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IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF CHILDEN
AND FAMILIES,

Petitioner,

v.

Case No.: SC13-1668
L. T. Case No. 2D12-1191

DAVIS FAMILY DAY CARE HOME,

Respondent.
_____/

BRIEF ON JURISDICTION BY RESPONDENT DAVIS FAMILY DAY CARE HOME

Charlann Jackson Sanders, Esq.
Florida Bar No.: 765120
Charlann Jackson Sanders P. A.
P. O. Box 7752
Lakeland, FL 33807
(863) 646-2002
(863) 646-2202 – fax
Email: csanders64@tampabay.rr.com

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PRELIMINARY STATEMENT

Respondent, Ms. Davis and the Davis Family Daycare Home, was the appellant below and shall be referred to herein as "Ms. Davis". Petitioner, the Department of Children and Families, shall be referred to as "DCF".

STATEMENT ON JURISDICTION

Our Supreme Court should decline to engage in a discretionary review of this case. This Court can refuse to exercise its discretion to review any case falling within a discretionary category if it determines that the result below was essentially correct. It is not enough to establish in a discretionary appeal to the Supreme Court that jurisdiction merely exists; a party has an obligation to demonstrate that the case at bar is significant

enough to need to be heard. *Fla. Const. art. V, section 3(b)(3)-(6).*[1] DCF has not met that obligation in its jurisdictional brief.

DCF asserts, at page 6 of its brief, that the Second District's "approach" in *Davis Family Day Care Home v. DCF*, 2013 WL 3724769 (Fla. 2nd DCA July 17th, 2013), "greatly diminishes agency licensing discretion, and places the licensing decision ultimately with the ALJ." It further asserts that *Comprehensive Medical Access, Inc. v. Office of Insurance Regulation*, 983 So. 2d 45 (Fla. 1st DCA 2008), (hereinafter, "CMA"), affirms agency discretion, so long as the agency can demonstrate that it has met the proper standard for appellate review, which is competent, substantial evidence. Just as DCF blurs the distinct concepts of "jurisdiction" and "discretion" when seeking to invoke Supreme Court review in its brief, it likewise confuses the ALJ's role below in administrative proceedings.

It is not the ALJ's job, or the appellate court's either for that matter, to either affirm or disaffirm agency discretion. ALJ's hear and "weigh" evidence pursuant to evidentiary standards of proof. Appellate courts "review" the ALJ's actions, to assess whether he/she used the proper trial standards in weighing the

[1] The Supreme Court may decline to hear cases falling into particular categories even if it has jurisdiction over them.

evidence. Agency discretion is arguably but one factor, on evidence presented at the hearing level below, upon which findings of fact and conclusions of law are rendered. While without question our tribunals and appellate courts should, and do acknowledge that our state agencies rightly enjoy broad discretion in granting or denying license applications, the process by which they perform this function is subject to the same method and mode of proof as dictated by Chapter 120 if there is a challenge. This Court should not exercise its discretion in response to a state agency's request that the High Court act to expand or bolster agency discretion, no more than it should act to expand or bolster the individual rights of licensees.

There is no "readily apparent confusion" regarding *Department of Banking and Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996), (hereinafter, "Osborne"), as claimed by DCF on page 7 of its brief, in the cases string-cited there as examples. The ALJ's Recommended Order in *Rising Stars and Roslyn Smith v. DCF*, Case No. 11-4315 (DOAH Nov. 4th, 2011), citing *Osborne* at pages 25 and 26, outright states that "the Department has the burden of proving the alleged violations actually occurred if the registration is to be denied on that ground." This was a resounding point in both the ALJ's Recommended Order below, and in the Second District's opinion. Although the ALJ in *Roberts Large Family Daycare Home v. DCF*, case no. 08-3027 (DOAH Case No. 08-3027 (DOAH Sept. 5th, 2008),

agreed with DCF that the preponderance of the evidence standard applied to the proposed denial of a renewal license, the ALJ there at page 12, paragraph 51, stated that both the lesser standard and the clear and convincing standard were met by the Department.

In *Angela Collier v. DCF*, Case No. 06-3674 (DOAH Jan. 4th, 2007), the pro se Petitioner submitted no exhibits for admission into evidence, neither party requested a transcript, and neither party submitted a proposed recommended order. (Evidentiary burdens can only "shift" upon some reasonable presentation of evidence.) *Collier* makes no contribution here. In *The Growing Tree Learning Center and Nursery v. DCF*, Case No. 04-3892 and 04-3046 (DOAH Sept. 12th, 2005), at page 15, paragraph 25, the ALJ concluded that "regardless of who bears the ultimate burden of proof or persuasion, the Department there had ***clearly and convincingly*** established repeated violations of the statute and rules at issue in the case. From the language utilized on review of the opinions in these particular cases cited by DCF, the claimed confusion is simply non-existent. The Supreme Court is not faced with reasons sufficiently significant enough to exercise discretionary review, in a case where the holdings below are essentially correct.

