Filing # 10105747 Electronically Filed 02/10/2014 04:04:45 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2543

LT CASE NO. 1D13-1355

ROBIN A. MYERS ET AL.,

Petitioners,

v.

KEVIN M. MCCARTY, in his official capacity as the Commissioner of the FLORIDA OFFICE OF INSURANCE REGULATION,

Respondent.

FLORIDA OFFICE OF INSURANCE REGULATION'S REPLY TO MYERS ET AL.'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

C. TIMOTHY GRAY (FBN 0602345)
tim.gray@floir.com – E-mail
ALYSSA S. LATHROP (FBN 69510)
alyssa.lathrop@floir.com – E-mail
BRUCE CULPEPPER (FBN 898252)
Bruce.Culpepper@floir.com – E-mail
Assistant General Counsels
Office of Insurance Regulation
Florida Financial Services Commission
Larson Building, Room 647
200 East Gaines Street
Tallahassee, FL 32399-4206
(850) 413-4110 – Telephone
(850) 922-2543 – Facsimile

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INTRODUCTION

In initiating this case, the Petitioners, Robin A. Myers et al., improperly filed a notice of appeal, rather than a notice to invoke the discretionary jurisdiction stating the basis for invoking jurisdiction followed by a jurisdictional brief within ten days, as required by Florida Rule of Appellate Procedure 9.120(b)-(d). Accordingly, this Court issued an order to show cause as to why the appeal should not be dismissed for lack of jurisdiction. Petitioners responded by asserting express and direct conflict as the basis of jurisdiction and, going beyond what was requested in this Court's order, submitting, in essence, a jurisdictional brief.

Respondent, the Office of Insurance Regulation ("Office"), files this reply as permitted by the Court's order. Although the Petitioners' lengthy jurisdictional arguments were not within the scope of this Court's order and do not conform to the requirements of a jurisdictional brief, the Office nevertheless addresses those arguments in an effort to expedite this Court's consideration of jurisdiction.

STATEMENT OF THE CASE AND FACTS

This issue at the heart of this case is whether healthcare providers have standing to bring an access-to-courts constitutional claim with respect to chapter 2012-197, Laws of Florida (the "2012 PIP Act"),[1] despite failing to show that the healthcare providers' constitutional right to access to courts has been abrogated or threatened by the 2012 PIP Act.

Petitioners include an acupuncture physician, a chiropractic physician, and licensed massage therapists (the "Provider Plaintiffs") who filed a complaint for declaratory and injunctive relief in the trial court, asserting that the 2012 PIP Act was unconstitutional for various reasons, including an access-to-courts claim. "John Doe" was also listed as a plaintiff, purportedly representing all similarly situated healthcare providers. "Jane Doe" was listed as an additional plaintiff, purportedly representing all of the citizens of Florida that are, were, or will be injured in a motor vehicle collision.

[1] The 2012 PIP Act amended various provisions of Florida's Motor Vehicle No-Fault Law. The amendments included the following: to be eligible for PIP (Personal Injury Protection) benefits under the new law, persons injured in a motor vehicle accident must seek initial services and care from specified providers within fourteen days; medical benefits up to $10,000 are available for emergency medical conditions diagnosed by specific providers and up to $2,500 for non-emergency medical conditions; licensed massage therapists and acupuncturists are excluded from being reimbursed for medical benefits; and chiropractors cannot make the determination that a patient has suffered an emergency medical condition.

The Petitioners sought a temporary injunction, arguing that they would be irreparably harmed by losing substantial PIP-related business as a result of the 2012 PIP Act. The trial court granted a temporary injunction solely on the access-to-courts claim. The injunction applied only to the provisions of the Act that "require a finding of emergency medical condition as a prerequisite for payment of PIP benefits or that prohibit payment of benefits for services provided by acupuncturists, chiropractors and massage therapists." In so ruling, the trial court found that the Provider Plaintiffs had standing based on their purported loss of PIP-claim revenue. The trial court did not address the standing of "Jane Doe."

