

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HERBERT R. SLAVIN, M.D.,

Petitioner,

vs.

Case No. 13-2097F

DEPARTMENT OF HEALTH, BOARD OF  
MEDICINE,

Respondent.

\_\_\_\_\_ /

FINAL ORDER

Pursuant to notice, a final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on August 14, 2013, by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Andrea L. Wolfson, Esquire  
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For Respondent: Sharmin R. Hibbert, Esquire  
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STATEMENT OF THE ISSUE

Whether Petitioner, Dr. Herbert R. Slavin, is entitled to an award of attorney's fees and costs in an amount not exceeding \$50,000 pursuant to section 57.111, Florida Statutes (2011).

PRELIMINARY STATEMENT

On October 31, 2011, the Department of Health ("the Department") filed a two-count Administrative Complaint ("Complaint") against Dr. Herbert R. Slavin. In Count I of the Complaint, the Department alleged that Dr. Slavin violated section 458.331(1)(t), Florida Statutes, in that his treatment of a patient fell below the appropriate standard of care. The Department further alleged, in Count II of the Complaint, that Dr. Slavin failed to supervise properly the activities of his physician assistant, contrary to section 458.331(1)(dd). Respondent timely requested a formal hearing to contest the allegations, and, on January 6, 2012, the cause was referred to the Division of Administrative Hearings ("DOAH") and assigned Case No. 12-0079PL. The matter was subsequently transferred to the undersigned, who conducted a final hearing on June 22 and September 14, 2012.

In a Recommended Order dated January 7, 2013, the undersigned concluded that Counts I and II of the Complaint should be dismissed. See Dep't of Health v. Slavin, Case No. 12-0079PL (Fla. DOAH Jan. 7, 2013) (finding, with respect to

Count I, that the Department failed to adduce clear and convincing evidence that Dr. Slavin violated the standard of care; concluding that the Department had abandoned Count II). On April 19, 2013, the Board of Medicine entered Final Order No. 2010-06064, which adopted the Findings of Fact and Conclusions of Law contained in the Recommended Order.

On June 11, 2013, Dr. Slavin filed, through counsel, a "Motion for Attorney's Fee[s] and Costs Pursuant to [the] Equal Access to Justice Act, [section] 57.111[,] [Florida Statutes] (2011)," which alleged: that Dr. Slavin prevailed in the underlying administrative proceeding (DOAH Case No. 12-0079PL); that Dr. Slavin qualifies as a "small business party," as that term is defined by section 57.111; and that the underlying proceeding lacked substantial justification at the time it was initiated. In its "Response to Initial Order," filed on July 1, 2013, the Department disputed Dr. Slavin's status as a small business party and asserted, further, that the underlying action was substantially justified. The Department conceded, however, that an award of \$50,000.00 (the statutory maximum) would be reasonable if the underlying action were found to lack substantial justification, and if Dr. Slavin proved his status as a small business party.

The final hearing commenced on August 14, 2013, during which Dr. Slavin testified on his own behalf and introduced five

exhibits, numbered 1 through 5. The Department, which called no witnesses, introduced two exhibits, numbered 1 and 2. At the conclusion of the hearing, the undersigned granted Dr. Slavin's request to extend the deadline for the submission of proposed final orders to 20 days from the filing of the transcript.

The final hearing Transcript was filed with DOAH on August 29, 2013. Both parties submitted proposed final orders, which the undersigned has considered in the preparation of this Final Order.

Unless otherwise noted, all references to the Florida Statutes are to the 2011 codification.

#### FINDINGS OF FACT

1. Dr. Slavin, a licensed physician who specializes in internal medicine, has practiced in the state of Florida since 1981. In or around 2008, Dr. Slavin formed, and is the sole shareholder of, "Ageless Medicine Associates," a subchapter S corporation<sup>1/</sup> under which he practices medicine.

2. On October 31, 2011, the Department filed an Administrative Complaint that charged Dr. Slavin with two statutory violations, both of which were ultimately dismissed by the Board of Medicine. In connection with that proceeding, Dr. Slavin now seeks an award of attorney's fees and costs pursuant to section 57.111.

3. As explained later in this Final Order, a party seeking fees and costs pursuant to section 57.111 must demonstrate that he or she was a "small business party" at the time the underlying action was initiated by the state—in this instance, October 31, 2011. Section 57.111(3)(d) contemplates that a small business party can take four alternative forms, only two of which require discussion here: a partnership or corporation, including a professional practice, that, during the relevant timeframe, had 25 or fewer full-time employees or a net worth of not more than \$2,000,000 (section 57.111(3)(d)1.b.); or an individual whose net worth did not exceed \$2,000,000 during the relevant period (section 57.111(3)(d)1.c.).

