

In the Supreme Court of Florida

**DANIEL R. FERNANDEZ, and
DAX J. LONETTO, SR., PLLC,**

Petitioners,

Fla. S. Ct. Case No. SC2017-1165

Fla. 1st DCA Case No. 1D16-0050

**DEPARTMENT OF HEALTH,
BOARD OF MEDICINE, et al.,**

Respondents.

**DOAH Case Nos. 15-1774RP,
15-1775RP,
15-1778RP, and
15-1794RP**

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

PETITIONERS' INITIAL BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This case arises from an administrative proceeding in which the Petitioners, Daniel R. Fernandez and Dax J. Lonetto, Sr., PLLC, and others, challenged amendments proposed by the Respondent, Florida Board of Medicine (the "**Board of Medicine**"), to Florida Administrative Code Rule 64B8-10.003. The proposed amendments will drastically increase the maximum charge to patients for copies of their own medical records.

Rule 64B8-10.003 is a rule of the Board of Medicine which purports to set the maximum price that Florida physicians can charge for copies of a patient's medical records. As the rule currently stands, when a patient requests copies of his or her own medical records, the price cannot exceed \$1.00 per page for the first 25 pages, and 25¢ for each page thereafter. The Board of Medicine proposes to amend the rule to increase the maximum price to \$1.00 per page for all pages (A 2-3). In other words, after the first 25 pages, the amendment will *quadruple* the current maximum price of 25¢ per page to \$1.00 per page.

The Board of Medicine first published notice of its rulemaking proceedings in 2012, and conducted numerous public hearings in which it received written and oral comments from interested parties (A 3). The Board ultimately determined that the amendment would increase regulatory costs to such an extent that ratification

by the Florida Legislature was required in order for the amendment to take effect (A 3). *See*, § 120.541(2)-(3), Fla. Stat. (requiring legislative ratification).

The Petitioners filed petitions for administrative proceedings to challenge the proposed rule amendment (A 3). The administrative law judge ("ALJ") issued a final order (A 3), which concluded that the evidence "*fails to establish* that the proposed rule *is* an invalid exercise of delegated legislative authority, or is arbitrary or capricious as those terms are defined by section 120.52(8)" (A 11; *emph. added*). Notably, the ALJ did *not* conclude that the evidence established that the proposed rule is *not* invalid—which is the statutory standard imposed by Section 120.56(2)(a), Florida Statutes.

The Petitioners appealed the ALJ's final order to the Florida First District Court of Appeal ("**First District**") (A 2). Meanwhile, the Board of Medicine submitted the proposed amendment to the Florida Legislature with a request for ratification during the 2016 legislative session (A 3-4). However, the rule amendment was not ratified during the 2016 legislative session (A 4).

During the appeal, the Petitioners contended the amendment was "dead" or moot due to the lack of legislative ratification during the time period required by Section 120.541(3) (A 4-5). The Petitioners also contended the proposed amendment was an invalid exercise of the Board of Medicine's delegated

legislative authority, as defined by Section 120.52(8), Florida Statutes (A 7).

The First District's decision (A 1-8) concluded that the Legislature's failure to ratify the amendment during the 2016 session does not preclude ratification in any future legislative sessions (A 5). According to the First District, it would be improper to "read in the statute a deadline for ratification and a requirement for withdrawal if a rule was not ratified during the legislative session during which it was submitted," that there is "no deadline for the Legislature to act upon a rule submitted for ratification," and that "[a] subsequent Legislature could decide to ratify the rule" (A 6). In other words, the Court concluded that the rule amendment can be ratified by any Legislature at any time in the future "unless the rule is withdrawn" by the Board of Medicine (A 7).

As to the merits of the Petitioner's appeal, the First District held that "[t]he ALJ's conclusion that the evidence 'fails to establish that the proposed rule is an invalid exercise of delegated legislative authority, or is arbitrary or capricious as those terms are defined by section 120.52(8),' is clearly supported by the voluminous record of the multiple public hearings and Board meetings over the years of these rulemaking proceedings" (A 7).

The Petitioners subsequently timely filed a notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

The First District's decision expressly conflicts with decisions of this Court and the Florida Second District Court of Appeal ("**Second District**"). First, case law from this Court confirms that under the Florida Constitution, after expiration of the Legislature's regular session in which a bill was originally introduced, that bill cannot be lawfully passed by a subsequent Legislature. Second, case law from the Second District confirms that it was the Board of Medicine's burden to prove that its proposed rule amendment is *not* an invalid exercise of delegated legislative authority. Instead, the First District unlawfully shifted the burden to the Petitioners to prove that the proposed rule *is* an invalid exercise of delegated legislative authority. This case presents issues of great public importance with significant financial impacts to Florida patients, and therefore, this Court should exercise its jurisdiction to resolve the conflicting case law.

