IN THE SUPREME COURT OF FLORIDA

SHARI DANIELS,

Petitioner, Case No. SC04-230

v. L.T.No. 3D03-706

STATE OF FLORIDA,
DEPARTMENT OF HEALTH,

Respondent.
_____/

AMENDED INITIAL
BRIEF FOR PETITIONER

Dated: May 18, 2004

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A. Jurisdiction of this Court

This is an appeal from an Opinion and Order of the Third District Court of Appeal affirming the denial of petitioner's amended petition for attorneys fees under the Florida Equal Access to Justice Act ("FEAJA"), F.S.§ 57.111.

The Third District Court of Appeal certified conflict with the Fourth District Court on the controlling issue of law (A.005-006). This Court has jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi) (certified conflict).

B. Nature of the Case – Recovery of Attorneys Fees Under the Florida Equal Access to Justice Act

This appeal presents a narrow, but important, legal issue under the Florida Equal Access to Justice Act ("FEAJA"), F.S. 57.111. FEAJA was enacted by the Legislature to level the playing field in litigation between small businesses and the State. FEAJA enables small businesses to recover their attorneys fees in successfully defending against baseless litigation commenced by the State.

That is the case here. Petitioner, a licensed midwife, prevailed in her defense against a disciplinary proceeding brought by the State. Petitioner then filed a petition for attorneys fees under FEAJA which was dismissed. Petitioner now appeals from the dismissal of her FEAJA petition.

1. Conflict among the District Courts of Appeal

The present issue concerns the type of small business party who is entitled to recover attorneys fees under FEAJA. The District Courts of Appeal are in conflict over the controlling issue: whether a licensed professional (doctor, dentist, midwife, etc.), who holds a State-issued license in her individual name (as all individual licensees do), is automatically disqualified from recovering attorneys fees under FEAJA simply because the licensee has established a corporation (e.g., P.A., LLC., Inc., or S-corporation) within which to practice her profession.

The First and Third District Courts of Appeal take a restrictive view. They require that a licensee hold a professional license in the same capacity in which she practices her profession. They hold that a professional licensee's use of a corporation to practice her profession automatically disqualifies the licensee from recovering attorneys fees under FEAJA for a successful defense against a disciplinary complaint -- regardless of how frivolous the disciplinary proceedings were. These Courts reason that where the license is issued in a capacity (individual) which is different from the capacity in which the licensee practices his/her profession (corporate), the licensee is automatically disqualified from a FEAJA recovery

when defending against baseless disciplinary proceedings. Daniels v. State of Florida, Dept. of Health, So.2d, 2004 Fla.App.LEXIS 179, 29 Fla.L.Weekly D 209, (Fla. 3d DCA Jan. 14, 2004); Florida Real Estate Comm. v. Shealy, 647 So.2d 151 (Fla. 1st DCA 1994).

The Fourth District Court of Appeal takes the contrary position. It holds that, in light of the liberal and compensatory purpose of FEAJA, an individual licensee who is prosecuted frivolously by the State, and who defends successfully, is not automatically disqualified from recovering attorneys fees under FEAJA simply by forming a corporation for her professional practice. The Fourth District recognizes that many licensees establish solely-owned professional service corporations and that, for FEAJA purposes when defending against baseless disciplinary proceedings brought by the State, the licensee is the practical equivalent of her practice. Neither would exist without the other.

Also FEAJA expressly covers professional practices in all business forms -- individual, partnership and corporate. The Fourth District underscores the compensatory purpose of FEAJA and recognizes that the Legislature's inclusion of professional service corporations within the class of protected parties in FEAJA would be surplusage if individual licensees were automatically barred from a FEAJA recovery simply because they

had formed a professional service corporation. Albert v. Dept. of Health, Bd. of Dentistry, 763 So.2d 1130 (Fla. 4 DCA 1999); Ann & Jan Retirement Villa, Inc. v. Dept. of Health & Reh. Serv., 580 So.2d 278 (Fla. 4 DCA 1991).

Petitioner submits that the Fourth District's decisions in Albert and Ann & Jan are correct. These cases further the liberal and compensatory purpose of FEAJA and give meaning to all parts of FEAJA, unlike the harsh doctrine in the First and Third Districts. This Court should quash the opinion of the Third District Court of Appeal in this case.

