

**IN THE SUPREME COURT OF FLORIDA**

**DEPARTMENT OF CHILDREN AND  
FAMILIES,**

**Petitioner,**

**CASE NO.: SC13-1668**

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

**v.**

**DAVIS FAMILY DAY CARE HOME,**

**Respondent.**

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**REPLY BRIEF  
BY PETITIONER  
DEPARTMENT OF CHILDREN AND FAMILIES**

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## ARGUMENT

### Answer Brief Section I

Sections I.A. through I.C. of respondent's Answer Brief address interpretation of this Court's decision in *Dep't of Banking and Finance v. Osborne Stern 7 Co.*, 670 So. 2d 932 (Fla. 1996). The Department relies on the discussion in Point I of the Initial Brief, and will not restate those arguments here.

In section I.D. of the Answer Brief, respondent contends the denial of the large family child care home license was a sanction because it was premised on the same facts as the sanction imposed on the family day care home license. In section I.E., respondent contends the *Davis* decision below does not hold an agency must prove the reasons for denying an initial license application by a preponderance of evidence. Respondent is incorrect on both points.

The *Davis* court clearly concluded *Osborne Stern* held the burden of proof in a license application proceeding is preponderance of evidence. 117 So. 3d 464, 469 (Fla. 2<sup>nd</sup> DCA 2013). The court went on to hold the Department's denial of respondent's initial application for a large family child care license in this case was a disciplinary sanction authorized in section 402.310, Florida Statutes, such that the appropriate evidentiary standard was clear and convincing evidence. *Id.* The Department's Initial Brief provides considerable analysis of the statutory scheme for child care regulation in sections 402.301 – 402.319, Florida Statutes, to support

the Department's contention the denial of respondent initial application for a large family child care home license was not a sanction. The Initial Brief also addresses the *Davis* court's conclusion the language utilized in the Department's notification of the license denial rendered the denial a sanction. The Department will rely on the arguments in the Initial Brief and will not restate them here.

Respondent's contention the large family child care home license denial is a sanction because it relies on the same facts as the sanction against the family day care home license fails to appreciate the regulatory paradigm established in this Court's decisions. Denying an initial application for a license and imposing a sanction against an existing license are fundamentally different acts which involve significantly different balancing of competing interests. This Court's decisions in *Dep't of Banking and Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996), and *Astral Liquors, Inc. v. Dep't of Bus. Reg.*, 463 So. 2d 1130 (Fla. 1985), clearly define the qualitative distinction between these exercises of agency regulatory authority.

Generally speaking, the Legislature authorizes licensing (a direct exercise of regulatory authority) for those activities which are potentially injurious to the public welfare. Certainly that is true with operating a child care facility or home. *See* § 402.301, Fla. Stat. ("It is the legislative intent to protect the health, safety, and well-being of the children of the state and to promote their emotional and

intellectual development and care.”); *see also*, (T. 122-124). *Osborne Stern* and *Astral Liquors* explain an agency, when determining whether an applicant is qualified to engage in an activity which requires a license, has far greater discretion than when imposing a sanction against someone who already holds the license. An applicant for a license has nothing more than an expectation of engaging in a regulated activity. A licensee has a vested property interest in the license, which requires a different balancing of interests between the individual and the state/public.

Respondent here was in the somewhat unusual posture of being sanctioned as a licensee (family day care home) while she was also an applicant for a new license (large family child care home). The Department denied the large family child care home license application based on respondent’s performance under the family day care home license, which warranted a sanction. The *Osborne Stern/Astral Liquors* distinction between sanction and regulating entry is not erased simply because the factual predicate for the actions is the same. Assume, for example, an individual licensed by the Department of Financial Services (DFS) as securities broker commits acts of fraud. DFS could seek to revoke the license, and, under *Osborne Stern*, would have to prove the fraud by clear and convincing evidence. This is so because the sanction impacts the individual’s vested property interest in the securities broker’s license. Assume the same individual applied for

a real estate broker's license from the Department of Business and Professional Regulation (DBPR), and the agency decided to deny the license because of the same act of securities fraud. DBPR, unlike DFS, would not have to prove the securities fraud by clear and convincing evidence because DBPR is doing no more than denying entry into the business of real estate brokerage. Nothing in the case law or in sections 402.301 – 402.319, Florida Statutes, moreover, suggest this principle should not apply where the activity under the sanctioned license (family day care home) is similar to the license which is denied (large family child care home).

