

SUPREME COURT
STATE OF FLORIDA

J. ANTONIO ALDRETE, M.D.,

Case No. SC04-1812

L.T. Case No.: 1D02-4457

Petitioner,

v.

DEPARTMENT OF HEALTH, BOARD
OF MEDICINE,

Respondent.

-----/

JURISDICTIONAL BRIEF BY PETITIONER, J. ANTONIO ALDRETE, M.D.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT 1

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 4

I. THE DISTRICT COURT'S DECISION PREAPPROVING
PARTICULAR DISCIPLINE BY AN AGENCY CONFLICTS
WITH FLORIDA REAL ESTATE COMMISSION V. WEBB,
367 SO. 2D 201 (FLA. 1979) AS CONSTITUTING
JUDICIAL INTERFERENCE WITH THE AGENCY'S
EXCLUSIVE DISCRETION CONCERNING DISCIPLINE 4

II. THE DECISION IS IN CONFLICT WITH HAMMESFAHR
V. DEPT. OF HEALTH, BOARD OF MEDICINE, 869
SO. 2D 1221 (FLA. 2D DCA 2004), ON THE
REQUIREMENT OF CLEAR AND CONVINCING EVIDENCE 8

CONCLUSION 9

CERTIFICATE OF TYPE SIZE AND STYLE 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

CASES

Aldrete v. Department of Health,
2004 W.L. 825514 (Fla. 1st DCA 2004) 1, 9

DeGroot v. Sheffield,
95 So. 2d 912 (Fla. 1957) 9

Florida Real Estate Commission v. Webb,
367 So. 2d 201 (Fla. 1978) 5, 6, 7, 8

Gross v. Dep't of Health,
819 So. 2d 997 (Fla. 5th DCA 2002) 2

Hammesfahr v. Dept. of Health, Board of Medicine,
869 So. 2d 1221 (Fla. 2d DCA 2004) 8, 9

Hasbun v. Dept. of Health,
701 So. 2d 1235 (Fla. 3d DCA 1997) 7

Marrero v. Department of Professional Regulation, Board of
Psychological Examiners,
622 So. 2d 1109 (Fla. 1st DCA 1993) 8

OTHER AUTHORITIES

Arachnoiditis: The Silent Epidemic, Arachnoiditis Foundation,
Inc. (2002), by J. Antonio Aldrete, M.D., M.S..... 1

Notable Names In Anesthesia, The Royal Society of Medicine
Press Ltd. (J.R. Maltby)..... 1

SUMMARY OF THE ARGUMENT

The decision of the District Court conflicts with decisions from this Court and the Second District Court. This Court should exercise its discretion and allow briefs on the merits.

STATEMENT OF THE CASE AND FACTS

The petitioner is Dr. J. Antonio Aldrete who seeks review of the decision of the First District Court of Appeal in Aldrete v. Department of Health, 2004 W.L. 825514 (Fla. 1st DCA 2004). The opinion was dated April 19, 2004, and rendered August 13, 2004, by an order denying Aldrete's Motion for Rehearing. A copy of the opinion and the order denying rehearing of August 13, 2004, are attached.

Dr. Aldrete is a world-renowned physician specializing in anesthesiology and pain management. He has practiced for over 40 years and written extensively. See Notable Names In Anesthesia, The Royal Society of Medicine Press Ltd. (J.R. Maltby), and Arachnoiditis: The Silent Epidemic, Arachnoiditis Foundation, Inc. (2002), by J. Antonio Aldrete, M.D., M.S. Dr. Aldrete treated a patient with arachnoiditis for pain reduction. The patient's condition became aggravated and treatment lasted in the doctor's clinic for six hours before an ambulance was called to transport her to an emergency room at a small local hospital which did not have an anesthesiologist on staff. The Board of Medicine filed three counts concerning: (1) the six hour delay, (2) overuse of

legend drugs and (3) insufficient medical records. The Board sought to strip Dr. Aldrete of his license to practice medicine. The Administrative Law Judge ("ALJ") found Dr. Aldrete guilty of one out of the three charges. The ALJ also found the doctor guilty of an uncharged offense concerning a mid-hearing oral assertion that the patient had been left in the care of an untrained nurse. The Board called a single medical witness who testified in support of all three counts plus the uncharged count. Counts II and III were rejected by the ALJ. As stated by the First District's opinion:

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, even though Dr. Aldrete presented testimony of three doctors who opined the six hours lapse before calling EMS met the level of care, skill and treatment acceptable by a reasonably prudent physician. The credibility of witnesses and weighing of evidence is left to the ALJ. See Gross v. Dep't of Health, 819 So. 2d 997 (Fla. 5th DCA 2002). (Emphasis supplied).

