IN THE SUPREME COURT OF FLORIDA

SHARI DANIELS,

Petitioner, Case No. SC04-230

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

STATE OF FLORIDA,
DEPT. OF HEALTH,

Respondent.
_____/

REPLY BRIEF FOR PETITIONER

Dated: August 2, 2004

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A. The State does not dispute this Court's jurisdiction nor the de novo review in this Court on a pure issue of law involving statutory interpretation

The State does not dispute the jurisdiction of this Court nor the de novo review in this Court. Nor could it. The Third District Court of Appeal certified express conflict with the Fourth District Court of Appeal on the governing issue of statutory construction, vesting jurisdiction in this Court pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi) (certified conflict) (A.006).

Also since the governing issue is one of statutory interpretation, the review in this Court is de novo. The State concedes this. (Ans.br. at 4-5: "In this case ... the issues presented are issues of law.... Therefore, the standard of review is de novo"). Armstrong v. Harris, 773 So.2d 7 (Fla. 2000) (statutory construction is subject to de novo review).*

*The State earlier discussed the substantial evidence and abuse of discretion standards of review in connection with issues of fact and attorneys fees (Ans.br. at 4). However, because the present appeal concerns a pure issue of law involving statutory construction, the State concedes, as it must, that in this case "the standard of review is de novo" (Ans.br. at 5, 8, 14).

B. The State's rigid interpretation of the statute overlooks the statute's express inclusion of professional practices in all business forms, overlooks the statute's broad remedial purpose, would render much of the statute a nullity, and would create an anomalous gap in statutory coverage which is inconsistent with the express statutory objectives

The issue on appeal involves the interpretation of the Florida Equal Access to Justice Act ("FEAJA"), F.S. § 57.111. FEAJA is a remedial provision which authorizes the recovery of attorneys fees against the State by small business parties who have prevailed in civil litigation commenced by the State if the State's actions are not substantially justified (F.S. § 57.111(4)(a)). The maximum FEAJA recovery is $50,000 (F.S. § 57.111(4)(d)(2)). FEAJA by its express terms is intended to level the playing field in civil litigation between the State and small business parties by removing the financial deterrent to defending against civil litigation brought by the State. See F.S. § 57.111(2) ("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.").

The issue on appeal is straightforward. The issue is whether an individual licensee (doctor, dentist, lawyer, accountant, etc.) who is prosecuted by the State in a baseless administrative proceeding, and who prevails in gaining the dismissal of the proceeding, is automatically excluded from recovering attorneys fees under FEAJA solely because the

licensee uses the corporate form (P.A. or S-Corporation) for his/her professional practice.

On this appeal the State takes a narrow, rigid view of the statute. The State would automatically exclude professional licensees from a FEAJA recovery -- by excluding such licensees from the statutory definition of "small business party" -- simply because they use the corporate form for their professional practices, as tens-of-thousands of licensees do in this State. This is the view of the Third District Court in its terse opinion denying the present petition for attorneys fees. Daniels v. State of Florida, Dept. of Health, 868 So.2d 551 (Fla. 3d DCA 2004).

The Fourth District Court, on the other hand, takes a broader view of the statute. It holds that the express remedial intent of FEAJA -- to level the playing field in civil litigation between the State and small business parties in all business forms, F.S. § 57.111(2) (quoted above) -- compels a non-discriminatory view of FEAJA. FEAJA's remedial intent, its express inclusion of all forms of "professional practice", and the anomalous gap in statutory coverage which would result from the rigid interpretation proffered by the State, together warrant reversal and adoption of the remedial interpretation made by the Fourth District Court. 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 professional service corporations for their professional practices. Albert v. Dept. of Health, Bd. of Dentistry, 763 So.2d 1130 (Fla. 4th DCA 1999); Ann & Jan Retirement Villa, Inc. v. Dept. of Health & Reh. Serv., 580 So.2d 278 (Fla. 4th DCA 1991).

