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IN THE SUPREME COURT OF FLORIDA

ROGER MARRERO, M.D.,

Petitioner,

vs.

DEPARTMENT OF PROFESSIONAL REGULATION, FLORIDA STATE BOARD OF MEDICINE,

Respondent.

_____/

CASE NO. 73,392

CASE NO. 87-1285
(1st DCA)

# PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal
First District, State of Florida

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

FLORIDA STATUTES:



OTHER:

## STATEMENT OF THE CASE AND FACTS

Dr. Roger Marrero applied to the Department of Professional Regulation Board of Medicine for Florida licensure but thereafter noticed said Board that he had withdrawn said application. The Board refused to acknowledge its consequent lack of jurisdiction of Dr. Marrero or his erstwhile application, and proceeded as if Dr. Marrero and his application were still within the Board's jurisdiction per Chapter 458, Florida Statutes.

Petitioner petitioned the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, for a preliminary injunction enjoining the Board from preventing his application withdrawal and from taking any further action on his application since the Board no longer had jurisdiction. The preliminary injunction was followed by a permanent injunction on September 2, 1987 (Appendix 1).

The Respondent Board appealed to the First District Court of Appeal (First DCA). On September 15, 1988, the First DCA decision (Appendix 2) assumed-in-error that Dr. Marrero filed a motion for leave to withdraw his application. From this, the First DCA said Marrero was required to exhaust his administrative remedies. Additionally, the First DCA found that the Circuit Court erred in divesting the Board of primary jurisdiction.

On November 18, 1988, the DCA denied the motion for rehearing (Appendix 3) and issued its modified decision (Appendix 4). The District Court adopted Marrero's premise

that he noticed withdrawal of his application; but it found that the Board's exercise of continuing jurisdiction of Dr. Marrero and his [already withdrawn] application could not be said to be beyond colorable authority, and it reversed the Circuit Court's order, and remanded the cause to the Board for Marrero to exhaust administrative remedies.

Petitioner's notice to invoke the discretionary jurisdiction of this Court was timely filed.

## SUMMARY OF THE ARGUMENT

In this case the First DCA held that a person who applied for a medical license did not have the right to take a voluntary withdrawal of that application prior to the Board taking final action on the application. This case cannot be reconciled with the decision of the Fifth DCA in Middlebrooks v. St. Johns River Water Management District, 13 FLW 1608 (5th DCA, July 15, 1988), wherein the court held that the applicant could take a voluntary withdrawal of his application for a consumptive use permit up to the time the application went to the finder of fact. Thus, the decision of the First DCA directly conflicts with a decision of the Fifth DCA.

In the instant case, the Board was divested of jurisdiction after Petitioner withdrew his application yet they continued to act upon the application. Therefore, the decision in this case expressly affects a class of state officers by vesting in the gubornatorially-appointed members of each DPR multi-member Board, the power and authority to act

quasi-judicially on matters not before said boards. All state officers with this quasi-judicial power are affected.

This decision also expressly affects a class of constitutional officers by barring and precluding the circuit court judges of this state from exercising declaratory or injunctive jurisdiction granted them under the Constitution over the aforesaid state officers when-where-or-as said state boards act quasi-judicially on matters not before them.

Additionally, the Court said that it would be appropriate for the Petitioner to seek a declaratory statement from DPR pursuant to Chapter 120.565, F.S. This case cannot be reconciled with Eastern Air Lines, Inc. v. Hillsborough County Aviation Authority, 454 So.2d 1076 (Fla. 2d DCA 1984), where the Court held that it was inappropriate to give a declaratory statement where the proceedings are already pending in another tribunal. Thus, this decision directly conflicts with the decision of the Second DCA.

## JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V, s. 3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

The Florida Supreme Court has discretionary jurisdiction to review a decision which expressly affects a class of

constitutional or state officers. Art. V, s. (3)(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iii).

## ARGUMENT

I. THIS DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DCA IN MIDDLEBROOKS v. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, 13 FLW 1608 (5th DCA July 15, 1988), AS WELL AS WITH AT LEAST TWO OF ITS OWN DECISIONS (RULE 9.030(a)(2)(A)(iv), FLA.R.APP.P.)

The decision in the case at bar says that the administrative agency continues to be vested with jurisdiction after Petitioner Marrero withdrew his application for a medical license. The First DCA says, therefore, that the appropriate administrative remedies must therefore be exhausted before Petitioner will be allowed to come into the circuit or district courts for relief.

