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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NUMBER: SC15-2217
LOWER CASE NUMBER: 1D14-4988

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, and WEST JACKSONVILLE MEDICAL CENTER, INC., a foreign corporation,

Petitioners,

v.

BAKER COUNTY MEDICAL SERVICES, INC.
d/b/a ED FRASER MEMORIAL HOSPITAL,

Respondent.

RESPONSE TO PETITIONERS' BRIEFS ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW FROM A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Baker County Medical Services, Inc. d/b/a Ed Fraser ("Fraser" or "Respondent") hereby adopts the facts stated in the First District Court of Appeal's decision below ("Opinion"). Nowhere in the 10-page jurisdictional briefs filed by the Agency for Health Care Administration ("AHCA") or West Jacksonville Medical Center, Inc. ("West Jacksonville") (collectively, "Petitioners") do the Petitioners inform the court of the crucial and pivotal fact that AHCA had issued a 4-year Certificate of Need ("CON") that directly violated Section 408.040(2)(a), Florida Statutes, requiring that CONs terminate *18 months from date of issuance*, and in doing so, AHCA *exceeded its colorable statutory authority.* This was the key holding of the Court below. As stated in the Opinion below: "[w]e have searched for the existence of colorable statutory authority for AHCA's action in the case, but found none." (Opinion, at 13-14). Petitioners offer no facts to support a conflict, express or otherwise, to the key holding in this case.

SUMMARY OF ARGUMENT

An express and direct conflict is required by Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure in order for this Court to exercise its discretionary jurisdiction. In this case, the First District Court of Appeal's decision does not expressly and directly conflict with a decision of this Court or a decision

of another District Court of Appeal on the same question of law. Therefore, this Court should decline to exercise its discretionary jurisdiction.

Applying established Florida law, the First District Court of Appeal held that AHCA had "no colorable statutory authority" for issuing a 4-year Certificate of Need and, thus, "Fraser Hospital's claim [fell] into the limited category of cases allowing for direct resort to a circuit court without exhaustion of remedies." (Opinion at 13-14). The Petitioners have failed to identify any express and direct conflict with the District Court's Opinion and, accordingly, this Court should deny Petitioners' request to exercise discretionary jurisdiction.

ARGUMENT

I. PETITIONERS FAIL TO IDENTIFY AN EXPRESS AND DIRECT CONFLICT

Petitioners contend that this Court has conflict jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv), which parallels Article V, Section 3(b)(3) of the Florida Constitution:

> The supreme court … [m]ay review any decision of a district court of appeal … that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

There is no conflict jurisdiction in this case. In order to establish conflict jurisdiction, the purported conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). The record cannot be used to establish

jurisdiction. Id. In Persaud v. State, 838 So. 2d 529, 532 (Fla. 2003), this Court reiterated the standard for determining whether there is decisional conflict:

> As we explained in *Florida Star*, this Court's discretionary review jurisdiction can be invoked only from a district court decision "that expressly addresses a question of law within the four corners of the opinion itself" by "contain[ing] a statement or citation effectively establishing a point of law upon which the decision rests." *Florida Star*, 530 So. 2d at 288.

The Court cannot conclude it has discretionary jurisdiction to hear a case based on an inherent or an implied conflict. See Dept. of Health and Rehab. Svcs. V. Nat'l Adoption Counseling Serv., Inc. 498 So. 2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). One test for determining if the cases are in express and direct conflict is if the instant decision is irreconcilable with the prior decision. See Aravena v. Miami-Dade Cty., 928 So. 2d 1163, 1166-67 (Fla. 2006).

Petitioners contend that the decision in the instant case expressly and directly conflicts with the decisions of de Marigny v. de Marigny, 43 So. 2d 442 (Fla. 1949), Teston v. City of Tampa, 143 So. 2d 473, 476 (Fla. 1962); City of N. Miami Beach v. Bernay, 117 So. 2d 863 (Fla. 3d DCA 1960), and several other cases that stand for the general proposition that where the law provides for appellate review and the party adversely affected does not avail itself of such relief, a suit for declaratory relief may not be sought to reverse the prior adjudicated decision. See e.g., Teston, 143 So. 2d 473 (cited by Petitioners as

expressly conflicting, but actually holding that declaratory relief was proper where there was no established appellate procedure to follow). None of these alleged "conflict cases" cited by Petitioners held that declaratory relief was inappropriate *where an agency exceeded its colorable statutory authority* and, thus, no express and direct conflict exists. See e.g., Teston, 143 So. 2d 473, 475 (1962) ("Inasmuch as the particular point of law now before us was neither discussed nor determined in the four decisions cited, we would not be justified in finding the presence of a judicial conflict between those decisions and the one now under review. Since the decisions are clearly distinguishable on this ground, and were not determinative of the same point of law, no conflict exists").

