

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MELODY M. JOHNSON, P.A.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-3807F
	)	
DEPARTMENT OF HEALTH, BOARD OF	)	
MEDICINE,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

On October 14, 2005, Petitioner, Melody M. Johnson, P.A. (Johnson),<sup>1</sup> filed Respondent's Motion for Attorneys' Fees and Costs Pursuant to §57.111, Florida Statutes (2005).<sup>2</sup> On November 3, 2005, Respondent, Department of Health, Board of Medicine (Department), filed a Motion to Dismiss Petition for Attorney's Fees, waiving its right to an evidentiary hearing. On November 11, 2005, Johnson filed Petitioner's Response to Respondent's Motion to Dismiss Petition for Attorneys' Fees, waiving her right to an evidentiary hearing on the issues of whether she is a small business party and whether the Department was substantially justified in filing the Administrative Complaint.

APPEARANCES

For Petitioner: Michael S. Smith, Esquire  
Sonneborn Rutter Cooney &  
Klingensmith, P.A.  
Post Office Box 024486  
West Palm Beach, Florida 33402-4486

For Respondent: Lynne Quimby-Pennock, Esquire  
Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to recover attorney's fees and costs pursuant to Section 57.111, Florida Statutes.

PRELIMINARY STATEMENT

On January 26, 2005, the Department filed an Administrative Complaint against Johnson, alleging a violation of Subsection 458.331(1)(t), Florida Statutes (2001). Johnson requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings and assigned DOAH Case No. 05-0840PL. A final hearing was held on May 13, 2005, and a Recommended Order was issued on August 17, 2005. A Final Order was entered October 19, 2005, adopting the findings of fact and conclusions of law of the Recommended Order and dismissing the Administrative Complaint.

On October 14, 2005, Johnson filed Respondent's Motion for Attorneys' Fees and Costs Pursuant to §57.111, Florida Statutes, accompanied by an affidavit from Johnson; an affidavit by

Michael Smith, her attorney; and an invoice for professional services from Sonneborn, Rutter, Cooney & Klingensmith, P.A.

On November 3, 2005, the Department filed a Motion to Dismiss Petition for Attorneys' Fees, accompanied by Exhibits A through F. Exhibit A consists of pages 169 and 170 of the Transcript of the final hearing in DOAH Case No. 05-0840PL. Exhibit B is a composite exhibit entitled "Complete DOH Material to PCP." Exhibit C is a Department of Health Medical Review completed by Philip T. Nix, PA-C, MPAS. Exhibit D is Petitioner's Response to Respondent's Request for Production of Documents in DOAH Case No. 05-0840PL. Exhibit E is a portion of the transcript of a meeting of the North Probable Cause Panel of the Board of Medicine on January 21, 2005. Exhibit F is the Final Order in Department of Health v. Melody McSorley Johnson, P.A., DOH Case No. 2003-02105 and DOAH Case No. 05-0840PL.

In its Motion to Dismiss, the Department contends that Johnson is not a small business and that the Department was substantially justified in filing the Administrative Complaint. The Department agreed to waive an evidentiary hearing.

On November 11, 2005, Johnson filed Petitioner's Response to Respondent's Motion to Dismiss Petition for Attorneys' Fees, waiving an evidentiary hearing on the issues of whether Johnson was a small business and whether the Department was substantially justified in filing the Administrative Complaint.

## FINDINGS OF FACT

1. On January 26, 2005, the Department filed an Administrative Complaint against Johnson, alleging that she violated Subsection 458.331(1)(t), Florida Statutes (2001), relating to the care of a patient seen in the emergency room of Highlands Regional Medical Center (Highlands) on April 16, 2000. The Administrative Complaint was based on a probable cause finding by the Board of Medicine on January 21, 2005.

2. In determining that probable cause existed to file an administrative complaint against Johnson, the Probable Cause Panel considered the affidavit of Philip T. Nix, PA-C, MPAS, who opined that Johnson "failed to meet the standard of care by not ordering and obtaining an emergency CT scan of the brain based on the documented signs and symptoms of dizziness, neck pain, syncope, inability of patient to raise head, headache, intractable vomiting and weakness."

3. The Probable Cause Panel also considered the affidavit of Don Harvey, M.D., which was submitted by counsel for Johnson for consideration by the Probable Cause Panel. Dr. Harvey opined that Johnson's care of the patient at issue did not fall below the standard of care required of a physician's assistant and that a CT scan of the brain was not necessarily indicated. The Probable Cause Panel did take into consideration the opinion

of Dr. Harvey when they made the determination that probable cause existed to file an administrative complaint.

4. The investigation file was submitted to the Probable Cause Panel and reviewed by the Probable Cause Panel prior to their determination of probable cause. The investigation file revealed that the patient at issue had considered the filing of a civil lawsuit against Johnson and others. Included in the investigation file were affidavits by physicians, which were taken to support the civil lawsuit. An affidavit by John L. Gentri, M.D., was in the investigation file. Dr. Gentri opined that Johnson practiced below the standard of care by her failure "to recognize the classical symptoms for intracerebral hemorrhage, failure to order any diagnostic tests, including CT Scan of the head with contrast and lumbar puncture, and failure to obtain a formal neurological consultation."

