

# ORIGINAL

IN THE SUPREME COURT OF FLORIDA

BECKY S. TORREY, Duly Appointed  
Personal Representative of the Estate  
of HELEN ROSE WOODARD, Deceased,

CASE NO. 95,841  
FIFTH DCA CASE NO. 98-02024  
L.T. CASE NO. 97-2313 CA

Plaintiff-Appellant,

vs.

LEESBURG REGIONAL MEDICAL CENTER,  
KENNETH KUPKE, M.D., and ROBERT  
HUX, M.D., Jointly and Severally,

Defendants-Appellees.

**FILED**  
DEBBIE CAUSSEAU  
AUG 30 1999  
CLERK, SUPREME COURT  
By *BAR*

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**DEFENDANT-APPELLEE'S, LEESBURG REGIONAL  
MEDICAL CENTER, JURISDICTIONAL BRIEF**

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Defendant-Appellee, LEESBURG REGIONAL MEDICAL CENTER, certifies that the following persons and entities have or may have an interest in the outcome of the case.

Honorable G. Richard Singletary

Kenneth Kupke, M.D. Robert Hux, M.D.

Becky S. Torrey

Roger E. Craig, Esquire

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Leesburg Regional Medical Center

CERTIFICATE OF TYPE SIZE AND STYLE

This brief has been printed using 14 point proportionately spaced times Roman.

INTRODUCTION

The symbol “A. \_” will be used to denote the citations to the Appendix attached to the brief.

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Appellee, LEESBURG REGIONAL MEDICAL CENTER, hereby adopts the arguments and authorities contained in the jurisdictional briefs of Appellees, KENNETH KUPKE, M.D. and ROBERT HUX, M.D., as additional support for the arguments contained herein.

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## STATEMENT OF THE CASE AND FACTS

As more fully explained under the Argument section of this brief, Respondent cannot accept Petitioner's Statement of the Case and Facts because Petitioner has referenced portions of the record outside the four corners of the District Court opinion subject to review. Only those limited facts disclosed by the District Court opinion can be considered for jurisdictional purposes.

## ISSUES PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE DISTRICT COURT  
BELOW EXPRESSLY AND DIRECTLY CONFLICTS  
WITH ANOTHER DISTRICT COURT OPINION.

## SUMMARY OF ARGUMENT

Discretionary review should be denied for the following reasons: (A) Petitioner has relied impermissibly on portions of the record outside the four corners of the District Court's opinion; and (B) The decision subject to review does not conflict expressly and directly with any other District Court's opinion.

## ARGUMENT

### A.. PETITIONER HAS RELIED IMPERMISSIBLY ON PORTIONS OF THE RECORD OUTSIDE THE FOUR CORNERS OF THE DISTRICT COURT OPINION SUBJECT TO REVIEW

The jurisdiction of this Court is strictly defined by Article V of the Florida Constitution. See Lawyers Title Ins. Corp. V. Little River Bank & Trust Co., 243 So.2d 417 (Fla. 1970). Article V grants jurisdiction to this Court to review a decision of the District Court of Appeal “that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law.” Art. V, § 3(b)(3), Fla. Const. (Emphasis added). As Article V makes clear, “[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.” Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Concerning matters outside the four corners of the District Court opinion, the Reaves court opined:

This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explained in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here.

Reaves, 485 So.2d at 830 n.3 (emphasis supplied).



Apparently overlooking the constitution and the well-settled precedents cited above, Petitioner has wandered outside the four corners of the underlying District Court opinion in an attempt to allege an express and direct conflict. Likewise, this Petitioner has relied impermissively on portions of the record outside the four corners of the District Court opinion subject to review.

The citations to the record contained on page one of Petitioner's Jurisdictional Brief that were not contained within the four corners of the Fifth District Court of Appeal opinion should not be considered by this Court.

