SUPREME COURT OF FLORIDA

J. ANTONIO ALDRETE, M.D.,

Petitioner,

v. **CASE NO. SC04-1812**
L.T. NO. 1D02-4457

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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

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STATEMENT OF THE CASE AND FACTS

The Board of Medicine ("Board") adopted the findings of the Administrative Law Judge ("ALJ") and suspended the medical license of J. Antonio Aldrete, M. D. ("Dr. Aldrete") for one year, finding that he failed to practice medicine with the level of care, skill and treatment acceptable for a reasonably prudent physician under similar circumstances. In addition, the Board imposed a $5,000.00 fine and costs in the amount of $25,427.37.

Dr. Aldrete appealed the Board's Final Order. The First District Court of Appeal affirmed the finding that Dr. Aldrete violated the standard of care as alleged in Count I of the Department's administrative complaint. The ALJ found that Respondent Department met its burden of proof by clear and convincing evidence. Recommended Order at p. 16. (R. 264). The Board adopted this finding in its Final Order. Aldrete v. Department of Health, Board of Medicine, 879 So. 2d 1244, 1245 (Fla. 1st DCA 2004). §458.331(3), Fla. Stat.

On appeal, the First District Court of Appeal affirmed this finding. Id. at 1246. In so holding the Court commented that the underlying finding of fact was supported by competent, substantial evidence. Id. at 1246. §120.68(7), Fla. Stat.

Dr. Aldrete then moved the Court for rehearing, clarification and certification. He specifically requested the Court to certify conflict between the Court's decision and the Second District Court of Appeal's decision in Hammesfahr v. Department of Health, Board of Medicine, 869 So. 2d 1221 (Fla. 2d DCA 2004). The Court denied the motions.

With respect to the penalty issue, Dr. Aldrete alleged that he was found to have violated the standard of care by leaving the patient in the care of an unqualified nurse and that this was an uncharged offense. The Court agreed that this offense was not charged in the Department's complaint and that Dr. Aldrete could not be properly disciplined on this ground. In this regard, this Court specifically stated: "[s]ince we do not know whether this offense impacted the sanctions imposed by the Board, we remand."

SUMMARY OF ARGUMENT

Dr. Aldrete has failed to present justification for this Court to review the decision of the First District Court of Appeal, pursuant to rule 9.030, Florida Rules of Appellate Procedure. Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) provides that jurisdiction of this Court may be sought to review decisions of a district court of appeal that expressly and directly conflict with a decision

of another district court of appeal or a supreme court decision on the same question of law.

The rule requires that the conflict be "express and direct". Dr. Aldrete has not shown that there is an express and direct conflict. Moreover, he has failed to show that the decision of the First District Court Appeal conflicts with a decision of another district court of appeal or of this Court. Merely stating that a conflict exists does not demonstrate a conflict.

ARGUMENT

I. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH FLORIDA REAL ESTATE COMMISSION V. WEBB, 367 So.2d 201 (FLA. 1979).

Dr. Aldrete asks this Court to accept jurisdiction of this case contending that the First District Court of Appeal's Aldrete decision conflicts with this Court's decision in Florida Real Estate Commission v. Webb, 367 So. 2d 201 (Fla. 1979). The alleged conflict is the following language in the First District Court of Appeal's decision: ". . . we do not rule out the Board's ability, upon proper consideration, to impose the same or similar discipline as before." Aldrete at 1247.

Dr. Aldrete contends that the above-quoted language conflicts with this Court's holding in Webb that "[s]o long

as the agency imposes a penalty prescribed by law, it has acted within the range of its discretion and the penalty may not be overturned by the reviewing court except in situations where an agency's findings were in part reversed." Webb at 203. Dr. Aldrete interprets the language in the First District Court of Appeal's decision as the court's pre-approval of the Board's imposition of the same penalty upon remand.

This Court has discretionary jurisdiction to review a decision of a 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 point of law** (emphasis added). Fla. R. App. P. 9.030(a)(2)(A)(iv). The conflict "must appear within the four corners of the majority decision." Department of Health and Rehabilitative Services v. National Adoption Counseling Services, Inc., 498 So.2d 888, 889 (Fla. 1986). "Inherent or so-called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." Id. at 889. Review is not available "where the opinion below establishes no point of law contrary to a decision of this Court or another district court." The Florida Star v. B.J.F., 530 So.2d 286, 289 (Fla. 1988).

In this case, the alleged conflict is not on the same point of law. The language of the First District Court of Appeal which Dr. Aldrete claims to be in conflict with the decision in Webb is dicta, not a point of law on the same issue. "A purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination is obiter dictum . . . . While such dictum may furnish insight into the philosophical views of the judge or the court, it has no precedential value." Bunn v. Bunn, 311 So.2d 387, 389 (Fla. 4th DCA 1975) (citations omitted). The above-quoted language is not essential to the determination in Aldrete. The Board is not bound by the language, as it is merely gratuitous.