An examination of FEAJA shows the correctness of the Fourth District's approach and the errors in the State's answer brief on this appeal.

FEAJA defines a "small business party" as follows:

> "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."

F.S. § 57.111(3)(d)(1)(a,b).

The State's answer brief overlooks or ignores several features of the statute which warrant FEAJA coverage for licensees who practice in corporate form.

1. The State's answer brief overlooks the fact that FEAJA expressly covers professional practices in all business forms

The statutory definition of "small business party" expressly includes professional practices in all business forms -- individual, partnership or corporation. Subsection "a" expressly includes professional practices which are unincorporated sole proprietorships, while subsection "b" expressly includes professional practices which are "a partnership or corporation". This express inclusion of professional practices in all business forms makes clear what it says -- the Legislature's express intent to include professional practices (doctor, lawyer, etc.) in all business forms. The State's present argument -- that licensees who practice in corporate form are somehow excluded from a FEAJA simply because they use the corporate form of practice -- is itself baseless and contrary to FEAJA's express terms.

The State's argument also is ironic. The State argues that the text of the statute is as far as the Courts should go in discerning the Legislature's intent (Ans.br. at 9-10). That is precisely the point here: The text of FEAJA expressly includes professional practices ("including a professional practice ...") in all business forms. Thus the fact that a licensee uses the

corporate form of practice (P.A. or S-Corporation), rather than an individual sole proprietorship, should have no bearing on the licensee's entitlement to a FEAJA recovery for baseless litigation brought by the State.

For FEAJA purposes, it should not make a difference that the license to practice a profession is held by the individual licensee rather than by the corporation. Generally it is the individual doctor, lawyer, etc., who holds the State-issued license, not the corporation through which he/she practices a profession. Thus when the State commences administrative (disciplinary) proceedings, the State files those proceedings against the individual (who holds the license) rather than against the corporate entity through which the individual practices a profession. The fact that the licensee has chosen the corporate form of practice is irrelevant to the purposes of FEAJA and should not disqualify him/her from a FEAJA recovery, especially since FEAJA on its face expressly "includ[es] a professional practice ..." in all business forms. F.S. § 57.111(3)(d)(1)(a,b) (quoted p.4, supra).

The State's contrary view is an excessively rigid interpretation of FEAJA. The State argues that a licensee who chooses to practice in corporate form thereby forfeits a FEAJA recovery because, under subsection b which includes the corporate form of practice, the licensee is not mentioned individually (Ans.br. at 9-10). But this rigid, narrow view of

the statute is at odds with FEAJA's express comprehensive coverage of professional practices in all business forms.

2. The State's answer brief overlooks FEAJA's express remedial purpose to level the field in civil litigation commenced by the State

The State's view overlooks FEAJA's broad remedial intent to "diminish the deterrent effect of seeking review of, or defending against [baseless] governmental action" (F.S. § 57.111(2)). A licensee who has a small professional practice in corporate form, and otherwise qualifies financially as a small business party, is no less in need of removing this deterrent effect than a licensee who practices as a sole proprietor in non-corporate form. The State's rigid approach to FEAJA overlooks the express remedial intent of FEAJA which the Legislature provided on the face of FEAJA itself. F.S. § 57.111(2) (quoted at p.2, supra). It is no less applicable to licensees in small corporate practices than to licensees in unincorporated sole proprietorships.

3. The State's answer brief would render a major section of FEAJA as a nullity since administrative proceedings are brought against an individual licensee, not against a corporation

The State also overlooks the nature of administrative (disciplinary) proceedings. In virtually all licensed professions, the license is held only by the individual licensee, not by the P.A. or other corporation through which the

licensee practices. This includes the professions of law, medicine, osteopathy, dentistry, midwifery, ophthalmology, optometry, accountancy and virtually all other licensed professions. An administrative (disciplinary) proceeding is brought only against the individual licensee, not against the corporate practice, because it is the individual, not the corporation, who holds the State-issued license.

