SC17-1165

In the Supreme Court of Florida

DANIEL R. FERNANDEZ; and
DAX J. LONETTO, SR., PPLC,
Petitioners,

v.

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,
Respondent,

and

BACTES IMAGING SOLUTIONS, INC.,
and HEALTHPORT TECHNOLOGIES, LLC
Intervenors/Respondents.

On Petition for Discretionary Review from the
District Court of Appeal, First District
Case No.: 1D16-0050

RESPONDENTS' JOINT BRIEF ON JURISDICTION

Pamela Jo Bondi
Attorney General

Marlene K. Stern
Assistant Attorney General
Florida Bar No. 0183570
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
marlene.stern@myfloridalegal.com
Counsel for the Board of Medicine

Dan R. Stengle
Dan R. Stengle, Attorney, LLC
Florida Bar No. 352411
502 North Adams Street
Tallahassee, FL 32301
dstengle@comcast.net
Counsel for Intervenor, HealthPort Technologies, LLC

Michael Fox Orr
Florida Bar No. 14594
Amanda Eaton Ferrelle
Florida Bar No. 913251
Dawson Orr, P.A.
50 N. Laura St., Ste. 1675
Jacksonville, FL 32202
mfo@dawsonorr.com
aef@dawsonorr.com
Counsel for Intervenor, Bactes Imaging Solutions, Inc.

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PRELIMINARY STATEMENT

Petitioners here try to defeat a proposed administrative rule amendment after three different bodies have rejected their arguments over the course of at least four years. To appear before this Court, Petitioners must try to establish a ground for the Court to invoke its discretionary jurisdiction. *See* Art. V, § 3(b)(3), Fla. Const.; Rule 9.030(a)(2), Fla. R. App. P. As conflict jurisdiction is the only one of the statutorily enumerated grounds that could even arguably permit discretionary jurisdiction here, Petitioners have been forced to try to fit this case within that ground and, therefore, have been forced to manufacture alleged conflicts between the opinion of the First District Court of Appeal ("Opinion") and other Florida courts. As is demonstrated in detail below, no express or direct conflicts exist and, therefore, this Court should decline to invoke its discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

In 2015, the Board of Medicine ("Board") proposed an amendment to rule 64B8-10.003, Florida Administrative Code ("Proposed Amendment"), which is the subject of this case. Petitioners challenged the Proposed Amendment and an evidentiary hearing was held at the Division of Administrative Hearings. The resulting Final Order determined that the Proposed Amendment was valid and, on appeal, the First District Court of Appeal ("First DCA") affirmed the Final Order.

The Proposed Amendment potentially increases the maximum fee that can be charged for reproduction of medical records. To assess the magnitude of the potential increase, during the rulemaking process the Board prepared a Statement of Estimated Regulatory Costs ("SERC") in accordance with section 120.541(2), *Florida Statutes*. The SERC showed that the estimated regulatory costs could exceed one of the monetary thresholds in section 120.541(2)(a)1.-3., *Florida Statutes*. Accordingly, pursuant to section 120.541(3), *Florida Statutes*, the Board submitted the Proposed Amendment to the Legislature for ratification prior to the 2016 legislative session.

The Legislature did not vote on ratification during the 2016 session, and after the close of the session, Petitioners filed a motion to dismiss their pending appeal at the First DCA for mootness. Petitioners claimed that if the Legislature intended to ratify the Proposed Amendment, it had to do so during the 2016 session. The Opinion denied the Motion for Mootness and determined that a "subsequent Legislature could decide to ratify the rule." Op. at 6. Petitioners now seek this Court's discretionary review on the basis of express and direct conflict under Article V, section 3(b)(3), of the Florida Constitution.

SUMMARY OF THE ARGUMENT

Review should be denied. There is no express and direct conflict upon which to base this Court's jurisdiction. Petitioners assert that two issues support

this Court's conflict jurisdiction. First, they claim that the decision to deny their Motion for Mootness conflicts with three decisions of this Court, all of which were issued in the 1920s and 1930s. The requirement for rule ratification was not enacted until 2010, which precludes any express or direct conflict with the cases. Furthermore, the cases are readily distinguishable because they bear no factual similarity to the case at bar.

