Electronically Filed 08/23/2013 03:27:04 PM ET

RECEIVED, 8/23/2013 15:28:43, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

CASE NO.
L.T. CASE NO. 2D12-1191

v.

DAVIS FAMILY DAY CARE HOME,

Respondent.
_____/

BRIEF ON JURISDICTION BY PETITIONER DEPARTMENT OF CHILDREN AND FAMILIES

Gregory D. Venz
FBN: 0000965
Assistant General Counsel
Department of Children and Families
1317 Winewood Blvd., Bldg. 2, Rm. 204
Tallahassee, FL 32399-0700
Ph: (850) 488-2381
Email: gregory_venz@dcf.state.fl.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Decisions

Administrative Decisions

Statutes and Court Rules

PRELIMINARY STATEMENT

The petitioner, Department of Children and Families, was the appellee below, and shall be referred to as "Department". The respondent (appellant below) will be referred to as "respondent" or "Ms. Davis".

JURISDICTION

The Department seeks this Court's discretionary review under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi). The Department petitions the Court to review the decision in *Davis Family Day Care Home v. Dep't. of Children and Families*, 2013 WL 3724769 (Fla. 2nd DCA July 17, 2013), in which the lower court certified conflict with *Comprehensive Medical Access, Inc. v. Office of Ins. Reg.*, 983 So. 2d 45 (Fla. 1st DCA 2008).

STATEMENT OF THE CASE AND FACTS

The Second District's decision below reviewed a portion of the Department's administrative final order in Case No. 11-2242. The administrative proceeding included respondent's challenge to two Department actions: On March 23, 2011, the Department denied respondent's application to renew her family day care home license, and on April 11, 2011, the Department denied respondent's initial application

for a large family child care home license. Both denial notices stated identical bases for the denials:

1. Three alleged instances of respondent employing inappropriate corporal punishment on children in care. The events were alleged to have occurred in 2007, 2008, and 2010;

2. Respondent's alleged misrepresentation of the number of children in her care on December 1, 2010, when the Department and local law enforcement were investigating the third alleged corporal punishment incident;

3. The overcapacity incident in Case No. 11-0916.

The Department, at the final hearing, elected not to rely on the 2007 and 2008 allegations of corporal punishment. The ALJ found, with regard to the 2010 corporal punishment allegation, the child in question suffered physical injury but the Department did not prove by clear and convincing evidence respondent caused the injury. The ALJ found respondent misrepresented the number of children in her home on December 1, 2010, but further found the Department did not prove by clear and convincing evidence that respondent's misrepresentation was intentional. The ALJ found the Department proved the overcapacity violation by clear and convincing evidence. The Department approved and adopted the ALJ's findings of fact.

The ALJ concluded "[t]he standard of proof with respect to a contested denial of the family day care renewal application and the denial of the large family day care

application is by clear and convincing evidence." (recommended order ¶ 44). The ALJ concluded the Department did not meet this burden with regard to either application. (recommended order ¶53).

The ALJ recommended the Department renew respondent's existing family day care home license, but place it in probation status for six months with enhanced inspections to ensure safe operation. The final order approved and adopted this recommendation and it was not part of the appeal below. With regard to respondent's initial application for a large family day care home license, the ALJ recommended the Department issue respondent a six-month provisional license with enhanced periodic inspections to ensure safe operation. The final order rejected this recommendation, concluding respondent was not an appropriate candidate for a provisional license. The Department also concluded the overcapacity violation, together with the competent substantial evidence relating to the 2010 corporal punishment incident and the December 1, 2010, misrepresentation of the number of children in care, were appropriate reasons for denying respondent's application for an initial license. The Department's rejection of the ALJ's recommendation for a provisional large family day care home license was the sole action under review by the Second District.

In *Davis Family Day Care Home v. Dep't of Children and Families,* 2013 WL 3724769 (Fla. 2nd DCA, July 17, 2013), the court below reversed the Department's final order, and instructed the Department to issue a final order

granting respondent a provisional large family day care home license consistent with the ALJ's recommendation. The court concluded the Department's denial of respondent's initial application for a large family day care home license was a sanction such that the Department's reasons for denying the license had to be proven by clear and convincing evidence. The court, in so holding, certified conflict with *Comprehensive Medical Access v. Office of Ins. Reg.*, 983 So. 2d 45 (Fla. 1st DCA 2008), which holds an agency denying a license application must only present competent substantial evidence to support the stated reasons for denial. The *Davis* court below also certified conflict with *Haines v. Dep't of Children and Families*, 983 So. 2d 602 (Fla. 5th DCA 2008), but, as will be explained below, the Department does not believe *Haines* and *Davis* conflict. The Department seeks this Court's review only on the basis of conflict with *Comprehensive Medical Access*.