As a result, the State's approach would render pointless a major section of FEAJA. By excluding from subsection "b" a licensee who practices in corporate form, and by limiting subsection "b" to the corporate entity itself, the State would render subsection "b" a nullity. It is the individual licensee, not his/her corporation, who is the party against whom a disciplinary proceeding is brought. Corporations as such simply are not parties to disciplinary proceedings. There is no point to enactment of subsection "b" unless a licensee who practices in corporate form is permitted to recover FEAJA fees.

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 all statutory provisions."

Unruh v. State, 669 So.2d 242, 245 (Fla. 1996) (emp. in orig.); State v. Goode, 830 So.2d 817, 824 (Fla. 2002) ("a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and Courts should avoid readings that would render part of a statute meaningless"). 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; State v. Goode, supra.

To do this, the individual licensee, such as present petitioner Ms. Daniels who is a licensed midwife, must not be disqualified from recovering attorneys fees under FEAJA simply because she practices in corporate form. Otherwise there is no point to the enactment of subsection "b". Disciplinary proceedings are brought against an individual licensee, not a corporation, and the inclusion of "professional practices" in subsection b (professional practice in corporate form) would have no purpose unless an individual licensee who practices in corporate form is permitted a FEAJA recovery. The State's approach improperly would reduce to a nullity a major portion of FEAJA, as regards disciplinary proceedings brought against licensees in virtually every licensed profession. Unruh v. State, supra; State v. Goode, supra.

4. The State's answer brief would yield an absurd result which is contrary to FEAJA's express remedial intent and FEAJA's express inclusion of professional practices in all business forms

The State argues that its proffered interpretation is supported by a literal reading of the statute (Ans.br. at 9-10). This argument is not only erroneous, but also would yield an absurd result.

It is erroneous for reasons mentioned above. The statute expressly includes professional practices in all business forms. It follows that licensees may recover fees under FEAJA regardless of the business form used in their practices (pp.4-6, supra).

The State's interpretation also would yield an absurd result, in light of FEAJA's express purpose. The State's interpretation would make a FEAJA recovery depend upon the form of business in which a licensee practiced his/her profession. Under the State's interpretation, a licensee who used an unincorporated sole proprietorship could recover fees under FEAJA, but a licensee who used a corporate form of business, such as a P.A. or S-Corporation, could not. Yet this difference in business form has nothing to do with FEAJA's purpose. FEAJA was intended to level the playing field in civil litigation with the State by "diminish[ing] 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." (F.S. § 57.111(2)). This legislative purpose has nothing to do with the form in which a licensee operates his/her small business. In addition, the Legislature expressly included in FEAJA's coverage professional practices in all business forms -- individual, partnership and corporate (F.S. § 57.111(3)(d)(1)(a,b) - quoted p.4 supra). As a result, the interpretation proffered by the State -- making a FEAJA recovery dependent upon the form of business practice -- is absurd.

It is axiomatic that statutory interpretations, which yield an absurd result when measured against a statutory purpose, may not be countenanced, regardless of whether they reflect a technical reading of the statute. Here the State's interpretation not only fails to reflect an accurate reading of the statute's express terms (pp.4-6, supra), but even if it did (which Ms. Daniels disputes), its interpretation should not be accepted, in light of the absurd results which would obtain. As this Court has held:

> "Under standard rules of construction, it is our primary duty to give effect to the Legislative intent; and if a literal interpretation leads to an unreasonable result, plainly at variance with the purpose of the legislation as a whole, we must examine the matter further [citation omitted]. Statutes as a rule will not be interpreted so as to yield an absurd result."

State v. Iacovone, 660 So.2d 1371, 1373 (Fla. 1995); see also Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984) ("A literal interpretation of the language of a statute need not be given

when to do so would lead to an unreasonable or ridiculous conclusion").

