SUPREME COURT OF FLORIDA

SHARI DANIELS,

Petitioner,

v. **CASE NO. SC04-230**
L.T. NO. 3D03-706

DEPARTMENT OF HEALTH,
BOARD OF MIDWIFERY,

Respondent.
_____/

ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The Department of Health ("the Department") provides the following Statement of the Case and Facts inasmuch as Petitioner's nine-page Statement of the Case is mainly an extension of Petitioner's argument on the merits of the issue before the Court.

Shari Daniels ("Daniels") was the subject of an Administrative Complaint to which the Department subsequently filed a Notice of Voluntary Dismissal. On August 5, 2002, Daniels filed a petition for attorney's fees pursuant to the Florida Equal Access to Justice Act. (R. 1). Daniels claimed personally to be a "small business party" and a "prevailing small business party". (R. 1-2). In her petition, Daniels did not mention South Beach Maternity Associates, Inc., d/b/a Miami Beach Maternity Center ("South Beach Maternity Associates, Inc."). The Department moved to dismiss the petition for attorney's fees on August 26, 2002. (R. 11). In support of its motion, the Department cited, inter alia, various cases involving attorney's fees pursuant to section 57.111, Florida Statutes. (R.15-23). The petition was dismissed by the Administrative Law Judge on November 20, 2002, with leave for Daniels to file an amended petition consistent with the

dismissal order. (R. 103). The order required Daniels to do the following:

> [E]xplain whether she believes she is a "sole proprietor of an unincorporated business," a "partnership" or a "corporation, including a professional practice." Petitioner should also explain, to the extent Petitioner believes the issue to be relevant, why she believes the Administrative Complaint was brought against her as a "sole proprietor of an unincorporated business," a "partnership" or a "corporation, including a professional practice."

(R. 102-103).

Daniels filed an amended petition for attorney's fees on December 2, 2002, (R. 106) that included a new allegation that she was the sole shareholder of South Beach Maternity Associates, Inc., a sub-chapter "S" corporation. (R.107). Daniels also claimed that the action against her arose solely from her treatment of a patient of South Beach Maternity Associates, Inc., and claimed that under case law she was a "small business party." (R. 107). The remainder of the amended petition was substantially similar, if not identical, to the original petition.

On December 11, 2002, the Department moved to dismiss the amended petition. (R. 118). On February 10, 2003, the Administrative Law Judge entered a Final Order denying the amended petition for attorney's fees based on the finding that Daniels was not a "small business party" as defined in section

57.111(3)(d), Florida Statues (2002), the Florida Equal Access to Justice Act. (R. 226). The Administrative Law Judge did not determine whether the agency's action was "substantially justified" because Daniels had not met the necessary criterion of being a "small business party". (R. 227).

On March 5, 2003, Daniels filed a Notice of Appeal from the February 10, 2003 Final Order with the Third District Court of Appeal. On January 14, 2004, the Third District Court of Appeal, acknowledging conflict with the Fourth District Court of Appeal, affirmed the decision of the Administrative Law Judge and opined that "[a] review of the record shows that the administrative complaint was filed against the petitioner [Daniels] individually, rather than her corporation." Daniels v. Department of Health, 868 So. 2d 551 (Fla. 3d DCA 2004).

The record on appeal will appear as (R. page#). The Initial Brief will be cited as (I.B. page#). All statutory citations are to Florida Statutes (2002), unless otherwise indicated.

STANDARD OF REVIEW

Section 57.111(4)(d), Florida Statutes, provides for review of an Administrative Law Judge's final order pursuant to section 120.68, Florida Statutes, which governs appellate review of final administrative agency action. Generally, the inquiry on appeal is whether the final order is supported by competent substantial evidence in the record. § 120.68(7)(b), Fla. Stat. See also Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 933 (Fla. 1996)("It is well established that a factual finding by an administrative agency will not be disturbed on appeal if it is supported by 'substantial evidence.'").