The decisions in Aldrete and Webb are in agreement on the point of law relating to an agency's authority to decide penalty. They both hold that the ultimate decision relating to penalty is within the agency. Thus, under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), there is no conflict on a point of law between the First District Court of Appeal and the Supreme Court.

II. THE FIRST DISTRICT COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH HAMMESFAHR v. DEPARTMENT OF HEALTH, BOARD OF MEDICINE, 869 So. 2d 1221 (FLA. 2nd DCA 2004).

Dr. Aldrete next contends that this Court should accept jurisdiction because the decision in the First District Court of Appeal conflicts with the decision of the Second District Court of Appeal in Hammesfahr v. Department of Health, Board of Medicine, 869 So. 2d 1221 (Fla. 2nd DCA 2004). The conflict alleged is the point of law regarding the standard of review in cases involving suspension or revocation of disciplinary actions against physicians.

Dr. Aldrete argues that the standard of proof before the ALJ should have been "clear and convincing evidence", instead of the lesser standard of "competent substantial evidence." Undisputably, the record shows that the standard of proof before the ALJ required the Petitioner to prove by "clear and convincing evidence that Respondent committed the violations alleged in the Administrative Complaint and the reasonableness of any proposed penalty." Recommended Order at p. 16, *citing* Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973); Ferris v.

Turlington, 510 So. 2d 292 (Fla. 1st DCA 1987). It is evident from the face of the Recommended Order itself that the standard of proof before the ALJ was that of clear and convincing evidence, not the greater weight of the evidence. Id. (R 259 - 277).

The Hammesfahr opinion does in fact refer to the competent substantial evidence standard when it discusses underlying findings of fact, as does the Aldrete opinion. The District Court stated in Hammesfahr: "[t]he record contains competent, substantial evidence to support the Board's finding that the patient enrolled in a $3000 treatment program but only received the services outlined in a $2000 treatment program." Hammesfahr at 1223.

In Hammesfahr, the Board adopted the recommended order of the ALJ in its entirety. Id. at 1221. When the court reviewed the Board's Final Order, the court in essence reviewed the ALJ's recommended order. Thus, the ALJ's conclusions in the Hammesfahr case must be reviewed for clear and convincing evidence. Hasbun v. Dep't of Health, 701 So. 2d 1235, 1236 (Fla. 3rd DCA 1997).

Dr. Aldrete's argument that the evidence against him was less than clear and convincing is belied by the ALJ's finding that:

> 26. Petitioner satisfied its burden of proof

> with regard to Count one of the Administrative Complaint. The proof is **clear and convincing** that Respondent violated the Standard of Care with regard to the time that he permitted to elapse before EMS personnel were called and transported J.S. to the hospital.

Recommended Order at p. 16; R 264 (emphasis supplied).

There is no conflict with Hammesfahr v. Department of Health, 869 So. 2d 1221 (Fla. 2nd DCA 2004). The Court's opinion in Aldrete's appeal does not hold that the standard of proof in a license suspension proceeding is competent substantial evidence:

> We affirm the finding that Dr. Aldrete violated the standard of care as alleged in count I. The Department offered expert testimony that the approximately six hours Dr. Aldrete waited before calling EMS was excessively long. During this period, J.S.' heart rate vacillated between 39 and 153 beats per minute. Such testimony provided competent, substantial evidence to support this finding . . . .

Aldrete at 1246 (emphasis supplied).

In Hammesfahr, the Second District Court of Appeal agreed that there was competent substantial evidence to support an underlying finding of fact, that is, that the patient received services outlined in a less expensive treatment program than he had enrolled, but concluded that:

> . . . the record did not contain clear and convincing evidence to support the board's ultimate conclusion that the overcharge was the result of exploitation for financial gain under section 458.331(1)(n).

Id. at 1223.

In Aldrete, the First District Court of Appeal agreed that there was competent substantial evidence to support the Department's expert testimony that Dr. Aldrete waited excessively long before calling EMS. Although the Court in Aldrete affirmed the ALJ's conclusion, which the Board adopted, that Dr. Aldrete violated section 458.331(1)(t) by failing to practice medicine with the level of care, skill and treatment acceptable for a reasonably prudent physician under similar circumstances, the Court did not reject the ALJ's analysis that there was clear and convincing evidence to support that conclusion.

Thus, there is no conflict on a point of law between the First District Court of Appeal and the Second District Court of Appeal.

CONCLUSION

The four corners of the decision in this case show that there is no express and direct conflict with another district court of appeal or this Court. Therefore, Dr. Aldrete's petition for review pursuant to Florida Rule of Appellate Procedure, 9.030(a)(2)(A)(iv), should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction was furnished by United States Mail to John Beranek, Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302; Allen R. Grossman, Gray Harris, P.A., 301 S. Bronough Street, Tallahassee, FL 32301; and Jon M. Pellett, Barr, Murman, Tonelli, Slother & Sleet, Post Office Box 172669, Tampa, FL 33672, on October ____, 2004.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Brief on Jurisdiction complies with the font requirements of Florida Rule of Appellate Procedure 9.100(*l*).

_____
Dana Baird