Petitioners' second proffered conflict is that the First DCA unlawfully shifted the burden of proving the validity of the rule on to them. This argument requires the assumption that, in this one case, the First DCA reversed its longstanding jurisprudence on the burden of proof without so stating and without any analysis. Express and direct conflict cannot be based on such an assumption.

ARGUMENT

I. This Court Should Decline Review Because the Decision to Deny Petitioners' Motion for Mootness, Which Applies a Statutory Provision Enacted in 2010, Cannot Directly and Expressly Conflict with Decisions Issued Prior to that Year.

This Court's conflict jurisdiction is not to be invoked lightly, but rather, exists to resolve irreconcilable holdings within Florida on the same question of law. *See Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985); *see also Boardman v. Esteva*, 323 So.2d 259, 270 (Fla. 1975) (Overton, J. concurring) ("Our role in conflict jurisdiction is to stabilize the law by a review of decisions which form patently irreconcilable precedents."); Art. V, § 3(b)(3), Fla. Const.

Such jurisdiction does not lie in the absence of express and direct conflict appearing within the four corners of a district court's decision. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *see also Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980) (explaining that for a conflict to be express, it must be "represented in words.")

The three cases that Petitioners claim create an express and direct conflict with the Opinion were issued in 1936 (two cases) and 1922 (one case). The statutory provision requiring ratification, section 120.541(3), *Florida Statutes,* was enacted in 2010. *See* §2, ch. 2010-279, *Laws of Fla.* Simple chronology precludes an irreconcilable conflict. Petitioners' first advocated conflict should be rejected for this reason alone.

Moreover, the substance of the cases on which Petitioners rely is not relevant to ratification. The statutory directive for ratification provides:

> If the adverse impact or regulatory costs of the rule exceed any of the criteria established in [section 120.541(2)(a)1.-3.], the rule shall be submitted to the President of the Senate and the 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.

§ 120.541(3), *Fla. Stat.*

The factual scenario presented in all three cases involved bills which passed both houses during the last day of a legislative session but were allegedly not signed by the presiding officers of the two legislative houses and the governor in

accordance with the requirements of the Florida Constitution. The legal issues presented by those cases were whether the legislation was valid, given that the votes were taken in accordance with the Florida Constitution, and the type of evidence that was required to prove whether the bills were signed in accordance with the Florida Constitution.

In Petitioners' leading case, *State ex rel. Cunningham v. Davis*, the issue was whether the Legislature violated the Constitution by remaining in session longer than 60 days for legislative officers to perform the ministerial duties of signing bills voted on within the 60 days, and then presenting them to the Governor for signature. *Cunningham*, 166 So 289, 298 (Fla. 1936). The Court decided that the Legislature did not violate the Constitution by remaining in session beyond day 60 solely to obtain the signatures. *Id*.

The second and third cases cited by Petitioners, *State ex rel. Thompson v. Davis*, 169 So. 199 (Fla. 1936), and *Amos v. Gunn*, 94 So. 615 (Fla. 1920), deal with evidentiary matters regarding the authenticity of the signatures on legislation. In each case the Court determined that the proffered evidence was insufficient to cast doubt on the authenticity of the signatures. *See Thompson*, 169 So. at 211[1], *Amos*, 94 So. at 638-9[2].

[1] In *Thompson*, the Court took up a petition for writ of mandamus alleging that the signatures of presiding officers and the governor on a bill were back dated to day 60 of the legislative session, as were associated entries in the journals of the House

Petitioners assert that their three cases mean "that specific duties imposed on the Legislature must be performed while that legislative body is still in session." Init. Br. at 6. Petitioners' three cases and the Opinion are distinguishable based on the text they construe. The signing of bills into law is a duty expressly imposed on the Legislature by Article III, section 7 of the Florida Constitution. According to that provision:

> Each bill and joint resolution passed in both houses shall be signed by the presiding officers of the respective houses and by the secretary of the senate and the clerk of the house of representatives during the session or as soon as practicable after its adjournment.

Art. III, § 7, *Fla. Const.*

In contrast, the ratification statute imposes an express requirement on the agency, not the Legislature, to submit the proposed rule to the Legislature. *See* §

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and Senate. *Thompson*, 169 So. at 201-2. The petitioner claimed that the bill was void for this reason, but his petition gave no indication of any evidence available to support his contention, other than parol evidence. The Court deemed parol evidence unacceptable to impeach a public record that appeared compliant on its face and quashed the petition. *Id*. at 211.