The standard of review of an order denying attorney's fees is whether the trial court abused its discretion. Hoover v. Sprecher, 610 So. 2d 99 (Fla. 1st DCA 1992); Association of School Consultants, Inc. v. Spillis Candela & Partners, Inc., 639 So. 2d 991 (Fla. 3rd DCA 1994).

In this case, unless otherwise stated, the issues presented are issues of law. The standard of review is whether the Third District Court of Appeal erroneously interpreted the law, and if so, whether a correct interpretation requires a particular

action. See § 120.68(7)(d), Fla. Stat.; Metropolitan Dade County v. Dep't of Environmental Protection, 714 So. 2d 512 (Fla. 3rd DCA 1998). Therefore, the standard of review is de novo. Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Fla. 1st DCA 2002).

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal properly found in the case below that Daniels is not a "small business party" as defined by section 57.111(3)(d) of the Florida Equal Access to Justice Act because the administrative complaint was filed against Daniels individually rather than against her corporation.

The Florida Equal Access to Justice Act defines a "small business party" in parts here pertinent as follows:

> 1. a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million; or
>
> b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than $2 million;

§ 57.111(3)(d)1. a. and b., Fla. Stat. Unlike other attorney's fee provisions for administrative proceedings, the Florida Equal Access to Justice Act does not include individuals. Similarly, contrary to the federal Equal Access to Justice Act, the state counterpart, the Florida Equal Access to Justice Act, does not include individuals.

When the words of a statute are clear and unambiguous, the words do not need any canon of statutory construction other than plain meaning, which is:

> . . . a status above that of any other canon of construction, and often vitiates the need to consider any of the other canons. Therefore, if the plain meaning rule is a canon of construction, it is the largest caliber canon of them all.

CBS Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217 (11th Cir. 2001).

Thus, the Third District Court of Appeal properly found that Daniels is not a "small business party" as defined by the Florida Equal Access to Justice Act because the administrative complaint was filed against Daniels individually, rather than against her corporation.

Should the Court disagree with the Third District Court of Appeal's interpretation of the Florida Equal Access to Justice Act, the case would need to be remanded to the Administrative Law Judge for an evidentiary hearing on the issue of whether Daniels was a "small business party" within the meaning of the Act and, if so, whether the Department was substantially justified in bringing the disciplinary action.

ARGUMENT

I. AN INDIVIDUAL HEALTH CARE LICENSEE WHO IS DEFENDING A DISCIPLINARY ACTION INITIATED BY THE DEPARTMENT OF HEALTH IS NOT A "SMALL BUSINESS PARTY" WITHIN THE PLAIN MEANING OF SECTION 57.111(3)(d), FLORIDA STATUTES.

The standard of review is whether the Third District Court of Appeal erroneously interpreted the law, and if so, whether a correct interpretation requires a particular action. See 120.68(7)(d), Fla. Stat.; Metropolitan Dade County v. Dep't of Environmental Protection, 714 So. 2d 512 (Fla. 3rd DCA 1998). Therefore, the standard of review is de novo. Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Fla. 1st DCA 2002).

In the instant case, the Third District Court of Appeal reviewed an appeal from the Division of Administrative Hearings. The Administrative Law Judge denied Daniels' amended complaint for attorney's fees under the Florida Equal Access to Justice Act, section 57.111, Florida Statutes (2002), based on the finding that Daniels was not a "small business party" as defined by section 57.111(3)(d) of the Act. The Third District Court of Appeal affirmed, reasoning:

> A review of the record shows that the administrative complaint was filed against the petitioner individually, rather than her corporation.

Daniels at 868 So. 2d 551. This decision was consistent with the holdings of the First District Court of Appeal in analogous cases.

Petitioner Shari Daniels contends that the definition of a "small business party" includes herself individually as a licensed health care practitioner midwife against whom Respondent Department of Health had initiated an Administrative Complaint based on an alleged violation of a statutory disciplinary standard. Respondent contends that this definition does not include Petitioner.