ANALYSIS OF CONFLICT

The holdings below in *Davis* are essentially correct because the ALJ used the proper evidentiary burdens based upon the evidence

presented, and the Second District recognized this in rendering its opinion. There is a clear, harmonious thread running through *Department of Banking & Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996), *Comprehensive Medical Access, Inc. v. Office of Insurance Regulation*, 983 So. 2d 45 (Fla. 1st DCA 2008), *Haines v. Department of Children and Families*, 983 So. 2d 602, 607 (Fla. 5th DCA 2008),and *Davis*, the case at issue. The bright line emerging reflects those cases where the licensee is facing proposed revocation, *and* renewal or initial application for licensure, ***at the same time.*** In these cases, *Osborne* dictates that fact-finders and litigants alike adhere to the wisdom of Judge Booth in his analysis of evidentiary burdens ***not*** *standards of appellate review.* He reasons in *Osborne* that "while the burden of producing evidence may shift between the parties in an application dispute proceeding, the burden of ***persuasion*** remains upon the applicant to prove her entitlement to the license." That said, did the licensee in *Davis* prove her entitlement to the license at issue? On the evidence as presented below, wholly considered by the fact-finder, she did.

In *Davis* below, DCF relied on the same evidence, for revoking the home's then-current license, ***and*** for denying the new, large-home care license it sought. After hearing the testimony of all witnesses on both sides of the case, and reviewing all documentary exhibits submitted, the ALJ concluded that:

> "the Department did not sustain its burden with respect to the denial notification letters . . . . Further, *its own witnesses* stated that Ms. Davis was shocked, overwhelmed, or stunned that the investigation was on-going and that they pushed her with respect to answering questions in a stressful situation. That's not to say that the investigation was conducted inappropriately. However, under the circumstances once, it was determined that no children were in immediate danger (which was determined by DCF Investigator McCain's inquiries on December 2nd, 2010),a more methodical approach to seek the requisite answers to the inquiry could have been undertaken. That systematic methodology may have ensured that the ***documentation*** of the events was accurately recorded as opposed to ***various discrepancies in the Department's exhibits.***" (emphasis added).

Although the ALJ correctly provided guidance regarding the parameters of entry of the final order in *Davis,* stating that "any final order denying renewal of the applicant's license must be based solely on the grounds asserted in the notice of intent to deny given the applicant,", (*quoting M. H. v. Department of Children and Family Services*, case no. 2D07-1006, 2008 Fla. App. LEXIS 4391 *6 (Fla. 2d DCA, March 28th, 2008), DCF nonetheless entered a final order denying the license at issue, relying upon unsupported, insufficient matters outside of any evidentiary presentation it made in the hearing below, and then rubber-stamping it as 'competent and substantial'. This was error, as reiterated by the Second District. In *Davis* below, on the evidence presented, DCF did not prove the regulatory violations it alleged by clear and convincing evidence, and hence, there was no appropriate reason to deny renewal of the current license the applicant held. Further, hearing no other evidence below other than the reasons

put forth to deny renewal of the current license the applicant held, there was no plausible asserted reason or rationale for denying the applicant the larger license she sought. Plainly stated, in this evidentiary posture, the applicant below ultimately persuaded the fact-finder that she was entitled to the privilege of a grant of the license she sought.

The underlying facts in *Osborne* are relevant here. Unlike DCF in *Davis* below, the Department of Banking and Finance in *Osborne*, presented evidence that the applicant there had violated several provisions of the pertinent regulatory statutes at issue. In addition to the testimony of DBF representatives who had warned the applicant of its illegal conduct within the state of Florida ***prior to*** so much as the issuance of any license at all, DBF also presented a series of letters and sworn affidavits from Florida investors with whom the applicant had conducted business in violation of pertinent state law. On that evidence, the hearing officer found that the applicant had violated the relevant statutory provisions. Although this high Court remanded *Osborne* so that the fact-finder could correct error by hearing and considering the applicant's evidence of mitigation, that fact merely drives home exactly what Judge Booth's reasoning is - - that the burden of *persuasion* remains with the applicant.

