SUPREME COURT OF FLORIDA

CASE NO. SC12-123

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

AVALON'S ASSISTED LIVING, LLC, et al,

Respondent.

Express & Direct Conflict Jurisdiction
First DCA Court of Appeal Case Number 1D11-1411

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

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Table of Contents

Page(s)

Table of Authorities

Cases **Page(s)**

Statutes **Page(s)**

Preliminary Statement

In this Initial Discretionary Jurisdiction Brief, Respondents, Avalon's Assisted Living, LLC, and Avalon's Assisted Living II, LLC, are referenced as "Avalon I" and "Avalon II" respectively. The Petitioner is referenced as "AHCA" or the "Agency."

Statement of the Case and Facts

This is an appeal from an Opinion of the First District Court of Appeals ("First DCA") that reverses an AHCA Final Order that adopted the Recommended Order of the Division of Administrative Hearings ("DOAH").

The instant appeal involves two separate but consolidated administrative actions that AHCA took against Avalon I and Avalon II: the issuance of a notice denying their license renewal applications and of an administrative complaint charging various violations of the law governing assisted living facilities ("ALFs"). Both actions were predicated, in part, on allegations that the owners/administrators of Avalon I and Avalon II had unlawfully operated a third, unlicensed ALF. Because the owners/administrators invoked their Fifth Amendment right against self-incrimination, all other staff for the unlicensed facility had disbanded, and because the facility's alleged residents were of fragile physical and mental status, AHCA's ability to produce direct evidence of the unlicensed activity at the hearing was limited. This is a problem AHCA commonly faces in unlicensed activity

cases. However, the DOAH administrative law judge ("ALJ") who heard the case found that AHCA had produced sufficient circumstantial and hearsay evidence to meet its burdens of proof for both the license application denials and the sanction actions; importantly, the ALJ recognized these were two separate inquiries.

The Agency's Final Order adopted the ALJ's Recommended Order *en toto*, revoked Avalon I and Avalon II's licenses, imposed the administrative fines, and affirmed the denial of the license renewal applications. All of these actions were then reversed by the First DCA's Opinion. AHCA filed a timely but unsuccessful motion with the First DCA seeking rehearing or rehearing *en banc* to correct conflicts between well-settled Florida law and the Opinion. Now AHCA appeals to this Court, seeking a resolution of these conflicts.

Summary of the Argument

The First DCA's Opinion conflicts with established case law for several reasons. First, it fails to recognize that the law imposes separate and distinct burdens on an agency to prove unlawful activity in license denial actions versus sanction actions. The First DCA has imposed a direct evidence burden on AHCA to prove the unlicensed activity underlying the license denial and sanction actions, reweighed the evidence, substituted its judgment for the ALJ's, and found that hearsay is inadmissible in an administrative hearing. All of these improper actions are apparent from the face of the Opinion and are in express and direct conflict

with cases from this Court and/or the District Courts of Appeal. As such, this Court has discretionary jurisdiction over this case.

AHCA strongly urges this Court to exercise its jurisdiction. This Court's review is necessary to correct the errors of law in the Opinion and ensure uniformity among the courts of this State. Furthermore, review is necessary to ensure that this Agency and other Florida agencies retain the full measure of discretion to regulate persons and entities operating businesses in this State that was granted to them by the Legislature under its police power. Notably, this Court has recognized the wide discretion granted to agencies to adjudge which persons and entities are worthy to transact business in Florida in its previous cases. E.g., Department of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (1996). This discretion is important to Florida citizens, who trust their governmental agencies to protect them from persons and entities that are unworthy to transact business in Florida and, with respect to this case, unworthy to care for Florida's elderly and infirm.

Argument

I. The First DCA's Opinion holds AHCA must prove unlawful activity by "clear and convincing evidence" to prevail in both a sanction action and a license denial action, in express and direct conflicts with Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996) and N.W. v. Department of Children and Family Services, 981 So. 2d 599 (Fla. 3d DCA 2008).

The First DCA's Opinion in this case is in express and direct conflict with this Court's Opinion in Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996), and with the Third District Court of Appeals' Opinion in N.W. v. Department of Children and Family Services, 981 So. 2d 599 (Fla. 3d DCA 2008). Those cases hold that, **in a license denial action, the licensing agency must provide specific reasons for the denial and produce competent, substantial evidence to support those reasons but the ultimate burden of proof is on the applicant, who must prove by a "preponderance of the evidence" that it is entitled to a license**. Osbourne, 670 So.2d at 933-935; N.W., So.2d at 601. See also § 120.57(1)(j), Fla. Stat.; § 120.60(1) & (3), Fla. Stat. In contrast, in a **sanction action** (fines, revocation, etc.), the agency alone carries the burden of proving unlawful activity by **"clear and convincing evidence"**. Osborne, 670 So.2d at 935. See also § 120.57(1)(j), Fla. Stat. This is true even where the same unlawful activity forms the basis for both a license denial and a sanction. Osborne, 670 So.2d at 933-935.