This decision conflicts with the Fifth DCA's opinion in Middlebrooks v. St. Johns River Water Management District, 13 FLW 1608 (5th DCA July 15, 1988). In Middlebrooks, the appellant Middlebrooks withdrew his application for a consumptive use permit. The St. Johns River Water Management District, ignored his withdrawal and rendered a final order. The court likened the situation to that in a civil proceeding where the plaintiff could dismiss an action up to the time the case went to the trier of fact, pursuant to Fla.R. Civ.P. 1.420(a)(1). The court said that in Middlebrooks, the hearing officer was the trier of fact and until he had concluded his fact-finding process, the appellant should be allowed to

withdraw.

In reaching the decision in Middlebrooks, the Fifth DCA relied heavily on the First DCA decision in Humana of Fla., Inc. v. Dept. of Health and Rehabilitative Services, 500 So.2d 186 (Fla. 1st DCA 1986), reh.denied, 506 So.2d 1041 (Fla. 1987). The Fifth DCA said,

> In Humana. . . the petitioner for a certificate of need withdrew its petition prior to the hearing. The hearing officer cancelled the hearing and closed the file. The court held that Humana's withdrawal divested the agency of jurisdiction to proceed. Humana's withdrawal came before the fact issues were presented to the fact finder, analogous to filing a voluntary dismissal before the retirement of the jury."

Middlebrooks, 13 FLW at 1609 (emphasis in original)(citation omitted). See also, RHPC, Inc. v. Department of HRS, 509 So.2d 1267 (Fla. 1st DCA 1987) (petitioner withdrew his application for a certificate of need. Agency was divested on all further jurisdiction over the matter).

> II. THIS DECISION EXPRESSLY AFFECTS A CLASS OF STATE OFFICERS BY VESTING IN THE GUBORNATORIALLY-APPOINTED MEMBERS OF EACH DPR MULTI-MEMBER BOARD THE POWER AND AUTHORITY TO ACT QUASI-JUDICIALLY ON MATTERS NOT BEFORE SAID BOARD. (RULE 9.030(a)(2)(A)(iii), FLA.R.APP.P.)

The First DCA's decision affects a class of state officers. An officer is distinguished from a mere employee in that he is delegated a portion of the sovereign power and is authorized to exercise in his own right any sovereign power or prescribed independent authority of a governmental nature. See, State ex rel. Dresskell v. City of Miami, 13 So.2d 707 (Fla. 1943); State ex rel. Arthur Kudner, Inc. v. Lee, 7 So.2d

110 (Fla. 1942). Chapter 20.30, Florida Statutes, creates the Department of Professional Regulation Boards, members of which are appointed by the governor. In turn, each Board is granted sovereign authority under a specific chapter of the Florida Statutes. Additionally, the Supreme Court, in Fla. Dry Cleaning & Laundry Board v. Economy Cash & Carry Cleaners, 197 So. 550 (Fla. 1940) said the members of these boards were "officers." Id. at 557. See also, Lee, 7 So.2d at 114.

The decision affects a "class" when it "affects one state officer and in so doing similarly affects every other state officer in the same category . . . even though only one of such officers might be involved in the particular litigation." Fla. State Board of Health v. Lewis, 149 So.2d 41, 42-43 (Fla. 1963). Here, all of the members of the Board are equally affected. They are given jurisdiction over a matter where it no longer exists. The Boards, entities in themselves, may also be considered a class, since all of the Boards will be equally affected by this grant of jurisdiction beyond the scope of statutory authority. See, Lewis, 149 So.2d at 43.

Thus, the class of state officers affected includes the Boards, individually, and their individual members of the Department of Professional Regulation, including: Boards of Accountancy, Acupuncture, Architecture, Auctioneers, Barbers, Chiropractic, Construction, Cosmetology, Dentistry, Electrical Contractors, Professional Engineers, Funeral Directors and Embalmers, Professional Land Surveyors, Landscape Architecture, Massage, Medicine, Naturopathic Examiners,

Nursing, Nursing Home Administrators, Opticianry, Optometry, Osteopathic Medicine, Pharmacy, Pilot Commissioners, Podiatric Medicine, and Veterinary Medicine. The class also includes the boards of all other state agencies.