At one time, reliance on facts contained in the record proper to establish conflict jurisdiction was commonplace prior to adoption of the 1980 constitutional amendments. See Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965). The "express and direct" language contained in the 1980 amendment to Article V, however, ended the practice of delving into the record proper to determine conflict jurisdiction. See Jenkins v. State, 385 So.2d 1356 (Fla 1980). See also England, Hunter & Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev 147, 176-81 (1980).

**B. THE DECISION SUBJECT TO REVIEW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OTHER DISTRICT COURT OPINION.**

Article V, Section 3(b) of the Florida Constitution delineates the jurisdiction of

the Florida Supreme Court. This section of the Constitution was revised extensively in 1980 to restrict the jurisdiction of the Supreme Court to a narrowly defined class of appellate proceedings. P. Padovano, Florida Appellate Practice §3.1(2b ed. 1997).

Florida Rule of Appellate Procedure 9.030(a) lists the type of cases that may be reviewed by the Supreme Court and classifies each case within one of the following three general categories: (1) appeal jurisdiction; (2) discretionary jurisdiction; and (3) original jurisdiction. The Florida Supreme Court has been given discretionary jurisdiction to resolve legal conflicts created by the District Courts of Appeal. Article V, Section 3(b)(3) of the Florida Constitution enables the Supreme Court to review the decision of a District Court of Appeal that *expressly* and *directly* conflicts with the decision of a sister District Court of Appeal. See e.g. Allstate Insurance Co. v. Langston, 655 So.2d 91 (Fla. 1995).

Only if a decision of a District Court *expressly* conflicts with the decision of another District Court of Appeal may the Supreme Court exercise its discretionary jurisdiction. P. Padovano Florida Appellate Practice, §3.10 (1997). It is not enough to show that the District Court decision is effectively in conflict with other appellate decisions. The term “*expressly*” requires some written representation or expression of the legal grounds supporting the decision under review. Id. This court has defined “*expressly*” by its ordinary dictionary meaning: “In an express manner.” Jenkins v.

State, 385 So.2d 1356 (Fla. 1980). The Jenkins decision further defines the term “*express*” in the following manner: “To represent in words” or “to give expression to.” See also Times Publishing Company v. Russell, 615 So.2d 158 (Fla. 1993).

In the instant case, Petitioner has filed a Jurisdictional Brief indicating that the underlying Fifth District Court of Appeal opinion, Torrey v. Leesburg Regional Medical Center, 731 So.2d 738 (Fla. 5th DCA) (A.1) conflicts with the decisions of other District Courts of Appeal (Petitioner’s Initial Brief p.2). Moreover, Petitioner alleges that this Court has jurisdiction because of the divergent opinions of the District Courts of Appeal which have considered the legal status of a Complaint signed by other than an attorney licensed to practice in the State of Florida (Id. p.3). Nowhere in the text of Petitioner’s Jurisdictional Brief does Petitioner allege that there is an express and direct conflict with another District Court of Appeal opinion. Instead, Petitioner seems to imply that there exists a conflict between the underlying Fifth District Court of Appeal opinion and other District Courts of Appeal. This is insufficient under the mandates of Article V, Section 3(b)(3).

Although it is not necessary that the Court explicitly identify conflicting District Court or Supreme Court decisions in its opinion to create an express conflict under §3(b)(3), the Petitioner has a duty to specifically identify conflicting District Court opinions in its Jurisdictional Brief. See Ford Motor Company v. Kikis, 401 So.2d 1341

(Fla. 1981). See also Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). See also Fla.R.App.P. 9.120(d).

