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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/Appellants,

v.

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

Respondent/Appellee..

_____/

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

1st DCA Appeal No.: 92-3059

MAIN BRIEF OF PETITIONERS/APPELLANTS ON THE MERITS
(with Appendix)

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INTRODUCTION

As this case involves an appeal before the First District that was dismissed for lack of jurisdiction on the grounds of an improperly-filed notice of appeal in the wrong court, the record on appeal was never prepared by the Clerk of the Circuit Court for Leon County. For the convenience of this Court, counsel for the Petitioners/Appellants has prepared a 46-page Appendix containing all of the pertinent pleadings necessary for this Court's determination of the single issue presented for review in this cause, i.e. whether filing a notice of appeal in the appellate tribunal rather than the lower tribunal within the 30-day appeal period is jurisdictionally sufficient.

References in the brief to pages of the Appendix are designated by the letter "A," followed by the pertinent page number.

STATEMENT OF CASE AND FACTS

In their amended complaint filed on or about February 12, 1992 in the Circuit Court for Leon County, the seven Petitioners brought claims against the Respondent Board of Regents for breach of agreement and negligence, stemming from the Respondent's sudden dismantling of its Orthopedic Surgery Residency Program at the University of South Florida ("USF") Medical School in Tampa (A1-11). The Petitioners, all medical doctors who had previously been appointed as Residents in the 5-years graduate medical education program, were enrolled in the program at the time of its dismantling (A2). Each of the Petitioners had enrolled in the 5-year program to satisfy the board certification requirements of the American Board of Orthopedic Surgery (A2). According to Petitioners, they had suffered damages, relocation expenses, lost earnings and future lost earning capacity as a result of Respondent's dismantling of the orthopedic residency program (A8-9).

On February 27th, 1992 the Respondent filed a motion to dismiss the amended complaint, alleging *inter alia* lack of subject matter jurisdiction and sovereign immunity (A12-15).

On May 22, 1992 the Honorable George Reynolds, III, Circuit Judge for the Second Judicial Circuit, Leon County, rendered an "Order on Defendants' Motion to Dismiss the Action and Complaint," there dismissing the Petitioners' amended complaint with prejudice (A17-18). The deadline to file a notice of appeal from the dismissal order was Monday, June 22, 1992, as the 30th day from rendition fell on a Sunday.[1]

Thereafter, on June 19, 1992, the Petitioners' counsel mailed their Notice of Appeal seeking review of the circuit court's dismissal order to the clerk of the First District Court of Appeal, along with the appropriate filing fee of $250 (A19-21, 27).

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[1] See *Rubenstein v. Richard*, 346 So.2d 89, 90 (Fla. 3rd DCA, 1977) (where 30th day to file notice of appeal fell on Sunday, last day for filing notice was extended to next business day courthouse open).

Copies of this Notice of Appeal were also served by U.S. Mail that same day of June 19, 1992 upon Respondent's two attorneys, which included Morris Shelkofsky, Jr., Assistant Attorney General, and Debra King, Senior Counsel for the University of South Florida (A19-20). As expressly found by the Circuit Judge, the Notice of Appeal was received and stamped by the Clerk of the First DCA as "FILED" three days later on Monday, June 22, 1992 (A27-28).[2] The style of the notice of appeal indicated it was "*In the Circuit Court* for the Second Judicial Circuit. . . Leon County" (A19). The Notice of Appeal which was "filed" by the First DCA on June 22, 1992 was returned by the First DCA clerk shortly thereafter to Petitioners' counsel in Tampa, with directions of the appellate clerk to file in the lower tribunal clerk's office (in Tallahassee) (A22).

On June 25, 1992, after receiving back the previously-filed notice of appeal from the First District court clerk, Petitioners' counsel then sent the notice, filing fee and a letter of explanation to the Clerk of the Circuit Court for the Second Circuit (A23). This notice, filing fee and letter were apparently never received at that time by the circuit clerk (A28).

Thereafter, on August 28, 1992, Petitioners filed a Notice of Refiling the Notice of Appeal in the Circuit Court, noting it had originally been "filed" in the First DCA on June 22, 1992 on a timely basis (A24-26). Eventually the *refiled* Notice of Appeal, reflecting a filing date of September 2, 1992, was forwarded on to the First DCA on September 8, 1992 (A29).

On September 9, 1992 the First DCA entered an Order to Show Cause for Petitioners' to show why the appeal should not be dismissed for failure to file timely notice of appeal (A30). After responses were filed by the Petitioners and Respondent

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[2] In an order entered by the circuit judge on September 8, 1992, the circuit judge made these undisputed factual findings of record that the notice and check had been "inadvertently mailed for filing to the First District Court of Appeal," and that the First District had "filed the Notice of Appeal on June 22, 1992, and affixed the 'filed stamp' as of that date (i.e. June 22, 1992)" (A27-28).

(A31-43), on September 30, 1992 the First DCA entered an order dismissing the appeal for lack of jurisdiction on the grounds that "the notice of appeal was not timely filed in the *proper court*." (A44).

Thereafter, on October 15, 1992 the Petitioners filed a timely Notice to Invoke Discretionary Jurisdiction of the Supreme Court to review to the order dismissing appeal (A45-46). Following the filing of jurisdictional briefs, this Court accepted jurisdiction and granted review on January 25, 1993.

ISSUE PRESENTED:

"WHETHER A DISTRICT COURT OF APPEAL HAS JURISDICTION TO ENTERTAIN AN APPEAL FROM A FINAL JUDGMENT OF A CIRCUIT COURT WHERE, AS HERE, (1) THE APPELLANT ERRONEOUSLY FILES A NOTICE OF APPEAL WITH THE DISTRICT COURT, RATHER THAN THE CIRCUIT COURT, AND (2) THE APPELLANT TAKES NO CORRECTIVE ACTION TO FILE THE NOTICE OF APPEAL IN THE CIRCUIT COURT WITHIN THIRTY DAYS OF THE RENDITION OF THE FINAL JUDGMENT."

--- *Question as pending before this Court in Restrepo v. First Union, 591 So.2d 1157 (Fla. 3rd DCA, 1992), review pending, Supreme Court Case Number 79,406 and Alfonso v. State DER, 588 So.2d 1065 (Fla. 3rd DCA, 1991), review pending, Florida Supreme Court Case Number 79,096.*

SUMMARY OF ARGUMENT

The Petitioners timely filed their notice of appeal within the 30-day period with the clerk of the appellate court, rather than the lower tribunal. The clerk of the appellate court failed to transfer the notice to the appellate court as required by Rule 9.040(b) and Fla. Const. Art. V, Sec. 2(a), but rather improperly mailed the notice back to the office of Petitioners' counsel. Notwithstanding, this Court in its more-recent *Skinner* and *Johnson* decisions has declared that the improper filing of an initial appeal pleading in the wrong court is indeed sufficient to invoke the appellate court's jurisdiction, receding from this Court's 1978 *Lampkin* decision. The appellate court in this case erred in dismissing the appeal on the ground that the otherwise timely notice was improperly filed in the appellate court rather than the lower tribunal, and the dismissal order conflicts with *Skinner, Johnson* and other district court decisions.

ARGUMENT

THE FIRST DISTRICT'S DECISION DISMISSING THE APPEAL BELOW FOR FAILING TO FILE THE OTHERWISE TIMELY NOTICE OF APPEAL IN THE "PROPER COURT" IS ERRONEOUS, SINCE A DISTRICT COURT OF APPEAL HAS JURISDICTION TO ENTERTAIN AN APPEAL FROM A FINAL JUDGMENT OF A CIRCUIT COURT WHERE, AS HERE, (1) THE APPELLANT ERRONEOUSLY FILES A NOTICE OF APPEAL WITH THE DISTRICT COURT RATHER THAN THE CIRCUIT COURT, AND (2) THE APPELLANT IS UNABLE TO TAKE CORRECTIVE ACTION TO FILE THE NOTICE OF APPEAL IN THE CIRCUIT COURT WITHIN THIRTY DAYS OF THE RENDITION OF THE FINAL JUDGMENT.

Florida Rule of Appellate Procedure 9.110(b) provides that jurisdiction of the appellate court "shall be invoked by filing 2 copies of a notice, accompanied by filing fees prescribed by law, *with the clerk of the lower tribunal* within 30 days of rendition of the order to be reviewed." In accordance with the provision of Fla. Const. Art. V, Sec. 2(a) requiring "transfer to the court having jurisdiction of any [appellate] proceeding when the jurisdiction of another court has been improvidently invoked," Florida Rule of Appellate Procedure 9.040(b) provides with regard to filing in an improper forum:

> "If a proceeding is commenced in an *inappropriate court*, that court ***shall transfer*** the cause to an appropriate court." (Emphasis added.)

