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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEFFREY L. STICKNEY, M.D., JAMES N. PAPPAS, M.D., DOUGLAS STRINGHAM, M.D., TOM D. HOWEY, M.D., PAUL T. FORTIN, M.D., MARK FRANKLE, M.D., and WILLIAM F. BENNETT, M.D.,

Petitioners,

v.

THE BOARD OF REGENTS OF THE STATE OF FLORIDA STATE UNIVERSITY SYSTEM,

Respondent.
_____/

Fla. Sup. Ct. Case No. 80,623

1st DCA Appeal No. 92-3059

ON REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MORRIS E. SHELKOFSKY, JR.
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 165186

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, Florida 32399-1050
(904) 488-1573

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

CASES **PAGE(S)**

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Respondent disagrees with Petitioner's statement of the case and facts to the extent it recites alleged facts concerning the basis for the trial court's dismissal which are not relevant since they are not contained within the four corners of the decision alleged to be in conflict. Reaves v. State, 485 So.2d 829, 830 n. 3 (Fla. 1986). It is inappropriate for a party to attempt to bring additional facts, mixed with argument, to this Court's attention for the purpose of determining jurisdiction, and Respondent would ask that Petitioner's statement of the case and facts be stricken to this limited extent.

Respondent also points out that no notice of appeal was filed in the Leon Circuit Court until September 8, 1992, a full 79 days after rendition of the Circuit Court's order. Moreover, a more pristine example of a final order than Exhibit 1 from Petitioner's Appendix would be difficult to posit. As a result, there can be no issue of confusion of remedy.

SUMMARY OF THE ARGUMENT

The instant case does not expressly and directly conflict with the cited decisions of the Florida Supreme Court in Johnson v. Citizens State Bank, 537 So.2d 96 (Fla. 1989) and Skinner v. Skinner, 561 So.2d 260 (Fla. 1990)[1,2] or the Third District Court of Appeal in Alfonso v. State Department of environmental Regulation, 588 So.2d 1065 (Fla. 3d DCA 1991) and Restrepo v. First Union National Bank, 591 So.2d 1157 (Fla. 3d DCA 1992).[3] As to the Florida Supreme Court cases cited, the opinion of the First District Court of Appeal below is fully reconcilable with Johnson and Skinner. Beeks v. State, 569 So.2d 1345, 1347 (Fla. 1st DCA 1990). As to the two cited Third District Court of Appeal decisions, both Alfonso and Restrepo were dismissed as required by what was seen as

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[1]Petitioner has referred to Sanchez v. Swanson, 481 So.2d 481 (Fla. 1986) and Hines v. Lykes, 374 So.2d 1132 (Fla. 2d DCA 1979) after the legal citation signal see also. Petitioner's Jurisdictional Brief at 6. Respondent herein treats reference to Sanchez and Hines as mere legal citation to addition source material supporting the proposition, not an assertion that the opinion below conflicts with the decisions in those cases.

[2]Sanchez is clearly inapposite to the issues of the instant case because the Florida Supreme Court found that stamping of the notice of appeal as received by the Circuit Court was not at issue in the case. Sanchez v. Swanson, 481 So. 2d 481, 482 n. 1 (1986).

[3]Hines is clearly inapposite to the issues of this case because it dealt with the administrative action exception of Florida Rule of Appellate Procedure 9.110(c). Hines v. Lykes, 374 So.2d 1132, 1132 n. 1 (Fla. 2d DCA 1979).

controlling precedent in Lampkin-Asam v. Third DCA, 364 So.2d 469 (Fla. 1970). Alfonso v. State Department of Environmental Regulations, 588 So.2d 1065, 1066 (Fla. 3d DCA 1991). See Restrepo v. First Union National Bank, 591 So.2d 1157 (Fla. 3d DCA 1992.

Petitioner has failed to state a basis for discretionary review jurisdiction in the Florida Supreme Court based on a certified question of great public importance. Fla. R. App. P. 9.030(a)(2)(A)(v). This conclusion results from the absence of certification of the opinion below by the First District Court of Appeal.

