IN THE SUPREME COURT OF FLORIDA

Case No. SC12-123

District Court Case No. 1D11-1411
Division of Administrative Hearings Case Nos. 10-0528, 10-1672 &10-1673

AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

vs.

AVALON'S ASSISTED LIVING, LLC d/b/a AVALON'S ASSISTED LIVING and d/b/a AVALON'S ASSISTED LIVING AT AVALON PARK, and AVALON'S ASSISTED LIVING II, LLC d/b/a AVALON'S ASSISTED LIVING AT SOUTHMEADOW,

Respondents.

REPONDENTS' BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

In this Brief, Avalon's Assisted Living, L.L.C. and Avalon's Assisted Living II, L.L.C. are referred to as "Avalon's Assisted Living" or "Respondents." The Agency for Health Care Administration will be referred to as either "AHCA" or "the Agency."

STATEMENT OF THE CASE AND FACTS

This is an appeal of an opinion of the First District Court of Appeal (First DCA) that reversed a final order of the AHCA. AHCA filed an administrative complaint against Avalon's Assisted Living on December 4, 2009. On February 25, 2010, the AHCA issued notices of intent to deny the renewal applications for these facilities. The reasons given by the Agency were alleged unlicensed activity and "pending revocations" of the licenses of Avalon's Assisted Living. The cases were consolidated for trial at AHCA's request. A final hearing was held on September 14 – 16, 2010. An amended recommended order was issued on January 31, 2011 with an amended final order being issued on March 9, 2011. The First DCA's opinion was issued on November 30, 2011. On January 4, 2012, the First DCA denied AHCA's motion for rehearing and rehearing *en banc*.

Respondents object to AHCA's statement of the case and facts as argumentative. Respondents do, however, agree that AHCA failed to

present direct evidence (competent substantial evidence or CSE) of the allegations underlying both the administrative complaint and the denials of the license renewal applications for Avalon's Assisted Living.

SUMMARY OF THE ARGUMENT

There is no conflict jurisdiction between the Opinion issued by the First DCA and any appellate court decision in the State of Florida. Instead, AHCA fails to understand that uncorroborated hearsay cannot be used to formulate fact finding in either a disciplinary or a denial of license case. The Agency also argues that the Opinion holds that hearsay is not admissible in administrative proceedings. The Opinion does not contain such a statement. Further, AHCA ignores the numerous appellate decisions that have held that hearsay may be used in administrative proceedings to supplement or explain other evidence but it shall not be sufficient by itself to support a finding unless it would be admissible over objection in a civil proceeding. The First DCA determined that such uncorroborated hearsay does not constitute CSE and that the ALJ improperly shifted the burden of proof on several crucial allegations made by AHCA. The ALJ did not make any inferences on these issues – he shifted the burden of proof. Finally, AHCA's argument that there is an "exception" for regulatory agencies concerning the statute on

hearsay in administrative cases and the well-grounded decisions interpreting this language is not supported by any case, the evidence code or any law.

ARGUMENT

I. THERE IS NO DIRECT OR EXPRESS CONFLICT WITH ANY APPELLATE DECISION OF THIS STATE AND AHCA FAILS TO UNDERSTAND SECTION 120.57(1)(c), FLORIDA STATUTES CONCERNING HEARSAY IN ADMINISTRATIVE CASES

There is no direct or express conflict between the Opinion issued by the First DCA and any decision by other appellate courts of this state, including this Court. The party seeking review from this Court should specify when a decision "expressly and directly conflicts with another district court of appeal or of the Supreme Court on the same question of law." Art. V. §3(b)(3), Fla. Const., Rule 9.030(a)(2)(A)(iv), Fla. R. App. P. This Court has identified two principal situations for invoking its jurisdiction. These are:

1. The announcement of a rule of law which conflicts with a rule previously announced by this Court, or
2. The application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court.

Nielson v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960). Neither situation exists here. Instead, AHCA simply fails to understand that Section 120.57(1)(c), Florida Statutes applies in both licensure disciplinary cases and

denial of license renewal cases. Section 120.57(1)(c), Florida Statutes states:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

This statutory section applies to all administrative hearings.