[2] In *Amos*, a complaint alleged irregularities in the signing of a bill after it passed both houses, although on its face the bill appeared to comply with the signing requirements. *Amos*, 94 So. at 618. On rehearing, the Court refused to strike down the bill stating it could "be impeached only by the legislative journals," *id*. at 638-9, because they were the only types of records that were "of equal dignity," *id.*, to the bill. The legislative journals showed that the bill was signed in accordance with law. *Id*.

120.541(3), *Fla. Stat*. The statute does not contain a requirement for the Legislature to ratify a rule at any particular time. As the First DCA explained:

> There are statutory deadlines for submission of a rule to the President of the Senate and the Speaker of the House for ratification, but no deadline for the Legislature to act upon a rule submitted for ratification.

Op. at 6.

There is no direct and express conflict between the three cases and the Opinion because they rely on different legal authority to reach their conclusions. The legal authorities are not interchangeable. In other words, the First DCA could not have relied on the signature requirement in Article III, section 7 of the Florida Constitution to determine if the instant case was moot for lack of ratification. That constitutional provision is irrelevant to the case at bar. The three cases Petitioners relied on are irrelevant for that very reason.

The facts and the law of the cases relied on by Petitioners are unrelated to the First DCA's opinion, and, as such, they create no express and direct conflict that would warrant invocation of the Court's discretionary jurisdiction. *See Wainwright*, 476 So. 2d at 670.

II. The First DCA's Opinion, Like that of the Second DCA, Properly Places the Burden on the Agency to Prove that a Proposed Rule in not Invalid.

Petitioners claim that the Opinion conflicts with *Southwest Florida Water Management District v. Charlotte County*, 774 So. 2d 903, 908 (2d DCA 2001), on

the issue of burden of proof. They claim that in the Opinion the burden of proof was placed on them, while *Charlotte County* would place the burden on the Board. The argument is based on semantics and is not supported by substance.

The purported basis for Petitioners' argument is the following underlined phrase from the Opinion:

> 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.

Op. at 8 (emphasis added). On this basis alone, Petitioners claim that the underlined language shows that the First DCA unlawfully placed the burden on them to prove that the Proposed Amendment was not invalid. However, the Opinion does not expressly or directly say it placed the burden of proof on Petitioners, and the opinion provides no indication that it intended to apply a different burden that it has in prior cases. *See Jenkins*, 385 So.2d at 1359 (declining to invoke conflict jurisdiction and holding that "express" means that a conflict must be expressed in words or articulated in an express manner).[3]

[3] Apparently, according to Petitioners, the First DCA's opinion should have said that the evidence shows that the "rule is not an invalid exercise of delegated legislative authority." *Charlotte Cnty.*, 774 So.2d at 908 (citing § 120.56(2)(a), Fla. Stat.). Petitioners argue that using that language would have placed the burden to prove the rule not invalid on the Board.

For conflict jurisdiction to exist, the conflicting opinions must include "discussion[] of the legal principles which the court applied." *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981) (holding that an affirmance with no analysis cannot create a conflict for purpose of discretionary jurisdiction). While the Opinion discussed the legal principles underlying its denial of the Motion for Mootness, it simply affirmed, without analysis, the Final Order on sufficiency of the evidence to prove the rule valid.

Petitioners ask the Court to make a huge leap, which is to assume that the First DCA "unlawfully shifted" the burden of proof in this particular case, even though the First DCA did not state that it was doing so and even though Petitioners themselves cite to numerous cases in which the First DCA applied the burden of proof correctly. This conflict is purely speculative, not express, and should be rejected. *See Jenkins*, 385 So.2d at 1359.

Moreover, the First DCA opinion quoted the Final Order, which merely made reference to the standards for invalidating a proposed rule specified statutorily in section 120.52(8), *Florida Statutes*. It borders on the ludicrous for Appellants to extrapolate -- from a reference to a specific statutory standard -- that the First DCA is flouting the statute and is unilaterally shifting the established statutory burden of proof in challenges to proposed rules. Additionally, the

substance of the proceedings demonstrates that the ALJ and First DCA understood quite clearly the burdens of proof on each party.