ARGUMENT

THE FIRST DISTRICT'S DECISION EXPRESSLY CONFLICTS WITH DECISIONS OF ANOTHER DISTRICT COURT AND THE SUPREME COURT ON THE SAME QUESTIONS OF LAW

(a) This Court has jurisdiction

To trigger "conflict" jurisdiction under Article V, §3(b)(3), Fla. Const., the decision below must: (1) announce a rule of law that conflicts with a rule

previously announced by another district court or this Court, or (2) apply a rule of law to produce a different result in a case involving similar facts to a case decided by another district court or this Court. *Mancini v. State*, 312 So.2d 732 (Fla.1975).

(b) The proposed rule cannot be ratified by a subsequent Legislature

The First District's conclusion that the proposed rule amendment can be ratified by any subsequent legislature conflicts with well-settled law. Section 120.541(3), Florida Statutes states:

If the adverse impact or regulatory costs of the rule exceed any of the criteria established in paragraph (2)(a), the rule shall be submitted to the President of the Senate and Speaker of the House of Representatives **no later than 30 days prior to the next regular legislative session**, and the rule may not take effect until it is ratified by the Legislature.

(Emphasis added). In addition, Section 120.54(3)(e)5, Florida Statutes states:

If a rule ... has not been adopted in compliance with all statutory rulemaking requirements, the agency proposing the rule shall withdraw the rule and give notice of its action in the next available issue of the Florida Administrative Register.

(Emph. added). In this case, it is undisputed that the proposed amendments to Rule 64B8-10.003 were not ratified by the Legislature at the "next" regular session in 2016 (A 4). To date, after multiple legislative sessions, the rule is still not ratified.

There is no statute or constitutional provision which authorizes an agency which is unable to obtain legislative ratification during the "next" regular session

expressly identified by Section 120.541(3) to continue resubmitting the same proposed rule over-and-over again in future legislative sessions. Absent timely legislative ratification in accordance with the express requirements of Section 120.541(3), the proposed rule cannot lawfully go into effect, and must be withdrawn under Section 120.54(3)(e)5. The First District's contrary conclusion conflicts with the Florida Constitution and controlling case law from this Court.

The phrase "next legislative session" as used in Section 120.541(3), can only be lawfully construed as the specific 60-day duration of that particular session described in Article III, §3(d) of the Florida Constitution. Neither the Legislature, nor the Board of Medicine, nor the First District has any power to expand that time period. Case law from this Court explains that specific duties imposed on the Legislature must be performed while that same legislative body is still in actual session and undissolved. *State ex rel. Cunningham v. Davis*, 166 So. 289, 296 (Fla. 1936). When the Florida Constitution fixes the time period of permissible legislative activity, lawmaking sessions can be held at no other times, or for no longer time periods than the Florida Constitution allows. *Id.* at 297. Upon the expiration of its regular session, the Florida Legislature becomes "*functus officio*" as to its lawmaking powers. *Id.* at 295. At that point, neither the prior Legislature or any subsequent Legislature have any power under the Florida

Constitution to originate, consider, agree to, or vote upon any bill which at that time that the prior Legislature's regular session expired, remained in the status of a mere unapproved legislative proposal. *Id.* at 295 and 298. *See also, State ex rel. Thompson v. Davis*, 169 So. 199, 206 (Fla. 1936) (a legislative bill cannot be lawfully passed by a subsequent Legislature, after expiration of prior Legislature's regular session in which that bill was originally introduced); *Amos v. Gunn*, 94 So. 615, 619 (Fla. 1922) (after Legislature adjourns its session *sine die*, it has no any authority to subsequently perform any act which the Constitution requires be done to pass a bill proposed but not approved within that session).¹

The First District attempted to justify its conclusion by noting that other agencies have successfully resubmitted proposed rules for ratification in future legislative sessions (A 5). Based on that logic, breaking the speed limit would also be deemed lawful. Simply stated, engaging in prohibited conduct without getting caught or without challenge, does not mean that conduct is lawful.