The Opinion does not conflict with Department of Banking and Finance v. Osborne Stern & Co. 670 So. 2d 932 (Fla. 1996). Avalon's Assisted Living challenged the final order because it was not based on CSE and the administrative law judge (ALJ) shifted the burden of proof on two crucial issues that the AHCA had to prove. AHCA never cross-appealed to challenge the evidence that Respondents produced concerning their fitness for licensure.[1] The ALJ also did not find a lack of CSE concerning the fitness for licensure because AHCA's own licensure personnel conceded the issue. AHCA then argues that the Opinion did not find that AHCA failed to produce CSE of the reasons for the denial of the licenses. On the contrary, the Opinion summarized the hearsay and scant nonhearsay evidence produced by AHCA and concluded that AHCA failed to sustain its burden. (Opinion page 6). See, Osborne p. 936, fn 2 ("an administrative decision

[1] AHCA raised this issue for the first time in its motion for rehearing and rehearing *en banc* with the First DCA in violation of Rule 9.330(a), Fla. R. App. P.

denying a license will not be sustained unless it can be demonstrated that the decision is supported by competent, substantial evidence present in the record."). See also, Section 120.68(7)(b), Florida Statutes and Haines v. Dept. of Children and Families, 983 So. 2d 602, 605 & 606(Fla. 5th DCA 2008). AHCA's burden was to produce clear and convincing evidence because the cases were consolidated and the same allegations underlying the administrative complaint were used to deny the applications for renewal of the licenses. The Opinion properly recognized that the allegations (for both actions) must be supported by competent, substantial evidence. Because AHCA only produced uncorroborated hearsay in support of the critical allegations and the ALJ improperly shifted the burden of proof to Avalon's Assisted Living on issues AHCA failed to prove, reversal was appropriate. The Opinion does not conflict with Osborne Stern.

N.W. v. Dept. of Children and Family Services, 981 So. 2d 599 (Fla. 3rd DCA 2008) does not conflict with the Opinion issued by the First DCA. Instead, the case stands for the same proposition: the department or agency has the burden to state the specific reasons for denial of the license and to produce CSE to support those reasons. Id at 601. AHCA relied on the same allegations to file an administrative complaint and to deny the applications for license renewal: allegations that the owners/administrators were

operating an unlicensed facility. (Opinion p. 3). The Opinion then summarizes the hearsay and scant nonhearsay evidence produced by AHCA. (Opinion p. 3-6). The First DCA found that the ALJ improperly shifted the burden of proof to Avalon's Assisted Living on this issue and then determined that there was no direct admissible evidence supporting the ALJ's presumption that any person was receiving personal services for a period exceeding 24 hours. (Opinion p. 6). In compliance with Section 120.57(1)(c), Florida Statutes, the Opinion holds that uncorroborated hearsay cannot be used to formulate findings of fact in an administrative hearing. There is no express or direct conflict with N.W. case.

The Opinion issued by the First DCA is consistent with the following decisions ignored by AHCA in its jurisdictional brief: Scott v. Department of Professional Reg., 603 So. 2d 519 (Fla 1st DCA 1992); Harris v. Game and Fresh Water Fish Comm., 495 So. 2d 806 (Fla. 1st DCA 1986); Juste v. Department of Health and Rehabilitative Services, 520 So. 2d 69 (Fla. 1st DCA 1988), Doran v. Department of Health and Rehabilitative Services, 558 So. 2d 87 (Fla. 1st DCA 1990) and SKF Management v. Unemployment Appeals Comm., 664 So. 2d 345 (Fla. 5th DCA 1995). These decisions have uniformly held that uncorroborated hearsay evidence alone cannot be used to formulate findings of fact in administrative hearings.

II. AHCA FAILS TO UNDERSTAND THE CASE LAW ON HEARSAY IN ADMINISTRATIVE PROCEEDINGS AND THE OPINION DOES NOT CONFLICT WITH OTHER CASES THAT HOLD THAT UNCORROBORATED HEARSAY DOES NOT CONSTITUTE COMPETENT SUBSTANTIAL EVIDENCE

AHCA's argument concerning its perceived four "bedrock principles" of Florida jurisprudence merely emphasizes its failure to understand that uncorroborated hearsay cannot be used to formulate findings of fact in an administrative hearing. In addition, AHCA argues that its role in regulating facilities allows it to evade the requirements of Section 120.57(1)(c), Florida Statutes. Avalon's Assisted Living would disagree and would note that there is no decision by any of the district courts of appeal or by this Court allowing for an "exception" for an agency concerning the rules of evidence and Chapter 120, Florida Statutes. Rather, one could argue that Chapter 120, Florida Statutes was implemented to protect licensees and businesses from overreaching agency actions. There is simply no conflict, either express or direct, with any decision issued by any appellate court of this state concerning the Opinion issued by the First DCA.