The Opinion affirmed the Final Order, which described the burdens of proof as follows:

> The party challenging a proposed agency rule has the burden of going forward. 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. § 120.56(2)(a), Fla. Stat. When any substantially affected person seeks a determination of the invalidity of a proposed rule pursuant to section 120.56(2), the proposed rule is not presumed to be valid or invalid. 120.56(2)(b), Fla. Stat.

Fernandez v. Dept. of Health, Bd. of Medicine, Case No. 15-1774 (Div. of Admin. Hrngs. Dec. 8, 2015) (Final Order at ¶ 72).

The burdens of proof as described by the Second DCA comport with the Final Order and the Opinion. The Second DCA stated:

> [a] party challenging a proposed rule has the burden of establishing a factual basis for the objections to the rule, and then the agency has the ultimate burden of persuasion to show that the proposed rule is a valid exercise of delegated legislative authority.

Charlotte Cnty., 774 So. 2d at 908.

There is no express or direct conflict between the two cases because the First DCA did not shift the burden of proof onto Petitioners.

CONCLUSION

The Court does not have jurisdiction and should deny review.

CERTIFICATE OF SERVICE

I HEREBEY CERTIFY that a true and correct copy of the foregoing Respondents' Joint Brief on Jurisdiction was served on this 18th day July, 2017 by electronic mail to:

Counsel for Petitioners, Daniel R. Fernandez, and Dax J. Lonetto, Sr., PLLC:

David M. Caldevilla, Esq. and Nicolas Q. Porter, Esq., de la Parte & Gilbert, P.A., P.O. Box 2350, Tampa, FL 33601-2350, dcaldevilla@dgfirm.com, nporter@dgfirm.com, and serviceclerk@dgfirm.com;

Scott R. Jeeves, Esq., Jeeves Law Group, P.A., 954 1st Avenue North, St. Petersburg, FL 33705, sjeeves@jeeveslawgroup.com, khill@jeeveslawfirm.com, and mbusino@jeeveslawfirm.com;

Counsel for Appellees, Florida Department of Health, Board of Medicine:

Nichole Geary, General Counsel, Department of Health, Bin A02, 4052 Bald Cypress Way, Tallahassee, FL 32399-3265, Nichole.Geary@flhealth.gov;

Jennifer A. Tschetter, Esquire, General Counsel, Department of Health, Bin A02, 4052 Bald Cypress Way, Tallahassee, FL 32399-3265, jennifer_tschetter@doh.state.fl.us;

Counsel for Intervenors, Bactes Imaging Solutions, Inc.:

Michael Fox Orr, Esq. and Amanda Eaton Ferrelle, Esq., Dawson Orr, P.A., 50 N. Laura St., Ste. 1675, Jacksonville, FL 32202, mfo@dawsonorr.com and aef@dawsonorr.com;

Louis M. Ursini, Esq., Adams and Reese LLP, 101 E. Kennedy, Blvd., Ste. 4000, Tampa, FL 33602, Louis.Ursini@arlaw.com and ServeARTampa@arlaw.com;

Counsel for Intervenors, Healthport Technologies, LLC:

Dan R. Stengle, Esq., Dan R. Stengle, Attorney, LLC, 502 N. Adams St., Tallahassee, FL 32301, dstengle@comcast.com;

Cynthia A. Henderson, Esq., Cynthia A. Henderson, P.A., 2606 Thomasville Rd., Tallahassee, FL 32308, cyhenderson@me.com**:**

Counsel for Florida Medical Association:

Jeffery M. Scott, Esq. and Mary K. Thomas, Esq., 1430 Piedmont Dr. East, Tallahassee, FL 32308, JScott@flmedical.org and MThomas@flmedical.org; and,

Counsel for Florida Justice Association:

G.C. Murray, Jr., Esquire, Florida Justice Association, 218 South Monroe Street, Tallahassee, Florida 32301;
gcmurray@floridajusticeassociation.org; gc@gcmurray law.com

/s/ *Marlene K. Stern*
Marlene K. Stern

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is completed in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/Marlene K. Stern
Marlene K. Stern