ARGUMENT

The Court should exercise its discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi) to resolve conflict between the decision below and the decision in *Comprehensive Medical Access v. Office of Ins. Reg.*, 983 So. 2d 45 (Fla. 1st DCA 2008). The conflict has arisen because the district courts have fundamentally different interpretations of this Court's decision in *Dep't of Banking*

and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996), concerning the relative evidentiary burdens in an administrative proceeding between an applicant for a license and a regulatory agency which has denied the application. This is an important and recurring issue impacting license applicants, many state agencies, and the wider public who may procure services from regulated licensees. The divergent applications of *Osborne Stern* seen in the case law suggest the Court should revisit the issue and clarify the standard.

In *Osborne Stern*, this court "decline[d] to extend the clear and convincing evidence standard to license application proceedings." 670 So. 2d at 934. Instead, the Court held a license applicant, at each and every step of a licensing proceeding, bears the burden of persuasion as to her fitness for licensure, and the reviewing agency, while required to specify its reasons for denying the license, must only produce competent evidence to support those reasons. *Id.* *Osborne Stern* identified two principles underlying the holding: first, a license denial is not a sanction for whatever misconduct the applicant may have engaged in, but is the application of a regulatory measure to protect the public interest; and second, requiring a regulatory agency to produce clear and convincing evidence to persuade the finder of fact as to the agency's reasons for denying the license would be "inconsistent with the discretionary authority granted . . . administrative agencies responsible for regulating professions under the State's police power." *Id.*

The Second District's decision in the case below and its prior decision in *M. H. v. Dep't of Children and Family Serv.*, 977 So. 2d 755 (Fla. 2nd DCA 2008), construe *Osborne Stern* to require an agency denying a license application to carry the burden of *persuasion* as to the reasons it provides for denying a license. *Davis*, 2013 WL 3724769, at p. 3 (DCF misused competent substantial evidence standard of review as an evidentiary standard); *M. H.*, 977 So. 2d at 762 (same). The First District in *Comprehensive Medical Access* and in *Mayes v. Dep't of Children and Family Serv.*, 801 So. 2d 980 (Fla. 1st DCA 2001) conversely, and correctly, holds *Osborne Stern* imposes on agencies only a burden of *production* to support the specific reasons provided for denying a license. *Comprehensive Medical Access*, 983 So. 2d at 47 (where there was no dispute as to license applicant's substantive qualifications, the issue *at the evidentiary hearing* was whether the agency had a competent substantial basis for the state reason for denying the license); *Mayes*, 801 So. 2d at 981 (same). The Department submits these two approaches produce dramatically different legal frameworks for licensing decisions. The Second District's approach greatly diminishes agency licensing discretion and places the licensing decision, ultimately, with the administrative law judge, while the First District affirms agency discretion, so long as the agency can demonstrate it has competent evidence to support its exercise of that discretion.

The judicial conflict over this issue appears in other district courts. In *N. W. v. Dep't of Children and Family Serv.*, 981 So. 2d 599, 601 (Fla. 3rd DCA 2008), the Third District followed the First District in defining the evidentiary standard, but applied it in a manner limiting agency discretion, more like the Second District. The Fifth District's approach to *Osborne Stern*, although presented as dicta in *Haines v. Dep't of Children and Families*, 983 So. 2d 602, 605 (Fla. 5th DCA 2008), appears to generally align with the Second District[1]. The Fourth District has not directly addressed the issue, but did allude to it in *Silver Show, Inc. v. Dep't of Bus. & Prof. Reg.*, 763 So. 2d 348 (Fla. 4th DCA 1998), in acknowledging agencies have particularly broad discretion in granting or denying license applications.