On appeal, the First District began with the well-established rule that " 'a party seeking adjudication of the courts on the constitutionality of statutes is required to show that *his* constitutional rights have been abrogated or threatened by the provisions of the challenged act.' " *McCarty v. Myers*, 125 So. 3d 333, 336 (Fla. 1st DCA 2013) (quoting *Hillsborough Inv. Co. v. Wilcox*, 152 Fla. 889, 13 So. 2d 448, 453 (1943)). The First District concluded that "[t]his burden was not met here, as none of the Provider Plaintiffs claimed a violation of his or her own right of access to courts. Instead, the trial court erroneously conferred standing on the Provider Plaintiffs based on their purported loss of PIP-claim revenue as a result of the 2012 PIP Act." *Id.*

After discussing analogous case law in which economic interest or a practical effect on the plaintiff was insufficient to assert a constitutional claim on the behalf of others, the First District reasoned that "[s]imilarly, the alleged economic harm suffered by the Provider Plaintiffs in this case is an insufficient basis to assert others' potential access-to-courts claims." *Id.* at 336-37. The First District stated: "Without a showing of an actual denial of access to courts in a specific factual context, the Provider Plaintiffs lack standing to assert this claim. The real parties in interest—injured motorists whose ability to sue tortfeasors has been impermissibly limited—are absent from this case." *Id.* at 337.

With respect to the "Jane Doe" plaintiff, the First District rejected the "attempt to bootstrap the standing requirement by joining the fictional Jane Doe, purporting to represent all Florida citizens that were, are, or will be injured as a result of a motor vehicle collision," holding that "[t]he instant record does not provide a factual context or legal basis to support this hypothetical claim." *Id.* The First District also noted that this case is not one that invokes the third-party standing doctrine as that argument was not advanced below and "and there is no apparent reason why Floridians whose access-to-courts rights are infringed by the 2012 PIP Act cannot bring their own constitutional challenge." *Id.* at 337 n.4.

Accordingly, the First District reversed the trial court's order granting injunctive relief. *Id.* at 337. Petitioners now seek review of that decision.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal's decision does not expressly and directly conflict with any of the cases cited by the Petitioners. In reversing the trial court's order granting injunctive relief and ruling that Petitioners had failed to make a colorable showing of standing to proceed on the access-to-courts claim, *Myers*, 125 So. 3d at 336-37, the First District's decision is consistent—and certainly not in conflict—with well-established law that in order to bring an action on the constitutionality of an Act, plaintiffs have to show that their "constitutional rights have been abrogated or threatened by the provisions of the challenged act." *Hillsborough Inv. Co.*, 13 So. 2d at 453.

The jurisdictional argument advanced by Petitioners is predicated on facts not found within the four corners of the First District's decision and amount to nothing more than a disagreement on the merits with the First District's application of general rules of law to the specific facts of this case. Petitioners' position on standing is in conflict with the cases cited by Petitioners and would nullify any limitations on standing to seek declaratory judgments. Review should be denied.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.

This Court has jurisdiction under the Florida Constitution to review a decision of a district court 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. "Conflict 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). No such conflict exists here.

Petitioners first argue that the First District ignored the rule of law in *Hillsborough Investment Co. v. Wilcox*, 13 So. 2d 448, 453 (Fla. 1943), that "a party seeking adjudication of the courts on the constitutionality of statutes is required to show that his constitutional rights have been abrogated or threatened by the provisions of the challenged act," because every plaintiff in this case has had their constitutional rights abrogated or threatened by the 2012 PIP Act.

The Petitioners in their response attempt to emphasize their individual status so that their personal injuries align with those of the hypothetical "Jane Doe" plaintiff, contending that they were shown to be citizens of Florida and would not only suffer irreparable harm from the loss or limitations of their healthcare

practices, but also would also suffer a denial of their right of access to courts. Petitioners' Response at 5, 8. Petitioners argue that they did, in fact, assert a violation of their constitutional right of access to courts. *Id.* at 9.