Thus despite the close questions presented by three doctors against one, the court found the case was controlled by the presence of competent substantial evidence instead of clear and convincing evidence. Gross v. Dept. of Health, is purely a competent substantial evidence case in which the doctor's license was not at risk.

On the pleadings, the case against Dr. Aldrete was a

proceeding seeking to strip him of his medical license based on the 6 hour charge and on two other charges on drugs and records on which he was found not guilty. Dr. Aldrete has a substantial property interest in his medical license and thus the standard by which the case had to have been proven was clear and convincing evidence rather than the lesser standard of competent substantial evidence.

This evidence issue was clearly presented. The first page of the appellee's brief by the Board of Medicine stated: Aldrete appears to suggest that the standard of review on appeal is clear and convincing evidence. However, on appeal the correct standard of review is whether there is competent substantial evidence in the record to support the Board's Final Order.

The court so ruled and adopted solely the competent substantial evidence standard.

The ALJ found Dr. Aldrete guilty of two charges; (1) the six hour charge and (2) the untrained nurse charge. The ALJ also relied upon an Ohio Exhibit which the ALJ excluded from evidence but expressly relied upon as an "aggravating" factor.

The Board of Medicine stated that it adopted the ALJ's Recommended Order of a one-year suspension and a \$5,000 fine.

The District Court reversed in substantial part and remanded for a new discipline ruling by the Board. However, in the closing paragraph, the court concludes that the same discipline can be imposed on remand:

We affirm in part, reverse in part, and remand. On

remand the Board should discipline Dr. Aldrete without consideration of the uncharged offense or the Ohio document. By this reversal, we do not rule out the Board's ability, upon proper consideration, to impose the same or similar discipline as before. (emphasis supplied).

ARGUMENT

I. THE DISTRICT COURT'S DECISION PREAPPROVING PARTICULAR DISCIPLINE BY AN AGENCY CONFLICTS WITH FLORIDA REAL ESTATE COMMISSION V. WEBB, 367 SO. 2D 201 (FLA. 1979) AS CONSTITUTING JUDICIAL INTERFERENCE WITH THE AGENCY'S EXCLUSIVE DISCRETION CONCERNING DISCIPLINE

Dr. Aldrete was found guilty on only one out of three counts but was also found guilty of the uncharged offense of leaving the patient in the hands of an untrained nurse. The District Court's opinion reverses as to the untrained nurse finding of guilt and further reverses as to the Ohio Exhibit.

Costs including approximately \$25,000 in attorneys' fees were also reversed. The case was remanded with instructions to impose further discipline based upon the single count (delay in calling an ambulance) on which the District Court affirmed.

However, the District Court concluded with the gratuitous comment that the Board of Medicine can impose the same discipline on remand as previously imposed.

Under this opinion, the Board must refrain from considering the Ohio Exhibit and refrain from considering the untrained nurse finding. Thus, despite taking away two of the major reasons for the particular sanction imposed, the court has gone further and preapproved the same sanction against Dr. Aldrete on remand.

Dr. Aldrete is fearful that he may have won the battle but lost the war. The Board will now know that it can impose precisely the same penalty and Dr. Aldrete will not be able to point to the reduced nature of the charges and argue or present evidence that the Board should impose some lesser penalty such as a reprimand. When the same penalty is ordered, Dr. Aldrete will not be able to seek meaningful appellate review because the court has already ruled that the "same penalty" will be proper.

This decision is in direct conflict with this Court's decision in Florida Real Estate Commission v. Webb, 367 So. 2d 201 (Fla. 1978), holding that the "proper penalty" is solely within agency discretion and that courts should not exercise their "judgment" on the penalty on a remand. The Webb case was a situation where the Florida Real Estate Commission imposed a 60-day suspension on two real estate brokers for misconduct. The Third District Court of Appeal concluded that the Real Estate Commission had been too severe in its discipline and the District Court reduced the penalty and required only a written reprimand as punishment for the brokers for their technical violations.

The Third District's opinion was reviewed and this Court reversed. The issue was the extent that a district court can go to in interfering with the exclusive discretion of an administrative agency in imposing discipline on a regulated professional. This Court concluded that Florida district

courts have absolutely no authority to interfere in any way whatsoever with the exclusive discretion of an agency in imposing a penalty. Webb makes it clear that a district court cannot increase or decrease a penalty but must instead simply remand the case back to the agency for imposition of a new penalty after a reversal and remand. Here the district court has found error and remanded for a new penalty but in doing so the court has interfered with the discretion of the agency by preapproving another one year suspension and \$5,000 fine. The district court has reduced the charges but substituted its own judgment by preapproving a particular penalty by the agency.

