated the need to balance among the harms that could be done to the movant and the nonmovant. *See U.S. v. Lambert*, 695 F.2d 536, 539 (11th Cir., 1983) (articulating that a preliminary injunction turns in part on a balance of harms).

Neither Bayfront Health Port Charlotte nor Bayfront Health Medical Group faces any potential harm if this order is issued. Ms. Goodall has expressed, and continues to express, her

willingness to consent to surgery if she is advised that any condition indicating need for surgery arises during labor, as well as to memorialize in writing her understanding of the potential risks and benefits of TOLAC and repeat cesarean surgery. (Goodall Decl. ¶ 4). Her clear informed consent to a TOLAC, memorialized in writing, will serve to protect any interest the hospital has with respect to limiting exposure to medicolegal liability.

IV. THE PUBLIC INTEREST FAVORS THE RELIEF MS. GOODALL REQUESTS

The public interest in this case strongly favors the preservation of Ms. Goodall's constitutional and statutory rights to medical decision making, informed consent, bodily integrity, family privacy, equal protection of the law, and due process of the law. For this court to permit BHPC, Bayfront Health Medical Group, Stephen B. Russell as the State Attorney for Florida's Twentieth Judicial Circuit, John Doe in his or her capacity as Special Assistant State's Attorney, John Doe I in his or her official capacity as Special Assistant State's Attorney, John Doe(s) II, physicians providing obstetric care at Bayfront Health Port Charlotte, their agents, servants, employees or attorneys to force a woman to undergo surgery by threat of force or force of law would create a second-class status for pregnant women that would strip them of the fundamental elements of personhood under the United States and Florida Constitutions. Moreover, it is in the interests of the public to ensure that pregnant women's rights as patients to informed consent are vindicated; here, by virtue of its actions so late in her pregnancy, without immediate action the hospital and other providers will be encouraged to take this patently unethical and illegal action against their patients when they disagree with the patients' decisions regarding their recommended course of treatment.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that this court:

1. Enter a temporary restraining order as requested in the Motion for Temporary Restraining Order, filed herewith;
2. Enter a preliminary injunction enjoining the Defendants and their agents and employees, pending the outcome of the above-entitled action, from Expedited Judicial Intervention Concerning Medical Treatment Procedures or any other judicial proceeding requesting authorization to perform cesarean surgery without her consent, and from reporting Ms. Goodall to child welfare services because of her medical decisions regarding her labor and delivery, and from forcing Ms. Goodall to undergo cesarean surgery without her consent; and
3. On final hearing herein, said injunction be made permanent;

Plaintiff further request that this Court enter a judgment declaring that:

4. Plaintiff does not lose her rights under the Florida and United States Constitutions, including the right to privacy, medical autonomy, bodily integrity, informed consent, the right to counsel, and any other rights, as a result of becoming pregnant or at any point during her pregnancy; and

Plaintiff respectfully requests such other and further relief just and proper, including damages in an amount to be proved at trial.

Respectfully submitted this 17th day of July, 2014.

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