The District Court's Opinion does not expressly and directly conflict with any of the cases cited by Petitioners, and is not irreconcilable with those decisions. Significantly, none of the alleged conflict decisions cited by Petitioners involved factual circumstances where a District Court held that the state agency *exceeded its colorable statutory authority*. That was the key holding and pivotal fact in the District Court's Opinion. Absent the illegal action by AHCA, the Petitioners' CON expired after 18 months as a matter of law and the Petitioners are now required to obtain a new CON to build a hospital.

The decisions in de Marigny, Teston and Bernay and the other cases cited by Petitioners did not address a state agency's actions taken in the absence of all

colorable authority, while the District Court's Opinion below was predicated upon the state agency's lack of any colorable authority to act. As the Court put it succinctly: "[w]e have searched for the existence of colorable statutory authority for AHCA's action in the case, but found none." (Opinion, at 13-14). Thus, the controlling facts in the "conflict cases" do not include the key controlling fact in the instant case. See 12A Fla. Jur. 2d Courts and Judges §135 ("Where the cases claimed to be in conflict are distinguishable on their facts, or on the rule of law as applied to the facts, review on the ground of conflict will not lie.").

The facts in de Marigny did not even concern a state agency's actions at all. Rather, the case concerned a divorce decree where an appellant (second wife) alleged that her husband's ten year old divorce decree from his first wife was invalid because husband and first wife perpetrated fraud upon the court. There was simply no issue whatsoever in that case involving allegations that a state agency exceeded its colorable statutory authority. Thus, there is no express or direct conflict with the decision in the instant case.

Teston, far from being in express and direct conflict, actually further supports that declaratory relief is appropriate in the instant case. The Teston Court held that declaratory relief was appropriate because the party seeking relief had no established appellate review available to it. Teston v. City of Tampa, 143 So. 2d at 476 ("Being without other available remedy, the petitioners here sought through

the equity court a determination of their rights…"; "So far as the record reveals, there was no established appellate procedure which they could have followed in order to obtain such a determination."). Moreover, Teston, is factually distinguishable as it concerned an administrative order from a municipal agency. Most importantly, there was no issue of a state agency action exceeding its statutory authority. Petitioners seek to imply a conflict from a few sentences in the case concerning "quasi-judicial" orders. However, implied conflicts do not satisfy the requirement for express and direct conflict jurisdiction.[1] See Dept. of Health and Rehab. Svcs., 498 So. 2d at 889.

[1] Petitioners argue throughout their brief that the District Court Opinion conflicts with other decisions because it allows for declaratory relief regarding a "quasi-judicial" order. To be clear, as held by the First District in its Opinion, AHCA did not issue a lawful CON as a result of a quasi-judicial proceeding, it unlawfully exceeded its colorable statutory authority by issuing the 4-year CON contrary to Florida Statutes; thus, in accordance with the District Court's Opinion, and the Falls Chase line of cases, declaratory relief is appropriate. Moreover, for an administrative order to be considered "quasi-judicial" it must have the following characteristics – there must have been "due notice of a hearing to be held on the question to be considered" (i.e., notice that a 4-year CON exceeding statutory jurisdiction would be entered); there must have been a hearing on the decision to be made (i.e., a hearing on the decision to enter a 4-year CON in violation of Florida Statutes); and an established procedure for which to review. See Teston; see also Bloomfield v. Mayo, 119 So. 2d 417, 421 (Fla. 1st DCA 1960) ("It thus appears that before an administrative order may be considered quasi-judicial in character and therefore subject to review by certiorari, the statute authorizing the entry of such an order must also require that the administrative agency give due notice of a hearing to be held *on the question to be considered*, and provide *a fair opportunity to be heard in a proceeding in which the party affected is accorded the basic requirements of due process of law*.") (Emphasis added). As alleged in the Amended Complaint, Fraser had no notice that AHCA intended to exceed its

Likewise, Bernay is distinguishable because it does not involve a state agency exceeding its delegated legislative authority. Instead, it involved City annexation proceedings brought previously in circuit court, and a party's effort to use a declaratory action to overturn two prior circuit court final judgments.

The Appellants improperly seek to imply a conflict in this case based on the following language from Bernay:

> "Declaratory decree proceedings cannot be used to obtain a review *by a party adversely affected* of a judgment or decision *where provision is made by law for a review by appeal* of such judgment or decision… This, we conclude, is an attempt to review the decrees by collateral proceedings *where admittedly no review by appeal was taken, although such procedures were available.* See Frix v. Beck, Fla.App.1958, 104 So.2d 81, and also 16 Am. Jur., Declaratory Judgments, § 23, pp. 295-96."