5. The affidavit of Charles Brock, M.D., was in the investigation file. Dr. Brock also opined that Johnson practiced below the standard of care during the initial evaluation of the patient in the emergency room.

6. Included in the investigation file was a written statement submitted by Johnson. In the statement, Johnson stated:

From my review of the records, the triage nurse took a history and evaluated the patient. Initially, the patient's [sic]

presented at triage at 9:58 A.M. with complaints of nausea, vomiting, dizziness and cannot raise the head. The vital signs were 150/90 blood pressure, pulse of 80, respirations of 20. I saw the patient at 10:02 A.M. and she told me she had been vomiting 2 or 3 times an hour since the night before and she had sharp intermittent abdominal pain and that she had had a fever and she had some headache on the top of her head and had questionably passed out. She had a cough, flank and back pain. I took a past medical history, the medicines she was on, and any allergies. I did a complete physical exam, I found she was alert, anxious, and moderate distress.

7. Johnson requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings (DOAH). The case was assigned DOAH Case No. 05-0849PL. On April 29, 2005, the Department filed Petitioner's Motion to Amend Administrative Complaint, which was granted by an Order dated May 5, 2005.

8. The actions which were the subject of the Administrative Complaint occurred at Highlands, where Johnson was a full-time employee. The evidence neither established that at the time of the incident alleged in the Administrative Complaint that Johnson was practicing as a sole proprietor of an unincorporated business nor that she was contracting with Highlands as an independent contractor. Thus, the Administrative Complaint was brought against Johnson in her individual capacity while an employee of Highlands and not for

violations that occurred while she was practicing as the sole proprietor of an unincorporated business.

9. The final hearing in DOAH Case No. 05-0849PL was held on May 13, 2005. Johnson testified that the records that she made in the emergency room indicating that the patient had "passed out" were in error and that the patient complained of dizziness, but denied passing out. The opinion of Philip Nix, the Department's expert witness, that Johnson's care of the patient fell below the standard of care was based in part on his assumption that the patient had lost consciousness.

10. The evidence does not establish that at the time that the Administrative Complaint was issued that the Department, the Probable Cause Panel, or Mr. Nix was aware that Johnson's notation in the medical records that the patient had passed out was in error. Based on the written statement provided by Johnson included in the investigation file, it does not appear that prior to the filing of the Administrative Complaint Johnson had informed the Department or the Probable Cause Panel that the notation was in error.

11. A Recommended Order was issued on August 17, 2005, finding that the Department failed to establish the allegations in the Amended Administrative Complaint. On October 18, 2005, the Department filed a Final Order in DOH Case No. 2003-02105, adopting the findings of fact and the conclusions of law

contained in the Recommended Order and dismissing the Administrative Complaint against Johnson.

12. Johnson filed Respondent's Motion for Attorneys' Fees and Costs Pursuant to §57.111, Florida Statutes, on October 14, 2005. Included with the motion, was an affidavit of Johnson.

13. Based on the affidavit filed by Johnson, the undisputed evidence establishes that at the time the Administrative Complaint was filed, Johnson was "a sole proprietor of an unincorporated business which consisted of [her] own professional practice as a physician's assistant" and that her "professional practice consisted of [herself] and no other employees" and that her "professional practice did not have more than 25 full-time employees or a net worth of not more than \$2 million, including both personal and business investments."

14. Johnson retained Sonneborn, Rutter, Cooney & Klingensmith, P.A., to represent her in the administrative action filed by the Department. Michael S. Smith, Esquire was counsel of record for Johnson. She also retained expert witnesses to testify on her behalf at the final hearing in the administrative action.

15. The affidavit of Michael S. Smith, Esquire was submitted with the motion for fees. Attached to his affidavit was an invoice from his law firm, which listed the hours of



attorney time and paralegal time expended in defense of Johnson and a list of the costs incurred in defense of the administrative proceeding.

16. Based on Smith's affidavit, it is undisputed that Smith is a member of the Florida Bar in good standing and has been practicing law for 19 years, during which time he prosecuted or defended civil and administrative matters concerning medical malpractice. Smith customarily charges his clients \$150 per hour for the defense of administrative matters such as DOAH Case No. 05-0840PL.

17. Based on the undisputed invoice attached to the motion for fees and costs, Johnson incurred \$19,485.00 for attorney's fees and paralegal fees and \$9,770.40 for costs in the defense of the Administrative Complaint filed against her in DOAH Case No. 05-0840PL. The fees and costs are reasonable and were necessary for the defense of the administrative proceeding.

#### CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 57.111(4), 120.569, and 120.57, Fla. Stat.

19. Subsection 57.111(4)(a), Florida Statutes, provides:

Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated

by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

20. The term "small business party" is defined in Subsection 57.111(3)(d), Florida Statutes, as follows:

- 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 the 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 of 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 . . . .

