

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN GERRITY WADE, A.R.N.P.,)
R.N.,)
)
 Petitioner,)
)
vs.) Case No. 02-3027F
)
DEPARTMENT OF HEALTH, BOARD OF)
NURSING,)
)
 Respondent.)

)

FINAL ORDER

On July 31, 2002, the Petitioner, John Gerrity Wade, A.R.N.P., R.N. ("Mr. Wade"), filed his Petition for Attorney's Fees and Costs, in which he seeks an award of such fees and costs pursuant to Section 57.111, Florida Statutes. He asserts entitlement to such costs and fees on the basis of his contention that he is a "small business party" and a "prevailing small business party" within the meaning of those terms as defined at Section 57.111(3)(c) and (d), Florida Statutes.¹

Attached to the petition were numerous exhibits. One of those exhibits (Exhibit 6) is a certification dated June 12, 2002, by the Florida Secretary of State, which includes the following language:

I certify from the records of this office that JOHN G. WADE, L.L.C., is a limited liability company organized under the laws

of the State of Florida, filed on
November 17, 2000.

On August 1, 2002, the Division of Administrative Hearings issued an Initial Order which required the Respondent to, within 20 days, file a written statement setting forth its defenses to the petition. On August 21, 2002, the Respondent timely filed Respondent's Response to Initial Order, in which it stated its defenses. On the same date, the Respondent filed Respondent's Motion to Dismiss Petitioner's Petition for Attorneys Fees and Costs.²

In its motion seeking dismissal of the Petition in this case, the Respondent asserts that, for two basic reasons set forth in the motion, the Petitioner is not entitled to an award of attorney's fees and costs under Section 57.111, Florida Statutes. The first of such reasons is an assertion that the Petitioner is not a "small business party" within the definition of that term in Section 57.111(3)(d), Florida Statutes. The second of such reasons is an assertion that the agency's action in the underlying case was "substantially justified."³

On August 30, 2002, the Petitioner filed a response in opposition to the motion to dismiss. The arguments in the response include the assertion that the motion to dismiss should be denied because it relies on facts different from the facts alleged in the Petition and, for purposes of the motion to

dismiss, all facts alleged in the Petition must be taken as true. The response also contains legal arguments regarding the interpretation that should be given to the relevant definitions in Section 57.111, Florida Statutes, and legal arguments as to how some of the apparent conflicts and inconsistencies in the case law interpreting Section 57.111, Florida Statutes, should be resolved. And, finally, the response argues that the "substantial justification" issue is not ripe for disposition by motion to dismiss, because there are disputed issues of fact that are material to the "substantial justification" issue.

The parties' written arguments have been carefully considered during the preparation of this order. All facts asserted in the Petition for Attorney's Fees and Costs have been, as they must be, taken to be true for purposes of disposing of the motion.⁴

Section 57.111, Florida Statutes, includes the following definitions of terms used in that statutory provision:

(c) A small business party is a "prevailing small business party" when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;
2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of

issues which such party raised during the course of the proceeding; or

3. The state agency has sought a voluntary dismissal of its complaint.

(d) The term "small business party" means:

1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$2 million, including both personal and business investments; or

b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than \$2 million.

. . .

The Respondent's motion to dismiss first addresses the contention that the Petitioner is not a "small business party" within the meaning of that term, as defined in the statutory provisions upon which the Petitioner bases his claim to costs and fees. In the arguments incorporated into its motion to dismiss, the Respondent, relying on such cases as Shealy, Toledo Realty, Thompson, Jory, and Zalis,⁵ presents a convincing and compelling argument in support of the proposition that the Petitioner is not a "small business party." Conclusions based on the reasoning contained in the above-mentioned cases appear

to be much more sound than any conclusions that can be reached by relying on the reasoning that supports the conclusions reached in such cases as Albert and Ann & Jan.⁶

All of the argument on the subject of the Petitioner's status as a "small business party" on pages 7 through 17 of the Respondent's corrected motion to dismiss is hereby adopted as a basis for granting the motion to dismiss. Additional support for the same conclusion also flows from the fact that the business entity named JOHN G. WADE, L.L.C., a limited liability company organized under the laws of the State of Florida, did not come into existence until November 17, 2000, which was several months after the last of the alleged actions of Mr. Wade (the individual) that formed the basis for the agency actions for which Mr. Wade seeks costs and fees. (See Exhibits 1, 2, 3, and 6 attached to the Petition.) The business entity named JOHN G. WADE, L.L.C., was not a named party in any of the agency actions upon which Mr. Wade claims entitlement to costs and fees, and there is no rational basis for attributing to such business entity some form of imputed party status in administrative proceedings that arose from events that preceded the formation of the business entity upon which Mr. Wade bases his claim to status as a "small business party."

It is also worthy of note that Mr. Wade's claim to small business party status is asserted to be in his capacity as "the

sole proprietor of John G. Wade, LLC, an unincorporated business." (See paragraph 10 of the Petition.) Although the matter is not entirely free from doubt, the term "sole proprietor" does not appear to be a term that would normally encompass a person who was a creator, investor, or owner of a limited liability company, even if such person were the sole creator, investor, or owner. The statutory term for such a person, whether acting alone or in concert with others, is "member." Section 608.402(21), Florida Statutes. In this regard, it should also be noted that the definition of a "small business party" in Section 57.111, Florida Statutes, does not mention a "limited liability company," nor does it mention a "member" of such a company. And there does not appear to be any logical way to stretch the language of Section 57.111, Florida Statutes, far enough to encompass a "limited liability company" or a "member" of such a company.