5. There is no basis for the State's argument that licensees who practice in corporate form somehow have waived their FEAJA protection

The State proffers the argument that licensees who practice in corporate form do so voluntarily and thus presumably "waive" the protections of FEAJA (Ans.br. at 27: "Licensees are not required to join professional service corporations ..."). This is an unduly harsh and insensitive view of FEAJA. There is nothing in FEAJA's text or legislative history which would indicate a legislative intent to charge licensees with waiver of its protections if they practice in corporate form. To the contrary, FEAJA's expansive and express inclusion of professional practices in all business forms (pp.4-6, supra) indicates a comprehensive intent to include professional licensees within FEAJA regardless of the business form under which they practice their professions.

6. There is no basis for the State's argument that FEAJA protection for licensees who practice in corporate form would have a "chilling effect" on administrative disciplinary proceedings

Finally, the State argues that allowing a FEAJA recovery for licensees who practice in corporate form would have a "chilling effect" on its prosecution of wayward licensees (Ans.br. at 25). This is a fatuous argument on many levels.

First, under FEAJA the State is liable for attorneys fees only if a disciplinary proceeding is not "substantially justified" (F.S. § 57.111(4)(a)). As long as a disciplinary proceeding has a reasonable basis in law and fact, it is substantially justified, and there is no FEAJA liability even if the proceeding is dismissed or withdrawn (F.S. § 57.111(3)(e)). Thus the State has substantial breathing space in commencing disciplinary proceedings, exempting it from FEAJA liability as long as there is some reasonable basis in law and fact for its actions, regardless of ultimate success.

Second, the State concedes that licensees who practice as sole proprietors (not incorporated) may recover attorneys fees under FEAJA (F.S. § 57.111(3)(d)(1)(a)). It is difficult to discern how there might be less "chilling effect" against commencing a disciplinary proceeding against sole-proprietor licensees (where the State concedes FEAJA coverage) than against licensees who practice in corporate form. The State's argument is frivolous.

Third, FEAJA liability is carefully limited even where the disciplinary proceeding is baseless. The maximum liability is $50,000 (F.S. § 57.111(4)(d)(2)).

Fourth, there is not one shred of historical or anecdotal evidence to support the State's conclusory (and baseless) argument. Counsel is not aware of any -- and the State has not pointed to any -- reports or evidence that FEAJA protection ever has deterred the State from prosecuting wayward licensees.

Fifth, the Legislature carefully balanced the prosecutorial needs of the State against the rights of licensees who are defending against disciplinary proceedings. The Legislature struck that balance in the provisions of FEAJA, especially its provision exempting the State from liability, regardless of ultimate result, as long as the State has reasonable bases in law and fact for its actions (F.S. §§ 57.111(3)(e), 57.111(4)(a)).*

*Ms. Daniels's omission of arguments from this reply brief of arguments made in her initial brief is not a waiver of her initial arguments, but simply is a reliance on the arguments as made in her initial brief which Ms. Daniels does not waive.

IV. CONCLUSION

The State's rigid interpretation of FEAJA overlooks FEAJA's express inclusion of professional practices in all business forms, overlooks FEAJA's broad remedial purpose, would render much of FEAJA a nullity, and would create an anomalous gap in statutory coverage which is inconsistent with express statutory objectives.

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.

This Court should quash the decision of the Third District Court of Appeal in Daniels v. State of Florida, Dept. of Health, 868 So.2d 551 (Fla. 3d DCA 2004), and should approve the decisions of the Fourth District Court of Appeal in Albert v. Dept. of Health, Bd. of Dentistry, 763 So.2d 1130 (Fla. 4th DCA 1999); Ann & Jan Retirement Villa, Inc. v. Dept. of Health & Reh. Serv., 580 So.2d 278 (Fla. 4 DCA 1991).

August 2, 2004

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CERTIFICATE OF SERVICE

I certify that a copy of this reply brief was served by U.S. mail on August 2, 2004, to: PAM PAIGE, ESQ., Assistant General Counsel, DOH/Bureau of Health Care, Prosecution Services Unit, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3265.

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CERTIFICATE OF FONT COMPLIANCE

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

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