## **Answer Brief Section II**

In section II of the Answer Brief, respondent argues *Comprehensive Medical Access, Inc. v. Office of Ins. Reg.*, 983 So. 2d 45 (Fla. 1<sup>st</sup> DCA 2008), and the *Davis* decision below interpret *Osborne Stern* the same way, and that *Davis* does not articulate any conflict with *Comprehensive Medical Access*. Respondent's argument is undercut by *Davis*' certification of conflict. The Department's Initial Brief analyzes the conflict between these cases at length, and the Department relies on that analysis here.

At page 19 of the Answer Brief, respondent contends

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.

This assertion is not supported by the record. The record reflects three reasons for denying respondent's large family child care home license application: 1) a 2010 child abuse (corporal punishment) allegation; 2) respondent's misrepresentation of the number of children in care on December 1, 2010; and, 3) respondent operating her family day care home over its licensed capacity in 2010. (Respondent's Exhibit 2; R. 17; T. 162-163). The record also reflects the Department presented competent substantial evidence to support each of these reasons. The ALJ found respondent misrepresented the number of children in her home on December 1, 2010, but found the Department did not prove by clear and convincing evidence that respondent's misrepresentation was intentional. (R. 26-8). The ALJ found the Department proved the overcapacity violation by clear and convincing evidence<sup>1</sup>. (R. 21-2, 32). As to the abuse allegation, the Department presented competent substantial evidence to support the allegation. (T. 44-49; 62-65). The ALJ found the Department did not prove respondent committed the abuse by clear and convincing evidence. (R. 29-30).

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<sup>1</sup> The Department presented competent substantial evidence respondent exceeded her capacity on multiple occasions in 2010. (T. 30 – 36; 107-112).

The evidence of respondent's violation of child care standards was such the ALJ recommended respondent's existing license be renewed on probationary status. With regard to the initial application for a large family child care home license, the ALJ recommended the Department issue respondent a provisional license, with heightened monitoring for a time to ensure respondent could meet standards. Clearly, the ALJ found the Department presented evidence of respondent's wrongdoing. The ALJ simply disagreed with the Department's decision to deny the license, and concluded the Department did not produce clear and convincing evidence to support the denial. (R. 42).

#### **Answer Brief Section IV<sup>2</sup>**

Section IV of the Answer Brief addresses points III and IV of the Department's initial brief. The Answer Brief cites no authority in support of its argument concerning the distinction between a sanction and license denial. (Answer Brief p. 19). As to the Department's argument in point IV of the Initial Brief concerning the provisional license, respondent's Answer Brief simply states the decision below is correct, with no argument or citation of authority. The Department relies on its initial brief on these points.

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<sup>2</sup> The answer brief argument does not have a section III.

## CONCLUSION

*Davis* and *Comprehensive Medical Access* present divergent interpretations of this Court's decision in *Osborne Stern*. The two cases not only directly conflict as to the evidentiary standard in administrative proceedings concerning license denials, but they reflect dramatically different concepts of agency regulatory authority. This is an important issue for state government operation and public safety. This Court should take the opportunity to return to *Osborne Stern*, clarify the evidentiary standard, and re-affirm agency authority to deny licenses to persons who threaten the public safety and well-being. The Department requests the Court approve *Comprehensive Medical Access* and disapprove *Davis* to the extent of the conflict in the two cases, even if it were to conclude the Department's denial of the license application in this case was inappropriate under the correct standard.

*Davis* erroneously concludes the denial of respondent's large family child care home license application was a sanction rather than a "regulatory measure" as contemplated in *Osborne Stern*. The license denial at issue in this appeal was legally indistinguishable from the denial in *Osborne Stern*, and *Davis* should not have re-cast it as a disciplinary sanction. This Court should affirm the Department's denial of respondent's license application as a regulatory measure under *Osborne Stern*.





