IN THE SUPREME COURT OF THE
STATE OF FLORIDA

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,

Petitioner,

vs.

INVESTMENT CORP. OF PALM
BEACH, et al.,

Respondents.

_____/

Case No. 92,952
DCA Case Nos. 97-3414
97-2926

ON A PETITION
FOR DISCRETIONARY REVIEW

JURISDICTIONAL BRIEF OF PETITIONER DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING

withdrawn

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PRELIMINARY STATEMENT

Petitioner seeks review of a decision of the Third District Court of Appeal reversing a declaratory statement of the Division of Pari-Mutuel Wagering ("the Division"), in Investment Corp. of Palm Beach v. Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation, 23 Fla. L. Weekly D1621 (Fla. 3d DCA July 8, 1998). The petitioner is the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering. The respondents are Investment Corp. of Palm Beach d/b/a Palm Beach Kennel Club and Palm Beach Jai Alai ("Investment Corp."); Calder Race Course, Inc. ("Calder"); Tropical Park, Inc. ("Tropical Park"); and Gulfstream Racing Association ("Gulfstream"). All emphasis is supplied by the Department unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The only facts relevant to this Court's determination of jurisdiction are those facts contained in the four corners of the decision for which the Department is seeking review. Reaves v. State, 485 So. 2d 829, 830n.3 (Fla. 1986). The facts in this case are that Calder, Gulfstream and Tropical Park as well as Investment Corp. filed petitions for declaratory statement concerning the distribution of uncashed tickets and "breaks" from wagering on out-of-state thoroughbred races that are rebroadcast to Investment Corp.

facilities through Calder, Tropical Park and Gulfstream. The Division issued a declaratory statement but noted:

> The Division is cognizant that a similar fact pattern may exist between other tracks in Florida and that the same dispute may reoccur between one of these Petitioners and a non-Petitioner. Therefore, the Division will initiate rulemaking to establish an agency statement of general applicability.

Slip op. at 3. As stated by the Third District, the Division provided its opinions on the issued raised by the petitions but attempted to limit the applicability of the statement to the parties before the Division and to their relationship with each other as to the matters questioned.

The Third District reversed the declaratory statement, holding that it construes "various statutory provisions of general applicability to all pari-mutuel permitholders who conduct intertrack wagering on simulcast rebroadcasts of horse races." The court indicated that rulemaking, rather than a declaratory statement was the appropriate action by the agency.

Judge Cope dissented with a lengthy opinion. He stated that the appropriateness of the declaratory statement was not preserved for review and that the majority had misapprehended section 120.565, Florida Statutes (1997). As stated by Judge Cope,

> Seeking to vacate the agency decision, the racetracks contend for the first time on appeal that the agency never should have issued a declaratory statement—

> even though the appellant racetracks were the very ones who requested the declaratory statement. This argument should be rejected out of hand because it is not preserved for appellate review. The racetracks asked for a declaratory statement. The racetracks got a declaratory statement. Assuming arguendo that the agency erred by issuing a declaratory statement in these circumstances, any error was invited by the racetracks themselves.

Slip op. at 7. Judge Cope cites to the First District Court of Appeal's decision in Chiles v. Department of State, Division of Elections, 23 Fla. L. Weekly D1225, D1226 (Fla. 1st DCA May 12, 1998), which held that "a declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person."

The Department filed a request for certification of the decision in accordance with Rule 9.330, Florida Rules of Appellate Procedure. The request was denied, with Judge Cope voting to grant certification.

SUMMARY OF THE ARGUMENT

The Department seeks to invoke the jurisdiction of this Court pursuant to Article V, Section 3(b)(3), Florida Constitution. This Court's review is based on the express and direct conflict of the Third District's decision with that of the First District decision in Chiles v. Department of State, Division of Elections, 23 Fla. L. Weekly D1225, D1226 (Fla. 1st DCA May 12, 1998).

The Third District's decision in Investment Corp. and the First District's decision in Chiles both address the 1996 amendments to section 120.565, Florida Statutes (Supp. 1996). In Chiles, the First District states that while a petition for declaratory statement must raise an issue that applies in the petitioner's particular set of circumstances, there is no longer a requirement that the issue apply only to petitioner. The Court upheld a petition for declaratory statement despite the fact that the agency's ruling on the issue could be applied to any candidate running for statewide office.

By contrast, the Third District held that where a declaratory statement provides a response that is not limited to specific facts and specific petitioners, but provides a statutory or rule interpretation that applies to an entire class of persons, it must be set aside. The Court reversed the Division of Pari-Mutuel Wagering's declaratory statement because it construed "various statutory provisions of general applicability to all pari-mutuel permitholders who conduct intertrack wagering on simulcast rebroadcasts of horse races." Slip op at 5.

This Court has discretionary jurisdiction where a decision of a district court of appeal expressly and directly conflicts with a decision of another district court of appeal. Here, the First and Third districts have issued sharply conflicting decisions regarding when a petition for declaratory

statement should be issued. These two decisions leave both state agencies and the public with no guidance concerning when this procedural vehicle can be utilized. The Supreme Court should exercise its discretion and entertain the Third District's decision on the merits in order to address the appropriate use of petitions for declaratory statement pursuant to section 120.565 (Supp. 1996).