Since the circuit court order sought for review was rendered on May 22, 1992, a notice of appeal must have necessarily been filed within 30 days of rendition, i.e. Monday, June 22, 1992. As the 30th day fell on Sunday, June 21, 1992, the 30-day period would have been tolled until Monday, June 22, 1992. See *Rubenstein v. Richard*, 346 So.2d 89, 90 (Fla. 3rd DCA, 1977) (where 30th day to file notice of appeal fell on Sunday, last day for filing notice was extended to next business day that courthouse was open). Thus, a notice of appeal could be timely filed through June 22, 1992.

In this case the Petitioners inadvertently filed their notice of appeal, although on a timely basis within the prescribed 30-day period, with the Clerk of the First District Court of Appeal. Apparently on or about the last day of the 30-day jurisdictional period the district court clerk returned the notice to the Petitioners' counsel in Tampa, with directions for filing in the circuit court clerk's office back in Tallahassee (i.e. the "lower tribunal") (A22).[3] Although the Leon County circuit court clerk's office was in close physical proximity to the First DCA, the appellate clerk made no effort to ensure that the notice was timely transferred to and filed in the circuit clerk's office. The notice was eventually refiled in the circuit court clerk's office, but well beyond the 30-day period (A29). The First DCA subsequently dismissed the appeal on the grounds that the notice of appeal was not timely filed in "the proper court" (A44).

Notwithstanding Petitioners' inadvertent filing of the notice of appeal in the district court (A27), said filing within the 30-day period was indeed sufficient to invoke the district court's appellate jurisdiction, even though the Petitioners might have properly filed the notice in the circuit court. See *Skinner v. Skinner*, 561 So.2d 260, 262 (Fla., 1990); *Johnson v. Citizens State*, 537 So. 2d 96 (Fla., 1989). In any event Fla. Const. Art, V, Sec. 2(a) and Rule 9.040(b) *mandate* that a timely but improperly filed initial notice in the district court *must* be transferred to the circuit court clerk, which was never done by the district court clerk here as required.

In *Lampkin-Asam v. Third DCA*, 364 So.2d 469 (Fla, 1978), a decision rendered in 1978 during the transitional period from the Florida Appellate Rules to the Rules of Appellate Procedure, this Court rendered its first interpretation of the effect of Rule 9.040(b) . This Court in *Lampkin* approved the dismissal of a notice of appeal on jurisdictional grounds, where, as here, "the notice was inadvertently sent to the

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[3] When filing the notice in the district court on the last day of the 30-day period, the district court clerk apparently did not "transfer" the notice to the nearby circuit court clerk in Tallahassee as *required* by Rule 9.040(b) and Fla. Const. Art. V, Sec. 2(a).

District Court of Appeal . . . rather than to the Circuit Court." However, this Court has since receded from *Lampkin-Asam* in two situations where the parties seeking review by the district court filed their papers initiating the action in the wrong court and made the second error of mischaracterizing the relief and remedy sought, i.e. "two wrongs" and "two errors" in connection with an appellant's efforts to obtain appellate review of a trial court order.

In *Skinner*, 561 So.2d at 262, this Court held in 1990 that where an initial appeal pleading (a petition for certiorari) attempting to invoke the appellate jurisdiction of the district court is improperly filed with the district court, rather than a notice of appeal correctly filed with the circuit court clerk, such improper filing in the district court *and* seeking the wrong remedy is nonetheless *sufficient* to invoke the district court's appellate jurisdiction. As noted by this Court in *Skinner*, 561 So.2d at 262:

> "It was the mistaken view of petitioner that the post-judgment order [of the circuit court] was, by its nature and content final, and therefore an appropriate matter for review by certiorari [in the district court]. As a result, petitioner filed with the district court a petition for certiorari instead of a notice of appeal with the circuit court. There is no question that an appellate court has jurisdiction to review a cause even though the form of appellate relief is mischaracterized. *Johnson*, 537 So.2d at 97. As a result, we believe that petitioner's timely filed application for certiorari in the district court was sufficient to invoke that court's appellate jurisdiction.
>
> In *Johnson*, this court held that the filing of a notice of appeal in the circuit court was sufficient to confer jurisdiction on that appellate court in order to consider the appropriate remedy. We find no distinguishable difference between the scenario in allowing a petition for certiorari filed in the district court to confer jurisdiction on that appellate court in order to consider the appropriate remedy. **We believe that once the district court's jurisdiction has been invoked, it cannot be divested of jurisdiction by a hindsight determination that the wrong remedy was sought by a notice or petition *filed in the wrong place*."**

And in *Johnson*, 537 So. 2d at 98, the 1989 mirror-image situation of *Skinner*, this Court held that a notice of appeal improperly filed within the 30-day period in the lower tribunal (i.e. circuit court) was nonetheless sufficient to invoke the district court's appellate jurisdiction to consider a petition for certiorari, even though the notice was itself not timely *nor* properly filed in the district court within the 30-day period. This, again "two wrongs" were accomplished by the appealing party, by filing for the wrong remedy and filing in the wrong court. This Court emphasized in *Skinner*:

> "[P]etitioner argues that no substantive reason exists for having to file a piece of paper with the clerk of the circuit court which will automatically be forwarded to the district court, especially when the reverse circumstances, district courts accepting notice of appeals filed in circuit court as petitions for certiorari has long been exercised. We agree."

In analogous situations to the case *sub judice* various district courts have similarly held that misfilings of appeal origination papers in wrong courts are indeed sufficient to invoke appellate jurisdiction. See: *Sanchez v. Swanson*, 481 So. 2d 481 (Fla., 1986) [where notice of appeal of county court order to circuit court was stamped as filed in circuit court (in its appellate capacity), improper filing of notice of appeal with circuit court clerk was sufficient to invoke circuit court's appellate jurisdiction]; *Sternfield v. Jewish Introductions*, 581 So.2d 987 (Fla. 4th DCA, 1991) (order of circuit court in appellate capacity quashed, which dismissed county court appeal where an initial appeal pleading was filed in circuit court); *Hines v. Lykes*, 374 So. 2d 1132, 1133 (Fla. 2 DCA 1979) [where notice of administrative appeal was timely filed with district court clerk, but not timely filed with lower tribunal (i.e. administrative agency), timely filing in district court sufficient to invoke district court's appellate jurisdiction].

It is also significant to point out that the notice of appeal filed by Petitioners clearly designates at the top of the page that it is filed "*In the Circuit Court* for the

Second Judicial Circuit" in Tallahassee (A19), although it was inadvertently mailed to and received by the nearby District Court Clerk in Tallahassee. The fact that the notice was specifically addressed to the *lower tribunal* in its caption, is further indication of a jurisdictionally-sufficient notice. See *Sanchez*, 481 So. 2d at 482, note 1.

Fla. Const. Art. V, Sec. 2(a) and general principles of due process of law require Rule 9.040(b) to be interpreted so as to mandate transfer of a correctly-denominated notice of appeal from the appellate court to the trial court. Otherwise, we will be left with the incongruous result that "two-wrongs-make-a-right" when it comes to invocation of appellate jurisdiction. It would be fundamentally unfair that the parties in *Johnson* and *Skinner* would be entitled to relief because they filed their initiating paper in the wrong court and sought the wrong remedy ("two wrongs"), but that the Petitioners herein would be left without a remedy because they only filed a correctly titled Notice in the wrong place ("one wrong"). If Petitioners had made yet another mistake, i.e. calling their appeal initiating document a "Petition for Certiorari," the law is clear at this time that the First District would indeed be under a *duty* to consider the merits of the appeal.

Petitioners urge this Court to reject the simplistic analysis which appears to support the transfer of cases in "two wrongs" situations, but which does not exist in cases involving only the *single* mistake of filing in the wrong court. That analysis seems to be that, because district courts have jurisdiction to hear *some* cases which arise when certiorari petitions are filed therein, the mere act of filing such a mislabeled petition somehow triggers a magic-like "switch" engaging the jurisdictional power of that court to awaken and to do whatever else is needed to hear any case on the merits, even when in the particular case certiorari will not lie. The analysis goes on to say that because the filing of a "notice of appeal" in a district court does not *ever* trip the switch of power in that court, then the filing of such a

correctly-denominated paper in the district court is ineffective to give rise to jurisdiction. Jurisdiction does not spring forth only in a magical fashion upon application for some obscure or improper writ being laid like dust into the clerk's files, but also upon application for the right remedy being timely filed in the specific appellate court which will exercise its review power to provide that remedy.