As the Second District confirmed resoundingly in *Davis* below, this Court's decision in *Osborne* does not "stand for the

proposition that the 'competent substantial evidence' standard is applicable as an evidentiary standard in a hearing conducted in accordance with section 120.57." (citing *M. H.*, 977 So. 2d at 760). The Second District also points out that the 1997 amendments to chapter 120 added 120.57(1)(h), now section 120.57(1)(j), stating that "findings of fact shall be based upon a preponderance of the evidence, ***except*** in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized." (citing ch. 97-176, Section 8, Laws of Fla.). *Osborne* appropriately reaffirms its decision in *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987), wherein the Florida Supreme Court adopted the Second District's holding in *Reid v. Florida Real Esate Commission*, 188 So. 2d 846, 851 (Fla. 2d DCA 1966), that sanctions should be proven by clear and convincing evidence. 510 So. 2d at 295. These legal precedents, combined with the fact that the proceedings below were determined by DCF in its proposed denial to be disciplinary in nature, necessitated that DCF prove its case based upon what it alleged in its self-proclaimed administrative complaint. Therefore, as pointed out below by the Second District, the ALJ "was constrained to apply a more onerous standard other than the preponderance of the evidence."

CMA does not hold that competent, substantial evidence is a burden of proof to be applied in administrative proceedings under

Chapter 120. In reading the text of *CMA*, DCF's error in its reasoning is clear. DCF is placing itself in the shoes of the appellate courts in the rendition of its final orders in hearings held pursuant to Chapter 120. DCF consistently misinterprets the roles at each litigation level. In *CMA*, the issue for consideration ***by the appellate court*** is whether the proposed licensee presented competent, substantial evidence of entitlement to licensure. At the administrative hearing level, it is the fact-finder's job to assess what it hears and reads based upon the choice of two proof models, preponderance of the evidence on the one hand, and clear and convincing on the other. At the appellate court level, it is the *reviewer's* job to assess the fact-finder – i. e., did the fact-finder render a decision based upon competent, substantial evidence? On the evidence presented below in *CMA*, the First District correctly determined that the fact-finder, the ALJ, had not. On appeal, competent substantial evidence is such evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield* 95 So. 2d 912, 916 (Fla. 1957).

In *CMA*, the Office of Insurance Regulation premised its sole reason for denial of the applicant's initial license on the mere existence of a federal civil complaint alleging fraud in relation to the practice of medicine. While this federal civil complaint

was admitted into evidence at the administrative hearing, there was no testimony or other evidence admitted regarding the truth or falsity of the allegations contained therein. Because of the mere existence of the federal civil complaint, the Office of Insurance Regulation presented evidence that it had a basis for suspecting that the applicant was untrustworthy. There was no evidence of record at all that the applicant had actually committed the alleged acts. Because the ALJ found that the applicant was otherwise fit for licensure, the First District reversed the agency's decision to deny the license, and remanded with directions to approve said application.

In *Davis* below, the mere existence of prior unproven allegations of child abuse prompted DCF to propose denial of a renewal of licensure, as well as initial denial of a larger license. However, there was no competent substantial evidence that the licensee was the perpetrator of any child abuse. There was no evidence of record that the applicant had actually committed the acts alleged. As did the First District in *CMA*, the Second District herein below reversed the agency's decision to deny the license, and remanded with directions to approve said application. *CMA* is in harmony with *Osborne*, in that it too plainly quotes Judge Booth's reasoning that "while the burden of producing evidence may shift between the parties in an application dispute proceeding, the burden of persuasion remains upon the applicant to prove her

entitlement to the license". *CMA*, 983 So. 2d at 46. It is clear that *CMA* applies the correct standard of review on appeal in its reasoning, in its review of the fact-finder's weighing of the evidence, and *CMA* does not re-weigh the evidence. It is even clearer that the Second District does not hold or state in *Davis* that *CMA* holds that competent, substantial evidence is a burden of proof to be applied in administrative proceedings under chapter 120. The Second District therein merely reasons that to the extent that DCF believes that *CMA* stands for such a holding, it disagrees. *CMA*, when properly interpreted and utilized for appellate review of Chapter 120 proceedings, presents no clear good reason for discretionary review by our highest Court. It is clearly in harmony with *Osborne*, as is the Second District's reasoning in *Davis* below. This Court should decline to exercise discretionary review in this case.

Respectfully Submitted,

s/*Charlann Jackson Sanders*
CHARLANN JACKSON SANDERS
Fla. Bar No.: 765120
Charlann Jackson Sanders, P. A.
P. O. Box 7752
Lakeland, FL 33807
(863) 646-2002
(863) 646-2202 – fax
Csanders64@tampabay.rr.com

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that this brief was prepared using Courier New 12 point font.

s/Charlann Jackson Sanders

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been provided by electronic transmission to Gregory D. Venz, at Gregory venz@dcf.state.fl.us this 12th day of September, 2013.

s/Charlann Jackson Sanders