21. It is undisputed that at the time the incident which was the subject of the Administrative Complaint occurred, Johnson was an employee of Highlands. It is undisputed that at the time the Administrative Complaint was filed, Johnson was the sole proprietor of an unincorporated business. The evidence does not establish whether Johnson was practicing as a sole proprietor of an unincorporated business in addition to her employment with Highlands at the time of the incident alleged in the Administrative Complaint. It is clear that the actions alleged in the Administrative Complaint did not involve her

status as a sole proprietor of an unincorporated business, but involved actions committed while she was an employee. Thus, the Administrative Complaint was brought against Johnson in her individual capacity not in her capacity as a sole proprietor of an unincorporated business.

22. In Florida Real Estate Commission v. Shealy, 647 So. 2d 151 (Fla. 1st DCA 1994), the court held that a small business party as defined in Section 57.111, Florida Statutes, does not encompass individual employees. In Daniels v. Florida Department of Health, 898 So. 2d 61 (Fla. 2005), the Florida Supreme Court held that when a complaint is filed against a person in the person's individual capacity, the person does not qualify as a small business pursuant to Section 57.111, Florida Statutes.

23. Johnson argues that the only time to consider whether Johnson was a small business is at the time the Administrative Complaint is filed. This argument would have merit if the Administrative Complaint had been brought against Johnson based on her actions as a sole proprietorship. It is clear that the Administrative Complaint was not brought against Johnson for actions committed while practicing as a sole proprietorship, but was brought against her in her individual capacity while an employee. The Administrative Complaint must relate to the small business. Otherwise, an absurd result could occur such as a

teacher, whose teaching certificate is being disciplined by the Education Practices Commission for misconduct in the classroom, could be qualified as a small business because, in addition to teaching, she was the sole proprietor of an antique shop.

24. Johnson has failed to qualify as a small business pursuant to Section 57.111, Florida Statutes. Even if Johnson were considered to be a small business for purposes of Section 57.111, Florida Statutes, the Department has established that it was substantially justified in filing the Administrative Complaint. Subsection 57.111(3)(e), Florida Statutes, provides: "A proceeding is 'substantially justified' if it had a reasonable basis in law and fact at the time it was initiated by a state agency." Attorney's fees and costs are not to be awarded if the actions of the agency were substantially justified at the time the action was initiated.

25. At the time the Administrative Complaint was filed, the Department had conducted an investigation, and had obtained an opinion from an expert, Philip Nix, that Johnson's actions fell below the standard of care. In addition to Mr. Nix's opinion, the Probable Cause Panel was also privy to two affidavits in the investigation file from physicians also opining that Johnson's actions fell below the standard of care. The Probable Cause Panel was aware of the opinion from

Dr. Harvey that Johnson's actions did not fall below the standard of care.

26. In Department of Health, Board of Medicine v. Thomas, 890 So. 2d 400 (Fla. 1st DCA 2004), the Department had three expert opinions. One of the expert opinions indicated the physician did not meet the standard of care, and the other two opinions indicated that the physician did meet the standard of care. The court stated: "The Department was free to believe the opinion of one expert despite the existence of two expert opinions to the contrary because a decision to prosecute that turns on a credibility assessment has a reasonable basis in fact and law."

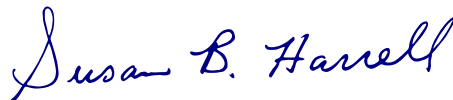
27. Johnson argues that the Department should have investigated the case more fully before bringing the Administrative Complaint, because a more complete investigation would have revealed that the patient did not lose consciousness. Such an argument is without merit. The medical record made by Johnson indicated that the patient had passed out. When Johnson submitted a written statement to the Department prior to the meeting of the Probable Cause Panel, she did not indicate that her notation in the medical records was in error. Thus, it was reasonable to conclude that the patient had passed out.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Motion for Attorneys' Fees and Costs Pursuant to §57.111, Florida Statutes, is DENIED.

DONE AND ORDERED this 1st day of March, 2006, in Tallahassee, Leon County, Florida.



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SUSAN B. HARRELL  
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 1st day of March, 2006.

ENDNOTES

1/ Petitioner filed the motion for attorneys' fees under the name Melody M. McSorley, which was her name at the time the Administrative Complaint was filed against her in DOAH Case No. 05-3807. At the time of the final hearing in DOAH Case No. 05-3807, Petitioner had married, and her married name was Melody M. Johnson. The Recommended Order and the Final Order reflected her married name, and she will be referred to in this Final Order by her married name.

2/ Unless otherwise indicated, citations to the Florida Statutes are to the 2005 edition.

COPIES FURNISHED:

Lynne Quimby-Pennock, Esquire  
Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

Robert E. Fricke, Esquire  
Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

Michael S. Smith, Esquire  
Sonneborn Rutter Cooney & Klingensmith, P.A.  
Post Office Box 024486  
West Palm Beach, Florida 33402-4486

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

Edward A. Tellechea, Esquire  
Rosanna Catalano, Esquire  
Office of Attorney General  
The Capitol, Plaza Level 01  
Tallahassee, Florida 32399-1050

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 the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a 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.