Notwithstanding, it is evident from the 1989 *Johnson* and 1990 *Skinner* decisions that this Court has receded from its 1978 holding of *Lampkin*. See *Alfonso v. State DER*, 588 So. 2d 1065, 1066 (Fla., 3 DCA, 1991) ("we agree that the continuing validity of *Lampkin-Asan's* narrow holding may be open to question in view of the *Johnson* and *Skinner* cases.") See also: *Thompson v. Multi-Restaurant*, 561 So.2d 1192, 1193 (Fla. 3rd DCA, 1990) ("the continued authority of *Lampkin-Asam* is *dubious at best*"). And in *Johnson*, 537 So. 2d at 98, this Court even noted in 1989, "we ***recede*** from *Lampkin-Asan* . . ."

The First DCA erred in dismissing Petitioners' otherwise timely notice of appeal for filing in the wrong place. Accordingly, the First District's order dismissing the subject appeal should be quashed, with instructions to determine the merits of the appeal therein.

CONCLUSION

Even though the notice was timely filed in the wrong court, such filing with the Clerk of the First District was sufficient to invoke the First District's appellate jurisdiction. See: *Skinner; Johnson; Sanchez; Sternfield; Hines*. Based upon the foregoing arguments and authorities, the Petitioners respectfully request this Honorable Court to quash the order of the First District dismissing the appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Brief and Appendix has been furnished by U.S. Mail Morris E. Shelkofsky, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050, and Debra A. King, Senior Counsel, University of South Florida, ADM 250, 4202 East Fowler Avenue, Tampa, Florida 33620-6250, this 1st day of March, 1993.

Sam Mandelbaum
Samuel R. Mandelbaum, Esquire

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/Appellants,

v.

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

Respondent/Appellee..

_____/

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

1st DCA Appeal No.: 92-3059

APPENDIX OF PETITIONERS/APPELLANTS

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IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY
CIVIL DIVISION

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.,

Plaintiffs,

vs.

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

Defendant.

_____/

Case No. 91-4715

Florida Bar No. 472867

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs 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., by and through their undersigned attorneys, file this complaint against the BOARD OF REGENTS of the State of Florida University System and states as follows:

1. This is an action for breach of contract and negligence and the amount in controversy is in excess of $10,000.00 exclusive of interests and costs.

2. Each of the Plaintiffs is a medical doctor.

3. The University of South Florida is a university in the State of Florida's State University System with a main campus located in Hillsborough County, Florida.

4. The University of South Florida, on its Hillsborough County campus, operates a college of medicine known as the University of South Florida College of Medicine.

5. The BOARD OF REGENTS of the State of Florida is a body corporate responsible for reviewing and evaluating the instructional, research, and service programs of each of Florida's state universities.

6. The BOARD OF REGENTS is responsible for terminating programs at the state universities.

7. Both the University of South Florida and the University of South Florida College of Medicine are and were at all times relevant, agents of the BOARD OF REGENTS acting within the actual or apparent scope of their authority.

8. The individual Plaintiffs are medical physicians who were orthopaedic surgery residents at the University of South Florida College of Medicine Department of Orthopaedic Surgery.

9. Each of the Plaintiffs was offered an appointment to the Orthopaedic Surgery Residency Program (the "program") after making application to the University of South Florida College of Medicine Department of Orthopaedic Surgery. Each of the Plaintiffs entered the program to satisfy the certification requirements of the American Board of Orthopaedic Surgery. The Plaintiffs' primary motivation in accepting appointment to the program was to satisfy the requirements for board certification.

10. The Orthopaedic Surgery Resident Training Program of the Department of Orthopaedic Surgery at the University of South Florida was (prior to its termination), a graduate medical education program. At the time each of the Plaintiffs was offered and accepted appointment to the program, it was anticipated that they would spend five (5) years in the program provided they performed satisfactorily and obtained adequate skills, knowledge and maturity to become

competent orthopaedic surgeons. The program was extremely demanding and required the complete attention, interest and energies of the residents in training. It required them to (1) provide day-to-day patient care, including after hours and weekends; (2) be available for formal study sessions and organized learning experiences, including lectures, laboratory sessions, informal course presentations; (3) engage in extensive and in depth individual study; (4) conduct individual and supervised investigational research with the assistance of the faculty whose purpose it was to acquaint the residents with the tools and techniques for investigative research; (5) develop a personal program of self-study and professional growth with guidance from the teaching staff; (6) participate fully in the educational activities of the program; and (7) participate in institutional programs and activities involving the medical staff.

11. In the program, it was anticipated that the Plaintiffs would work under the tutilege of the Department's faculty, who it was expected would provide the guidance and assistance necessary so that the Plaintiffs could successfully complete the course of training, studies and research necessary to become board certified.

COUNT I

(Breach Of Implied Covenants Of A Written Agreement)

12. This is an action by Plaintiffs 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. (hereinafter in Count I the "Plaintiffs") against the BOARD OF REGENTS for breach of implied covenants of a written agreement.

13. All of the allegations contained in paragraphs 1 through 11 are incorporated and realleged herein.

14. After being offered appointments to the Orthopaedic Surgery Residency Program, each of the Plaintiffs executed house officer contracts in the form attached

as Exhibit "A." These house officer contracts were for one-year periods and were routinely renewed for each subsequent year of residency until the Orthopaedic Surgery Residency Program was dismantled. The nature of the house officer contract and the relationship between the College of Medicine and the Plaintiffs was such that it was an implied covenant of the agreements that they would be routinely renewed for each of the five years of residency, provided the Plaintiffs satisfactorily performed and maintain professional patient care standards in compliance with house officer personnel policies.

15. Sometime during 1989, annual house officer contracts in the form attached as Exhibit "A" were entered into between the BOARD OF REGENTS (through its agent, the University of South Florida College of Medicine) and each of the Plaintiffs. These agreements were entered into and were to be performed in Hillsborough County, Florida.

16. Despite the absence of explicit language, the house officer contracts carried with them an implied covenant on the part of the BOARD OF REGENTS to exercise that degree of care which a reasonably-careful educational institute would use under like circumstances. The house officer contracts also carried with them an implied covenant on the part of the BOARD OF REGENTS to keep the Orthopaedic Surgery Residency Program in existence until each of the Plaintiffs completed his residency in said program. Additionally, despite the absence of explicit language, the house officer contracts carried with them an implied covenant on the part of the BOARD OF REGENTS to routinely renew the house officer contracts so that the Plaintiffs could successfully complete the course of training, studies and research necessary to become board certified.

17. Each of the Plaintiffs has performed all of his obligations under the house officer contract he entered into with the BOARD OF REGENTS.

18. The BOARD OF REGENTS has breached each of the house officer contracts by failing to perform in accordance with the implied covenants thereof, including but not limited to failing to exercise that degree of care which a reasonably-careful educational institute would use under like circumstances and allowing the Orthopaedic Surgery Residency Program to become dismantled thereby making it impossible for the Plaintiffs to successfully complete the course of training, studies and research necessary to become board certified.

19. As a result of the breach by the BOARD OF REGENTS, each of the Plaintiffs has suffered damages including, but not limited to, relocation expenses, lost earnings, and loss of future earning capacity.

WHEREFORE, Plaintiffs respectfully request this Honorable Court enter judgment for Plaintiffs awarding damages, costs, prejudgment interest, and all other relief the Court deems appropriate.

COUNT II

(Breach Of Implied Contract)

20. This is an action by Plaintiffs Jeffrey L. Stickney, M.D., James N. Pappas, M.D., Douglas Stringham, M.D., Tom D. Howey, M.D., and William F. Bennett, M.D. (hereinafter in Count II the "Plaintiffs") for breach of an implied contract.

21. All of the allegations contained in paragraphs 1 through 11 are incorporated and realleged herein.

22. [redacted] by each of the Plaintiffs of the BOARD OF REGENTS' offer of [redacted] to the Orthopaedic Surgery Residency Program and the nature of the relationship between the BOARD OF REGENTS and the Plaintiffs created implied contracts which were separate and apart from the later executed house officer contracts described in paragraph 14 above.

23. These implied contracts carried with them an obligation on the part of the BOARD OF REGENTS to keep the Orthopaedic Surgery Residency Program in

existence so that each of the Plaintiffs could complete his residency in said program. Additionally, the implied contracts carried with them a duty on the part of the BOARD OF REGENTS to exercise that degree of care which a reasonably careful educational institute would use under like circumstances. Specifically, the standard of care required that the BOARD OF REGENTS continue the Orthopaedic Surgery Residency Program in good standing so that each of the Plaintiffs could complete the five year residency program and satisfy the certification requirements of the American Board of Orthopaedic Surgery.