It is readily apparent on the face of the Opinion that the First DCA ignored Osborne and N.W. and required AHCA to prove both its reasons for denying the license applications and its reasons for imposing the sanctions by "clear and convincing evidence." At pages 2 and 3 of the Opinion, the First DCA quotes section 429.02(5), Florida Statutes, the statute defining the unlicensed activity that was the basis for both actions, and then states, "[b]ecause Appellants' licenses were at stake, the Agency, as the complainant, had the burden of proving its allegations by clear and convincing evidence." [1] This is the correct burden of proof for the sanction action, but not for the license denial action, according to Osborne and N.W.; **nowhere in its Opinion does the First DCA acknowledge that Avalon I and Avalon II had the burden of proving their fitness for licensure by a "preponderance of the evidence" or that AHCA's burden in the license denial case was to provide specific reasons for the denial and to produce competent, substantial evidence in support.** Rather, after analyzing (in truth, reweighing) AHCA's evidence according to the clear and convincing evidence standard (Opinion at 4-10), and after finding the ALJ had improperly shifted the burden of proof onto Avalon I and II as to some aspects of the unlicensed activity (Opinion at 6 & 7), the First DCA concluded AHCA had failed to submit sufficient

[1] In imposing this burden of proof, the First DCA cites Ferris v. Turlington, 510 So.2d 292, 294-295 (Fla. 1987). Opinion at 3. Ferris imposes a "clear and convincing evidence" standard to **sanction** actions involving a license revocation, and was distinguished by this Court in Osborne. 670 So. 2d at 933.

"admissible evidence to prove [the unlicensed activity] claim or any of the other alleged violations," and reversed the Final Order revoking Avalon I and II's licenses, denying their licenses applications and imposing administrative fines. Opinion at 10.

II. The First DCA has imposed a direct evidence burden on AHCA to prove the unlicensed activity underlying the license denial and sanction actions, reweighed the evidence, substituted its judgment for the ALJ's, and found that hearsay is inadmissible in an administrative hearing, in express and direct conflict with four bedrock principles of Florida jurisprudence.

The First DCA's Opinion expressly and directly conflicts with four bedrocks principles of Florida jurisprudence. These principles are as follows.

Principle One: "**Any material fact may be proved by circumstantial evidence, as well as by direct evidence**." Moorman v. State, 25 So. 2d 563, 564 (Fla. 1946) (emphasis added) (noting also that this principle is "too well settled to require citation of authorities."). See also Buchman v. State Bd. of Accountancy, 300 So. 3d 671, 673 (Fla. 1971); State v. Castillo, 877 So. 2d 690 (Fla. 2004); State v. Waters, 436 So.2d 66, 71 (Fla. 1983); Alcorn v. State, WL 2200625 (Fla. 4th DCA 2011); Lonergan v. Estate of Budahazi, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1996). ***Principle Two***: **"It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, *draw permissible inferences from the evidence*, and reach ultimate findings of fact based on competent, substantial evidence."** Kany v. Fla. Eng'rs. Mgmt. Corp.,

948 So. 2d 948, 953 (Fla. 5th DCA 2007) (emphasis added). See also State Beverage Dep't v. Ernal, Inc., 115 So. 2d 566, 568 (Fla. 3d DCA 1959); Bejarano v. Dept. of Educ., 901 So.2d 891, 892 (Fla. 4th DCA 2005). ***Principle Three***: **It is not an appellate court's role to weigh evidence anew, or to substitute its judgment for that of the finder of fact.** Odoms v. Travelers Ins. Co., 339 So. 2d 196, 199 (Fla. 1976); Smit v. Geyer Detective Ag., Inc., 130 So. 2d 882, 884 (Fla. 1961); Wenz v. Bd. of Trs. of Brevard Cmty. Coll., 439 So. 2d 264 (Fla. 5th DCA 1983); Doyle v. Fla. Unemployment Appeals Comm'n, 635 So. 2d 1028 (Fla. 2d DCA 1994); Gershanik v. Dep't. of Prof'l. Reg., 458 So. 2d 302 (Fla. 3d DCA 1984). See also § 120.68(10), Fla. Stat. ***Principle Four***: **Hearsay evidence is admissible in administrative hearings to supplement or explain other evidence, but may not serve as the sole basis for a finding of fact.** Wark v. Home Shopping Club, 715 So. 2d 323, 324 (Fla. 2d 1998); McPherson v. School Bd. of Monroe County, 505 So. 2d 682, 684 (Fla. 3d DCA 1987); Campbell v. Cent. Fla. Zoological Soc'y., 432 So.2d 684, 685 (Fla. 5th DCA 1983). The fact that the First DCA has violated or ignored these four bedrocks is evident from the face of the Opinion.