The plain meaning of the phrase "small business party" does not include actions initiated against individuals in their individual capacities:

> (d) The term "small business party" means:
>
> 1. a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million; or
>
> b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than $2 million;

§ 57.111(3)(d)1. a. and b., Fla. Stat. Had the Legislature wanted to include individuals within the Act's coverage, it could have done so by simply including the term "individuals"

along with the phrase "small business party." Had the Legislature wanted to include only those individuals licensed by the State of Florida, it could have done so by simply adding the phrase "individuals licensed by the state."

If a statute is clear and unambiguous, the courts must presume that the Legislature "said what it meant and meant what it said." CBS Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217 (11th Cir. 2001). See also Hankey v. Yarian, 755 So. 2d 93, 96 (Fla. 2000), where the Florida Supreme Court stated:

> It has long been a rule of statutory construction that statutes must be given their plain and obvious meaning and courts should assume that the legislature knew the plain and ordinary meaning of words when it chose to include them in a statute.

See also Department of Insurance v. Florida Bankers Association, 764 So. 2d 660, 663 (Fla. 1st DCA 2000), quoting Nicoll v. Baker, 668 So. 2d 989, 990-91 (Fla. 1996):

> When the words of a statute are plain and unambiguous and convey a definite meaning, courts . . . must read the statute as written, for to do otherwise would constitute an abrogation of legislative power.

Under the two other attorney's fees provisions for section 120.57 administrative proceedings, the Legislature chose to include recovery for individual parties. See §§ 57.105 and 120.595, Fla. Stat.

Section 120.595, Florida Statutes, provides in part:

120.595 Attorney's fees.-

> (1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).-
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> * * *
>
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative judge to have participated in the proceeding for an improper purpose. (Emphasis added).

The Florida Legislature thus authorized attorney's fees for all parties, individual or other, who prevailed in an administrative proceeding where the nonprevailing adverse party was determined to have participated in the proceeding for an improper purpose.

Section 57.105, Florida Statutes, provides for attorney's fees to the prevailing party in administrative proceedings under chapter 120, Florida Statutes, under specified conditions:

> **57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation.-**
>
> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a)Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

> However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.
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> * * *
>
> (5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.2(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection. (Emphasis added).

The Florida Legislature thus authorized attorney's fees for all parties who prevailed in an administrative proceeding where the nonprevailing party knew or should have known that the claim or defense was not supported by the material facts or by the application of the then-existing law to the material facts. Again, the Florida Legislature included coverage for all parties to a proceeding regardless of whether they are individual, corporate or other.

In Department of Insurance, Florida Bankers Association, supra, the First District Court of Appeal affirmed a denial of

an award of attorney's fees pursuant to section 120.595(2), Florida Statutes, to the bank that was represented by a non-attorney. The Court reasoned that nothing in the statute or rule authorizes an award of attorney's fees to non-attorneys. The courts may not add words that are otherwise omitted from the statute.

The Florida Equal Access to Justice Act was patterned after the federal Equal Access to Justice Act, 5 U.S.C.A. Section 504, which reads in part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding . . . .
>
> (b)(1) For the purposes of this section - -
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> * * *
>
> (B) . . . "party" means a party, as defined in section 551(3) of this title[1], who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated. . . . (Emphasis added).

[1] 5 U.S.C.A. Section 551(3) provides: ". . . 'party' includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purpose; . . . . "

When the Legislature drafted the Florida Equal Access to Justice Act, it did not adopt the language in the federal counterpart which expressly covered of an individual.

II. THE FLORIDA EQUAL ACCESS TO JUSTICE ACT IS AN ATTORNEY'S FEES PROVISION, AND THEREFORE SHOULD BE STRICTLY CONSTRUED.

[Restatement of Issue A of Initial Brief]

The standard of review is whether the Third District Court of Appeal erroneously interpreted the law, and if so, whether a correct interpretation requires a particular action. See 120.68(7)(d), Fla. Stat.; Metropolitan Dade County v. Dep't of Environmental Protection, 714 So. 2d 512 (Fla. 3rd DCA 1998). Therefore, the standard of review is de novo. Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Fla. 1st DCA 2002).