C. Importance of Issue to Licensed Professionals

In this State, tens-of-thousands of licensed professionals have established corporations through which they practice their professions. Doctors, dentists, attorneys, accountants, architects, midwives (present petitioner) and numerous other licensed professionals use corporations as the business vehicles for their practices, for numerous reasons -- pensions, liability, income tax benefits, etc. All are legitimate reasons for using the corporate form of business; all are authorized by State law. The Third District Court's opinion seriously impacts the tens-of-thousands of licensed professionals who practice in corporate form. It disqualifies them from ever recovering attorneys fees under FEAJA for baseless State

complaints seeking professional discipline. This is a blanket disqualification under the Third District Court's opinion.

This is not the Legislature's intent. As shown below, the Legislature expressly intended to cover these licensed professionals under FEAJA by expressly authorizing FEAJA recovery for professional practices in both individual and corporate form which prevail against baseless State actions. F.S.§ 57.111(3)(d)(1)(a,b) (including both individual and corporate professional practices in definition of small business party entitled to recover under FEAJA). There would be no purpose in including professional practices in both individual and corporate form within FEAJA's coverage unless the Legislature intended to cover professional licensees who practice in corporate form (pp. 16-18, infra).

As shown below, the Third District Court of Appeals' opinion undermines this important FEAJA protection for Florida's tens-of-thousands of licensed professionals who use the corporate form. Many, if not most, of them own their corporations as sole shareholders, using the corporate form solely for business reasons. The blanket disqualification from FEAJA coverage has a serious and adverse impact on Florida's tens-of-thousands of licensed professionals practicing in corporate form and, as shown below, is inconsistent with the liberal and compensatory purposes of FEAJA (pp. 11-14, infra).

D. De Novo Review in this Court

The present appeal turns on an issue of statutory construction under FEAJA and is reviewed de novo on appeal. Armstrong v. Harris, 773 So.2d 7 (Fla. 2000) (statutory construction is subject to de novo review).

E. Course of Proceedings before the Agency / Facts *

Petitioner is a licensed midwife. As authorized by State law, she practices her profession through a corporation of which she owns 100% of the stock.

On September 20, 2001 the Department of Health issued an administrative complaint against Ms. Daniels claiming she had violated Fla. Stat. § 467.203(1)(f). Daniels vigorously disputed the complaint and requested a formal administrative hearing. On March 13, 2002 the Department referred the case to the Division of Administrative Hearings for assignment to an Administrative Law Judge.

* Because the pertinent facts concern the proceedings before the administrative agency, they will be addressed as part of the discussion of the proceedings below.

The Department filed a Notice of Voluntary Dismissal on June 28, 2002. The Department's voluntary dismissal made Daniels the prevailing party for FEAJA purposes. F.S. § 57.111(3)(c)(3) (voluntary dismissal makes licensee the prevailing party under FEAJA).

On August 5, 2002, Daniels timely filed a petition for attorneys fees under FEAJA, seeking to recover the attorneys fees she incurred in her successful defense against the administrative complaint.

The Department moved to dismiss the petition which was granted on November 20, 2002, with leave to file an amended petition for attorneys fees.

On December 2, 2002, Daniels filed her amended petition seeking the attorneys fees she incurred (A.007). Again the Department moved to dismiss which Daniels opposed.

On January 2, 2003, the ALJ granted the Department's motion and requested proposed final orders. On February 10, 2003, the ALJ issued a final order dismissing Daniels's amended petition for attorneys fees under FEAJA (A.011-026).

The ALJ held that Daniels was not a "small business party" entitled to recover attorneys fees under FEAJA because Daniels practiced midwifery as an S-corporation generally instead of as a professional service corporation (P.A.) (A.011). The ALJ followed the Fourth District Court's precedent in Albert and Ann

& Jan which allowed individual licensees who practice under professional service corporations to recover fees under FEAJA, but held that Daniels did not qualify for fees under Albert or Ann & Jan because she used an S-corporation which was not a professional service corporation (A.011). In short, the ALJ created a distinction between professional service corporations and S-corporations generally for purposes of FEAJA fees, allowing individual licensees to recover fees if they practiced their professions under the former but not the latter (A.011).

Because Daniels practiced under an S-corporation but not a professional service corporation, the ALJ denied Daniels's amended petition for attorneys fees under FEAJA (A.026).

Daniels timely appealed to the Third District Court of Appeal. The Third District affirmed the dismissal on a different ground. The Third District did not follow the ALJ's distinction between professional service corporations and S-corporations generally, but instead adopted the distinction drawn by the

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Neither the case law nor legislative history supports the ALJ's distinction between professional service corporations and S-corporations generally. Instead, the difference between the First and Fourth District Courts turns on whether the licensee used the corporate form at all -- with the First District disqualifying all licensees from recovering FEAJA fees if they used any corporate form (P.A. or other S-corporation), Shealy, supra, while the Fourth District allows such recovery. Albert, supra; Ann & Jan, supra. No cases turn on the distinction, adopted by the ALJ here, between professional service corporations and S-corporations generally.