On the issue of whether personal care services were provided to Avalon III residents on a 24-hour basis, the First DCA **refused to defer to the ALJ's judgment as to the admissibility of evidence**. See Opinion at 3-4. Instead, it

reviewed the evidence, determined the only "admissible" evidence regarding when and how long residents were at the unlicensed facility was the testimony of witnesses Brown, Atkinson and Williams regarding their **direct** observations of the facility (i.e., direct evidence), and that all other evidence previously considered by the ALJ on this point was **inadmissible hearsay**. Opinion at 3-5. These acts and findings of the First DCA **expressly and directly conflict with bedrock principles one and four** (regarding proof by circumstantial evidence and the admissibility of hearsay in administrative proceedings, respectively) **and with the cases cited for these principles above.**

Also, the First DCA delineated the evidence that it deemed **inconsistent** with the ALJ's factual finding of 24-hour operation, including that: "[Brown] admitted neither working at [the unlicensed ALF] at night nor staying at the facility overnight"; "Brown testified ***only*** that someone covered for her in the evening and that [she] relieved someone upon arrival in the morning"; "Brown's testimony that she never saw a resident leave the facility at the end of the day or arrive in the morning does not foreclose the ***possibility*** that these residents were at the facility for periods less than 24 hours, [because] record does not indicate that Brown was present from 8:00 in the evening until 8:00 in the morning"; and "no one testified about working a late-night or early-morning shift that covered the period from 8:00 P.M. until daybreak" (Opinion at 3-7). The First DCA then **reweighed the**

evidence, found the Agency had not met its burden of proving 24-hour operation of the unlicensed ALF under the "clear and convincing evidence" standard because of a **lack of direct evidence**, and **rejected the ALJ's factual finding** of 24-hour operation of the unlicensed ALF, and said the ALJ **could not reasonably make the factual inference** that "if a resident was at Avalon III at 8:00 P.M. and was awakened for breakfast, then he or she resided there for a period exceeding 24 hours" from the "admissible" evidence. Opinion 4-5, 7 & 10. **These acts and findings of the First DCA expressly and directly conflict with bedrock principles one, two, three and four** (regarding proof by circumstantial evidence, the ALJ's role as fact-finder in evaluating the evidence and making reasonable inferences, the prohibition against reweighing evidence, and the admissibility of hearsay in administrative proceedings, respectively), **and with the cases cited for these principles above.**

Similarly, on the issue of whether services were provided to one or more persons who are ***not*** relatives of the owners/administrators of Avalon III, the First DCA listed the evidence that supported the ALJ's finding, then reweighed the evidence, determined independently that the testimony did not "dispose of the issue", and found that "the Agency failed to meet its burden" on this point. Opinion at 5-6, 9. **These acts and findings, likewise, expressly and directly conflict with bedrock principles one, two, and three** (regarding proof by

circumstantial evidence, the ALJ's role as fact-finder in evaluating the evidence and making reasonable inferences, the prohibition against reweighing evidence, and the admissibility of hearsay in administrative proceedings, respectively) **and with the cases cited for these principles above**.

Conclusion

For all of these reasons, this Court has discretionary jurisdiction over this matter. AHCA respectfully ask this Court to accept jurisdiction to restore unity to fundamental principles of appellate review amongst the courts of this state and to ensure administrative agencies retain the full power to determine the worthiness of license applicants that was granted them by the Legislature under its police power.

Respectfully submitted and served,

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Certificate of Service

I CERTIFY that a copy hereof has been furnished by U.S. Mail to John E. Terrel, Esquire, at 1700 North Monroe Street, Suite 11-116, Tallahassee, Florida 32303, on this the 30th day January, 2012.

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Certificate of Compliance

I CERTIFY that the foregoing Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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