However, this assertion of facts is not found in the four corners of the First District's decision below. The First District stated that "none of the Provider Plaintiffs claimed a violation of his or her own right of access to courts." *Myers*, 125 So. 3d at 335. Moreover, as reflected in the First District's decision, the trial court's order granting an injunction was premised on the Petitioners' standing as healthcare providers to bring an access-to-courts claim because of purported loss of revenue. *Id.* The Petitioners' attempt to now recast their claims as individual ones, rather than in their capacity as healthcare providers, cannot form the basis for conflict jurisdiction. *See Reaves*, 485 So. 2d at 830.

Contrary to the Petitioners' characterization of the First District's decision, *Hillsborough* and the general rule of law therein were recognized and applied by the First District. Notably, Petitioners do not argue that the First District's decision below is factually similar to *Hillsborough*, which involved the homestead status of a decedent's property, but reached a different result. Rather, Petitioners simply assert that the First District's application of the general rule in *Hillsborough* to the facts presented in this case—as well as to asserted facts *not* found within the four corners of the First District's decision—was incorrect and therefore conflict exists.

Petitioners' arguments as to why the First District's decision conflicts with *Hillsborough* amount to nothing more than a disagreement with the merits of the First District's decision and do not invoke the limited jurisdiction of this Court.

Petitioners next appear to argue conflict with *Lasky v. State Farm Insurance Co.*, 296 So. 2d 9, 12 (Fla. 1974), and *Chapman v. Dillon*, 415 So. 2d 12 (Fla. 1982), which considered the constitutionality of prior versions of Florida's no-fault law, including access to courts. Neither case provides a basis for conflict jurisdiction. This Court's decisions in *Lasky* and *Chapman* are devoid of any discussion of standing with respect to the access-to-courts claims and, accordingly, do not conflict with the First District's decision on the same question of law. Moreover, Petitioners cite *Lasky* and *Chapman* for the proposition that "you don't need an injured motorist" to determine a constitutional violation in the unique area of PIP. However, *Lasky* and *Chapman*, in fact, involved injured motorists who were denied the ability to recover certain damages under Florida's no-fault law after an automobile collision and, accordingly, asserted that their right of access-to-courts was violated. *Lasky*, 296 So. 2d at 12; *Chapman*, 415 So. 2d at 14.

Petitioners also seem to argue that the First District's decision below conflicts with two other decisions of the First District—*Alachua County v. Scharps*, 855 So. 2d 195, 201 (Fla. 1st DCA 2003), and *Reinish v. Clark*, 765 So. 2d 197, 202-03 (Fla. 1st DCA 2000). However, intra-district conflict—assuming

for the sake of argument that it even exists here—does not confer jurisdiction on this Court. *See* art. V, § 3(b)(3), Fla. Const. ("The supreme court . . . [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of *another* district court of appeal . . . ." (emphasis added)).

Next, Petitioners cite several cases setting forth the general rules pertaining to standing in Florida, broadly asserting conflict with those general rules. *See* Petitioners' Response at 10-11 (citing *May v. Holley*, 59 So. 2d 636, 637 (Fla. 1952); *Martinez v. Scanlan*, 582 So. 2d 1167, 1170-71 (Fla. 1991); *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720-21 (Fla. 1994)). To the extent that Petitioners' conflict argument relies on their assertion that they did actually allege a violation of their right of access to courts, the assertion is contrary to the facts set forth in the First District's decision. Reliance on an alleged fact not found within the four corners of the First District's decision cannot form the basis for conflict jurisdiction in this Court. *See Reaves*, 485 So. 2d at 830.

Petitioners' argument of conflict between the First District's decision and *May*, *Martinez*, and *Kuhnlein* amounts to disagreement on the merits with the application of general rules of standing to this case, and each of the cases cited is materially distinguishable. *See May*, 59 So. 2d at 637 (declaratory judgment action to determine whether the plaintiff had title to a certain piece of property); *Martinez*, 582 So. 2d at 1170-71 (because the issue of standing was not raised by

any party, this Court considered it a "close call," but did not dismiss when taxpayers, employers, employees, and labor organizations sought declaratory judgment as to validity of a comprehensive revision of workers' compensation laws); *Kuhnlein*, 646 So. 2d at 720-21 (state tax issue; plaintiffs included a certified class seeking declaratory judgment that impact fee violated the federal commerce clause, several members of which "were legally required to pay the impact fee," as well as group that filed a § 1983 action arguing that the impact fee violated their civil rights). There is no conflict with *May*, *Martinez*, or *Kuhnlein*.