Daniels asserts that the Florida Legislature intended the Florida Equal Access to Justice Act to be interpreted "broadly and liberally, in line with its compensatory and remedial purpose." (I.B. 13). The Florida Equal Access to Justice Act is an attorney's fees provision. It is a general and well established rule of law that attorney's fees provisions are in derogation of common law, and therefore should be strictly construed. Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So.2d 276 (Fla. 2003); Dade County v. Pena, 664 So. 2d 1131

(Fla. 1995); Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n, 539 So. 2d 1131 (Fla. 1995).

Even if the Florida Equal Access to Justice Act should be interpreted broadly, it would still not permit the interpretation Daniels asserts because the plain meaning of the statute will not support such an interpretation.

III. THE THIRD DISTRICT COURT OF APPEAL AND THE FIRST DISTRICT COURT OF APPEAL CORRECTLY INTERPRETED THE PHRASE "SMALL BUSINESS PARTY" TO ASCERTAIN THE LEGISLATIVE INTENT OF THE FLORIDA EQUAL ACCESS TO JUSTICE ACT AND EFFECTUATE ITS PURPOSE.

[Restatement of Issue B of Initial Brief]

In this case, unless otherwise stated, the issues presented are issues of law. The standard of review is whether the Third District Court of Appeal erroneously interpreted the law, and if so, whether a correct interpretation requires a particular action. See § 120.68(7)(d), Fla. Stat.; Metropolitan Dade County v. Dep't of Environmental Protection, 714 So. 2d 512 (Fla. 3rd DCA 1998). Therefore, the standard of review is de novo. Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Fla. 1st DCA 2002).

Daniels' argument rests on the following assertions: 1) the Florida Equal Access to Justice Act covers small businesses; 2) health care practitioners' small businesses are dependent on

the health care practitioner's license; therefore, 3) the Florida Equal Access to Justice Act covers health care practitioner licensees. This is not so. In logic, if A equals B, and B equals C, then A may also be said to equal C. For the above-stated hypothesis to be logical, licensed health care practitioners must be small businesses, which of course is not true.

The Legislature's intent in enacting the Florida Equal Access to Justice Act is written into the statute itself:

> The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state. (Emphasis added).

§ 57.111(2), Fla. Stat. Although Daniels argues that licensees are permitted to recover attorney's fees under section 57.111, the argument ignores the plain text of the statute. Section 57.111 makes no mention at all of licensees. Nor does the statute specifically address situations in which a licensee owns or operates a business. Although the statute's coverage

"includ[es] a professional practice," such language does not confer standing upon Daniels as an individual.

Although Daniels argues that the First District Court of Appeal incorrectly viewed the statute too narrowly, the court kept the statute in its proper context. The distinction made by the court is sensible. The First District Court of Appeal in Florida Real Estate Commission v. Shealy, 647 So. 2d 151 (Fla. 1st DCA 1994), which is directly on point, appropriately distinguished Ann & Jan Retirement Villa, Inc. v. Department of Health and Rehabilitative Services, 580 So. 2d 278 (Fla. 4th DCA 1991), because in Ann & Jan Retirement Villa, Inc., the Administrative Law Judge granted attorney's fees to the corporation, not the individual. Ann & Jan Retirement Villa, Inc., at 281.

In Ann & Jan Retirement Villa, Inc., an individual operated an adult living facility as a corporation. An administrative proceeding was brought regarding the renewal of a license to operate an adult living facility. The case was subsequently dismissed by the state and the individual and the facility moved for attorney's fees under the Florida Equal Access to Justice Act. The court held that the individual and the facility "are one and the same entity" and awarded fees to the corporation. In Ann & Jan Retirement Villa, Inc., the underlying action

involved the right to operate a business rather than an action involving one's personal professional license. These facts are thus very different from those presented in a disciplinary action against a health care practitioner.