¹ The Respondents will probably cite to *Chiles v. Phelps*, 714 So.2d 453 (Fla. 1998), but that case involves a bill that was actually adopted by the Legislature during its regular session and then vetoed by the Governor after that regular session had expired, and the subsequent Legislature overrode the Governor's veto during the next regular session--as expressly authorized by Article III, Section 8 of the Florida Constitution. In contrast, the proposed bill in this case died without approval during the precise legislative session described by Section 120.541(3), and that statute makes no provision for the previously unapproved bill to be resubmitted to a subsequent Legislature as in Article III, Section 8.

(c) **The First District shifted the burden of proof**

The First District misapprehended the parties' respective burdens of proof.

A proposed rule is not presumed valid. Section 120.56(2)(a) clearly states:

(2) ... (a) ... The petitioner has the burden to prove by a preponderance of the evidence that the petitioner would be substantially affected by the proposed rule. **The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. ...**

(Emph. added). The First District has repeatedly recognized that the burden is on the **agency** to prove that its proposed rule is **not** an invalid exercise of delegated legislative authority. *See, e.g., Board of Clinical Laboratory Personnel v. Florida Ass'n of Blood Banks*, 721 So.2d 317, 318 (Fla. 1st DCA 1998); *Dep't of Bus. & Prof'l Regulation v. Calder Race Course, Inc.*, 724 So. 2d 100, 101 (Fla. 1st DCA 1998). In *Southwest Florida Water Mgmt. Dist. v. Charlotte County*, 774 So.2d 903, 908 (Fla. 2d DCA 2001), the Second District likewise held that the burden is on the **agency** to prove that a proposed rule is **not** invalid.

Contrary to the Second District's decision in *Southwest Florida*, and contrary to the plain language of Section 120.56(2)(a), and contrary to the First District's own prior case law, the First District's decision below has unlawfully shifted the Board of Medicine's burden of proving that the rule is **not** invalid, by

requiring the Petitioners to prove that the rule *is* invalid. This is an important distinction because an examination of the record in this case will easily demonstrate that the Board of Medicine did not meet its burden.

CONCLUSION

This case does not present a trivial matter. The Board of Medicine itself has concluded its proposed amendment will have such a huge economic impact in Florida that it requires legislative ratification. Contrary to the First District's conclusion, the time period to obtain such ratification is not infinite.

The federal Health Insurance Portability and Accountability Act ("**HIPAA**") expressly prohibits health care providers from charging patients more than the actual cost of making the copies of the patient's medical records. *See*, 45 CFR §164.524(c)(4). These HIPAA requirements preempt any contrary state law which is less protective than HIPAA. *See* 42 U.S.C. §1320d-2 note; 42 U.S.C. §1320d-7(a)(1); 45 CFR §160.203. In purporting to authorize Florida physicians to charge up to \$1 per page, the amendment does not refer to HIPAA or otherwise include an actual cost cap or limit. Thus, any Florida physician who relies on the prices purportedly authorized by the proposed amendment could unwittingly violate the controlling actual cost maximum price allowed by HIPAA.

Under the existing rule, the price for 1,000 pages of medical records is

\$268.75 [i.e., $(25 \times 1) + (975 \times .25)$], and under the proposed rule amendment, the price will be \$1,000. Both examples result in charges that grossly exceed the actual cost of making the copies (which is the maximum price allowed under HIPAA), but the \$1,000 charge under the proposed amendment is staggering. A primary reason that medical records are maintained is to promote the patient's health and legal interests. *See*, Fla. Admin. Code R. 64B8-9.003(1). Imposing a \$1 per page price tag on those records places an untenable financial burden on Floridians who quickly need their medical records for health care and legal reasons. *See, Allen v. HealthPort Technologies, LLC*, 22 Fla. L. Weekly 577b, ¶10 (Fla. 13th Jud. Cir. Ct. 2014), *affirmed*, 207 So.3d 229 (Fla. 2d DCA 2017).

The Board of Medicine should protect Floridians from price gouging, not assist copy companies to reap unlawful profits (in violation of HIPAA) from patients who have no choice but to pay the unlawful price at the risk of not receiving their medical records. *Id.* At the very least, to justify a rule amendment that will have such a drastic economic impact on Floridians, that agency must be required to comply with the burden of proof imposed by Section 120.56(2)(a). Instead, the ALJ and the First District unlawfully shifted the burden of proof to the Petitioners. Accordingly, this case presents important issues that this Court should resolve. Petitioners, therefore, request this Honorable Court to accept jurisdiction.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy hereof was served by electronic mail; on this 23rd day of JUNE, 20 17, on the following persons:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the text herein is printed in Times New Roman

14-point font, and that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

Respectfully submitted,



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15-1794RP**

APPENDIX

Opinion of the Florida First District Court of Appeal (Apr. 11, 2017)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DANIEL R. FERNANDEZ and
DAX J. LONETTO, SR., PLLC,

Appellants,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D16-0050

v.

