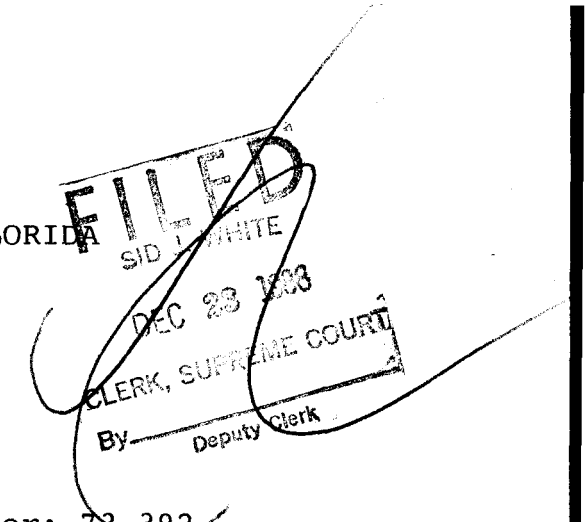
IN THE SUPREME COURT OF FLORIDA



ROGER MARRERO, M.D.,

Petitioner,

-vs-

Case Number: 73,392
1st DCA No. 87-1285

DEPARTMENT OF PROFESSIONAL REGULATION, FLORIDA STATE BOARD OF MEDICINE,

Respondent.
_____/

On Review of a Petition To Invoke the Discretionary Jurisdiction of the Florida Supreme Court To Review a Decision of the First District Court of Appeal

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The petitioner, Roger Marrero, M.D., was the plaintiff in the trial court and the appellee before the First District Court of Appeal. The respondent, Department of Professional Regulation, Florida State Board of Medicine, was the defendant in the trial court and the appellant before the First District Court of Appeal. For purposes of clarity, the parties will be referred to as "Dr. Marrero" and "the Board." All emphasis is added unless otherwise stated.

STATEMENT OF THE CASE AND FACTS

Jurisdiction of the Court must be determined from the facts contained within the four corners of the District Court's opinion. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986); see also Hardee v. State, 13 FLW 706 (Fla. Dec. 8, 1988). The Board therefore rejects Dr. Marrero's statement of facts which include matters outside the opinion for which review is sought.[1] The only facts relevant to this Court's determination of jurisdiction are that Dr. Marrero applied for a Florida medical license; he appeared before the Board of Medicine in August of 1986 in support of his application, at which time questions arose about unfavorable evaluations and possible personality problems; and he was asked to secure a psychiatric evaluation and reappear before

[1] The Board urges this Court to strike appendices 1,2, and 3 submitted by Dr. Marrero since they are extraneous to the issue of jurisdiction. However, should this Court decline to strike appendix 3, the Board notes that Dr. Marrero's Motion for Rehearing did not give the District Court the benefit of the issues, the arguments or the cases now urged before this Court.

the Board. After he failed to attend the October or December meeting and requested that the matter be continued until the February 1987 meeting, the Board informed Dr. Marrero that if he failed to attend the February meeting, his application would be denied. Before that meeting Dr. Marrero informed the Board that he was withdrawing his application, but he intended to reapply in the future.

The Board declined to remove consideration of his application from the February agenda and, as promised, voted to deny his application. Before a written order was rendered, Dr. Marrero obtained an injunction from the circuit court forbidding the Board to take any further action on his application. The Board's motion to dismiss for failure to exhaust administrative remedies was denied.

The First District Court of Appeal reversed the Circuit Court. Its opinion held that Dr. Marrero was required to resort to available and adequate administrative remedies, because it could not be said the Board acted without colorable statutory authority or that Dr. Marrero had shown irreparable harm.