24. Each of the Plaintiffs has performed all of his obligations under his implied contract with the BOARD OF REGENTS.

25. The BOARD OF REGENTS breached each of the implied contracts it had with the Plaintiffs by failing to exercise that degree of care which a reasonably careful educational institute would use under like circumstances and by allowing the Orthopaedic Surgery Residency Program to become dismantled prior to the Plaintiffs having successfully completed the course of training, studies and research necessary to become board certified.

26. All conditions precedent to bringing this action have been performed or have occurred.

27. As a result of the breach by the BOARD OF REGENTS, each of the Plaintiffs has suffered damages including, but not limited to, relocation expenses, lost earnings, and loss of future earning capacity.

28. [redacted] M.D., and Mark Frankle, M.D. reserve the right to join in Count II [redacted] complying with Florida's sovereign immunity statute.

WHEREFORE, Plaintiffs respectfully request this Honorable Court enter judgment for Plaintiffs awarding damages, costs, prejudgment interest, and all other relief the Court deems appropriate.

COUNT III

(Negligence)

29. This is an action by Plaintiffs Jeffrey L. Stickney, M.D., James N. Pappas, M.D., Douglas Stringham, M.D., Tom D. Howey, M.D., and William F. Bennett, M.D. (hereinafter in Count III the "Plaintiffs") against the BOARD OF REGENTS for negligence.

30. All of the allegations contained in paragraphs 1 through 11 are incorporated and realleged herein.

31. The BOARD OF REGENTS in administering the Orthopaedic Surgery Residency Program had a duty to use that degree of care which a reasonably careful person would use under like circumstances.

32. The Board of Regents in administering the Orthopaedic Surgery Residency Program breached this standard of care and failed to use that degree of care which a reasonably careful person would use under like circumstances. Specifically, the BOARD OF REGENTS negligently allowed the Orthopaedic Surgery Residency Program to become dismantled thereby making it impossible for the Plaintiffs to successfully complete the course of training, studies and research necessary to become board certified.

33. All conditions precedent to bringing this action have been performed or have occurred.

34. As a direct and proximate result of the BOARD OF REGENTS' negligence and the dismantling of the Orthopaedic Surgery Residency Program, each of the Plaintiffs has suffered damages including, but not limited to, relocation expenses, lost earnings, and lost of future earning capacity.

35. Paul T. Fortin, M.D., and Mark Frankle, M.D. reserve the right to join in Count III after complying with Florida's sovereign immunity statute.

WHEREFORE, Plaintiffs respectfully request this Honorable Court enter judgment for Plaintiffs awarding damages, costs, prejudgment interest, and all other relief the Court deems appropriate.

COUNT IV

(Professional Negligence)

36. This is an action by Plaintiffs Jeffrey L. Stickney, M.D., James N. Pappas, M.D., Douglas Stringham, M.D., Tom D. Howey, M.D., and William F. Bennett, M.D. (hereinafter in Count IV the "Plaintiffs") against the BOARD OF REGENTS for professional negligence.

37. All of the allegations contained in paragraphs 1 through 11 are incorporated and realleged herein.

38. The BOARD OF REGENTS in administering the Orthopaedic Surgery Residency Program had a duty to use that degree of care which a reasonably careful educational institute would use under like circumstances.

39. The BOARD OF REGENTS in administering the Orthopaedic Surgery Residency Program breached this standard of care and failed to use that degree of care which a reasonably careful educational institute would use under like circumstances. Specifically, the BOARD OF REGENTS negligently allowed the Orthopaedic Surgery Residency Program to become dismantled thereby making it impossible for the Plaintiffs to successfully complete the course of training, studies and research necessary to become board certified.

40. [redacted] precedent to bringing this action have been performed or have occurred.

41. As a direct result of the BOARD OF REGENTS' negligence and the dismantling of the Orthopaedic Surgery Residency Program, each of the Plaintiffs has suffered damages including, but not limited to, relocation expenses, lost earnings, and lost of future earning capacity.

42. **Paul** T. Fortin, M.D., and Mark Frankle, M.D. reserve the right to join in Count IV **after** complying with Florida's sovereign immunity statute.

WHEREFORE, Plaintiffs respectfully request this Honorable Court enter judgment for Plaintiffs awarding damages, costs, prejudgment interest, and all other relief the Court deems appropriate.

Plaintiffs demand a jury trial on all issues so triable.

SMITH & WILLIAMS, P.A.

By: _____

JAMES A. MUENCH
712 South Oregon Avenue
Tampa, Florida 33606
(813) 253-5400
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Morris E. Shelkofsky, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050, and Debra A. King, Senior Counsel, University of South Florida, ADM 250, 4202 East Fowler Avenue, Tampa, Florida 33620-6250, this 12 day of February, 1992.

_____
JAMES A. MUENCH

UNIVERSITY OF SOUTH FLORIDA
COLLEGE OF MEDICINE AFFILIATED HOSPITAL
HOUSE OFFICER CONTRACT

By this agreement, the University of South Florida College of Medicine (hereinafter "University") and _____ _____ (hereinafter "House Officer") agree to the following:

1. House Officer accepts appointment to the University's Affiliated Hospitals House Officer Training Program (hereinafter "Program"), which is approved by the American Council on Graduate Medical Education as _____, from _____.

2. University agrees to compensate House Officer during the above period at the rate of $_____ per annum ($_____ biweekly).

3. University agrees to provide:

(a) Professional liability protection equivalent to that provided to the clinical faculty physicians through the University of South Florida Malpractice Insurance Trust Fund.

(b) Paid vacation leave of 10 workdays during the PGY-1 year, and 15 workdays during each subsequent year of residency, with use and accrual subject to provisions set forth in House Officer Personnel Policies.

(c) Paid sick leave of 5 workdays during each year of residency and participation in sick leave pool subject to provisions set forth in House Officer Personnel Policies.

(d) Health and life insurance benefits pursuant to provisions of the House Officer Personnel Policies.

4. House Officer agrees to accept responsibility for:

(a) Developing a personal program of self-study and professional growth with guidance from the teaching staff, and refraining from any and all outside activities (compensated or uncompensated) which may interfere with the full and faithful discharge of program responsibilities;

(b) Participating in safe, effective and compassionate patient care under supervision, commensurate with level of advancement and responsibility, and advising all patients at an

appropriate time of their status as University-employed residents;

(c) Participating fully in the educational activities of the Program and, as required, assuming responsibility for teaching and supervising other house staff and students.

(d) Participating in institutional programs and activities involving the medical staff and adhering to established practices, procedures, policies and medical staff by-laws of the University and of the relevant affiliated hospital.

(e) Participating in institutional committees and councils, especially those that relate to patient care review activities; and

(f) Applying cost containment measures in the provision of patient care.

5. House Officer agrees and understands that continuation in the Program is dependent upon satisfactory performance and maintenance of satisfactory professional patient care standards and compliance with House Officer Personnel Policies. University endorses the principle of progressive discipline and seeks to address substandard performance and/or conduct with the least severe action necessary to affect the desired change. University agrees that when actions are contemplated which could result in discontinuation or could significantly threaten House Officer's career development, due process will be provided prior to final action. University further agrees to provide due process for House Officer to pursue a grievance concerning University action or decision affecting House Officer, as set forth in House Officer Personnel Policies.

_____

HOUSE OFFICER

_____

Date

_____

UNIVERSITY OF SOUTH FLORIDA
COLLEGE OF MEDICINE
SENIOR ASSOCIATE DEAN, COLLEGE OF MEDICINE

_____

Date

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

JEFFREY L. STICKNEY, M.D.,
JAMES N. PAPPAS, M.D.,
DOUGLAS STRINGHAM, M.D.,
TOM D. HOWEY, M.D.,
WILLIAM F. BENNETT, M.D.,

Plaintiffs,

v. CASE NO. 91-4715

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

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS THE ACTION AND COMPLAINT AND SUPPORTING MEMORANDUM OF LAW

Defendant, THE BOARD OF REGENTS OF THE STATE OF FLORIDA, STATE UNIVERSITY SYSTEM ("BOARD"), by and through its undersigned attorney, states its motion for an order dismissing the action and the Complaint and as reasons therefor states the following:

1. The Court lacks subject matter jurisdiction over the cause of action asserted because the Plaintiffs seek to hold the state liable for breach of implied covenants of an express contract ([redacted]) and breach of an implied, nonexpress contract (Count II), concerning which the State has not waived sovereign immunity. Pan Am

Tobacco Corporation v. Department of Corrections, 447 So.2d 4, 6 (Fla. 1985); Southern Road Builders, Inc. v. Lee County, 495 So.2d 189 (Fla. 2nd DCA 1986); Hern v. University of South Florida, No. 85-4084 (Fla. 2nd Cir. Ct., Leon County, 6-30-86); Switzer v. BOR/USF, NO. 87-8486 (Fla. 13th Cir. Ct., Hillsborough County, 10-28-87). Moreover an employment contract for a definite term such as the house officer contract alleged and attached as Exhibit A to the Amended Complaint does not have implied covenants to exercise the degree of care of a "reasonably careful" educational institution, to keep a Residency Program in existence until Plaintiffs' completed the program or for routine renewal. The first alleged implied covenant is barred by the complete absence of any tort duty arising out of the contract. Fla. Power & Light v. Westinghouse Elec., 510 So.2d 899, 901 (Fla. 1987) and AFM Corporation v. Southern Bell Tel. & Tel., 515 So.2d 180, 181 (Fla. 1987). The second and third alleged implied covenants are not stated within the provisions of the definite term employment contract and are thus excluded. Amalgamated Association, Etc. v. Greyhound Corp., 231 F.2d 585, 587 (5th Cir. 1956).