Implicit in the Petitioner's arguments is the notion that a "limited liability company" is "an unincorporated business." Such does not appear to be the case. The most logical interpretation of the term "sole proprietor of an unincorporated business" is to limit the scope of the quoted term to those individuals who engage in a business or practice a profession in their own name or in a fictitious name, without creating a separate legal entity through which to engage in business or

practice a profession. A "limited liability company" is a legal entity that is separate and distinct from the person who created the company, even when the creator is the sole "member" of the company. Because of that separate and distinct status, a "limited liability company" does not appear to be an entity that would come within the normal meaning of the term "sole proprietor of an unincorporated business." This view of what is encompassed by the quoted definition is also supported by the fact that, although not a corporation in name, a "limited liability company" is, for all practical purposes, a corporation. In this regard it is interesting to note that Section 608.701, Florida Statutes, reads as follows:

In any case in which a party seeks to hold the members of a limited liability company responsible for the liabilities or alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under the law of this state.

Judging from the above-quoted provision, it would appear that a "limited liability company" is much more like a corporation than it is like a "sole proprietor of an unincorporated business." It seems most unlikely that the Legislature intended to include "limited liability companies" or their "members" within the statutory definition of "small business party" in Section 57.111, Florida Statutes.

The motion to dismiss also argues that the petition in this case should be dismissed because the agency actions upon which the Petitioner bases his claim were "substantially justified." On the present state of the record, the substantial justification issue cannot be addressed on the merits because the Respondent's position on that issue depends in part on facts that are not alleged in the petition or on facts asserted by the Respondent which are disputed by the Petitioner. Under such circumstances an issue raised in a motion to dismiss cannot properly be resolved on the merits.

FINAL ORDER

For all of the reasons set forth above, it is ORDERED:

That the pending motion seeking the dismissal of the petition in this case is GRANTED, the petition is hereby DISMISSED, all relief sought by the Petitioner is hereby DENIED, and the file of the Division of Administrative Hearings in this matter is hereby CLOSED.⁷

DONE AND ORDERED this 3rd day of February, 2003, in
Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of February, 2003.

ENDNOTES

1/ In the underlying license discipline proceeding, DOAH Case No. 02-1646PL, Mr. Wade is also seeking an award of attorney's fees and costs pursuant to Section 120.569(2)(e), Florida Statutes.

2/ The Respondent's original motion to dismiss filed on August 21, 2002, bore the case number of the underlying case (DOAH Case No. 02-1646PL) and was, accordingly, filed in that case. The Respondent promptly took steps to remedy its mistake, and on August 22, 2002, it filed a corrected motion to dismiss in this case. The Petitioner has moved to strike the corrected motion. The motion to strike is denied.

3/ In the Respondent's Response to Initial Order, the Respondent raised a third issue; namely, that the Petitioner was not entitled to recover attorney's fees and costs pursuant to Section 57.111, Florida Statutes, because such an award would be "unjust."

4/ In his response to the motion to dismiss, the Petitioner asserts that the motion to dismiss must be denied because, for purposes of the motion, the Petitioner's assertion that he is a "small business party" must be taken as true. While it is clear that all facts alleged in the petition must be taken as true for

the purpose of addressing the issues raised in a motion to dismiss, not every assertion of a Petitioner is an assertion of fact. In this case, the Petitioner's assertion that he is a "small business party" is an assertion of an opinion or of a conclusion reached by the Petitioner based on his interpretation of the facts. But that opinion or conclusion is not a fact. At best it is an assertion of a conclusion of law.

5/ Florida Real Estate Commission v. Shealy, 647 So. 2d 151 (Fla. 1st DCA 1994); Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc., 549 So. 2d 715 (Fla. 1st DCA 1989); Thompson v. Department of Health and Rehabilitative Services, 533 So. 2d 840 (Fla. 1st DCA 1988); Jory v. Department of Professional Regulation, 583 So. 2d 1075 (Fla. 1st DCA 1991); Department of Insurance and Treasurer v. The Administrators Corporation and Charles H. Zalis, 603 So. 2d 1359 (Fla. 1st DCA 1992). These cases interpreting Section 57.111, Florida Statutes, are all well-reasoned and are all consistent with each other. These cases also adhere to well-established rules of statutory construction in deciding how Section 57.111, Florida Statutes, should be applied.

6/ Albert, D.D.S. v. Department of Health, Board of Dentistry, 763 So. 2d 1130 (Fla. 4th DCA 2000), and Ann & Jan Retirement Villa, Inc. v. Department of Health and Rehabilitative Services, 580 So. 2d 278 (Fla. 4th DCA 1991). These two cases are inconsistent with a number of the conclusions reached in the cases cited in the immediately preceding endnote. Further, some of the reasoning supporting the conclusions reached in these two cases is, at best, difficult to follow. Some of such reasoning also appears to be inconsistent with a number of well-established rules of statutory construction.

7/ In view of the reasons for granting the motion to dismiss the petition in this case, there does not appear to be any manner in which the Petition for Attorney's Fees and Costs could be amended to overcome the basis for dismissal of the petition. Accordingly, this order is a Final Order without any provision for leave to amend the petition.

COPIES FURNISHED:

Kelly Cruz-Brown, Esquire
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302

Reginald Dixon, Esquire
Department of Health
4052 Bald Cypress Way
Bin C-65
Tallahassee, Florida 32399-3265

R. S. Power, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

William W. Large, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

Dan Coble, R.N., Ph.D., C.N.A.A. C., B.C.
Executive Director
Board of Nursing
Department of Health
4052 Bald Cypress Way, Bin C02
Tallahassee, Florida 32399-3252

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.