IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 74,016

BELARMINA ALVAREZ, et al.,

Petitioners,

v.

DEPARTMENT OF PROFESSIONAL
REGULATION, STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF MANDAMUS

The Department has requested this Court to decline to issue the Writ of Mandamus alleging that the Dentists have not demonstrated that they have a clear right to practice unsupervised, that the Department has a clear duty to license them without supervision, and that the Dentists have other remedies available to them through the Administrative Procedure Act.

I. ARGUMENT

A. THE DENTISTS HAVE A CLEAR RIGHT TO BE LICENSED BY THE DEPARTMENT.

The Dentists have petitioned this Court for the issuance of a Writ of Mandamus to compel the Department to license them under Section 455.218, Florida Statutes (Supp. 1988) (the "FTEPA").

The Dentists have demonstrated, and the Department agrees, that they have a clear right to be licensed under the FTEPA. The Department, however, contends that the Dentists have failed to satisfy one of the requirements for mandamums because they have not demonstrated that they have the clear right to practice unsupervised. The Department's attempt to confuse the Dentists' clear right to be licensed with the Dentists' right to practice unsupervised constitutes a feeble excuse for the Department's arbitrary refusal to comply with the requirements of the FTEPA.

Whether the Dentists must practice under supervision is a matter to be determined separately from their entitlement to

licensure and the Department's obligation to license them under FTEPA.

B. THE DEPARTMENT IS NOT REQUIRED TO ISSUE THE LICENSES SUBJECT TO SUPERVISION.

The Department does not contend that it does not have a clear obligation to license the Dentists. The FTEPA is clear. It provides that the Department shall license any applicant who satisfies the statutory requirements, which, the Department admits, have been satisfied by the Dentists. The Department's argument is that the Dentists have not satisfied the requirements for the issuance of the writ because they have not demonstrated that the Department has a clear duty to license them without supervision.

If the Department was required to issue the licenses subject to supervision, the FTEPA would say so. Instead, Section 455.218(4), Florida Statutes, (Supp. 1988) provides:

> The Department shall license any applicant who meets the requirements of subsections (1) and (2). All licenses so issued are subject to the administrative requirements of this chapter and the respective practice act under which the license is issued. Each applicant so licensed is subject to all provisions of this chapter and the respective practice act under which his license was issued (emphasis added).

The statute clearly requires the Department to license all applicants who meet the requirements for licensure, whether or not they are found to be subject to supervision under by the applicable practice act. In this connection, it should be noted that Chapter 466, Florida Statutes, which regulates the practice of Dentistry, does not contain any provision, nor does it permit the issuance of regulations, for the supervision nor does it permit the issuance of regulations, of Dentists licensed under the FTEPA.

The Dentists have demonstrated that the Department has a clear obligation to license them. The Department has admitted this obligation and has done so in the past, when it licensed two veterinarians under the FTEPA, without supervision regulations being in place.

C. THE DENTISTS ARE NOT REQUIRED TO PRACTICE UNDER SUPERVISION.

1. THE SUPERVISION PROVISION DOES NOT APPLY TO THE DENTISTS.

The Department admits that Section 455.2182, Florida Statutes (1987) (the "supervision provision") is the same as Section 25 of Chapter 86-290, Laws of Florida (the "Act"), which Chapter has been described, and referred to, by the Department as the re-enactment of the Oesteopathic Medicine Act. (Respondent's App. 1).

The Department's argument that the Dentists are subject to the supervision provision, notwithstanding that it appeared in, and is a part of, the Act, is, essentially, that "when the Legislature intended to effect (sic) only oesteopathic physicians and oesteopathic physicians (sic) assistants those terms were used, whereas in Section 25 of the Act, health care practitioners, which is clearly a broader category of licensees, was specifically referenced. (Respondent's Response at Page 7).

The Department's argument ignores that the Act also refers to the oesteopathic physicians covered by it as "licensees", "practitioners," "persons" and "physicians," which terms include a broader category of persons. Clearly, the Department can not mean that the Legislature intended to affect all "licensees," "practitioners," "physicians" or "persons," whenever those terms are used in the Act, but only those health care practitioners to which the Act is to be applied, as specifically provided in Section 2 thereof.

The only logical reading of Section 25, indeed, the only reading it may be given without running afoul of constitutional requirements, is that the term "health care practitioners," whenever used in the Act, means only oesteopathic physicians and assistants.