2. Any claim by Plaintiffs for [redacted] interest is improper because the State has not waived sovereign immunity from claims of prejudgment interest.

3. The Complaint fails to state a cause of action for breach of an implied contract because Florida law does not permit quantum meruit recovery where an express contract exists between the parties as alleged by Plaintiffs in Count I of the Amended Complaint. Accordingly, Count II of the Complaint should be dismissed. Kovtan v. Fredericken, 449 So.2d 1 (Fla. 2nd DCA 1984).

4. The Amended Complaint fails to state a cause of action because of the failure to plead and to meet the mandatory statutory conditions precedent to lawsuits against the Board of Regents pursuant to §768.28, Florida Statutes. Commercial Carries Corp. v. Indian River County, 3717 So.2d 1010, 1013 (Fla. 1979).

5. The Amended Complaint fails to state a cause of action for damages in tort outside the alleged house officer employment contract (Count I); outside the alleged implied contract regarding termination of the residency program (Count II); based upon negligence (Count III); and professional negligence (Count IV). In this regard, the pertinent allegation of Counts I-IV is that relating to an alleged failure "to exercise that degree of care which a reasonably-careful educational institution/person would use under like circumstances." Complaint paras. 16-Count I; 23-Count II; 32-Count III; and 39-Count IV. Each of these counts attempt to state a cause of action for negligent breach of an underlying contract. Such claims are barred

by the economic loss rule to the extent in that they seek to recover damages for tortious breach of contract. Florida Power and Light v. Westinghouse Electric, 510 So.2d 899, 901 (Fla. 1987) (as to products) and AFM Corporation v. Southern Bell Tel. & Tel., 515 So.2d 180, 181 (Fla. 1987) (as to services).

CONCLUSION

For the foregoing reasons, this Honorable Court lacks subject matter jurisdiction over Plaintiffs' claims and the Amended Complaint fails to state a cause of action against the Board of Regents.

WHEREFORE, Defendant BOARD having stated its Motion to Dismiss the Action and Complaint respectfully prays for an order dismissing the action and complaint with prejudice.

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 **DEFENDANT'S MOTION TO DISMISS THE ACTION AND COMPLAINT AND SUPPORTING MEMORANDUM OF LAW** has been furnished by U.S. Mail to **DEBRA A. KING, Senior Counsel,** University of South Florida, ADM 250, 4202 East Fowler Avenue, Tampa, Florida 33620-6250 and **JAMES A. MUENCH, Esquire,** Smith & Williams, Old Hyde Park, 712 South Oregon Avenue, Tampa, Florida 33606-2569 on this 27th day of February, 1992.

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

Morris>Stickney.MD&ML/lw

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

JEFFREY L. STICKNEY, M.D.,
JAMES N. PAPPAS, M.D.,
DOUGLAS STRINGHAM, M.D.,
TOM D. HOWEY, M.D.,
WILLIAM F. BENNETT, M.D.,

Plaintiffs,

v. CASE NO. 91-4715

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

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO DISMISS
THE ACTION AND COMPLAINT

This action was heard on Defendant's Motion to Dismiss the Action and the Complaint and

IT IS ADJUDGED that:

1. The Motion is GRANTED.

2. The Amended Complaint is DISMISSED with prejudice.

ORDERED in Tallahassee, Florida this 22 day of May, 1992.

George S. Reynolds, III

GEORGE S. REYNOLDS, III
CIRCUIT COURT JUDGE

cc: James A. Muench, Esquire
Smith & Williams
Old Hyde Park
712 South Oregon Avenue
Tampa, Florida 33606-2569

Deborah A. King, Senior Counsel
University of South Florida
ADM 250
4202 East Fowler Avenue
Tampa, Florida 33620-6250

Morris E. Shelkofsky, Jr.
Assistant Attorney General
Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32399-1050

<Morris>Stickney.Ord/lw

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY
CIVIL DIVISION

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.,

Case No. 91-4715

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.
_____/

FILED

NOTICE OF APPEAL

NOTICE IS GIVEN that 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., Plaintiffs/Appellants, appeal to the First District Court of Appeals, the Order of this Court rendered on May 22, 1992. The nature of the Order is a final order: Order On Defendant's Motion To Dismiss The Action And Complaint.

SMITH & WILLIAMS, P.A.

By: _____
JAMES A. MUENCH
712 South Oregon Avenue
Tampa, Florida 33606
(813) 253-5400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Morris E. Shelkofsky, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050, and Debra A. King, Senior Counsel, University of South Florida, ADM 250, 4202 East Fowler Avenue, Tampa, Florida 33620-6250, this 19th day of June, 1992.

JAMES A. MUENCH

SMITH & WILLIAMS, P.A.
TAMPA, FL 33606

6987

INVOICE	G/L#	CLIENT	MAT	DESCRIPTION	AMOUNT
	89020	856	2	Jon S. Wheeler, Clerk of court	250.00

CHECK #: 6987 CHECK DATE: 06/19/92 CHECK AMOUNT: 250.00

EXHIBIT 2

DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA 32301

Jon S. Wheeler
CLERK

(904) 488-6151

RECEIVED
JUN 25 1992

In response to your recent communication, see paragraph(s) marked below.

X Your notice of appeal is returned herewith. It should be filed in the lower tribunal* clerk's office within 30 days from the rendition of the order you are appealing.

___ The papers tendered to this office fail to set forth any grounds for invoking the jurisdiction of this Court; therefore, no action can be taken by the Court.

___ Your appeal is pending in this Court. As soon as the record on appeal and all briefs have been filed, it will be ready to be submitted to the Court for decision. When a decision is reached, you will be notified.

___ Your appeal is presently under consideration by the Court and there is no way I can tell how long it will be before a decision is reached. As soon as a decision is reached and an opinion filed, you will be notified.

___ Motions for bail pending appeal must be filed in the clerk's office of the trial court. If denied by the trial court, a motion to reveiw denial of appeal bond can be filed in this Court. In the latter case you should accompany your motion to review with a copy of the order of the trial court denying the bond and a transcript of the hearing, if any.

___ I am not authorized to give detailed legal advice. It is suggested that you contact the attorney who was appointed to represent you on appeal or the attorney who represented you at trial.

___ This Court has no forms for petitions for writ of habeas corpus. The allegations in your petition may be set forth in your own words.

___ There appears to be no appeal pending or closed in this Court similar to the style you state.

___ The attached correspondence appears to have been mailed to this District Court of Appeal in error.

___ The judgment, order, or sentence was affirmed on _____.

___ The above-styled appeal was dismissed or quashed on _____.

___ The motion for rehearing was denied on _____.

___ This Court's mandate was issued on _____ and the appeal is now closed in this Court.

___

Sincerely,

Jon S. Wheeler

Jon S. Wheeler

*Lower tribunal: The court, agency, officer, board, commission, or body whose order is to be reviewed.