SUMMARY OF ARGUMENT

The First District Court of Appeal held that the Circuit Court erred in denying the Board's motion to dismiss the complaint for injunction relief because Dr. Marrero should have been required to exhaust administrative remedies. Because the issue of law ruled upon sub judice differed from that ruled upon

in Middlebrooks v. St. Johns River Water Management District, 529 So.2d 1167 (Fla. 5th DCA 1988) and because there are material factual distinctions between the cases, there is no express and direct conflict. Similarly Petitioner's attempt to find conflict with mere dicta defeats the express and direct requirements warranting this Court's exercise of discretion to settle an important point of law.

Since the Board of Medicine is not a class of officers, but a single entity, the decision did not affect a class of state officers. Nor did the decision affect a class of constitutional officers.

The decision merely added to the case law on exhaustion of administrative remedies. It did not directly and exclusively affect the Board's or the judiciary's powers, but held that the existence or lack of authority over Dr. Marrero's application had to be litigated, if at all, in an administrative forum.

ARGUMENT I [RESTATED]

THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

Article V, Section 3(b)(3), of the Florida Constitution, provides for discretionary jurisdiction in this Court when a decision of a district court expressly and directly conflicts with a decision of another district court or of the Florida Supreme Court. With specifically delineated exceptions, the decisions of the district courts are to be considered final. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

Dr. Marrero contends that the decision of the First District Court of Appeal conflicts with Middlebrooks v. St. Johns River Water Management District, 529 So.2d 1167 (5th DCA 1988). It does not. The First District held that Dr. Marrero failed to exhaust available and adequate administrative remedies. The Court did not rule on the issue of whether the Board had authority to continue to act on Dr. Marrero's application after he stated he was withdrawing it; the court, in fact, expressly refused to do so (Appendix 4, p.11). The Middlebrooks case did not rule on exhaustion of administrative remedies but rather arose as a review of administrative action. The District Court sub judice reviewed judicial intervention calculated to deprive the agency of the ability to make an initial determination on an issue of law.

Another important distinction, one pointed out by the First District Court of Appeal in its analysis of the Middlebrooks

case, is that in Middlebrooks the administrative agency involved had, by rule, explicitly bound itself to follow the Rules of Civil Procedure to the extent they were not inconsistent with Chapter 120, Florida Statutes. Thus, Rule 1.420, Fla.R.Civ.P., which relates to voluntary dismissals, is clearly applicable to the St. Johns River Water District's proceedings. In contrast, neither the rules of the Board of Medicine, nor the Model Rules of Procedure, Rule Chapter 28, Florida Administrative Code, incorporate the Rules of Civil Procedure except in discovery matters. See, Rule 28-5.208, Florida Administrative Code.

Petitioner seeks conflict jurisdiction with Eastern Airlines, Inc. v. Hillsborough County Aviation Authority, 454 So.2d 1076 (Fla. 2d DCA 1984). The statement by the First District Court of Appeal that petitioner could petition for a declaratory statement was dicta not the decision. The Court simply stated examples of the types of administrative remedies which might be available to Dr. Marrero after the Board entered its order. Even if the court were in error about the availability of that particular remedy, Dr. Marrero has not disputed the availability of a hearing on a matter affecting his substantial interests under section 120.57, Florida Statutes. The accuracy of the reference to the availability of the declaratory statment is not material to the decision of the appellate court. Therefore there is no express and direct conflict with Eastern Airlines, Inc. v. Hillsborough County Aviation Authority, supra.

Conflict jurisdiction does not exist if the points of law settled in the two cases allegedly in conflict are not the same or if the controlling factual elements are distinguishable. Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983); Kyle v. Kyle, 139 So.2d 885 (Fla. 1962); Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). Therefore, Dr. Marrero's reliances upon Middlebrooks and Eastern Airlines for express and direct conflict are misplaced.

Dr. Marrero cites to cases of the First District Court which he believes to be contrary to the holding sub judice. Assuming arguendo there is conflict, that intradistrict conflict is to be resolved by hearings en banc. Fla.R.App.P. 9.331.