Petitioners also contend that the First District's decision conflicts with *State v. Philips*, 70 Fla. 340, 70 So. 367 (1915), a 1915 case pertaining to the issuance of a gaming license, because the 2012 PIP Act "clearly was of such a nature that it renders invalid a provision of the statute that does affect [their] rights or duties." Petitioners' Response at 12. In *Philips*, after an individual was denied a gaming license for failing to satisfy the requirements of a statute, he brought suit challenging the constitutionality of the statute. *Philips*, 70 Fla. at 343-44. The *Philips* court held that a plaintiff can challenge a part of a statute that does not concern him or her if invalidating it would also render invalid the provision that *does* affect the plaintiff's rights or duties. *Id.* at 347. *Philips*, in which a plaintiff sought individual relief rather than on the behalf of others, is inapposite to this case, and there is no conflict on this basis.

Finally, Petitioners argue that the First District's decision conflicts with "***every*** decision embracing a proper reflection of the standing provided an 'affected party' under the Declaratory Judgment statute to determine the validity or construction of legislation." Petitioners' Response at 13-14 (citing *Ervin v. Capital Weekly Post, Inc.*, 97 So. 2d 464 (Fla. 1957); *Adams v. Gunter*, 238 So. 2d 824 (Fla. 1970); *Heinlein v. Metro. Dade Cnty.*, 239 So. 2d 635 (Fla. 3d DCA 1970); *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002); *Combs v. City of Naples*, 834 So. 2d 194 (Fla. 2d DCA 2002)).

Ervin, *Adams*, and *Heinlein* do not discuss standing. Moreover, these cases are materially distinguishable from the instant case and cannot serve as a basis for conflict jurisdiction. *See Ervin*, 97 So. 2d 464 (attorney general sought injunction against publishing an advertisement on the basis that it violated the election code); *Adams*, 238 So. 2d 824 (declaratory judgment action to determine validity of citizens' initiative petition proposing constitutional amendment, which the Secretary of State had declined to approve for placement on the ballot); *Heinlein*, 239 So. 2d 635 (landlord plaintiffs sought declaratory judgment as to provisions of county housing standards ordinance permitting the issuance of search warrants and placing on landlords the duty to make certain repairs).

Olive and *Combs* do discuss standing, setting forth the general rule that the declaratory judgment statute should be liberally construed; however, they also

demonstrate that standing to bring declaratory judgments is not limitless. In *Olive*, 811 So. 2d at 646, an attorney was appointed to represent a death-row defendant pursuant to the Registry Act, but his appointment was revoked after he refused to sign the contract, expressing concerns with being able to provide adequate representation under the Act. He then filed an action seeking a determination of his legal rights and professional duties under the Act. *Id.* This Court set forth the general rule that the declaratory judgment statute should be "liberally construed" and then analyzed whether the attorney had a sufficient interest to assert standing. *Id.* at 648. The Court concluded that the attorney had standing as he "did everything possible to represent [the defendant]—except sign a legally questionable contract." *Id.* at 649 n.4.

In *Combs*, 834 So. 2d at 196, the plaintiffs brought suit for a declaratory judgment, seeking to invalidate a development agreement between the city and a golf club. The Second District recognized that the declaratory judgment statute "should be liberally construed" and then analyzed the interests of each plaintiff involved. *Id.* at 197. The court concluded that all but one of the plaintiffs had an interest "sufficient to confer standing" because they were owners of property adjacent to the golf club as well as a neighborhood association formed to protect the interests of such property owners. *Id.* The court concluded that the remaining plaintiff, who was not a property owner in the vicinity but rather alleged "an

interest, as a City resident and taxpayer, in the proper procedural approval by the City of development agreements," lacked standing. *Id.*