EXHIBIT 3 A - 22

SMITH & WILLIAMS

A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

JEFFREY A. AMAN
JANA P. ANDREWS
DALE K. BOHNER
MARGARET E. BOWLES
DAVID L. COOLEY
ROBERT L. HARDING
J. GREGORY HUMPHRIES
JAMES A. MUENCH
BRIAN D. PUGH
NEAL A. SIVYER
DAVID LISLE SMITH
GREGORY L. WILLIAMS

*ALSO ADMITTED VA BAR

OLD HYDE PARK
712 SOUTH OREGON AVENUE
TAMPA, FLORIDA 33606-2569

(813) 253-5400

FAX (813) 254-3459

ORLANDO OFFICE:

201 EAST PINE STREET
SUITE 700
ORLANDO, FLORIDA 32801
(407) 849-5151

PLEASE REPLY TO TAMPA

June 25, 1992

Paul F. Hartsfield, Clerk of Court
Second Judicial Circuit
Leon County Courthouse
Tallahassee, Florida 32301

Re: Jeffrey L. Stickney, M.D., et al. v. The Board of Regents of The State of Florida State University System
Case No. 91-4715

Dear Mr. Hartsfield:

Enclosed for filing please find an Appeal and check in the amount of $250.00. The Appeal was inadvertently directly filed with the Appeal Court.

Thank you for your attention to this matter. Please call if you have any questions.

Sincerely,

Anna Marie Davis
Secretary to Mr. Muench

/amd
enclosures

EXHIBIT 4

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY
CIVIL DIVISION

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.,

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.
_____/

Case No. 91-4715

Florida Bar No. 472867

NOTICE OF REFILING NOTICE OF APPEAL

COMES NOW, Plaintiffs/Appellants 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., and hereby refiles their Notice Of Appeal previously filed with the First District Court Appeal, and state as follows:

1. On June 19, 1992, Smith & Williams, P.A., as counsel for Plaintiffs, mailed the Notice of Appeal for filing in the First District Court of Appeal (attached as Exhibit 1) along with the appropriate filing fee of $250.00. Said filing fee as evidenced by check stub #6987, attached as Exhibit 2 was made payable to Jon S. Wheeler, Clerk of Court. Through clerical error, the Notice of Appeal and check #6987 were inadvertantly mailed for filing to the First District Court of Appeal in Tallahassee.

2. Notwithstanding the First District Court of Appeal filed the Notice of Appeal on June 22, 1992, and affixed the "Filed" stamp as of that date (i.e., June 22, 1992) [See Exhibit "1" infra].

3. On June 25, 1992, the First District Court of Appeal sent back to Smith & Williams the Notice of Appeal and filing fee. (See supporting documentation attached as Exhibit 3). In returning the Notice of Appeal and filing fee, the First District Court of Appeal stated: "Your notice of appeal is returned herewith. It should be filed in the lower tribunal clerk's office within 30 days from the rendition of the order you are appealing."

4. On June 25, 1992, Smith & Williams then sent the Notice of Appeal, filing fee and a letter of explanation attached as Exhibit 4 to Paul F. Hartsfield, Clerk of Court for the Second Judicial Circuit.

5. On August 28, 1992, Ms. Brenda Gainey, Deputy Clerk for the Second Judicial Circuit informed Smith & Williams that it never received the aforementioned Notice of Appeal and letter.

WHEREFORE, the Plaintiffs/Appellants respectfully refiles the previously-filed Notice of Appeal with this Court.

Respectfully submitted,

SMITH & WILLIAMS, P.A.

By: _____

JAMES A. MUENCH
712 South Oregon Avenue
Tampa, Florida 33606
(813) 253-5400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Morris E. Shelkofsky, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050, Debra A. King, Senior Counsel, University of South Florida, ADM 250, 4202 East Fowler Avenue, Tampa, Florida 33620-6250, this 28th day of August, 1992.

JAMES A. MUENCH

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY
CIVIL DIVISION

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.,

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.
_____/

Case No. 91-4715

Florida Bar No. 472867

ORDER ON SMITH & WILLIAMS, P.A.'S MOTION TO WITHDRAW AS COUNSEL

THIS ACTION was heard on Smith & Williams, P.A.'s Motion To Withdraw As Counsel, the Court finding that:

1. On June 19, 1992, Smith & Williams, P.A., as counsel for Plaintiffs, mailed a Notice Of Appeal for filing in the First District Court of Appeal, along with the appropriate filing fee of $250.00.

2. Through clerical error, the Notice of Appeal and check were inadvertently mailed for filing to the First District Court of Appeal.

3. Notwithstanding, the First District Court of Appeal filed the Notice of Appeal on June 22, 1992, and affixed the "filed stamp" as of that date (i.e., June 22, 1992).

4. On June 25, 1992, the First District Court of Appeal sent back to Smith & Williams, P.A. the Notice of Appeal and filing fee: In returning the Notice of Appeal and filing fee, the First District Court of Appeal stated: "Your notice of appeal is returned herewith. It should be filed in the lower tribunals clerks office within thirty days from the rendition of the order you are appealing."

5. On June 25, 1992, Smith & Williams, P.A. then sent the Notice of Appeal, filing fee and letter of explanation to Paul F. Hartsfield, Clerk of Court for the Second Judicial Circuit.

6. On August 28, 1992, Ms. Brenda Gainey, Deputy Clerk for the Second Judicial Circuit informed Smith & Williams that it never received the aforementioned Notice of Appeal, filing fee and letter.

7. On August 28, 1992, Smith & Williams filed a Notice of Refiling Notice of Appeal setting forth each of the above facts.

THEREFORE, it is **ORDERED AND ADJUDGED** that:

1. To the extent this Court has jurisdiction of this action, Smith & Williams, P. A.'s Motion To Withdraw As Counsel is granted.

2. All further pleadings shall be filed directly on Plaintiffs.

DONE AND ORDERED in Chambers, Leon County, Tallahassee, Florida, this 8th day of September, 1992.

P. KEVIN DAVEY
CIRCUIT COURT JUDGE

cc: Morris E. Shelkofsky, Esquire
Debra A. King, Esquire
James A. Muench

DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA 32399-1850

JON S. WHEELER
CLERK OF THE COURT

(904) 488-6151

September 08, 1992

Honorable Paul F. Hartsfield
Clerk of the Circuit Court
P.O. Box 726
Tallahassee, FL 32302

RE: Jeffrey L. Stickney, M.D., et al. VS The Board of Regents of The State of Fla. etc.
Case Number : 92-03059
Lower Case number : 91-4715

Dear Paul F. Hartsfield

The Clerk of the Court acknowledges receipt of the following:

Notice of Appeal from the lower tribunal reflecting a filing date of 09/02/92. Receipt number 921627 for filing fee attached.

In the future, please use this court's case number on all pleadings and correspondence filed in this cause.

BEFORE THIS CASE CAN BE ASSIGNED TO A PANEL OF JUDGES FOR CONSIDERATION, the attached Docketing Statement must be completed and filed with this Court by the Appellant/Petitioner. Appellees/Respondents/Amicus need to review the information on the Appellants/Petitioner docketing sheet and file a docketing statement if required, and as explained in the attached docketing statement.

Sincerely Yours,

JON S. WHEELER

CC:
James A. Muench
Morris E. Shelkofsky, Jr.
Debra A. King

RECEIVED

SEP 1 1 1992

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399

Telephone No.(904) 488-6151

DATE: September 9, 1992

CASE NO.: 92-3059

JEFFREY L. STICKNEY, M.D., et al. vs. THE BOARD OF REGENTS OF THE STATE OF FLA. etc.

Appellant/Petitioner Appellee/Respondent

ORDER

Upon the court's own motion the appellant is ordered to show cause within 10 days from the date of this order why the appeal should not be dismissed for failure to timely file the notice of appeal. If any pleading or order is referenced in support of the response, a copy of the referenced order or pleading shall be attached to the response.

By order of the court

JON S. WHEELER, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

James A. Muench
Debra A. King

Morris E. Shelkofsky, Jr.

Deputy Clerk

IN THE FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, 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.,

Appeal No. 92-3059

Appellants,

v.

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

Appellee.
_____/

APPELLANTS' RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW the Appellants, 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., by and through their undersigned counsel, and hereby respond to this Court's *sua sponte* Order to Show Cause why this appeal should not be dismissed for untimely notice of appeal, and in opposition thereto would state:

BACKGROUND

On May 22, 1992 the Honorable George Reynolds, III, Circuit Judge for the Second Judicial Circuit, Leon County, rendered an "Order on Defendants' Motion to Dismiss the Action and Complaint," with prejudice [Exhibit 1, *infra*]. The Defendants' motion was based upon an alleged lack of subject matter jurisdiction.