Therefore, since the Dentists are not osteopathic physicians, they are not subject to the supervision provision contained in Section 25 of the Act.

2. IF SECTION 455.2182, FLORIDA STATUTES, WAS INTENDED TO APPLY TO PRACTITIONERS OTHER THAN OSTEOPATHIC PRACTITIONERS, THEN IT IS INOPERATIVE AND IN VIOLATION OF THE FLORIDA CONSTITUTION.

A. THE SUPERVISION OF FOREIGN-TRAINED DENTISTS IS NOT EXPRESSED IN THE TITLE OF THE ACT.

The Department contends that the application to the Dentists of Section 455.2182, Florida Statutes, does not give the statute a scope beyond the range of the subject stated in its title because the title of Chapter 86-290, Laws of Florida, reads in pertinent part, "providing that the act shall not be deemed to allow the unsupervised practice of certain health care practitioners." (emphasis added)

The Department's argument is that the inclusion of the word "certain" in the title of the Act constitutes sufficient notice to the public that the health care practitioners described therein are the foreign-trained health care practitioners defined in the FTEPA.

If Section 25 of the Act was intended to apply to all foreign trained health care practitioners licensed under the FTEPA, then it is innoperative and violative of the Florida Constitution because its subject is neither expressed in the title, nor is it properly connected with the subject of the Act. This result would be mandated by Article III, Section 6, Florida Constitution, which provides that: "Every law shall embrace but one subject and matter properly connected therewith, and the subject must be briefly expressed in the title. . ." This provision was designed to prevent the surprise or fraud on the legislators and the people that may result from provisions hidden in the body of a statute which are not properly connected with it and so indicated by its title. Knight & Wall Co. v. Bryant, 178 So.2d 5 (Fla. 1965), King Kole, Inc. v. Bryant, 178 So.2d 2 (Fla. 1965), Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964).

The title of Chapter 86-290, Laws of Florida, comprises one full page of the Act. All references in the title are to Chapter 459, Florida Statutes, and to oesteopathic physicians and assistants. Hidden in the title, preceded and followed by references to Chapter 459 and oesteopathic physicians and assistants, is the following phrase: "providing that the act shall not be deemed to allow the unsupervised practice of certain health care practitioners." This is the phrase that the Department contends gives notice to the public that foreign-trained dentists must practice supervised.

This obscure reference to "certain health care practitioners" in an Act which re-enacts the Oesteopathic Medicine Act, without identifying these certain health care practitioners by the term by which they have become known (i.e. "foreign-trained professionals) or by the law that has recognized their right to be licensed (i.e. Chapter 86-90, Laws of Florida), can hardly be deemed sufficient notice to the legislators or the public that it affects the Dentists. This is clearly contrary to the intent of Art III §6, Fla. Const. United Gas Pipe Line Company v. Bevis 336 So.2d 560 (Fla. 1976) where this Court found that a statute, which partially repealed a statutory exemption, was defective and in violation of the constitution because the title of the Act of which it was a part, did not give sufficient warning to the public of the purported repeal of the statutory exemption in question.

The Department's suggestion that Section 25 of the Act applies to the Dentists implies that Section 25 amended the FTEPA by the imposition of supervision on the practice by the professionals licensed thereunder. The title of the Act does not mention the FTEPA nor the foreign trained professionals. Consequently, an acceptance of the Department's argument would be contrary to the holding in United Gas that a statute cannot be partially repealed (in this case amended) without sufficient warning in its title.

B. THE SUPERVISION OF FOREIGN TRAINED DENTISTS IS NOT PROPERLY CONNECTED WITH THE SUBJECT OF THE ACT.

Additionally, the statute is ineffective if it is interpreted to apply to the Dentists because the supervision of all health care practitioners licensed under the FTEPA is totally disconnected with the subject of the Oesteopathic Medicine Act. In City of Ocoee v. Bowness, 65 So.2d 7 (Fla. 1953), this Court stated that:

> In the determination as to whether provisions appearing in an act are "matters properly connected" with the "subject" thereof, the test is whether such provisions are fairly and naturally germane to the "subject" of the act, or are such as are necessary incidents to or tend to make effective or promote objects and purposes of legislation included in the "subject."

Id. at 10; See also Smith v. Chase, 109 So. 94 (Fla. 1926), Spencer v. Hunt, 147 So. 282 (Fla. 1933).