The First District's decision below is consistent, and not in conflict, with *Olive* and *Combs*. The First District in this case held that the alleged economic harm from loss of PIP-claim revenue did not constitute a sufficient basis to assert an access-to-courts claim on the behalf of others, which was the sole basis for the temporary injunction. *Myers*, 125 So. 3d at 337. Neither *Olive* nor *Combs* hold that an individual can bring a constitutional claim on the behalf of another, rather than when his or her own constitutional rights are at issue. Petitioners' conflict argument on this basis is simply an assertion that the First District did not adopt a liberal *enough* view of standing. However, neither *Olive* nor *Combs* require the virtually limitless rule propounded by Petitioners and instead demonstrate the opposite—that a plaintiff still must have a sufficient interest to bring a declaratory judgment action. There is no conflict.

CONCLUSION

The First District Court of Appeal's decision does not expressly and directly conflict with any of the cases cited by the Petitioners. The Petitioners in this case are healthcare providers that asserted a violation of access to courts on behalf of others, and the trial court conferred standing to bring that claim based on the Petitioners' purported loss of PIP-claim revenue. The First District's decision

reversing the trial court's order and holding that the Petitioners lack standing to bring the claim based on the facts of this case is consistent with the cases cited by Petitioners and well-established law on standing. Petitioners' jurisdictional arguments to the contrary are predicated on facts not found within the four corners of the First District's decision and amount to nothing more than disagreement on the merits. This Court should deny jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Office of Insurance Regulation's Reply to Myers et al.'s Response to the Court's Order to Show Cause has been served by E-mail on February 10, 2014, on:

LUKE CHARLES LIROT
Luke Charles Lirot, P.A.
2240 Belleair Road, Suite 190
Clearwater, FL 33764
luke2@lirotlaw.com
jimmy@lirotlaw.com

ADAM S. LEVINE
Fl. Legal Adv. Group of Tampa Bay
11180 Gulf Boulevard, Suite 303
Clearwater, Florida 33767
aslevine@msn.com

ALLEN WINSOR
Solicitor General
RACHEL NORDBY
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
allen.winsor@myfloridalegal.com
rachel.nordby@myfloridalegal.com

PAMELA JO BONDI
Attorney General
Office of the Attorney General
State of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050
pam.bondi@myfloridalegal.com

MARIA ELENA ABATE
MATTHEW C. SCARFONE
Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb, PA
One Financial Plaza, 23rd Floor
100 SE Third Avenue
Fort Lauderdale, Florida 33394
mabate@cftlaw.com
mscarfone@cftlaw.com

THEODORE E. KARATINOS
Holliday, Bomhoff & Karatinos, PL
18920 N. Dale Mabry Hwy., Ste 101
Lutz, Florida 33548
tedkaratinos@hbklawfirm.com

KATHERINE E. GIDDINGS
NANCY M. WALLACE
MARCY L. ALDRICH
Akerman Senterfitt
106 E. College Street, #1200
Tallahassee, Florida 32301
katherine.giddings@akerman.com
nancy.wallace@akerman.com
marcy.aldrich@akerman.com
elisa.miller@akerman.com
martha.parramore@akerman.com
debra.atkinson@akerman.com

JESSIE L. HARRELL
BRYAN GOWDY
Creed & Gowdy, P.A.
865 May Street
Jacksonville, Florida 32204
jharrell@appellate-firm.com
bgowdy@appellate-firm.com
filings@appellate-firm.com

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief is computer generated in 14-point Times New Roman font.

/s/ Alyssa S. Lathrop

C. TIMOTHY GRAY (FBN 0602345)
tim.gray@floir.com – E-mail
ALYSSA S. LATHROP (FBN 69510)
alyssa.lathrop@floir.com – E-mail
BRUCE CULPEPPER (FBN 898252)
bruce.culpepper@floir.com – E-mail
Assistant General Counsels
Office of Insurance Regulation
Florida Financial Services Commission
Larson Building, Room 647
200 East Gaines Street
Tallahassee, FL 32399-4206
(850) 413-4110 – Telephone
(850) 922-2543 – Facsimile

ATTORNEYS FOR
Florida Office of Insurance Regulation