Thereafter, on June 19, 1992, the Appellants' counsel mailed a Notice of Appeal seeking review of the above circuit court order to the First District Court of

Appeal, along with the appropriate filing fee of $250 [Exhibit 2, *infra*]. The Notice of Appeal was stamped by this Court as "FILED" three days later on Monday, June 22, 1992 [Exhibit 3, *infra*]. The style of the notice indicated it was "In the Circuit Court for the Second Judicial Circuit. . . Leon County" [Exhibit 3, *infra*]. The Notice of Appeal previously filed by this Court on June 22, 1992 was returned by this Court shortly thereafter to Appellants' counsel, with directions to file in the lower tribunal clerk's office [Exhibit 4, *infra*]. [1] Copies of this Notice of Appeal were served by U.S. Mail on June 19, 1992 upon Appellee's two attorneys, which included Morris Shelkofsky, Jr., Assistant Attorney General and Debra King, Senior Counsel for the University of South Florida [Exhibit 3, page 2, *infra*].

On June 25, 1992, after receiving back the previously-filed notice of appeal from the district court clerk, Appellants' counsel then sent the notice, filing fee and a letter of explanation to the Clerk of the Circuit Court for the Second Circuit [Exhibit 5, *infra*]. This notice, filing fee and letter were apparently never received by the circuit clerk [Exhibit 2, *infra*].

Thereafter, on August 28, 1992, Appellants' filed a Notice of Refiling the Notice of Appeal in the Circuit Court, noting it had originally been "filed" in this Court on June 22, 1992 on a timely basis. [Exhibit 6, *infra*].

Eventually the *refiled* Notice of Appeal, reflecting a filing date of September 2, 1992, was forwarded on to this Court on September 8, 1992 [Exhibit 7, *infra*].

On September 9, 1992 this Court entered an Order to Show Cause for Appellants' to show why this appeal should not be dismissed for failure to file timely notice of appeal.

---

[1] In an order entered by the circuit judge on September 8, 1992, the circuit judge made these factual findings of record [Exhibit 2, *infra*].

ARGUMENT OPPOSING DISMISSAL

Florida Rule of Appellate Procedure 9.110(b) provides that jurisdiction of the appellate court "shall be invoked by filing 2 copies of a notice, accompanied by filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed."

As the circuit court order sought for review was rendered on May 22, 1992, a notice of appeal must have necessarily been filed within 30 days of rendition, i.e. Monday, June 22, 1992. As the 30th day fell on Sunday, June 21, 1992, the 30-day period would have been tolled until Monday, June 22, 1992. See *Rubenstein v. Richard*, 346 So.2d 89, 90 (Fla. 3rd DCA, 1977) (where 30th day to file notice of appeal fell on Sunday, last day for filing notice was extended to next business day that courthouse was open).

In this case the Appellants inadvertently filed their notice of appeal, although on a timely basis, within the 30-day period, with the clerk of the First District Court of Appeal. Apparently on the last day or soon after the 30-day period had run, the district court clerk returned the notice to the Appellants' counsel in Tampa with directions for filing in the circuit court clerk's office (the lower tribunal). [2] The notice was eventually refiled in the circuit court clerk's office, but well beyond the 30-day period. [Exhibit 7, *infra*].

Notwithstanding Appellants' inadvertent filing of the Notice of Appeal in the district court, said filing within the 30-day period was indeed sufficient to invoke the district court's appellate jurisdiction, even though the Appellants should have filed the notice in the circuit court. See *Skinner v. Skinner*, 561 So.2d 260, 262 (Fla., 1990); *Johnson v. Citizens State*, 537 So. 2d 96 (Fla., 1989).

---

[2] The district court clerk apparently did not transfer the notice when he filed it on the last day of the 30-day period to the nearby circuit court clerk in Tallahassee.

In *Skinner*, 561 So.2d at 262, the Florida Supreme Court held that where an initial pleading attempting to invoke the appellate jurisdiction of the district court is improperly filed with the district court rather than correctly with the circuit court clerk, such improper filing with the district court is *sufficient* to invoke the district court's appellate jurisdiction. As noted by the Supreme Court in *Skinner*, 561 So.2d at 262:

> "It was the mistaken view of petitioner that the post-judgment order [of the circuit court] was, by its nature and content final, and therefore an appropriate matter for review by certiorari [in the district court]. As a result, petitioner filed with the district court a petition for certiorari instead of a notice of appeal with the circuit court. There is no question that an appellate court has jurisdiction to review a cause even though the form of appellate relief is mischaracterized. *Johnson*, 537 So.2d at 97. As a result, we believe that petitioner's timely filed application for certiorari in the district court was sufficient to invoke that court's appellate jurisdiction.
>
> In *Johnson*, this court held that the filing of a notice of appeal in the circuit court was sufficient to confer jurisdiction on that appellate court in order to consider the appropriate remedy. We find no distinguishable difference between the scenario in allowing a petition for certiorari filed in the district court to confer jurisdiction on that appellate court in order to consider the appropriate remedy. **We believe that once the district court's jurisdiction has been invoked, it cannot be divested of jurisdiction by a hindsight determination that the wrong remedy was sought by a notice or petition filed in the wrong place."**

And in *Johnson*, 537 So. 2d at 98, the Supreme Court held that a notice of appeal improperly filed within the 30-day period in the lower tribunal (i.e. circuit court) was nonetheless sufficient to invoke the district court's appellate jurisdiction to consider a petition for certiorari, even though the petition was itself not timely and properly filed in the district court within the 30-day period.

Moreover, Florida Rule of Appellate Procedure 9.040(b) provides, with regard to filing in an improper forum:

> "If a proceeding is commenced in an *inappropriate court*, that court ***shall transfer*** the cause to an appropriate court." (Italics added.)

Thus, Rule 9.040(b) mandates that an improperly-filed notice in district court must be transferred to the circuit court

See also: *Sanchez v. Swanson*, 481 So. 2d 481 (Fla., 1986) (where notice of appeal from county court order to circuit court was stamped as filed in circuit court (in its appellate capacity), improper filing of notice of appeal with circuit court clerk was sufficient to invoke circuit court's appellate jurisdiction); *Hines v. Lykes*, 374 So. 2d 1132, 1133 (Fla. 2 DCA 1979) (where notice of administrative appeal was timely filed with district court clerk, but not timely filed with lower tribunal (i.e. administrative agency), timely filing in district court sufficient to invoke district court's appellate jurisdiction).

Moreover, the notice of appeal filed by Appellants [Exhibit 3 *infra*] clearly notes at the top of the page that it is filed "In the Circuit Court for the Second Judicial Circuit" in Tallahassee, although it was inadvertently mailed to and/or received by the District Court Clerk, nearby in Tallahassee. The fact that the notice specifically designated the *lower* tribunal in its caption, is further indicia of a jurisdictionally-sufficient notice. See *Sanchez*, 481 So. 2d at 482, Note 1.

Appellants are mindful of the 14 year-old decision of the Florida Supreme Court in ***Lampkin-Asan v. Third DCA***, 364 So. 2d 469 (Fla., 1978), written during the time period of transition in this state from the Florida Appellate Rules to the Florida Rules of Appellate Procedure. The Supreme Court in *Lampkin* held that a notice of appeal inadvertently filed within the 30 day period in the district court of appeal, rather than in the circuit court, is jurisdictionally flawed and subject to dismissal.

However, it is evident from the 1989 *Johnson* and 1990 *Skinner* decisions that the Supreme Court has receded from its holding of *Lampkin* 12 years earlier. See *Alfonso v. State DER*, 588 So. 2d 1065, 1066 (Fla., 3 DCA, 1991) ("we agree that the continuing validity of *Lampkin-Asan's* narrow holding may be open to question in view of the *Johnson* and *Skinner* cases.") And in *Johnson*, 537 So. 2d at 98, the Supreme Court expressly held, "we ***recede*** from *Lampkin-Asan* . . ."

Significantly the Third District has certified the question of whether the erroneous filing of a Notice of Appeal with the District Court rather than the Circuit Court is jurisdictionally deficient. See *Restrepo v. First Union*, 591 So. 2d 1157 (Fla. 3 DCA, 1992), *review pending* , Florida Supreme Court Case Number 79,406; *Alfonso*, 588 So. 2d at 1066, *review pending*, Florida Supreme Court Case Number 79,096. Oral argument is scheduled in the Supreme Court on this question for November 6, 1992. The question as certified by the Third DCA is as follows:

> "WHETHER A DISTRICT COURT OF APPEAL HAS JURISDICTION TO ENTERTAIN AN APPEAL FROM A FINAL JUDGMENT OF A CIRCUIT COURT WHERE, AS HERE, (1) THE APPELLANT ERRONEOUSLY FILES A NOTICE OF APPEAL WITH THE DISTRICT COURT, RATHER THAN THE CIRCUIT COURT, AND (2) THE APPELLANT TAKES NO CORRECTIVE ACTION TO FILE THE NOTICE OF APPEAL IN THE CIRCUIT COURT WITHIN THIRTY DAYS OF THE RENDITION OF THE FINAL JUDGMENT." *ALFONSO V. STATE OF FLORIDA, DEPT. OF ENVIRONMENTAL REGULATIONS*, 588 So. 2d 1065, 1065 (FLA. 3D DCA 1991).