In Shealy, supra, contrary to Ann & Jan Retirement Villa, Inc., the corporation was neither the licensee nor was it the subject of the agency action. The licensee "appeared in his individual capacity." Id. at 152. The corporation was simply the vehicle through which the licensee attempted to seek attorney's fees, but was otherwise irrelevant to the case. Daniels is similarly postured.

South Beach Maternity Associates, Inc., like the corporation in Shealy, was neither the licensee nor the subject of the agency action. South Beach Maternity Associates, Inc., was not even mentioned in Daniels' initial petition for attorney's fees. In both Daniels' initial petition and the amended petition for attorney's fees, she personally claims her net worth and number of employees are within the limits of section 57.111, Florida Statutes. (R. 106). Daniels makes no claim at all regarding the net worth or number of employees of

South Beach Maternity Associates, Inc., the sub-chapter "S" corporation.[2]

There were no allegations regarding South Beach Maternity Associates, Inc.'s patient intake or how the patient in question came to be treated by South Beach Maternity Associates, Inc. The allegations were against Daniels personally. South Beach Maternity Associates, Inc., as a corporate entity, is incidental to the case. South Beach Maternity Associates, Inc., is simply the means through which Daniels seeks to plead for attorney's fees.[3]

Section 57.111(4)(d), Florida Statutes, provides for review of an Administrative Law Judge's final order pursuant to section 120.68, Florida Statutes, which governs appellate review of final administrative agency action. Generally, the inquiry on

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[2] In Bone v. Commissioner of Internal Revenue, 324 F.3d 1289, 1291, n. 1 (11th Cir. 2003), quoting Coggin Auto. Corp. v. Commissioner, 292 F.3d 1326, 1327 n. 3 (11th Cir. 2002) (internal citations omitted), discussed the difference between a tradition corporation (a C corporation) and an S corporation as follows:

> Simply speaking, under Subchapter C of the Internal Revenue Code, the income of a C corporation is subject to corporate tax and any distributions it makes to its shareholders will be subject to a second, individual tax. Under Subchapter S, certain C corporations are permitted to elect to be S corporations. While the S corporation determines taxable income at the corporate level, the corporate income is passed through the S shareholders and taxed to them at their individual rates.

[3] Daniels' corporation could not have become a "prevailing small business party" under the Florida Equal Access to Justice Act because it was not even a party to the proceeding below. See Department of Health and Rehabilitative Services v. South Beach Pharmacy, Inc., 635 So. 2d 117 (Fla. 1st DCA 1994), where the court noted:

> In order to recover when the predicate proceeding is administrative, a small business party must initiate a separate administrative proceeding by filing a petition with the Division of Administrative Hearings . . . "within 60 days after the date that the small business party becomes a prevailing small business party." § 57.111(4)(b)2., Fla. Stat. (1993). (Footnote omitted). Emphasis added).

appeal is whether the final order is supported by competent substantial evidence in the record. § 120.68(7)(b), Fla. Stat. See also Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 933 (Fla. 1996)("It is well established that a factual finding by an administrative agency will not be disturbed on appeal if it is supported by 'substantial evidence.'").

There is substantial evidence in the record to support the factual finding that the underlying action was against Daniels in her individual capacity as a licensed health care practitioner midwife and not against South Beach Maternity Associates, Inc.

Section 57.111 exists to assist ". . . certain persons . . . seeking review of, or defending against, unreasonable governmental action." § 57.111(2), Fla. Stat. The Legislature declined to include individual licensees in the statute. If the Legislature had intended that individual licensees could recover attorney's fees, it could have done so by adopting the language in the federal Equal Access to Justice Act. Instead, the Florida Equal Access to Justice Act limits recovery to a "prevailing small business party."