The Webb decision at p.204 makes clear that the agency's discretion is exclusive and states:

In those situations where the penalty may be overturned, the appellate court may not exercise its judgment as to the proper penalty to be imposed but must remand the cause for further consideration by the agency.

Dr. Aldrete is entitled to argue to the Board that no suspension or fine whatsoever should be imposed. The ALJ and the Board previously imposed this one-year suspension and \$5,000 fine based upon the charge that Dr. Aldrete had left the patient in the hands of an untrained nurse plus consideration of the adverse Ohio Exhibit, neither of which can be considered on the remand. Dr. Aldrete should be entitled to make arguments and present evidence before the ALJ or the Board when it considers imposing some new penalty. If

the District Court's opinion stands, then the Board alone will act and the Board will know it can impose precisely the same penalty. There will be no meaningful remand after the reversal. The court's "same penalty" language constitutes a substitution of the court's judgment for that of the agency.

Indeed, it is Dr. Aldrete who was entitled to relief on appeal and the opinion by the District Court is a substantial reversal deleting at least two matters from consideration by the Board of Medicine. In addition, the Board had imposed almost \$25,000 in attorneys' fees and this amount was imposed as a "sanction" in the words of the court's opinion. This \$25,000 part of the "sanction" was also reversed.

The District Court's decision also concludes that the inconsistency between the penalty imposed on Dr. Aldrete and the penalty imposed in similar cases as to other doctors should not be considered. Again, the case will be different when the agency considers it on remand. As in Webb, the District Court simply cannot rule on the "proper penalty to be imposed" because the court does not know what will be presented before the Board on remand and the court is engaged in substituting its judgment for the exclusive discretion of the agency if it says anything whatsoever about the extent of a "proper penalty to be imposed." See Webb at 204.

An example of a proper remand for a new penalty is shown in Hasbun v. Dept. of Health, 701 So. 2d 1235 (Fla. 3d DCA

1997), where the Third District reversed the Department of Health's penalty in part and remanded "to the Board for it to consider and impose whatever disciplinary action it chooses to order..." A further example of a correct remand for a new penalty occurred in Marrero v. Department of Professional Regulation, Board of Psychological Examiners, 622 So. 2d 1109 (Fla. 1st DCA 1993). There the agency "permanently" denied an application for licensure and the District Court reversed holding the word "permanently" to be error. The court concluded that it could not merely strike the word "permanently" because even taking this small step would constitute a substitution of the court's judgment for that of the Board.

When a district court goes beyond a completely open remand, it is substituting its own judgment and interfering with the exclusive discretion of the agency as to the penalty, Webb holds a court may not do so. This Court should accept jurisdiction based on this conflict.

II. THE DECISION IS IN CONFLICT WITH HAMMESFAHR V. DEPT. OF HEALTH, BOARD OF MEDICINE, 869 SO. 2D 1221 (FLA. 2D DCA 2004), ON THE REQUIREMENT OF CLEAR AND CONVINCING EVIDENCE

The Hammesfahr case is a very recent decision by the Second District Court of Appeal making it clear that the standard for disciplining a medical provider is clear and convincing evidence rather than the lesser standard of competent and substantial evidence. The Second District held:

We review the Board's determination for clear and convincing evidence. See Hasbun v. Department of Health...

At several points throughout the Hammesfahr opinion the District Court uses the words "clear and convincing evidence" and in the next to the last paragraph the court concluded that competent, substantial evidence may have existed on a certain issue but that clear and convincing evidence was not present.

The First District's Aldrete opinion relies solely on competent substantial evidence rather than on the clear and convincing evidence standard. Thus, conflict between the two opinions exists and this Court should accept jurisdiction and review on the merits. The First District opinion points out that Dr. Aldrete produced the expert testimony of three doctors who testified that the six hours he treated this patient in his clinic was completely proper. The Board of Medicine presented a single witness who testified to the contrary and the issue was squarely presented as to whether the overall evidence was clear and convincing in accordance with this court's definition of that term in DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957). Unquestionably, clear and convincing evidence is a higher standard than merely competent substantial evidence. The First District has chosen to apply the lesser standard and in doing so is in direct conflict with the Second District's Hammesfahr decision.

CONCLUSION

Conflict exists and this Court should exercise its discretion and review the case on the merits.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy was mailed to the following this 30th day of September, 2004.

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