As stated in Kincaid v. World Insurance Company, 157 So.2d 517, 518 (Fla. 1963), the measure of this Supreme Court's conflict jurisdiction is not whether the Supreme Court agrees with the District Court ruling, but on

> whether the decision of the District Court on its face collides with a prior decision of this Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents.

In summary, the Board contends that there is no express and direct conflict between Marrero and any other cases cited, and that there is no basis for the exercise of discretionary jurisdiction by the Florida Supreme Court. Even if there were conflict, however, the Board would urge this court to use its discretion to decline review. Dr. Marrero actually focuses on

the issue of the agency's jurisdiction over an applicant who wishes to withdraw, that is, the correctness of the Board's action, not on the correctness of the Court's decision that the circuit court erred in refusing to dismiss the complaint. As noted by the District Court, the merits of the withdrawal attempts can be litigated another day, but in the proper forum.

ARGUMENT II [RESTATED]

THE DECISION BELOW DOES NOT AFFECT A CLASS OF STATE OR COONSTITUTIONAL OFFICERS.

The Board of Medicine is not a class of state officers. In Florida State Board of Health v. Lewis, 149 So.2d 41 (Fla. 1963), this Court held that a Board of Health, acting collectively, was a single entity, not a class of entities.

> The 'class', as the word is employed in Section 4, Article V, supra, means two or more constitutional or state officers who separately and independently exercise identical powers of government. In this sense a group of officers composing a single governmental entity such as a board or commission would not, as such board or commission, constitute class. It is the existence of two or more members of a given class of separate official entities that supplies the jurisdictional foundation for this Court to proceed. [Emphasis in original.]

Id. at 43.

With regard to Dr. Marrero's argument that the District Court's decision vested in the Board "the power and authority to act quasi-judicially on matters not before said Board," the Board believes that in this argument, as in the first one, Dr. Marrero

is so impassioned about the merits of the issue he wishes to litigate that he is unable to recognize what issue the District Court decided. In order make his argument, Dr. Marrero must insist that this Court accept his contention that the Board had no authority to act on his application. The District Court did not accept Dr. Marrero's insistence that the Board immediately lost jurisdiction when Dr. Marrero decided to control the timing of when an application from him could be acted upon by the Board. All the District Court decided was that the matter should be litigated, if at all, in the administrative forum, not the circuit court.

Dr. Marrero's contention that the Supreme Court has discretionary jurisdiction on the basis that the District Court decision affects a class of state officers every time the District Court makes a ruling which affects the jurisdiction or authority of the Board could lead to only one result: all cases involving the Board's actions would be reviewable. Every time the court upholds the Board, the Board's authority is bolstered; every time the court reverses the Board, its authority is diminished.

Similarly Dr. Marrero argues that a class of constitutional officers was directly affected, specifically circuit judges. To follow Dr. Marrero's analysis of the issue, jurisdiction is vested every time the District Court disagrees with a Circuit Court's use of its power to grant declaratory or injuctive relief. In essence, he says when the District Court disagrees on the use of such powers, the Supreme Court can exercise its discretion on the

basis of the deprivation of circuit judges' powers and referee the disagreement. This is not the role of the Florida Supreme Court.

The difficulty with such broad readings of this jurisdictional basis was recognized in Spradley v. State, 293 So.2d 697 (Fla. 1974) when this Court ruled:

> A decision which "affects a class of constitutional or state officers" must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state. Such cases naturally affect all classes of constitutional or state officers, in that the members of these classes are bound by the law the same as any other citizen. To vest this Court with certiorari jurisdiction, a decision must *directly* and, in some way, *exclusively* affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officer. [Emphasis original.]

Id. at 701. This the Marrero decision did not do.

CONCLUSION

WHEREFORE, the Board respectfully requests this Court to enter an order denying jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished to Michael I. Schwartz, Attorney for Petitioner, 119 North Monroe Street, Tallahassee, Florida 32301, this 23rd day of Dec, 1988.