The Board members are granted the authority to act quasi-judicially by issuing and disciplining licenses of various professionals. The case at bar allows the Boards to exercise jurisdiction over a subject matter no longer before them. A board's jurisdiction ends when the petitioner takes a voluntary dismissal or withdrawal. Humana, 500 So.2d at 187; RHPC, 509 So.2d at 1267. This decision is to the contrary.

III. THIS DECISION AFFECTS A CLASS OF CONSTITUTIONAL OFFICERS BY BARRING AND PRECLUDING THE CIRCUIT COURT JUDGES OF THIS STATE FROM EXERCISING DECLARATORY OR INJUNCTIVE JURISDICTION OVER THE AFORESAID STATE OFFICERS WHEN-WHERE-OR-AS SAID STATE BOARDS ACT QUASI-JUDICIALLY ON MATTERS NOT BEFORE THEM. (RULE 9.030(a)(2)(A)(iii), FLA.R.APP.P.)

This decision affects the class of judges of the Circuit Courts, constitutionally created officers, by prohibiting them from providing declaratory or injunctive relief in administrative actions, a power granted them under Art. V, s. 5(b), Fla. Const. While the doctrine of exhaustion of administrative remedies is generally applicable, the courts have said that they will intervene prior to the exhaustion of administrative remedies, if the remedy is too little or too late. Dept. of General Services v. Willis, 344 So.2d 580 (1st DCA 1977). Circuit courts should not be deprived of their right to enjoin administrative actions where the Board acted

without jurisdiction over the matter.

These judges constitute the class of constitutional officers which the Florida Constitution and Florida Rules of Appellate Procedure contemplate, as all such officers are equally affected by this denial to use the sovereign power granted them under the Constitution.

## IV. THIS DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND DCA OPINION IN EASTERN AIR LINES, INC. v. HILLSBOROUGH COUNTY AVIATION AUTHORITY, 454 So.2d 1076 (Fla. 2d DCA 1984), AS WELL AS WITH MANY OF ITS OWN DECISIONS. (RULE 9.030(a)(2)(A)(iv), FLA.R.APP.P.)

The First District Court of Appeal in its November 18, 1988 opinion, said that the Petitioner "could petition the agency for a declaratory statement pursuant to Section 120.565, Florida Statutes." Chapter 28-4.005, Florida Administrative Code, states:

> A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule or order as it does, or may, apply to petitioner in his particular circumstances only. The potential impact upon petitioner's interests must be alleged in order for petitioner to show the existence of a controversy, question or doubt. (Emphasis added)

The Court in Eastern said that a declaratory statement would be an "inefficient and awkward proposition" where there was an ongoing proceeding in the circuit court. Eastern, 454 So.2d at 1079. Eastern is consistent with several other decisions in the First DCA which held that a declaratory statement is not a proper remedy where the same issues are

already pending in a judicial or administrative proceeding. Suntide Condo. v. Div. of Fla. Land Sales, Condos., and Mobile Homes, 504 So.2d 1343 (Fla. 1st DCA 1987); Fox v. St. Bd. of Osteopathic Medical Examiners, 395 So.2d 192 (Fla. 1st DCA 1981); Lawyers Prof. Liability v. Shand, Morahan & Co., 394 So.2d 238 (Fla. 1st DCA 1981); Couch v. State, 377 So.2d 32 (Fla. 1st DCA 1979). See also, Taylor v. Cooper, 60 So.2d 534 (Fla. 1952) (proceeding for declaratory decree improper where issues already pending in another forum).

Therefore, the decision in Eastern conflicts with the decision at bar.

For the Petitioner to get a declaratory statement now would violate the Florida Administrative Code itself, as the Code contemplates only "potential" litigation. This action has gone beyond "potential." The issue has already been brought to the circuit court. The Petitioner already withdrew his application and the Board, acting without jurisdiction, denied the application. There is no "potential" impact remaining. The Petitioner does not want to know what happens if he withdraws his application, because he has already withdrawn it. Thus, a declaratory statement would not even meet its purpose.

## CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of Petitioner's argument.

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I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Jurisdictional Brief, and Appendix to Petitioner's Jurisdictional Brief attached hereto, was furnished by U.S. Mail this 12 day of December, 1988, to M. Catherine Lannon, Esquire, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301.

MICHAEL I. SCHWARTZ