4. The evidence establishes that, as of October 2011, Ageless Medicine Associates had fewer than 25 employees and a net worth that did not exceed \$2,000,000. The problem, though, and as discussed elsewhere in this Order, is that section 57.111(3)(d)1.b. has no application where, as in this case, the underlying complaint was filed against a licensee individually, rather than the partnership or corporation under which the licensee conducts business.

5. As for Dr. Slavin's personal finances, his 2011 tax return reflects income of \$171,810, virtually all of which comprises wages and business income derived from Ageless Medicine Associates, and an adjusted gross income of \$161,400. The

remainder of Dr. Slavin's financial picture (including, for example, any assets on hand that did not generate taxable income) during October 2011 is nebulous, however, for nearly all of his testimony focused incorrectly on his finances at the time of the final hearing:

Q. Are you, doctor, currently worth \$2,000,000?

A. No.

\* \* \*

Q. Dr. Slavin, do you own a home?

A. Yes.

Q. How much, if you know, is that home worth?

A. Probably around \$300,000 to \$350,000.

Q. And do you have a mortgage on that home?

A. Yes.

Q. How much is the mortgage; do you know?

A. \$145,000.

Q. And do you have any cash in the bank?

A. Yes.

Q. How much?

A. Around \$10,000 . . . .

\* \* \*

Q. Do you own any boats?

A. No.

Q. Do you own any vacation homes?

A. No.

Q. Do you own any interest in any other businesses?

A. No.

Q. Do you have a lot of stock accounts?

A. No.

\* \* \*

Q. Okay. Is there any other asset that you have that has not been mentioned; your home, your business? Do you own your vehicles?

A. No, they're leased.

Q. Do you own any other stocks or bonds that provide you with an income or that are worth money, that you know of?

A. No.

\* \* \*

Q. Dr. Slavin, you testified that -- You were asked by counsel whether or not you had a lot of stocks or bonds as assets and you stated no. Do you -- what does a lot mean?

A. Well, I have -- I don't have any direct ownership of stocks or bonds. There are some annuities I have that have, I guess, investments and mutual funds or something. You know, I'm not --

\* \* \*

Q. Dr. Slavin, have you presented any information or any documentation as to what items are within your home?

A. Not that I'm aware of. I have a television, --

Q. Do you have --

A. -- a refrigerator and --

Q. Do you have furniture in your home?

A. Yeah. I have furniture, a refrigerator, stove, microwave. I have --

Q. Do you have computer equipment in your home?

A. I have laptop computers in the home.

Q. Do you have any personal items; jewelry, watches in your home?

A. I have -- Yes, I have watches.

Final Hearing Transcript, pp. 23; 25-28; 30-31 (emphasis added).

6. Even assuming, arguendo, that Dr. Slavin's testimony had been properly oriented to the relevant time period (which it was not, in nearly all instances), his overall evidentiary presentation was simply too fragmentary to permit the undersigned to independently determine the value of his net worth—a figure derived<sup>2/</sup> by subtracting total liabilities from total assets. For example, Dr. Slavin provided: no information concerning his annuities and mutual funds, the value of which could be non-trivial due to the remunerative nature his profession and his length of time in practice; no details regarding the value of his household assets; and no credible evidence regarding the value of his home.<sup>3/</sup> In light of these gaping holes in the evidence, which preclude anything more than rank speculation concerning the value



of Dr. Slavin's personal net worth, it is determined that status as a small business party has not been proven.<sup>4/</sup>

7. Because Dr. Slavin's failure to establish his status as a small business party is fatal to his application for attorney's fees, it is unnecessary to determine whether the underlying proceeding was substantially justified.

#### CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 57.111(4), 120.569, and 120.57(1), Florida Statutes.

9. Section 57.111, also known as the Florida Equal Access to Justice Act ("FEAJA"), provides, in relevant part, as follows:

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.

§ 57.111(4) (a), Fla. Stat.

10. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to section 57.111, the initial burden of proof is on the party requesting the award to demonstrate by a preponderance of the evidence that he or she:

(1) prevailed in the underlying action; and (2) was a small business party at the time the underlying cause was initiated.