In the case at bar, Petitioner has failed to allege that the decision subject to review expressly and directly conflicts with another District Court of Appeal opinion. In fact, the Fifth District Court of Appeal three page opinion makes reference to only one opinion from a sister District Court. The Fifth District Court of Appeal noted on page two of its opinion that in Daytona Migi Corp. v. Daytona Automotive Fiberglass, Inc., 417 So.2d 272 (Fla. 5th DCA 1982), the Court cited with approval Nicholson Supply Co. v. First Federal Sav. & Loan Ass'n of Hardee County, 184 So.2d 438 (Fla. 2d DCA 1966), which denied a Petition to Amend a Complaint not properly signed by a lawyer by adding the signature of an authorized lawyer. Instead of noting an express and direct conflict, the Fifth District merely cited to a Second District Court of Appeal opinion which had been approved in 1982. Since Petitioner's Jurisdictional Brief does not delineate which District Court of Appeal's opinion the underlying opinion is in express and direct conflict with, Respondent is unsure if Petitioner is alleging that the Nicholson Supply Co. case is in conflict with the underlying decision. In the alternative, Petitioner may be attempting to allege that the underlying decision conflicts with the following cases: Lincoln American Life Ins. Co. v. Parris, 390 So.2d 148 (Fla. 1st DCA 1980) and Szteinbaum v. Kaes Inversiones y Valores, 476 So.2d 247 (Fla. 3d DCA

1985).

If Petitioner, is, indeed, attempting to allege a direct and express conflict with the Lincoln American Life Ins. Co. and Szteinbaum decisions, Petitioner's arguments are without merit. In Lincoln American Life Ins. Co. the court held that a default against a corporation, entered because the answer was signed by an attorney not admitted to practice in Florida, would be considered the result of excusable neglect in view of the shortness of time available to arrange for in-state counsel and the out-of-state attorney's apparent intention to secure in-state counsel for further appearances. Id. at 149. Likewise, in Szteinbaum, corporate plaintiff filed a complaint signed by a non-attorney on behalf of the corporation. The court held that the defect of the complaint was curable and indeed cured by the later appearance in the action of the plaintiff corporation's attorney. Id. at 252. Both the Lincoln American Life Ins. Co. and Szteinbaum cases can be distinguished from the underlying Fifth District decision, in that they both involve corporate defendants. In the instant case, Petitioner was an individual that could have signed the initial Complaint. It is well recognized that a corporation, unlike a natural person, cannot represent itself and cannot appear in a court of law without an attorney. Nicholson Supply Co. v. First Fed. Sav. & Loan Ass'n of Hardee County, 184 So.2d 438 (Fla. 2d DCA 1966). Since Lincoln American Life Ins. Co. and Szteinbaum both dealt with corporate parties, there is no express and direct

conflict between those decisions and the underlying Fifth District Court of Appeal opinion.

CONCLUSION

For the foregoing reasons, Petitioner's Request for Review should be denied.

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 U.S. mail this 26 day of August, 1999 to **ROGER E. CRAIG, ESQUIRE**, Roger E. Craig & Associates, 1250 North Tamiami Trail, Suite 201, Naples, Florida 34102, **WILLIAM J. McHENRY, ESQUIRE**, Fieger, Fieger & Schwartz, 19390 West Ten Mile Road, Southfield, Michigan 48075-2463, **RAFAEL E. MARTINEZ, ESQUIRE**/**JEFFERY BADGLEY, ESQUIRE**, Sanders, McEwan, Martinez, Luff & Dukes, P.A., Post Office Box 753, Orlando, Florida 32802-0753 and **G. FRANKLIN BISHOP, III, ESQUIRE**, John Bussey and Associates, P.A., Post Office Box 531086, Orlando, Florida 32853-1086.

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IN THE SUPREME COURT OF FLORIDA

BECKY S. TORREY, Duly Appointed  
Personal Representative of the Estate  
of HELEN ROSE WOODARD, Deceased,

CASE NO. 95,841  
FIFTH DCA CASE NO. 98-02024  
L.T. CASE NO. 97-2313 CA

Plaintiff-Appellant,

vs.

LEESBURG REGIONAL MEDICAL CENTER,  
KENNETH KUPKE, M.D., and ROBERT  
HUX, M.D., Jointly and Severally,

Defendants-Appellees.