ARGUMENT

THIS DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW

The discretionary jurisdiction of this Court granted pursuant to Article V, Section 3(b)(3), Florida Constitution, is reserved for those cases which expressly and directly conflict with a decision of another district court of appeal or a decision of the Supreme Court of Florida. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). Cases that are factually dissimilar can still be in express and direct conflict with each other when they involve the application of the same principle of law. Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981). The conflict between the Third District's decision in Investment Corp. of Palm Beach v. Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation, 23 Fla. L. Weekly

D1621 (Fla. 3d DCA July 8, 1998), and the First District's decision in Chiles v. Department of State, Division of Elections, 23 Fla. L. Weekly D1225 (Fla. 1st DCA May 12, 1998) meets the standard required by Article V, Section 3(b)(3).

Both cases address the application section 120.565, Florida Statutes, the procedural mechanism for seeking agency interpretations of the laws and rules the agency implements. Prior to the 1996 amendments to the Administrative Procedure Act, section 120.565 provided that declaratory statements "shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his or her set of circumstances only." In 1996, section 120.565 was amended to provide,

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

In Chiles, the First District Court stated that deleting the term "only" signified that a petition for declaratory statement need not raise an issue that is unique. The Court held that while the issue must apply in the petitioner's particular set of circumstances, there is no longer a requirement that the issue apply only to the petitioner. The Chiles court stated:

> The purpose of a declaratory statement is to address the applicability of a statutory provision or an order or rule of the agency in particular circumstances. *See* section 120.565, Florida Statutes (1996). A party who obtains a statement if the agency's position may avoid costly administrative litigation by selecting the proper course of action in advance. Moreover, the reasoning employed by the agency in support of a declaratory statement may offer useful guidance to others who are likely to interact with the agency in similar circumstances. Another party can expect the agency to apply the rationale for its declaratory statement consistently, or to explain why a different application is required.

Chiles, 23 Fla. L. Weekly at D1226.

The Third District's view is markedly different. The majority opinion specifically held that the declaratory statement in this case had to be set aside because it provided a response that was not limited to specific facts and specific petitioners. The Court acknowledged the Chiles decision but stated that the deletion of the term "only" did not authorize the use of a declaratory statement in lieu of a rule.

Judge Cope's dissent details the basis for creating section 120.565 and its requirements for public notification and access to the declaratory statement proceeding. He states:

> In the declaratory statement in this case, the agency said it was "cognizant that a similar fact pattern may exist between other tracks in Florida and that the same dispute may reoccur between

> one of these Petitioners and a non-Petitioner. Therefore, the Division will initiate rulemaking to establish an agency statement of general applicability." This was a perfectly permissible step for the agency to take, but it did not thereby invalidate the declaratory statement. See Chiles, 23 Fla. L. Weekly at D1226.

Slip op. at 11-12. Judge Cope noted that the First District had approved the issuance of the declaratory statement sought by Commissioner Brogan in the Chiles case even though the answer was potentially applicable to all candidates for statewide office in 1998. In his view, the Division was permitted to answer the request for declaratory statement even though the answer is potentially applicable to other racetracks as well. With respect to the Chiles decision, Judge Cope stated:

> It is true that there are statements in Chiles which, taken out of context, can be read to support the majority's position in this case. When the Chiles opinion is written as a whole, however, it is clear that, were this case pending in the First District, the First District would hold that this declaratory statement was properly issued.

Slip op. at 13.

These two cases cannot be reconciled. The Department asserts that the divergence of opinion on the application of section 120.565 represents an express and direct conflict of opinions over which this Court may exercise discretionary review.

This Court no doubt receives thousands of petitions for review, all claiming that their particular issue warrants this Court's discretionary jurisdiction. This case presents a situation where the Court's jurisdiction should be exercised to provide uniformity in an unsettled area of the law. The Administrative Procedure Act was significantly revised in 1996. These two cases, the first to address the amendments to section 120.565, represent widely divergent views on the use of a procedural vehicle meant to provide additional access to state agencies. Review is appropriate to provide guidance to agencies and the public regarding the interpretation of section 120.565, Florida Statutes.

CONCLUSION

Based on the foregoing, the Department respectfully requests that this Court exercise its jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution, to review the decision of the Third District in this case.

Respectfully submitted,

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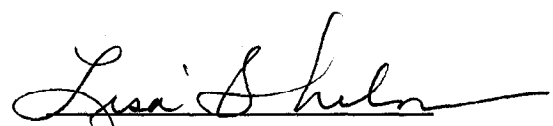
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Harold F. X. Purnell, Counsel for Respondent Investment Corp. of Palm Beach, at Rutledge, Ecenia, Underwood, Purnell & Hoffman, P.O. Box 551, Tallahassee, FL 32302; to Wilbur Brewton and Kelly B. Plante, Counsel for Respondents Calder Race Course, Inc. and Tropical Park, Inc., at Gray Harris & Robinson, P.A., 225 South Adams Street, Suite 250, Tallahassee, FL 32301; and to David S. Romanik, Esquire, Counsel for Respondent Gulfstream Park Racing Association, at Romanik, Huss, Paoli & Ivers, 1901 Harrison Street, Hollywood, FL 33020 this 25th day of September, 1998.



Lisa S. Nelson