Should the party seeking the award satisfy these elements, the burden shifts to the agency to prove that it was substantially justified in initiating the underlying action or that special circumstances exist that would make an award unjust. See Dep't of HRS v. S. Beach Pharmacy, 635 So. 2d 117, 121 (Fla. 1st DCA 1994) ("[O]nce a prevailing small business party proves that it qualifies as such under section 57.111, the agency that initiated the . . . underlying proceeding has the burden to show substantial justification or special circumstances"); Dep't of Prof'l Reg., Div. of Real Estate v. Toledo Realty, Inc., 549 So. 2d 715, 718 (Fla. 1st DCA 1989).

11. It is undisputed that Dr. Slavin prevailed in the underlying proceeding; the issue, therefore, is whether he qualifies as a small business party pursuant to section 57.111(3)(d), which reads:

(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;

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; or

c. An individual whose net worth did not exceed \$2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade; or

2. Any small business party as defined in subparagraph 1., without regard to the number of its employees or its net worth, in any action under s. 72.011 or in any administrative proceeding under that section to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, or interest thereon, or penalty therefor.

(emphasis added).

12. As Dr. Slavin is not the sole proprietor of an unincorporated business and the underlying proceeding did not relate to the legality of a tax assessment, two of the four alternatives (specifically, sections 57.111(3)(d)1.a. and 57.111(3)(d)2.) for establishing status as a small business party are plainly inapplicable here.<sup>5/</sup> This leaves but two possibilities: section 57.111(3)(d)1.b., which involves partnerships and corporations that, at the time the underlying proceeding was initiated, employed 25 or fewer employees or had a net worth not exceeding \$2,000,000; and/or section 57.111(3)(d)1.c., which relates to the holder of a professional license whose net worth did not exceed \$2,000,000 at

the time the underlying action was brought against the individual's license.

13. Beginning with the first of the two remaining options, it is concluded that section 57.111(3)(d)1.b. does not apply in instances where, as here, the underlying action was filed against the licensee individually—as opposed to the partnership or corporation within which the licensee conducts business. See Daniels v. Dep't of Health, 898 So. 2d 61, 66 (Fla. 2005). In Daniels, the Department filed an administrative complaint against a licensed midwife in her individual capacity. The complaint stemmed from questionable treatment furnished to a patient at "South Beach Maternity Associates, Inc.," a business organized as a subchapter S corporation, and one that the licensee solely owned. See id. at 63-64. Upon the Department's subsequent dismissal of the complaint, the licensee filed a petition for attorney's fees and costs pursuant to section 57.111. During the proceedings before the administrative law judge (ALJ), the licensee argued that her corporation, which employed fewer than 25 persons and had a net worth of less than \$2,000,000, qualified as a small business party pursuant to section 57.111(3)(d)1.b. In denying the request for fees, the ALJ concluded, inter alia, that section 57.111(3)(d)1.b. was inapplicable because the Department had filed the complaint against the licensee individually. See id. at 64. The ALJ's reasoning in this regard

was ultimately adopted by the Supreme Court of Florida. Id. at 66, 68 (holding that the licensee was not included within section 57.111(3)(d)1.b. where the agency filed a complaint against her as an individual and not against her corporation, notwithstanding the fact that the licensee and the corporation were "one and the same entity").

14. During the final hearing in this cause, Dr. Slavin's counsel questioned the extent to which Daniels remains good law in light of the 2006 revision to section 57.111, which added subsection (3)(d)1.c. (As noted previously, subsection (3)(d)1.c. defines small business party to include an individual whose net worth did not exceed \$2,000,000 at the time the state initiated the action against his or her license.) This revision, however, simply amended section 57.111 to add an additional, alternative means by which a party may attempt to establish small business party status; the amendment did nothing to alter the holding in Daniels that subsection (3)(d)1.b. (the subsection dealing with partnerships or corporations) is inapplicable where the underlying action was filed against a person in his or her individual capacity.

15. Accordingly, to demonstrate his status as a small business party, Dr. Slavin's only available option was to prove, consistent with section 57.111(3)(d)1.c., that his individual net worth did not exceed \$2,000,000 at the time the Department filed

its Complaint. However, and for the reasons explained previously, Dr. Slavin failed to meet this burden. See Fields v. United States, 29 Fed. Cl. 376, 383 (Fed. Cl. 1993) (denying application for attorney's fees under federal analog to section 57.111 where evidence concerning plaintiff's net worth was incomplete and lacked specificity), aff'd, 1995 U.S. App. LEXIS 22609 (Fed. Cir. 1995); Scherr Constr. Co. v. United States, 26 Cl. Ct. 248, 250-51 (Fed. Cl. 1992) (denying application for attorney's fees where the record evidence did "not enable the court to ascertain plaintiff's net worth, which plaintiff must establish as a predicate for an award"); Monzon v. Dep't of Bus. & Prof'l Reg., Case No. 11-6007F, 2012 Fla. Div. Adm. Hear. LEXIS 654, \*10-11 (Fla. DOAH Mar. 30, 2012) (denying application for attorney's fees and costs pursuant to section 57.111 where petitioner's evidence incorrectly focused on his net worth at the time of the final hearing).