The subject of supervision of foreign trained health care practitioners under the FTEPA is not "fairly and naturally germane" to the subject of the Act, which is the regulation of Osteopathic Physicians and Assistants. Further, the supervision of practitioners subject to the FTEPA is not a necessary incident to, nor does it tend to, or make effective or promote the objects and purposes of the legislation included in the Act.

Thus, where a particular provision in an act constitutes a broader or essentially different subject that is not properly connected with the stated subject of the act, such a provision is deemed inoperative and violative of the constitution. Smith v. Chase 109 So. 94 (Fla. 1936). Pilot Equipment Co., Inc. v. Miller, 470 So.2d 40 (Fla. 1 DCA 1985). Therefore, the interpretation of Section 25 of the Act suggested by the Department would make the provisions contained therein innoperative with respect to the Dentists because it would violate Article III, Section 6, of the Florida Constitution.

D. PETITIONERS HAVE NO ADEQUATE REMEDY AT LAW.

The Department has requested this Court to decline issuance of the Writ of Mandamus on the basis that the Dentists have other remedies available to them through the Administrative Procedure Act. It is interesting to note, however, that if, in fact, the Dentists had any administrative remedies available to them, the Department was required to so advise them under Section 120.60 of the Administrative Procedure Act. §120.60(3), Fla. Stat. This, which the Department has failed to do, is now being asserted by the Department to attempt to defeat the only adequate remedy available to the Dentists.

1. SECTION 120.57 HEARING.

First, the Department alleges that the Dentists could petition for a hearing pursuant to Section 120.57, Florida Statutes (a "Section 120.57 hearing"). The Department, however, acknowledges that the letter from Secretary Gonzalez, which represents the Department's decision not to license the dentists at this time, did not advise the Dentists that they had the right to review a denial of their licenses, "inasmuch as the Department did not interpret the letter to be a denial of a licensure." (Respondent's Response at pages 8-9). The Dentists agree that Secretary Gonzalez' letter is neither a grant nor a denial of licensure. The letter, essentially, places the licenses in "limbo."

In all candor, the Dentists do not know whether the letter from the Department is subject to the review provisions of Section 120.57, Florida Statutes.

Section 120.60, Florida Statutes, states that licensing is subject to the provisions of Section 120.57, Florida Statutes. Section 120.52(10), Florida Statutes, defines licensing to mean the process of issuance, denial, renewal, revocation, suspension, annulment, withdrawal or amendment of a license or imposition of terms for the exercise of a license. The letter from the Department does not quite fit within the meaning of "licensing" which would be subject to a Section 120.57 hearing.

The Dentists' confusion as to whether a Section 120.57 hearing is available to them is based, in part, on the fact that most licensing related proceedings seem to involve factual disputes. See 2 A. ENGLAND & L.H. LEVINGSON, FLORIDA ADMINISTRTIVE PRACTICE MANUAL §14.03 (Supp. 1988). In this case there is no factual dispute; the Department agrees that the Dentists are entitled to be licensed and the Department has acknowledged its obligation to license them.

Additionally, the Department has failed to advise the Dentists of this right, if it in fact exists. The Department's failure to advise the Dentists of any available administrative hearings is a clear violation of Section 120.60, Florida Statutes, which requires the Department to give written notice, to all applicants for licensure, if it intends to grant or deny, or has granted or denied, the application for license and to inform the recipient of any administrative hearing or judicial review which may be available to him.

By asking this Court to decline the issuance of the writ because the Dentists have several administrative remedies available to them, the Department is, in essence, asking this Court to sanction its violation of Section 120.60(3), Florida Statutes, and to be permitted to benefit from its own wrongdoing.

Although mandamus is a legal remedy, it is one of an equitable nature. Shevin v. Public Service Commission, 333 So.2d 9 (Fla. 1976). Equity would not permit a person to profit from his own wrongdoing.

2. DECLARATORY STATEMENT

The Department also alleges that the Dentists may file a petition for declaratory statement pursuant to Section 120.565, Florida Statutes (1987). The Department's contention presumes that the Dentists are only challenging the Department's position that their practice is subject to supervision.

The Dentists, however, are asking this Court to compel the Department to issue the licenses to which they are entitled

under the clear language of Section 455.218, Florida Statutes. Declaratory statement is not an adequate remedy because an interpretation of Section 455.2182, Florida Statutes, does not address the issue presented herein: that the Department is obligated to license all applicants who meet the statutory requirements for licensure whether or not their practice are found to be subject to supervision.