Finally, the Florida Supreme Court lacks discretionary review jurisdiction because the opinion below should be treated as a citation per curiam affirmed opinion. The absence of a discussion of legal principles in the opinion below prevents conflict jurisdiction from arising.

ARGUMENT

I.

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

This Honorable Court lacks discretionary review jurisdiction as alleged by Petitioners. Petitioner has alleged that there is discretionary review jurisdiction in this Honorable Court based upon an alleged conflict between the opinion below and a decision of the Florida Supreme Court. Petitioners' Jurisdictional Brief at 6. Petitioners allege that this Honorable Court has receded from the decision in Lampkin-Asam in a manner material to the assertions in the instant case in Johnson v. Citizens State Bank, 537 So.2d 96 (Fla. 1989). However, the alleged receding from Lampkin-Asam is not material to the facts of this case. Johnson, 537 So.2d at 98. It is clear that in the Johnson opinion the decision of the Florida Supreme Court did not reach the certified question attributed to Restrepo and Alfonso. That conclusion is clear because in Johnson, this Honorable Court relied upon the ability of a Petition for Writ of Certiorari filed with the clerk of a District Court of Appeal to invoke the jurisdiction of such District Court to consider an appropriate remedy, to quash the dismissal below. Johnson, 561 So.2d at 98. It is clear that "[i]n both Johnson and Skinner, the document

which Appellant/Petitioner did file - even though it was incorrect as to remedy - was sufficient to invoke the appellate court's jurisdiction." Beeks v. State, 569 So.2d 1345, 1347 (Fla. 1st DCA 1990).

In the instant case Appellant filed a Notice of Appeal, the correct document, in the District Court, the wrong court. Such document is not sufficient to invoke the jurisdiction of a District Court. The distinction between having properly invoked the jurisdiction of a District Court of Appeal which may then consider a proper remedy as opposed to the instant case in which the jurisdiction of the District Court of Appeal was never invoked is vast. Beeks v. State, 569 So.2d at 1347.

A clear constitutional and Florida Rule of Appellate Procedure requirement for discretionary review jurisdiction is that a decision of a District Court of Appeal expressly and directly conflict with a decision of the Supreme Court (or another District Court of Appeal) on the same question of law. Art. V, §3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). The conflict is one which must be ascertainable within the four corners of a majority opinion of the Florida Supreme Court. Reaves v. State, 485 So.2d 829 (Fla. 1986). It must involve so clear a collision with a prior decision on the same point of law as to create inconsistency or a conflict in precedent. Kincaid v. World Insurance Company, 157 So.2d 517 (Fla.

1963). A conflict so great that the decision in the instant appeal would have the effect of overruling the Johnson and Skinner decisions is required. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962). Where the issues in the instant appeal and that of Johnson and Skinner are distinguishable from that cited to be in conflict, there is no conflict jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iv). Department of Revenue v. Johnston, 442 So.2d 950, 951-952 (Fla. 1983). In view of the clear reconcilability of Johnson and Skinner on the one hand and the instant appeal on the other, well enunciated by the First District Court of Appeal in Beeks v. State, the Motion to Consolidate should be denied for lack of discretionary review jurisdiction because the opinion below does not expressly and directly conflict with the decisions in the Johnson and Skinner cases of this Honorable Court.

Petitioner next asserts that the instant decision below expressly and directly conflicts with the decision of another District Court of Appeal. Petitioners' Jurisdictional Brief at 7. A close reading of the two opinions of the Third District Court of Appeal in Restrepo v. First Union National Bank, 591 So.2d 1157 (Fla. 3d DCA 1992) and Alfonso v. State Department of Environmental Regulation, 588 So.2d 1065 (Fla. 3d DCA 1991) does not support this assertion. In both of those cases the appeals were dismissed as required by what was seen by the Third