16. As Dr. Slavin has failed to establish his status as a small business party, the instant application for attorney's fees and costs must be denied. See Fields, 29 Fed. Cl. at 384 n.6 ("Because plaintiff's deficiency in proof is fatal respecting whether he is a 'party' . . . it is, therefore, unnecessary to reach [the issue of substantial justification]").

ORDER

It is ORDERED that Dr. Slavin shall recover nothing in this action. The file of the Division of Administrative Hearings is closed.

DONE AND ORDERED this 27th day of September, 2013, in Tallahassee, Leon County, Florida.



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EDWARD T. BAUER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of September, 2013.

ENDNOTES

<sup>1/</sup> As explained by the Supreme Court:

Subchapter S of the Internal Revenue Code . . . was enacted in 1958 to eliminate tax disadvantages that might dissuade small businesses from adopting the corporate form and to lessen the tax burden on such businesses. The statute accomplishes these goals by means of a pass-through system under which corporate income, losses, deductions, and credits are attributed to individual shareholders in a manner akin to the tax treatment of partnerships.

Bufferd v. Comm'r, 506 U.S. 523, 524-25 (1993).

<sup>2/</sup> Although "net worth" is neither defined by section 57.111 nor any cases applying that statute, courts interpreting the federal counterpart to section 57.111 have held that "net worth is calculated by subtracting total liabilities from total assets." Broadus v. United States Army Corps of Eng'rs, 380 F.3d 162, 167 (4th Cir. 2004).

<sup>3/</sup> On cross-examination by the Department's counsel, Dr. Slavin offered an unpersuasive "guess" as to the value of his home in October 2011:

Q. Doctor, you said that your home varies in price from \$300,000 to \$350,000. Do you have an exact value as to how much your home is worth?

A. It depends on what year you're talking about.

Q. In October of 2011 . . . specifically, how much was your home valued at?

A. Like I said -- You know, nobody's buying it. But, if I were to guess it would be \$300,000 to \$350,000. . . .

Final Hearing Transcript, p. 29 (emphasis added).

<sup>4/</sup> With respect to the question of small business party status, Dr. Slavin's Proposed Final Order includes the following footnote:

[I]f this Court determines that Dr. Slavin should have provided more evidence to establish that he did not have a net worth of less than \$2,000,000, Dr. Slavin maintains that he relied upon the representations made by the Department of Health in its Response to Motion for Attorney[']s Fees . . . to his detriment.

To the extent the foregoing passage can be read to suggest that the Department lulled Dr. Slavin into a state of unpreparedness, such contention is not borne out by the record. First, the Department's Response explicitly denied Dr. Slavin's allegation concerning small business party status, albeit with a caveat that the Department's position could change in the future. See



July 1, 2013, Response to Initial Order, p. 2. In any event, the Joint Pre-hearing Stipulation (filed nearly five weeks after the Department submitted its Response to the Motion for Attorney's Fees) clearly identifies, as an issue of law and fact that remained to be litigated, Petitioner's status as a small business party. See August 5, 2013, Joint Pre-hearing Stipulation, p. 6. Dr. Slavin's argument is also refuted by an exchange that occurred at the outset of the final hearing, during which his counsel acknowledged, without any hesitancy or qualification, Dr. Slavin's burden to prove his status as a small business party:

THE HEARING OFFICER: Okay. All right. So, the parties agree that Dr. Slavin was a prevailing party.

So, the issues are, number one, does he qualify as a small business party. That would be his burden to demonstrate. And, if he can meet that burden then the State would need to prove that their actions were substantially justified at the time they were taken, I guess; more or less.

Is that -- Are we . . . all on the same page?

MS. WOLFSON: Yes, sir.

MS. HIBBERT: Yes, Your Honor.

THE HEARING OFFICER: All right. Well -- So, I guess, issue one is small business party and that's on the [P]etitioner.

So, any testimony on that, Ms. Wolfson?

MS. WOLFSON: Yes, I do, Your Honor . . . .

Final Hearing Transcript, p. 12.

<sup>5/</sup> See Daniels v. Dep't of Health, 898 So. 2d 61, 66 (Fla. 2005) (holding section 57.111(3)(d)1.a. did not apply where licensee practiced under a "subchapter-S corporation, and not as a sole proprietor.").

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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.