Similar confusion regarding *Osborne Stern* has been noted in administrative proceedings. This is readily apparent by comparing the recommended order in the instant case, which concluded the clear and convincing evidence standard applied to both the renewal and initial license applications, with the orders in, for example, *Rising Stars and Rosyln Smith v. Dep't of Children and Families*, Case No. 11-4315

[1] The decision below cites conflict with *Haines*, but the Department can discern none. *Haines* involved the revocation (i.e. a sanction) of a foster care license, and the impact of section 409.175(2)(d), Florida Statutes (2006), on the evidentiary burden in an administrative proceeding on the revocation. The *Haines* court construed section 409.275(2)(d) to permit a foster license revocation based upon preponderant, rather than clear and convincing, evidence. The court did opine preponderant evidence, rather than competent substantial evidence, was the burden applicable to denying a professional license application under *Osborne Stern*, but that statement was dicta.

(DOAH Nov. 4, 2011)(DCF Feb. 8, 2011)(Department required to prove reasons for denying license renewal application by preponderance of evidence); *Robert's Large Family Daycare Home v. Dep't of Children and Family Serv.*, Case No. 08-3027 (DOAH, Sept. 5, 2008)(DCF, Dec. 31, 2008)(same); *Angela Collier v. Dep't of Children and Family Serv.*, Case No. 06-3674 (DOAH, Jan. 4, 2007)(DCF, May 1, 2007)(Applicant to renew child care license had burden of proof in administrative proceeding); and *The Growing Tree Learning Center and Nursery v. Dep't of Children and Family Serv.*, Case Nos. 04-3892; 04-3046 (DOAH, Sept. 12, 2005)(DCF, Dec. 13, 2005)(Department has burden to present evidence of licensing violations which formed basis of denying renewal and initial license applications).

The Department is obliged to advise the Court the specific license denial giving rise to the instant case is now essentially moot. In the two plus years since the Department's April 2011 notice of intent to deny Ms. Davis' large family day care home application, she successfully completed the probationary period on her regular family day care home license and has operated in substantial compliance with licensing standards. Ms. Davis again initiated an application for an initial large family day care home license in February 2013. She completed the application in August, and the Department awarded her a large family day care home license on August 14. The Department granted the license based upon its evaluation of the application and Ms. Davis' recent performance as a family day care home provider, rather than the

direction in the Second District's decision below. Although Ms. Davis has already received the license she sought, the Department submits the issue presented in the Second District's decision remains ripe for this Court's resolution. The inter-district conflict remains, and regulatory agencies and license applicants in administrative proceedings will continue to be confronted with varying burdens of proof and production as a result.

Additionally, the decision below notes the Department's April 2011 denial notice referenced sanctioning provisions in section 120.60, Florida Statutes. 2013 WL 3724769 at pp. 2-3. This should not provide a basis for this Court to decline discretionary review. *Osborne Stern* clearly holds the act of denying a license application is qualitatively different from sanctioning an existing license. 670 So. 2d at 934. Here, it should not matter that the Department's license denial notice included an inartful reference to its sanctioning authority, because there is no dispute the action was the denial of respondent's initial application for a large family day care home license. *See generally, Augustin v. Blount, Inc.*, 573 So. 2d 104 (Fla. 1st DCA 1991)(appeal dismissed for lack of jurisdiction because order appealed, although denominated as a final order, actually dismissed claim without prejudice).

CONCLUSION

The *Comprehensive Medical Access* court noted "the effect of the burden of persuasion has been the source of much confusion in this appeal." 983 So. 2d at 46. More than simply being confusing, the conflicting interpretations of *Osborne Stern* certified below put the Department and other regulatory agencies in a difficult position with regard to granting or denying license applications, and may lead to differential treatment of applicants depending upon which district court will have jurisdiction over an eventual appeal. The conflict certified by the Second District below is ripe for this Court's review.

Respectfully Submitted,

___/s/_____
Gregory D. Venz
FBN: 0000965
Assistant General Counsel
Department of Children and Families
1317 Winewood Blvd., Bldg. 2, Rm. 204
Tallahassee, FL 32399-0700
Ph: (850) 488-2381
Email: gregory_venz@dcf.state.fl.us
Secondary email: dcf generalcounsel@dcf.state.fl.us

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this brief was prepared using Times-New Roman 14-point font.

___/s/_____
Gregory D. Venz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of this brief has been provided by electronic mail to Charlann Jackson Sanders at csanders64@tampabay.rr.com this 23rd day of August, 2013

___/s/_____

Gregory D. Venz