Daniels asserts that for purposes of the Florida Equal Access to Justice Act, the licensee and a wholly-owned

corporation through which he/she practices should be deemed one and the same entity. (I.B. 13 - 14). This assertion is not accurate in law or in fact. For example, the Board of Pharmacy has jurisdiction over pharmacies, which may or may not be small businesses, and also over pharmacists who are always individuals. The license of the pharmacy business is separate and distinct from the licenses of the individual pharmacists who own or work in the pharmacy. See Ch. 465, Fla. Stat.

Another example of the distinction between professional regulations as opposed to the regulation of health care organizations is the distinction between a beauty salon and cosmetologist. The license of a cosmetology salon is separate and distinct from the licenses of the individual cosmetologists who own or work in the salon. See Ch. 477, §§ 477.019 and 477.025, Fla. Stat.

Appellant's assertion that the decision below leaves a "bizarre gap" in coverage is not persuasive. The Legislature already provides protection for individuals who are the subject of frivolous or unfounded pleadings may recover attorney's fees. See §§ 120.569(1)(b) and 57.105(5), Fla. Stat. Section 120.569(2)(e) provides that it is "supplemental to, and do[es] not abrogate, other provisions allowing the award of fees or costs in administrative proceedings."

If the Legislature had intended to provide another source of attorney's fees to professional licensees defending their licenses, why wouldn't the Legislature have provided all professional licensees with coverage rather than only professional licensees who own a business? It makes no sense in rhyme or reason to provide attorney's fees coverage to licensees who own a business and are thus presumably more economically secure, yet exclude licensees who are employees of professional businesses and are thus presumably less able to financially afford to respond to governmental concerns.

The Third District Court of Appeal in Daniels correctly interpreted the Florida Equal Access to Justice Act and properly applied the law to the particular facts. The Administrative Law Judge below did not abuse his discretion in denying Daniels' petition for attorney's fees.

> **A. THE THIRD AND FIRST DISTRICT COURTS OF APPEAL CORRECTLY INTERPRETED THE PHRASE "SMALL BUSINESS PARTY" WITHIN THE FLORIDA EQUAL ACCESS TO JUSTICE ACT. THE INTERPRETATION IS NOT OVERLY TECHNICAL, BUT RATHER IS FAITHFUL TO CLEAR LEGISLATIVE INTENT.**
> [Restatement of Issue C of Initial Brief]

The spirit of the Florida Equal Access to Justice Act is to provide some relief to sole proprietors, partnerships, and corporations, and not to all aggrieved individuals. "If the legislature had intended the act to apply to individual

employees it could have said so." Thompson v. Department of Health and Rehabilitative Services, 533 So. 2d 840 (Fla. 1st DCA 1988). In Thompson, a state employee successfully challenged his dismissal from the Department of Health and Rehabilitative Services. He then petitioned for attorney's fees under the Florida Equal Access to Justice Act. The Administrative Law Judge denied the petition and the appellate court affirmed. Both based the denial of attorney's fees on the fact that Thompson was not a "small business party" within the meaning of the Florida Equal Access to Justice Act. In so holding, the Court noted: ". . . whether to extend the act's protection beyond the limitations presently imposed by the statute is a matter for legislative, not judicial, action." Id. at 841.

Department of Professional Regulation v. Toledo Realty, Inc., 549 So. 2d 715 (Fla. 1st DCA 1989), involved an action for attorney's fees under the Florida Equal Access to Justice Act following a dismissal of a disciplinary complaint against Toledo Realty, Inc., and its employee, Ramiro Alfert. The court, relying on Thompson, supra, upheld the denial of attorney's fees to Alfert, reasoning that the definition of a "small business party" does not include employees.