District Court of Appeal as controlling precedent in Lampkin-Asam. Alfonso v. State Department of Environmental Regulation, 588 So.2d 1065, 1066 (Fla. 3d DCA 1991). See Restrepo v. First Union National Bank, 591 So.2d 1157 (Fla. 3d DCA 1992). In Alfonso, the Third District Court of Appeal clearly stated that "[t]he narrow holding of Lampkin-Asam, however, has never been overruled and requires that we dismiss the instant appeal." Alfonso, 588 So.2d at 1066. See Restrepo, 591 So.2d at 1157. Clearly the Third District Court of Appeal was following proper procedure by ruling in accordance with binding precedent and then certifying a question. Continental Insurance Company v. Carroll, 485 So.2d 406, 409 (Fla. 1986). In no way may the opinion below in the instant case be said to be in conflict with two cited decisions of the Third District Court of Appeals which clearly followed what the Third District Court of Appeal saw as binding precedent in Lampkin-Asam.

II.

THE OPINION BELOW DOES NOT PASS UPON A QUESTION CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE.

Petitioners have not articulated a basis for discretionary review jurisdiction in this Honorable Court based on a certified question of great public importance. Fla. R. App. P. 9.030(a)(2)(A)(v). To their credit, Petitioners do not assert that the question certified in

Restrepo and Alfonso has in fact been certified by the First District Court of Appeal of Florida in the opinion below. Petitioners' Jurisdictional Brief at 4 and 7. Indeed the required certification was never sought or obtained in the instant case. Susco Car Rental System of Florida v. Leonard, 112 So.2d 832, 834 (Fla. 1959); Fla. R. App. P. 9.330(a). See Hittel v. Rosenhagen, 492 So.2d 1086, 1088 (Fla. 4th DCA 1986). Moreover, since the prerequisite of certification by the District Court of Appeal has not taken place, the requirement that the party adversely affected by the District Court's decision seek review after such certification cannot be met. See Petrik v. New Hampshire Insurance Company, 400 So.2d 8, 9-10 (Fla. 1981). In the absence of certification, there is no discretionary review jurisdiction based upon a certified question of great public importance.

III.

THE OPINION BELOW IS A CITATION PER CURIAM AFFIRMED OPINION NOT REVIEWABLE BY THE FLORIDA SUPREME COURT.

Finally, this Honorable Court lacks discretionary review jurisdiction because the opinion below should be treated as a citation per curiam affirmed opinion (hereinafter "citation pca"). The text of the order appealed is set forth herein below:

> The Court has considered the Appellant's Response to the show cause order. As the notice of appeal was not timely filed in the

> proper court, this appeal is dismissed for lack of jurisdiction. Beeks v. State, 569 So.2d 1345 (Fla. 1st DCA 1990).

It is clear that conflict jurisdiction must be based upon a direct conflict expressly appearing in a written opinion. Pena v. Tampa Federal Savings and Loan Association, 385 So.2d 1370 (Fla. 1980). In the last quoted material it is clear that sentences one and two in the order do not provide a discussion of legal principles which the District Court of Appeal applied. In order to have conflict jurisdiction, there must be a discussion of the legal principles which the District Court of Appeal applied which are alleged to be in conflict with a decision of another District Court of Appeal or the Supreme Court. Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981). Based on the absence of such discussion of legal principles, the decision should be treated as a citation pca not reviewable in this Honorable Court because it fails to set forth a direct conflict expressly appearing in the written order. Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980) and Pena, 385 So.2d at 1370.

CONCLUSION

For the foregoing reasons, this Honorable Court does not have jurisdiction over the instant case, and the petition for discretionary review should be denied.

RESPECTFULLY SUBMITTED,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MORRIS E. SHELKOFSKY, JR.
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 165186

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, Florida 32399-1050
(904) 488-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON JURISDICTION** has been furnished by U.S. Mail to **SAMUEL R. MANDELBAUM**, Esquire, Smith & Williams, P.A., 712 South Oregon Avenue, Tampa, Florida 33606 on this 20th day of November, 1992.

Morris E. Shelkofsky, Jr.
MORRIS E. SHELKOFSKY, JR.

<Paula>Stickney.Brief