City of N. Miami Beach v. Bernay, 117 So. 2d 863, 865 (Fla. 3d DCA 1960).

The problem with this analysis is it improperly draws parallels from Bernay to this case. In the instant case, the District Court specifically held that Respondent Fraser was *not a party* to the administrative action at issue below, and was never provided any Notice of AHCA's intent to exceed its colorable authority

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statutory jurisdiction and issue a 4-year CON in violation of Florida Statutes, and had no opportunity to contest the 4-year CON. The District Court Opinion left open this factual issue for resolution by the trial court – i.e., whether AHCA ever provided Fraser with Notice that it would issue a 4-year CON, in violation of the clear statutory limit to an 18-month CON. This issue remains for determination by the trial court.

by issuing a four-year CON in violation of the 18-month validity period established by statute. AHCA's failure to provide any notification deprived Fraser of any opportunity to challenge the illegal act, other than resort to circuit court. Simply put, there was no provision by law for Fraser to review, by appeal, the unlawful Final Order. As such, Bernay is not in conflict with the District Court's decision.

As demonstrated above, neither de Marigny, Teston, or Bernay or any of the other cases cited by Petitioners offer an express or direct conflict with the instant case and, as such, there is no conflict jurisdiction. See 12A Fla. Jur. 2d Courts and Judges §135 ("Where the cases claimed to be in conflict are distinguishable on their facts, or on the rule of law as applied to the facts, review on the ground of conflict will not lie.").

II. THE DISTRICT COURT'S DECISION FOLLOWED WELL-SETTLED LAW

The District Court's Opinion followed established precedent when it held that declaratory relief was available because the agency acted without colorable statutory authority. It is well-settled that a declaratory judgment action is an appropriate remedy when an agency acts outside of its delegated statutory authority. See Dep't of Envtl. Reg. v. Falls Chase Special Taxing Dist., 424 So. 2d 787, 796 (Fla. 1st DCA 1982)(hereinafter "Falls Chase")(holding that "[w]hen an agency acts *without colorable statutory authority* that is clearly in excess of its

delegated powers, a party is not required to exhaust administrative remedies before seeking judicial relief.")(emphasis in original). See also Dep't of Health v. Curry, 722 So. 2d 874, 878 (Fla. 1st DCA 1999)("An 'exception to the exhaustion doctrine exists where the agency is alleged to have acted without colorable statutory authority and in excess of its delegated powers.'")(internal citation omitted); cf. Lewis Oil Co. v. Alachua Cnty., 496 So. 2d 184, 186-87 (Fla. 1st DCA 1986)(reversing dismissal of declaratory judgment action on grounds that ordinance cannot be enforced where it failed to satisfy statutory requirements); see also Odham v. Foremost Dairies, Inc., 128 So. 2d 586, 592-93 (Fla. 1961)(holding that "where such agencies have attempted to act beyond the powers delegated to them, the courts have unhesitatingly intervened."). The District Court's Opinion held that because the agency acted without colorable statutory authority, Fraser's claim "falls into the limited category of cases allowing for direct resort to circuit court without exhaustion of remedies."[2] Thus, it is clear that the District Court's Opinion allowing for declaratory relief where AHCA exceeded its statutory authority followed settled case law. See Falls Chase, 424 So. 2d at 795 (holding that where an agency is "acting without the benefit of statute or rule and contrary

[2] Petitioners' assertion that the District Court's Opinion would "open the door for any non-party to contest the validity of any agency final order through a declaratory action" is simply false. The Opinion, as in Falls Chase, only concerns the narrow category of cases where an agency exceeds its colorable statutory authority and no established procedures for appellate review exist.

to its enabling legislation, the agency's action is patently invalid and the basis for court intervention is clear.").

CONCLUSION

Petitioners have failed to identify any decision of this Court or decision of another District Court of Appeal on the same question of law that expressly and directly conflicts with the First District Court of Appeal's decision below. Accordingly, this Court should deny Petitioners' request to exercise discretionary jurisdiction.

Respectfully submitted this 14th day of January, 2016.

/S/ GEOFFREY D. SMITH

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been electronically filed with the Clerk, Florida Supreme Court, on this 14th day of January, 2016. I further certify that copies of the foregoing have been furnished by email to the following on this 14th day of January, 2016:

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CERTIFICATE OF COMPLIANCE

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

/S/ GEOFFREY D. SMITH

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