

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

PETITIONERS' MOTION TO STRIKE

Pursuant to Florida Rule of Appellate Procedure 9.300, the Petitioners move to strike the "Respondents' Joint Brief on Jurisdiction," and state:

1. In this case, the Petitioners seek to invoke this Court's discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution, on the grounds that the First District Court of Appeal's decision below is in conflict with decisions of this Court and other district courts of appeal.

2. On July 18, 2017, the Respondents filed their joint answer brief on jurisdiction. Page 10 of their jurisdictional brief includes a quote from the administrative law judge's final order, which is not included within the First District's decision below.

3. In a jurisdictional brief, it is improper to include quotations from the record on appeal which do not appear within the "four corners" of the district court's underlying decision.

As explained by this Court in *Reaves v. State*, 485 So.2d 829 (Fla. 1986):

[Footnote 3] This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. ... [W]e are not permitted to base our conflict jurisdiction on a review of the record.... Thus, it is pointless and

misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant.

.....

... Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Id., 485 So.2d at fn.3 and 830. *See also*, *Miles v. Weingrad*, 164 So. 3d 1208, 1215 (Fla. 2015) (Pariente, J., concurring) ("to ascertain the existence of conflict, there is no need to look to the record, to a dissenting opinion, or to any facts not contained within the 'four corners' of the ... [district court of appeal's] majority opinion"); *Linn v. Fossum*, 946 So. 2d 1032, 1042 (Fla. 2006) (Wells, J., dissenting) ("this Court's conflict jurisdiction is based not upon a party's contentions but, rather, is based upon a district court's majority's decision"); *Chase v. Horace Mann Ins. Co.*, 158 So. 3d 514, 523 (Fla. 2015)(Polston, J., dissenting) (quotes from the trial court's order which were not included within the four corners of the First District's decision are insufficient for determining whether conflict exists).

4. At page 10 of their jurisdictional brief, the Respondents quote the administrative law judge's final order in an apparent effort to lead this Court to believe that she correctly applied the parties' respective burdens of proof in this case. As in *Reaves*, the Respondents' quotation from the administrative law judge's final order is "pointless and misleading." *Id.*, 485 So.2d at fn.3 At this point, the only issue is whether the First District's decision itself conflicts with a decision of this Court or of another district court of appeal, on the rule of law that governs the parties' respective burdens of proof in an administrative rule challenge case, and the administrative law judge's final order has no bearing on that issue. There are many things in that final order and in the record on appeal that the Petitioners would like to quote in response to the Respondents' jurisdictional brief, but it is improper to do so at this juncture of the case. To allow

the Respondents to quote one snippet of the voluminous record without giving the Petitioners an opportunity to present contrary information from the record on appeal is prejudicial, and as explained in *Reaves*, it is not permitted. If this Court grants jurisdiction, all parties will then be in a position to quote from anything in the record on appeal in their appellate briefs on the merits.

WHEREFORE, the Petitioners respectfully request this Honorable Court to strike the "Respondents' Joint Brief on Jurisdiction," with leave to file an amended brief which omits the improper quotation from the final order.

CERTIFICATE OF SERVICE

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

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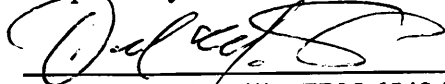
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Respectfully submitted,



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