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Appellee,

and

BACTES IMAGING
SOLUTIONS, INC., and
HEALTHPORT
TECHNOLOGIES, LLC,

Intervenors.

Opinion filed April 11, 2017.

An appeal from an order of the Division of Administrative Hearings.

David M. Caldevilla and Nicolas Q. Porter of de la Parte & Gilbert, P.A., Tampa;
and Scott R. Jeeves, St. Petersburg, for Appellants.

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Michael Fox Orr and Amanda E. Ferrelle, Jacksonville, for Intervenor Bactes
Imaging Solutions, Inc.

Dan R. Stengle, Tallahassee, for Intervenor HealthPort Technologies, LLC.

BILBREY, J.

Appellants, petitioners below, appeal the Administrative Law Judge's final order which held that the adopted but not yet ratified amendment to rule 64B8-10.003, Florida Administrative Code, was not an invalid exercise of the legislative authority delegated to the Department of Health, Board of Medicine. Appellants fail to establish that the adopted amendment, and therefore this appeal, are moot.¹ Appellants also fail to establish any ground under section 120.68(7), Florida Statutes, upon which the ALJ's final order must be set aside and remanded for further agency action. Because the ALJ correctly determined that the amendment was within the Board's rulemaking authority, we affirm the order.

The rule 64B8-10.003 which is currently in effect, titled "Costs of Reproducing Medical Records," provides that licensed physicians may charge patients and governmental entities "the reasonable costs of reproducing copies of written or typed documents or reports" not to exceed \$1.00 per page for the first 25 pages, and not to exceed 25 cents per page in excess of 25 pages. Other entities requesting copies of such documents may be charged up to \$1.00 per page

¹ Appellants raised the issue of mootness by a motion and in their briefs. However, Appellants never dismissed their appeal as allowed by rule 9.350(b), Florida Rules of Appellate Procedure.

regardless of the number of pages. The adopted but not yet ratified amendment to rule 64B8-10.003 eliminates the reduction in costs for pages in excess of 25 pages requested by patients and government entities, setting the price ceiling of \$1.00 per page for all pages for all requestors. The Board's legislative authority to enact and amend the rule is granted by sections 456.057(17) and 458.309, Florida Statutes.

Starting with the first notice published in the Florida Administrative Register on October 30, 2012, the Board conducted rulemaking proceedings pursuant to section 120.54, Florida Statutes. Following the requisite notices, the Board conducted ten public hearings and received written and oral comments from multiple interested parties. On March 4, 2015, at the tenth public hearing, the Board determined that the amendment would increase regulatory costs to such an extent that a revised statement of estimated regulatory costs (SERC) was necessary and that in order for the amendment to take effect legislative ratification was required. See § 120.541(2)-(3), Fla. Stat.

The revised SERC and changes to the proposed rule amendment based on comments and testimony received at the public hearings were noticed and published on March 12, 2015. Appellants each filed their petitions for administrative hearing on March 31, 2015. After the final administrative hearing, the ALJ's final order was entered December 8, 2015.

Thereafter, the Board submitted the proposed amendment to the President of

the Senate and Speaker of the House of Representatives with a request for legislative ratification during the 2016 legislative session. See § 120.541(3), Fla. Stat. The Board also filed the rule amendment with the Department of State for adoption, pursuant to section 120.54(3)(e), Florida Statutes. Pursuant to section 120.541(3), however, even though adopted, the amendment to rule 64B8-10.003 could not “take effect until it is ratified by the Legislature.”

The rule amendment was not ratified during the 2016 legislative session, but the Board has not taken any action to withdraw the amendment to date. Accordingly, the amendment is currently adopted, but not effective. See §§ 120.54(3)(d)3., Fla. Stat. (governing modification and withdrawal of rules at various procedural stages); 120.54(3)(e)5.-6., Fla. Stat. (requiring withdrawal if rule not adopted within time limits; setting separate times at which a rule is “adopted” and when “effective.”).