3. CHALLENGE OF PROPOSED RULES

Finally, the Department contends that the Dentists have an adequate remedy by challenging a rule which has not yet been promulgated.

The challenge of a rule which has not yet been promulgated and which the Department has arbitrarily imposed as a condition to the issuance of licenses is not an adequate substitute for an action to compel the Department to license the Dentists under Section 455.218, Florida Statutes.

4. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Department requests this Court to decline to issue the Writ of Mandamus on the basis that the Dentists have several administrative remedies available to them.

The flaw in the Department's argument is that, even if one assumes that the remedies proposed by the Department are available, they are not adequate. The doctrine that administrative remedies must be exhausted, which, parenthetically, is a doctrine of policy and not one of jurisdiction, Jones v. Braxton, 379 So.2d 115 (Fla. 1st DCA 1979), Department of Revenue v. Joanes, 364 So.2d 24 (Fla. 1st DCA 1978), applies only when administrative remedies are not only available but also adequate. Cherry v. Bronson, 384 So.2d 169 (Fla. 5th DCA 1980).

Neither a challenge to a rule that has just been proposed, nor the filing of a petition for declaratory statement on the applicability of the supervision provision are adequate remedies to compel the Department to do what it must do under Section 455.218, Florida Statutes.

With respect to the hearing under Section 120.57, Florida Statutes, even if such a hearing was available, the request thereof would be a futile gesture because the purpose for which the hearing provision was designed would not be accomplished.

Hearing requirements of the Administrative Procedure Act are designed to give affected parties an opportunity to change the agency's mind. Capeletti Bros. v. State Department of General Services, 432 So.2d 1359 (Fla. 1st DCA 1983), Couch Construction Co. v. Department of Transportation, 361 So.2d 172 (Fla. 1st DCA 1978). The Dentists vigorously tried to convince the Department of their statutory obligation to license them (whether or not their practice was subsequently determined to be subject to supervision) and failed. Accordingly, the decision of the Department, which is based on the Department's intentional misapplication of the law and not on a factual dispute, would not change as a result of an administrative hearing.

In City of Miami Beach v. Sunset Islands, 3 and 4 P.O. Assn.; 216 So.2d 509 (Fla. 3d DCA 1968), the court held that:

> Mandamus is a recognized remedy to require a public official, who is clothed with the authority to discharge his duty. . . . There is no requirement that a relator exhaust his administrative remedies prior to seeking the issuance of an alternative writ of mandamus, when it is apparent that either such gesture would be a futile one or that there is no discretion to be exercised by the official involved under the clear wording of . . . a statute.

Id. at 511. See also Hallfax Area Council v. City of Daytona Beach, 385 So.2d 184 (Fla. 5th DCA 1980), Cherry v. Bronson, supra.

The Dentists have demonstrated that there is no discretion to be exercised by the Department on the issuance of their licenses under the clear wording of Section 455.218, Florida Statutes, and that their request for an administrative hearing, if one is available, would be a futile gesture. The Dentists have also demonstrated that the availability of administrative

remedies, particularly a Section 120.57 hearing, is not clearly supported by statute. See Hickey v. Wells, 91 So.2d 106 (Fla. 1956) where the Court held that Mandamus was proper where a number of remedies appeared to be available but the authority for those remedies was not clear. See also Department of Professional Regulation v. Hall, 398 So.2d 978 (Fla. 1st DCA 1981). Further, the Dentists have demonstrated that the remedies proposed by the Department are not adequate.

II. CONCLUSION

The Department's Response to the Order to show Cause why the Petition should not be granted demonstrates the pattern of arbitrary conduct to which the Dentists have been subject since 1986.

The Department has attempted to justify its unreasonable, arbitrary and discriminatory decision not to license the Dentists on the basis that the Section 455.218, Florida Statutes, does not mean what it says. According to the Department, Section 455.218 does not require the Department to license the applicants who satisfy the requirements of that section, despite the fact that it has done so in the past. Instead, the Department contends that the statute requires it to "license subject to supervision." This is clearly contrary to the language and intent of the statute.

The Response filed by the Department is a poor attempt to justify what the Dentists hope will be the last of a long list of unreasonable and arbitrary actions which the Department has imposed on the Dentists.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy hereof has been mailed to E. Harper Field, Esq., Deputy General Counsel, Department of Professional Regulations, 130 North Monroe Street, Tallahassee, Florida 32399-0750 and to Robert A. Butterworth, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 5th day of May, 1989.

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