In Florida Real Estate Commission v. Shealy, 647 So. 2d 151 (Fla. 1st DCA 1994), an applicant successfully challenged a

denial of a real estate sales license by the Florida Real Estate Commission. The applicant sought attorney's fees under the Florida Equal Access to Justice Act, claiming that he desired the license for work which he intended to perform on behalf of a corporation wholly owned by himself and his spouse. In the licensure challenge proceeding, Shealy appeared in his individual capacity and the corporation was not a party in that proceeding. The Division of Administrative Hearings granted attorney's fees and the appellate court reversed. The court, relying on Toledo and Thompson, supra, stated:

> Although the appellee and the corporation were found to be "one and the same entity" based on the appellee's control of the business, the statute does not permit such disregarding of the corporate form. The appellee was not a small business party as defined by the statute, and he thus should not have been awarded a section 57.111 attorney's fee.

Id. at 152.

Again in the instant case, the court, relying on Toledo, Thompson, and Shealy, supra, affirmed the final order of the Division of Administrative Hearings, which found as a fact that Daniels was not a "small business party" because the administrative complaint was filed against Daniels individually, rather than against her corporation. Id. at 551. Cf. Williams v. Department of Health, Case No. 2D02-4713 (Fla. 2nd DCA June 4, 2004)(motion for rehearing pending). (attached as Appendix A).

While Daniels characterizes these opinions as overly-technical adherence to the "corporate form", the opinions are quite simply a correct application of law to fact. Disciplinary actions taken by the Department involving an individual's license are actions against the individual, not against a sole proprietor of an unincorporated business or a partnership or corporation.

The analysis of the Fourth District Court of Appeal which created the conflict among the districts, declined to read the above-cited provision literally because it stated that the "legislature overlooked . . . that the license to operate, which is generally the subject of the administrative proceedings, issued to the individual, not the professional service corporation." Albert v. Department of Health, 763 So.2d 1130, 1132 (Fla. 4th DCA 1999).

The Fourth District Court of Appeal's interpretation in Albert would have a chilling effect on the Department to initiate actions against health care practitioners in cases where the Department believes that there is immediate concern for the health, safety or welfare of the public, but cannot guarantee the certainty of the outcome of the action.

The interpretation of the First and Third District Courts of Appeal follows the plain meaning of the statute. The

interpretation is not overly technical but rather is faithful to clear legislative intent. The court's opinion in Daniels, supra, should be upheld.

B. THE THIRD AND FIRST DISTRICT COURTS OF APPEAL CORRECTLY INTERPRETED THE PHRASE "SMALL BUSINESS PARTY" WITHIN THE FLORIDA EQUAL ACCESS TO JUSTICE ACT. THE INTERPRETATION DID NOT RENDER ANY PART OF THE ACT A NULLITY, BUT RATHER IS FAITHFUL TO CLEAR LEGISLATIVE INTENT.
[Restatement of Issue D in Initial Brief]

The Fourth District Court of Appeal in Albert v. Department of Health, 763 So. 2d 1130 (Fla. 4th DCA 1999), mistakenly applied the Florida Supreme Court's decisions in Amente v. Newman, 653 So. 2d 1030 (Fla. 1995), and Unruh v. State, 669 So. 2d 242 (Fla. 1996), to reach its result.

In Amente v. Newman, 653 So. 2d 1030 (Fla. 1995), the Supreme Court addressed the issue of whether a non-party's medical records were discoverable in a lawsuit. Id. at 1031. Although a statute required notice to the non-parties whose records were being requested, notice could not be given to those same non-parties without first obtaining the records. Id. at 1032. In resolving this paradox, the Supreme Court held that:

> [i]n applying the statute to the request for discovery, the court created an anomaly in that the Amentes could not give the requisite notice because they did not know the patients' names and addresses, yet they could not be given the names and addresses without revealing the patients' identities. If

> possible, the courts should avoid a statutory interpretation which leads to an absurd result. City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950). (Emphasis added).

The Albert Court cited Amente in support of its holding that a literal reading of section 57.111, Florida Statutes, excluding an individual licensee who operates through a corporation, produces an absurd result, not intended by the legislature. Albert at 1131.