---

**APPENDIX TO DEFENDANT-APPELLEE'S, LEESBURG REGIONAL  
MEDICAL CENTER, JURISDICTIONAL BRIEF**

---

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APPENDIX

PAGE

Decision of the Fifth District  
Court of Appeal dated April 1, 1999

A.1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

JANUARY TERM 1999

BECKY S. TORREY, etc,

Appellants/Cross-Appellees,

NOT FINAL UNTIL THE TIME EXPIRES  
TO FILE REHEARING MOTION, AND,  
IF FILED, DISPOSED OF.

v.

CASE NO. 98-2024

LEESBURG REGIONAL MEDICAL  
CENTER, et al,

Appellees/Cross-Appellants.

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Opinion filed April 1, 1999

Appeal from the Circuit  
Court for Lake County,  
G. Richard Singeltary, Judge.

Roger E. Craig of Roger E. Craig & Associates,  
Naples, and Geoffrey N. Fieger and William H. McHenry,  
Southfield, Michigan, for Appellant.

Larry D. Hall and William W. Large, of  
Hill, Reis, Adams, Hall & Schieffelin, P.A.,  
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G. Franklin Bishop, III, of John W. Bussey, III and Associates,  
Orlando, for Appellee, Robert Hux, M.D.

HARRIS, J.

The underlying issue in this appeal is whether a complaint filed by an attorney not authorized to practice law in Florida is a nullity and thus not correctable by amendment adding the name of an authorized lawyer, or is it merely an unauthorized filing that is

4/1/99

validated upon entry into the case of a lawyer authorized to practice in this state. In this case, a Michigan lawyer, not authorized to practice in Florida although a member of his firm was,<sup>1</sup> filed a medical malpractice action against various doctors and a hospital. The trial court dismissed the action finding that the filing of the complaint by a non-authorized person was a nullity not subject to correction and dismissed the action without prejudice. Apparently the statute of limitations may have run and hence this appeal.

The action of the trial court is consistent with the opinion of this court in *Quinn v. Housing Authority of Orlando*, 385 So. 2d 1167 (Fla. 5th DCA 1980), in which this court held that a filing by a non-attorney employee was void and that the action should be dismissed without prejudice. We held substantially the same in *Daytona Migi Corp. v. Daytona Automotive Fiberglass Inc.*, 417 So. 2d 272 (Fla. 5th DCA 1982) (filing of a notice of appeal by a non-lawyer is a nullity and the appeal must be dismissed). In *Daytona Migi* we cited with approval *Nicholson Supply Co. v. First Federal Sav. & Loan Ass'n of Hardee County*, 184 So. 2d 438 (Fla. 2d DCA 1966), which denied a petition to amend a complaint not properly signed by a lawyer by adding the signature of an authorized lawyer. The court held that the complaint was a nullity.

Because we are bound by the precedent of this court, an affirmance of the dismissal is required. Therefore, the cross-appeal concerning the total lack of plaintiff's compliance with the statutory presuit screening requirement, even after a second notice to do so, is of interest only because it points out the wisdom of rule 2.060(b), Florida Rules of Judicial Administration, which provides: "Attorneys of other states shall not engage in a general

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<sup>1</sup> It is a lawyer who has passed The Florida Bar examination that is authorized to practice in this state, not every lawyer in the firm with which he is connected. This case shows why.

practice in Florida unless they are members of The Florida Bar in good standing."

The trial court's decision to dismiss the action without prejudice is also consistent with rule 2.060(d), Florida Rules of Judicial Administration, which provides that if a pleading is not signed (and we construe the signature of an unauthorized person as no signature at all), such pleading "may be stricken and the action may proceed as though the pleading or other paper had not been served." That is exactly what the trial court did in this case.

**AFFIRMED.**

**DAUKSCH and GOSHORN, JJ., concur.**

CERTIFICATE OF SERVICE

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