It is crystalline that the Supreme Court in *Skinner* and *Johnson* have abandoned its 1978 *Lampkin* decision. Accordingly, this Court should deny dismissal of the appeal *sub judice*. Notwithstanding, if this Court is inclined to consider dismissal of this appeal based upon *Lampkin*, the Appellants respectfully move this Court to stay and abate any decision on the order to show cause pending the Supreme Court's determination of the certified question of *Restrepo* and *Alfonso*. As grounds therefor the Appellants would state that it is in the best interests of the efficient administration of justice to await a final opinion from the

Supreme Court on the above certified question, to see if the Supreme Court will expressly overrule the 1978 *Lampkin* decision in view of its more recent *Skinner* and *Johnson* opinions.

CONCLUSION

In sum, even though the notice was timely filed in the wrong court, such filing with this Court was sufficient to invoke this Court's appellate jurisdiction. See: *Skinner; Johnson.* Accordingly, the Appellants respectfully request this Court to **decline** to dismiss the appeal *sub judice,* and allow this appeal to proceed. Alternatively, this Court should stay determination of its motion to dismiss pending outcome of the Supreme Court's decision in *Restrepo* and *Alfonso.*

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813-253-5400
Attorneys for Defendant

By: Sam Mandelbaum
Samuel R. Mandelbaum, Esquire
Florida Bar Number: 270806

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail Morris E. Shelkofsky, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050, and Debra A. King, Senior Counsel, University of South Florida, ADM 250,

4202 East Fowler Avenue, Tampa, Florida 33620-6250, this 17 day of September, 1992.

Sam Mandelbaum

Samuel R. Mandelbaum, Esquire

IN THE FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, 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.,

Appellants,

v. Appeal No. 92-3059

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

Appellee.

_____/

APPELLEE'S REPLY TO APPELLANTS' RESPONSE TO ORDER TO SHOW CAUSE

THE APPELLEE, THE BOARD OF REGENTS OF THE STATE OF FLORIDA STATE UNIVERSITY SYSTEM ("BOARD OF REGENTS"), by and through its undersigned attorney, hereby states its Reply to the Response of Appellants to the Order to Show Cause issued to Appellants as to why their appeal should not be dismissed for untimely filing of Notice of Appeal and in support thereof states the following.

Appellants seek relief from the District Court of Appeal of allowing the appeal to proceed or alternatively staying the determination of the Motion to

Dismiss pending the outcome of questions certified in Restrepo v. First Union National Bank of Florida, 591 So.2d 1157 (Fla. 3 DCA, 1992) and Alfonso v. State Department of Environmental Regulations, 588 So.2d 1065 (Fla. 3 DCA, 1991). The Plaintiffs' prayer for permitting the appeal to proceed or for the stay flies directly in the face of the determinations in the Restrepo and Alfonso cases. In both cases notwithstanding the certification of the questions involved, the appeals were dismissed. Alfonso, 588 So.2d at 1066 and Restrepo, 591 So.2d at 1157. Appellants have clearly granted the controlling effect of Lampkin-Asan v. Third DCA, 364 So.2d 469 (Fla. 1978). They recognize the holding of the Supreme Court in Lampkin to the effect "...that a Notice of Appeal inadvertently filed within the thirty (30) day period in the District Court of Appeal rather than in the Circuit Court, is jurisdictionally flawed and subject to dismissal." Appellants' Response to Order to Show Cause, page 5. Appellants argue that the decisions of the Florida Supreme Court in Johnson v. Citizens State, 537 So.2d 96 (Fla. 1989) and Skinner v. Skinner, 561 So.2d 260 (Fla. 1990) represent the abandonment by the Supreme Court of Florida of the Lampkin decision. This is clearly not the case. As recognized by the Third District Court of Appeal of Florida, Johnson and Skinner involved timely filing of documents appropriate to the court in which they were filed but not of the correct

type for the procedure involved, being treated as timely filings of correct documents. This involved a timely Notice of Appeal filed in Circuit Court being treated as a timely Petition for Certiorari in Johnson and a timely Petition for Certiorari filed in the District Court being treated as a timely Notice of Appeal in Skinner. Johnson, 537 So.2d at 98 and Skinner, 561 So.2d at 262. As the Third District Court of Appeals noted, Lampkin-Asan is good law and is binding on a District Court of Appeals such as this honorable Court. Alfonso, 588 So.2d at 1066. Moreover, the Third District Court of Appeals recognized the effect of Hoffmann v. Jones, 280 So.2d 431, 434 (Fla. 1973). That effect is to recognize the propriety of a District Court of Appeals certifying questions of great public interest to the Supreme Court of Florida for consideration but also clearly recognizing that prior to a change of the law by the Supreme Court of Florida, a District Court of Appeal, such as this honorable Court herein, is bound to follow controlling precedent. Hoffmann, 280 So.2d at 434. Under Lampkin-Asan, this honorable court has no discretion but to follow controlling precedent and sua sponte dismiss this untimely filed appeal.

The factual scenario presented by Appellants herein involves multiple errors. Initially, the error was filing in the First District Court of Appeals instead of the Circuit Court for Leon County, Florida. Secondly, presumptively

Appellants failed to mail to the Second Circuit Court Clerk the Notice of Appeal. As a result, the Notice of Appeal was never received by the Circuit Court Clerk. Rather, a Notice of Refiling of Notice of Appeal, a misnomer in view of the fact that the Notice of Appeal was never filed with the Circuit Court, was filed by Appellants' on August 28, 1992, sixty-six (66) days late by.their own account.

The Appellants' Response to the Order to Show Cause erroneously attempts to assert that Florida Rule of Appellate Procedure 9.040(b) "...mandates that an improperly-filed notice in the district court must be transferred to the circuit court." Appellants' Response to Order to Show Cause, page 5. This is clearly not the law of Florida. Rather, Florida Rule of Appellate Procedure 9.040(b) does not apply to the untimely filing of a Notice of Appeal which constitutes a jurisdictional defect rendering the District Court of Appeal without jurisdiction. Lampkin-Asan, 364 So.2d at 470-471.

WHEREFORE, Appellee, Board of Regents, having stated its opposition to Appellants' Response to Order to Show Cause respectfully prays for an order dismissing the Appellants' purported appeal.

RESPECTFULLY SUBMITTED,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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

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(904) 488-1573

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing **APPELLEES' REPLY TO APPELLANTS' RESPONSE TO ORDER TO SHOW CAUSE** has been furnished by U.S. Mail to **SAMUEL R. MANDELBAUM**, Esquire, Smith & Williams, P.A., 712 South Oregon Avenue, Tampa, Florida 33606-2569 on this 25th day of September, 1992.

MORRIS E. SHELKOFSKY, JR.

<morris>Stickney.reply

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Fl. 32399

Telephone (904) 488-6151

DATE September 30, 1992

LT 91-4715

CASE NO. 92-3059

JEFFREY L. STICKNEY, M.D., et al. (appellant/petitioner) vs. THE BOARD OF REGENTS OF THE STATE OF FLORIDA, e (appellee/respondent)

ORDER

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).

By order of the court

Jon S. Wheeler

JON S. WHEELER, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

James A. Muench
Morris E. Shelkofsky, Jr.
Paul F. Hartsfield

Samuel R. Mandelbaum
Debra A. King

Laurie Black
Deputy Clerk

DISTRICT COURT OF APPEAL STATE OF FLORIDA FIRST DISTRICT

IN THE FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, 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.,

Appellants/Petitioners,

v.

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

Appellee/Respondent.
_____/

Fla. Sup. Ct. Case No._____

1st DCA Appeal No. 92-3059

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Appellants/Petitioners 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.,, hereby invoke the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered September 30, 1992. The decision expressly and directly conflicts with decisions of other district courts of appeal and of the Supreme Court on the same question of law, and involves a question of great public importance.

Respectfully submitted,

SMITH & WILLIAMS, P.A.
712 South Oregon Avenue
Tampa, Florida 33606
(813) 253-5400
Attorneys for Appellants/Petitoners

By: Sam Mandelbaum
SAMUEL R. MANDELBAUM
Florida Bar No. 270806

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail Morris E. Shelkofsky, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050, and Debra A. King, Senior Counsel, University of South Florida, ADM 250, 4202 East Fowler Avenue, Tampa, Florida 33620-6250, this 14 day of October, 1992.

Samuel R. Mandelbaum, Esquire