Although it may be true that midwifery or other professional licenses are not issued to professional service corporations, the individual licensees are not mandated to join professional service corporations, but they may choose to do so. A plain meaning reading of the statute only creates a catch-22 if it is assumed that all professional licensees are required to join professional service corporations and are then denied attorney's fees on the ground that they fall outside the statute's coverage. A requirement that all professional licensees join professional service corporations combined with subsequent denials of attorney's fees to both the individual licensees (because they are not corporations) and the corporation (because they are not licensees) would result in the sort of conundrum remedied by Amente. However, such is not the case. Licensees are not required to join professional service corporations and section 57.111, Florida Statutes, does not

operate that way. The plain language of the statute permits its application to any action involving a state agency and an actual business.

The agency's action was not against South Beach Maternity Associates, Inc., nor is South Beach Maternity Associates, Inc., the licensee. The sub-chapter "S" corporation has no relevance at all to the action, apart from Daniels' attempt to create a connection between her, the corporation, and the request for attorney's fees. The rulings in Thompson, Toledo Realty, and Shealy give proper effect to section 57.111, Florida Statutes.

In Unruh, supra, the Supreme Court held that "law enforcement must render reasonable assistance in helping a DUI arrestee obtain an independent blood test upon request." Id. at 243-24. In reaching its conclusion, the Court stated that:

> As a fundamental rule of statutory interpretation, "courts should avoid readings that would render part of a statute meaningless." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 456 (Fla. 1992); Villery v. Florida Parole & Probation Comm'n, 396 So. 2d 1107 (Fla. 1980); Cilento v. State, 377 So. 2d 663 (Fla. 1979). Furthermore, whenever possible "courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another." Forsythe, 604 So. 2d at 455. This follows the general rule that the legislature does not intend "to enact purposeless and therefore useless legislation." Sharer v. Hotel Corp. of America, 144 So. 2d 813, 817 (Fla. 1962).

Id. at 245. The Albert Court relied on this language from Unruh in its interpretation of section 57.111, Florida Statutes. Albert at 1132. In Unruh, the Supreme Court reasoned that a statute guaranteeing arrestees the right to request an independent blood alcohol test would be of little value if law enforcement were not required to assist in its implementation. Unruh at 244-245.

While the arrestee in Unruh, absent the Supreme Court's decision, would essentially have a right without a remedy, the rulings in Thompson, Toledo Realty, Shealy and Daniels yield no such result. Business entities are still able to seek attorney's fees. Interpreting 57.111 to exclude individuals, like Daniels, does not render the statute meaningless. The statute simply does not cover individual licensees. Thompson, Toledo Realty, Shealy and Daniels do not produce the result that Unruh wisely avoided, namely relegating a statutory right to a merely theoretical and virtually unenforceable one.

The First and Third District Courts of Appeal acknowledged and distinguished the Fourth District Court of Appeal's decision in Ann & Jan Retirement Villa, Inc. Shealy at 152; Daniels at 551. The Albert case, on the other hand, makes no mention of Shealy whatsoever, despite being decided well after Shealy.

Daniels is the licensee seeking attorney's fees and she was the party to the proceedings below, not South Beach Maternity Associates, Inc. (her sub-chapter "S" corporation). The Administrative Law Judge correctly applied the law to the facts and properly distinguished Albert and accordingly denied attorney's fees. The Administrative Law Judge did not abuse his discretion and his dismissal of Daniels' amended petition is not erroneous. The Third District Court of Appeal's affirmance of that order should therefore not be disturbed.

CONCLUSION

For all these reasons, the Department respectfully believes that the Third District Court of Appeal's opinion is correct and requests that it be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this Answer Brief has been furnished to Max R. Price, Esq., and Colleen M. Greene, Esq., Solms & Price, P.A., 6701 Sunset Drive, Suite 104, Miami, FL 33143, by U.S. Mail on June ___, 2004.

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CERTIFICATE OF COMPLIANCE

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

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