We first address the status of the adopted amendment to the rule and whether the amendment and therefore this appeal of the ALJ’s order is moot due to the lack of legislative ratification of the amendment as required by section 120.541(3), Florida Statutes (2016). The issue is whether, as argued by Appellants, the failure of the Legislature to ratify the proposed amendment during the 2016 legislative session, and thus the failure of the amendment to become “effective,” renders the amendment “dead” and the appeal of the ALJ’s order moot due to the expiration of

statutory time limits for adoption and effectiveness of the rule. We hold that the failure of ratification in the 2016 legislative session does not put an end to the rulemaking proceedings for the amendment here and does not render this appeal moot.

The failure of the Legislature to take up the Board's request for ratification of the amended rule upon its submission to the President of the Senate and Speaker of the House does not preclude ratification in future legislative sessions. Although section 120.541(3) is a fairly recent statute — adopted in 2010 — renewals of other rule ratification requests which carried over to successive years' legislative sessions have already occurred. See Eric H. Miller and Donald J. Rubottom, Legislative Rule Ratification: Lessons from the First Four Years, 89 Fla. Bar J. 36, 40 (February 2015). For instance, a Department of Financial Services rule adopting a workers' compensation provider reimbursement manual was first submitted for legislative ratification under section 120.541(3) in the 2012 session, but was not considered by the Legislature during that session. A House Bill to ratify the workers' compensation rule was filed for the 2013 session, but was again not considered. Miller & Rubottom, *supra*, at 38. The Department renewed its request for ratification of the rule and re-submitted it to the Speaker of the House for the 2014 session, but the Legislature again did not consider legislation ratifying

the rule. Id. at 38. Finally, the rule was withdrawn in 2015.² Fla. Admin. Code R. 69L-7.020. Clearly, the fact that the rule was not ratified on the first attempt in 2012 did not “kill” the proposed rule amendment and end the Department’s ability to renew the request for ratification in subsequent sessions.

The Board is also not required to withdraw the proposed rule due to the lack of ratification to date. Section 120.54(3)(d), Florida Statutes, addresses modification and withdrawal of proposed rules. For a rule that is adopted but not ratified, the Board has the option of withdrawing the rule but is not required to do so. § 120.54(3)(d)3.c., Fla. Stat. Appellants would improperly read into the statute a deadline for ratification and a requirement for withdrawal if a rule was not ratified during the legislative session during which it was submitted. There are statutory deadlines for submission of a rule to the President of the Senate and Speaker of the House for ratification, but no deadline for the Legislature to act upon a rule submitted for ratification. See § 120.54(3), Fla. Stat.³ Likewise there is no statutory requirement for the Board to withdraw a rule which has been adopted but not ratified. A subsequent Legislature could decide to ratify the rule. Thus, the procedural posture of the rule amendments here does not render this

² A subsequent rule was ratified in 2016. See Ch. 2016-203, Laws of Florida.

³ Our holding is also consistent with the principle that the current Legislature cannot “bind the hands” of future Legislatures. See Neu v. Miami Herald Pub. Co., 462 So. 2d 821, 824 (Fla. 1985); Scott v. Williams, 107 So. 3d 379, 389 (Fla. 2013); Florida Carry, Inc. v. University of Florida, 180 So. 3d 137, 146 (Fla. 1st DCA 2015).

appeal moot.

Considering the merits of the challenge to the ALJ's order, Appellants fail to establish any erroneous interpretation or application of law in the ALJ's ruling that the rule amendment was not an "invalid exercise" of the Board's delegated legislative authority, as defined in section 120.52(8), Florida Statutes. Nothing in the record of these extensive rulemaking proceedings shows that the Board failed to follow applicable rulemaking procedures or exceeded its rulemaking authority under sections 456.004(1) and 456.057(17), Florida Statutes. There has been no showing that the rule is vague or that it vests unbridled discretion in the Board. The ALJ's conclusion that the evidence "fails to establish that the proposed rule is an invalid exercise of delegated legislative authority, or is arbitrary or capricious as those terms are defined by section 120.52(8)," is clearly supported by the voluminous record of the multiple public hearings and Board meetings over the years of these rulemaking proceedings.

Finally, we find no basis to set aside the ALJ's final order on the other two issues raised by the Appellants and affirm without further comment.

Accordingly, the adopted rule 64B8-10.003 — although not effective — is still subject to ratification by the Legislature unless the rule is withdrawn. This appeal of the ALJ's final order is not moot, and the ALJ's final order is affirmed.

AFFIRMED.

WETHERELL and JAY, JJ., CONCUR.