First District between sole-proprietor and corporate professional practices, allowing FEAJA recovery for the former but not the latter. The Third District in Daniels rejected the Fourth District's line of cases in Albert and Ann & Jan and held that Daniels was automatically disqualified from recovering attorneys fees under FEAJA simply because she practiced her profession in corporate form (A.005). The Third District certified conflict with the Fourth District's decisions in Albert and Ann & Jan (A.006).

Daniels timely sought review in this Court under Fla.R.App.P. 9.030(a)(2)(A)(vi) (certified conflict) (A.001).

IV. SUMMARY OF ARGUMENT

FEAJA's remedial and compensatory purpose, combined with its expansive definition of the parties entitled to recover attorneys fees, compels the conclusion that a licensed professional is not automatically disqualified from recovering attorneys fees simply by practicing through a corporation. Such a narrow view of FEAJA would contravene its broad remedial purpose, would overlook the regulatory reality that professional licenses are held by individuals (not corporations), and would be inconsistent with FEAJA's expansive definition of small business parties who are entitled to recover attorneys fees. Indeed, FEAJA expressly authorizes recovery of attorneys fees by a professional practice regardless of whether it does business in an individual (sole proprietorship) or corporate (P.A./other corporation) capacity.

In addition, adherence to the "corporate form" -- the rationale used by the First District -- is inconsistent with FEAJA's broad remedial purpose. FEAJA expressly transcends the corporate form and confers upon professional practices <u>of every business form</u> -- sole proprietorship, partnership and corporation -- its full benefits. FEAJA's remedial purpose -- levelling the playing field in litigation between small businesses and the State -- is no less applicable to licensees

who practice in small professional service corporations than to licensees who practice as sole proprietors.

This Court should approve the doctrine of the Fourth District Court of Appeal in Albert and Ann & Jan and should quash the decision of the Third District in the present case.

This Court should reverse the dismissal of petitioner's amended petition for attorneys fees under FEAJA.

V. ARGUMENT

A. The Legislature intended the Florida Equal Access to Justice Act to be interpreted broadly and liberally, in line with its compensatory and remedial purpose

FEAJA is a remedial statute. It is intended to level the playing field in litigation between the State, with its massive resources, and small business parties of limited means. It allows small business parties who have been successful in defending against the State to recover their attorneys fees if there was no basis for the State action. The statute on its face defines its broad remedial purpose:

> "Because of the greater resources of the State ... [t]he purpose of this section is to diminish the deterrent effect of ... defending against governmental action by providing ... an award of attorneys fees and costs against the State."

F.S. § 57.111(2).

Small business parties, as defined in the statute, are entitled to recover attorneys fees after successfully defending against a baseless State proceeding. F.S. § 57.111(3)(d).

B. FEAJA's expansive definition of small business party -- expressly covering professional practices in both individual and corporate form -- is inconsistent with the First and Third District's requirement that licensure and business be in the same capacity

The First and Third Districts in Shealy and Daniels impose an arduous requirement on a FEAJA recovery by licensed

professionals. They require that the licensure must be in the same capacity as the business in order for the licensee to recover attorneys fees under FEAJA after a baseless disciplinary complaint. Thus under the First and Third District's doctrine, a licensee who is disciplined individually (professional license in the individual's name) but practices through a corporation is, for that reason alone, automatically disqualified from a FEAJA recovery -- regardless of how frivolous the disciplinary proceeding is.

There is no reason for this requirement. The liberal and remedial purposes of FEAJA reject any mystical requirement of symmetry in licensure and ownership. FEAJA was designed to level the playing field in litigation between the State with its massive resources and the small business owner of limited means. The statute makes this clear on its face. F.S. § 57.111(2) ("diminish the deterrent effect of ... defending against governmental action") (quoted more fully at p. 12, supra).

For this remedial purpose, it does not matter whether the professional licensee practices in a sole proprietorship or small professional service corporation. One form of small business operation is no less in need of a level playing field with the State than the other.

For purposes of FEAJA, the licensee and wholly-owned corporation through which he/she practices are one and the same.