The First DCA correctly applied the CSE standard in reviewing this case and there was no reweighing of evidence. The Opinion utilized the CSE standard in determining that AHCA failed to prove the allegations for both the administrative compliant and the denial of the applications for

renewal of the licenses. (Opinion p. 7 – 10). See, DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957), Walker v. Bd. of Prof. Eng'rs, 946 So. 2d 604 (Fla. 1st DCA 2006) and Strickland v. Fla. A & M Univ., 799 So. 2d 276, 278-79 (Fla. 1st DCA 2001) (all cited in the Opinion p. 7-8). The First DCA applied the correct standard of review in this case.

AHCA then argues that the First DCA failed to defer to the **ALJ or trial judge** on whether there is CSE in the record. (AHCA brief p. 7). This is a novel and unsustainable argument. It is the role of the district courts of appeal to determine whether CSE supports a lower court or agency decision. Section 120.68(7)(b), Florida Statutes. Review from this Court is sought when there is a conflict with other district courts of appeal or this Court, not with the trial judge or ALJ. See, Rule 9.030(a)(2)(A)(iv), Fla. R. App. P.

AHCA then argues that the Opinion held that hearsay is inadmissible in an administrative hearing. (AHCA brief p. 2). Nowhere in the Opinion does the First DCA make this statement. Instead, the Opinion summarizes the hearsay and nonhearsay evidence. (Opinion pages 3- 6). Importantly, the Opinion states that AHCA failed to bring any witness with first-hand knowledge or direct evidence of the critical allegations. (Opinion p. 3, 5). AHCA simply fails to understand that the hearsay analysis is a two-step process. Hearsay may be admitted into evidence under Section

120.569(2)(g), Florida Statutes (step one) but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions (step two). See, Section 120.57(1)(c), Florida Statutes. The district courts of appeal have consistently held that hearsay alone cannot be used to formulate findings of fact. Scott, Harris, Doran, SKF Management and Juste.

There is no express or direct conflict with any cases involving the ability of a trial judge to make reasonable inferences from the record. The ALJ in this case made **no inferences** in regard to the burden on AHCA to prove the unlicensed activity of an ALF – either concerning whether assistance with daily living was provided to one or more persons on a 24 hour basis or in regard to the familial issue. Instead, the ALJ **shifted the burden of proof** on these two issues. The ALJ concluded in paragraphs 26 and 31 of his amended R.O. that:

> 26. . . . There is no evidence that such residents were transported out of the facility during the evening or that they did not otherwise remain at the Avalon III location overnight.
>
> 31. . . . There was no evidence that the Avalon III residents were related to Mrs. Carter-Walker or her husband.

AHCA fails to cite to any case that allows a prosecuting agency to shift the burden of proof to the licensee in disciplinary cases. The Opinion

recognized this was an improper shifting of the burden of proof and there was a lack of CSE to support the allegations made by AHCA. (Opinion p.6).

There is no conflict with any case cited by AHCA concerning the familial issue. The Opinion stated that "**even if we assume for the sake of argument**, that the ALJ had an adequate evidentiary basis to make the reasonable inference that one or more residents received services for a period exceeding 24 hours, the Agency failed to meet its burden to prove that one or more of the adults at the facility were not relatives of the owner or administrator." (Opinion p. 9). Again, the ALJ, after realizing that AHCA failed to produce evidence on this issue, improperly shifted the burden to Avalon's Assisted Living to **disprove** the allegation. The First DCA correctly concluded that this was improper and that uncorroborated hearsay did not constitute CSE of the allegations. (Opinion p. 6). Since there is no express or direct conflict with any case cited by the Agency, jurisdiction in this case is not appropriate.

CONCLUSION

Because the decision of the First DCA in this case does not conflict with any decisions of other district courts of this state or of any decision of this Court, this Court should decline to accept jurisdiction of the case.

Respectfully submitted,

John E. Terrel, P. A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing pleading has been delivered by U.S. mail to Tracy Lee Cooper and Dwight O. Slater, Assistants General Counsel, AHCA, 2727 Mahan Drive, Bldg 3, Tallahassee, FL 32308 this 23rd day of March, 2012.

/S/

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John E. Terrel

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Brief complies with the font requirements set forth in Rule of Appellate Procedure 9.210(a).

/S/

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John E. Terrel