FEAJA does not involve the usual corporate liability issues such as piercing the corporate veil or individual-vs.-corporate liability. Rather, FEAJA reflects a remedial policy of giving small businesses, in whatever form, a fair shake in litigation against the State. The Fourth District recognized that, for this limited purpose under FEAJA -- giving small businesses a fair shake against the State -- the individual licensee and his/her wholly owned professional corporation are essentially "one and the same entity". Ann & Jan, supra, 580 So.2d at 280.

The functional interdependence of licensee and professional corporation supports this view. The survival of the professional corporation depends upon the individual's license. If the license is revoked or suspended, the corporation no longer may operate. Thus the defense of the 100%-owner's license in the disciplinary proceeding is integral to the business operation of the professional service corporation. The latter cannot exist without the former. They are inextricably bound. This tight interdependence of corporate business and individual license rejects any notion that the former (corporate form) precludes a FEAJA recovery for defense of the latter (professional license in individual name).

Indeed, the State regulatory boards have no jurisdiction over professional corporations. They have jurisdiction only over the license and over the individual person to whom it is

issued. The corporation itself does not receive the professional license; the individual practitioner does. Because professional licenses are issued only to individual practitioners, not their corporations, a disciplinary proceeding may not be commenced against the corporation as such. A blanket requirement of symmetry in licensure and business form for recovery of fees under FEAJA -- the doctrine in the First and Third Districts -- disregards the lack of licensure to corporations as entities. It results in wholesale disqualification of individual licensees who practice their professions in corporate form. This blanket disqualification does not mesh with FEAJA's broad remedial and compensatory purpose.

Nor is it consistent with FEAJA's express language. FEAJA contains a broad definition of "small business parties" who are entitled to recover attorneys fees after a successful defense against baseless litigation brought by the State. This statutory definition expressly includes professional practices in all forms -- sole proprietorship, partnership, and corporation. F.S. § 57.111(3)(d)(1)(a,b) (professional practices in all forms included in "small business party" under FEAJA). FEAJA's pervasive coverage of all business forms in its entitlement to an attorneys fees recovery is inconsistent with the restriction imposed by the First and Third Districts against

awarding attorneys fees to licensees who practice in corporate form.

The decision below also leaves a bizarre gap in FEAJA coverage which is inconsistent with its broad remedial purpose. As mentioned above, professional disciplinary proceedings may be brought only against the individual licensee. Corporations as such are not subject to professional discipline. The decision below leaves the owners of professional corporations without recovery under FEAJA for the successful defense of their licenses, regardless of how vital the owner's license is to the business, and regardless of how frivolous the disciplinary proceeding. It is difficult to conceive that the Legislature intended such a bizarre gap in statutory coverage, after its pervasive extension of FEAJA's benefits to professional practices in all business forms.

C. The First District's reliance on "corporate form" improperly injects the technicalities of corporate liability into the remedial framework of FEAJA and is inconsistent with FEAJA's remedial purpose

The line of First District cases holds that an employee or owner of a corporation may not recover under FEAJA because to do so would violate the "corporate form". Shealy, supra, 647 So.2d at 152 ("disregard of the corporate form"); Dept. of Prof. Reg. v. Toledo Realty, Inc., 549 So.2d 715, 716 (Fla. 1 DCA 1989);

Thompson v. Dept. of Health, 533 So.2d 840, 841 (Fla. 1 DCA 1988).

These First District cases not only clash with the more understanding approach of the Fourth District in Albert and Ann & Jan (p. 3, supra), but also overlook the broad remedial purpose of FEAJA -- to level the litigation playing field for small businesses of every form in litigation against the State. FEAJA's broad definition of "small business party" and express inclusion of all forms of professional practice -- individual, partnership and corporate -- are inconsistent with the First District's narrow insistence on the preserving the "corporate form".

Adherence to "corporate form" has its place in other types of litigation. Corporation law traditionally distinguishes between the rights of corporations and their owners for purposes of private liability and defining the assets of corporation vs. its shareholders. Cf. Horvath v. General Motors Corp., 636 So.2d 771, 773 (Fla. 1 DCA 1994) ("a stockholder has no right to sue for damages to the corporation"). But this line of cases, which is controlling in the private economic sphere, is not pertinent to FEAJA's broader remedial purpose of achieving economic balance between the State and small businesses/professional practices regardless of business form (F.S. § 57.111(3)(d)(1(a,b) (covering professional practices of

every form -- "sole proprietor ... partnership or corporation"). This latter remedial purpose, to be effective, cannot depend upon the business form (individual vs. corporation) in which the professional licensee practices his/her profession.

Indeed, FEAJA's broad definition of small business party is pervasive. It expressly covers professional practices of every business form -- sole proprietor, partnership and corporation. F.S. § 57.111(3)(d)(1)(a,b). Its express purpose and broad statutory coverage are inconsistent with distinctions based on the business form under which the licensee practices a profession. Albert, supra; Ann & Jan, supra.

D. The First District's approach improperly renders part of FEAJA a nullity and contravenes the maxim that every part of a statute must be given effect

Finally, the First District's approach, which the Third District followed in Daniels, improperly renders part of FEAJA a nullity. FEAJA expressly includes "professional practices" within the small corporations covered by the Act (F.S. § 57.111(3)(d)(1)(b) ("corporation including a professional practice"). As far as disciplinary proceedings are concerned, there is no logical explanation for the inclusion of "professional practices" in FEAJA's definition of corporate small business parties other than to permit FEAJA recovery by the individual licensees who practice in corporate form.

Corporations themselves are not parties to disciplinary proceedings. The individual licensee is, not the corporation. Indeed, the inclusion of "professional practice" in subsection (3)(d)(1)(b) could not possibly be intended to allow corporations to recover for baseless disciplinary proceedings because corporations are not, and cannot be as a matter of law, parties to the disciplinary proceedings in the first place. The only logical explanation for the inclusion of "professional practices" in subsection (3)(d)(1)(b) is to permit FEAJA recovery by individual licensees who practice in corporate form.

It follows that individual licensees who practice in corporate form may recover attorneys fees under FEAJA. Otherwise, the FEAJA language -- "including a professional practice" -- would be rendered a nullity since corporations themselves are not parties to disciplinary proceedings. The statutory language has meaning only if it benefits individual licenses who practice in corporate form. F.S. § 57.111(3)(d)(1)(b).

Statutes must be construed to give meaning to every provision. This Court has held:

> "As a fundamental rule of statutory interpretation, courts should avoid readings that would render part of a statute meaningless [citations]. [C]ourts must give full effect to <u>all</u> statutory provisions."

Unruh v. State, 669 So.2d 242, 245 (Fla. 1996) (emp. in orig.). Interpretations which reduce statutory language to a nullity are not permitted, as the Legislature is not assumed to add language without reason. Thus each and every provision of a statute is given meaning. Unruh v. State, supra.

To do this, FEAJA's inclusion of "professional practice" in subsection (3)(d)(1)(b) must permit individual licensees who practice in corporate form to recover for baseless disciplinary proceedings. Their corporations as such are not subject to discipline. Only the licensee is. Without the recovery of fees by licensees who practice in corporate form, the inclusion of "professional practice" in subsection (3)(d)(1)(b) (defining corporations) would have no meaning, since the corporation itself is not involved in the disciplinary proceeding.

In short, individual licensees who practice in corporate form, no less than those who practice as sole proprietors, are prevailing "small business parties" under FEAJA. Whether as sole proprietors or as owners of professional service corporations, they are entitled to recover attorneys fees for their defense against baseless disciplinary proceedings.

VI. CONCLUSION

This Court should reverse the dismissal of petitioner's amended petition for attorneys fees under FEAJA.

Consistent with FEAJA's remedial purpose and expansive language, a professional licensee who prevails in defending against a baseless disciplinary proceeding brought by the State should be permitted to recover his/her attorneys fees regardless of the business form in which he/she conducts the professional practice. The Albert and Ann & Jan cases in the Fourth District correctly follow this principle.

The contrary view held by the First District, which the Third District adopted here, is an unduly narrow view of FEAJA. It would contravene FEAJA's broad remedial purpose, would overlook the regulatory reality that professional licenses are held by individuals (not corporations), and would be inconsistent with FEAJA's expansive definition of small business parties who are entitled to recover attorneys fees.

This Court should approve the remedial and compensatory reading of FEAJA by the Fourth District in Albert and Ann & Jan, should disapprove the narrow reading of FEAJA by the First District in Shealy and similar cases, and should quash the decision of the Third District in the present case which followed the First District.

Respectfully submitted this 18th day of May, 2004.

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By:_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was sent via U.S. Mail on this _____ day of May, 2004, to: Dana Baird, ESQ., Assistant General Counsel, Department of Health, Bureau of Health Care, Prosecution Services Unit, 4052 Bald Cypress Way, Bin # C-65 Tallahassee, FL 32399.

May 18th, 2004.

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CERTIFICATE OF FONT COMPLIANCE

I certify that the attached brief was printed in Courier New 12-point font, in compliance with Fla.R.App.P. 9.210(a)(2).

May 18th, 2004.

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