NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

TAMPA BAY DOWNS, INC., and TBDG ACQUISITION, LLC, d/b/a TGT Poker and Racebook, Appellants, v. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING, Appellee.	)	Case No. 2D18-1968

Opinion filed February 28, 2020.

Appeal from the Division of Administrative Hearings.

Christopher M. Kise, James A. McKee, and Joshua M. Hawkes of Foley & Lardner LLP, Tallahassee, for Appellants.

Ross Marshman of Department of Business & Professional Regulation, Tallahassee, for Appellee.

NORTHCUTT, Judge.

Appellants Tampa Bay Downs, Inc., and TBDG Acquisition, LLC, d/b/a TGT Poker and Racebook, appeal a final order of an administrative law judge (ALJ) determining their entitlement to attorney's fees and costs in proceedings on their rule

challenge. They contend that after their proceeding was consolidated with proceedings filed by other parties, the ALJ should not have applied the applicable statutory attorney's fee limitation to all of the petitions in the aggregate. We agree, and we reverse the order.

In 2016, the appellants filed a petition pursuant to section 120.56(2), Florida Statutes (2015), challenging the Department of Business and Professional Regulation's proposed repeal of Florida Rules of Administrative Procedure 61D-11.001(17) and 61D-11.002(5). The proceedings on appellants' petition were consolidated with those on petitions filed by seven other parties, and all of the petitioners ultimately prevailed on the merits. See generally Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering v. Dania Entm't Ctr., LLC, 229 So. 3d 1259 (Fla. 1st DCA 2017) (reviewing the merits of the rule challenges).

After the ALJ's order was affirmed on appeal, see id. at 1266, the ALJ considered the motions of the appellants and the other petitioners for awards of attorney's fees and costs pursuant to section 120.595(2), Florida Statutes (2017). That subsection provides as follows:

> If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings

> for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed $50,000.

§ 120.595(2), Fla. Stat. (emphases added).

The attorney's fee proceedings were likewise consolidated. They then were bifurcated into two phases in which the ALJ first considered how the statutory cap on attorney's fees was to be applied and then determined the amount of fees and costs to be awarded. Following a hearing on the effect of the limitation, the ALJ issued a partial final order concluding that "in cases such as this, in which a group of Petitioners is acting in a concerted and collective manner to achieve a common result, the total award of fees to the Petitioners, and against the agency, is limited to $50,000." The ALJ then issued a final order awarding all of the petitioners, collectively, a single attorney's fee award of $50,000, as well as additional costs. (The order did not specify how the $50,000 award was to be apportioned among the various petitioners.) The petitioners then filed two separate appeals, one by the appellants here and another by the other seven petitioners.[1] The sole issue presented is whether after separate rule challenge proceedings are consolidated the limitation on attorney's fees imposed by section 120.595(2) applies on an aggregate basis or per petition.

"It is a fundamental principle of statutory interpretation that legislative intent is the 'polestar' " of our analysis. Borden v. E.-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006). "To discern legislative intent, we look 'primarily' to the actual language used in the statute." Id. The appellants and the Department each argue that

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[1]The second appeal by the other seven petitioners, Dania Entertainment Center, LLC, et al. v. Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering, No. 2D18-1967, has been voluntarily dismissed.

the plain language of the statute supports their respective positions. The appellants contend that the use of the singular "award" of attorney's fees means that each party is entitled to an award up to $50,000, whereas the Department argues that the singular "award" mandates one award up to $50,000 that must apply to all parties. Their conflicting interpretations of the statute's language illustrate our view that its plain language, standing alone, does not yield a clear answer to the question at hand.

That said, our consideration of the statute in light of the scheme of which it is a part confirms that it was intended to provide for an award of fees up to $50,000 for each petition. Statutes related to the same subject matter must be read *in pari materia.* Hill v. Davis, 70 So. 3d 572, 577 (Fla. 2011). "Where, as here, the Florida Legislature has provided a unified and comprehensive statutory scheme, this Court will 'attempt to follow the requirements that it has set forth.' " Id. (quoting E.A.R. v. State, 4 So. 3d 614, 629 (Fla. 2009)).

The subject attorney's fee statute refers to section 120.56(2*)* and is intended to apply to proceedings thereunder. Section 120.56 addresses administrative rule challenges. Subsection (1) sets forth provisions applicable to rule challenges generally. It states that "[a]ny person" who is substantially affected by a rule or proposed rule may seek an administrative determination of its invalidity, and it prescribes what must be contained in "the petition." § 120.56(1)(a)–(b). In turn, subsection (2), which relates to challenges to proposed rules, contemplates the filing of "a petition." § 120.56(2)(a).

Thus, of course, a single party is entitled to file a petition challenging a proposed rule. If that petition results in a declaration that the proposed rule or a part

thereof is invalid, that petitioner is entitled to recover reasonable attorney's fees of up to $50,000. Importantly, this entitlement is a substantive right. See Am. Family Mut. Ins. Co. v. Alvis, 72 So. 3d 314, 317 (Fla. 2d DCA 2011) ("[T]he statutory right to attorney's fees is a substantive right." (citing Menendez v. Progressive Express Ins. Co., 35 So. 3d 873, 878–79 (Fla. 2010))). As such, it is not altered by the consolidation of proceedings on one petition with proceedings on another. See CDI Contractors, LLC. v. Allbrite Elec. Contractors, Inc., 836 So. 2d 1031, 1033 (Fla. 5th DCA 2002) (holding that a party's entitlement to attorney's fees under mechanics lien law could not be diminished by consolidation of cases); Shores Supply Co. v. Aetna Cas. & Sur. Co., 524 So. 2d 722, 725 (Fla. 3d DCA 1988) ("Consolidation does not merge suits into a single cause or change the rights of the parties, or make those who are parties in one suit parties in another. Rather, each suit maintains its independent status with respect to the rights of the parties involved." (quoting Wagner v. Nova Univ., Inc., 397 So. 2d 375, 377 (Fla. 4th DCA 1981))). The purpose of consolidating cases is strictly "to minimize expense and delay. Consolidation affects the procedure of the cases, but has no effect on the substantive rights of the parties in an individual case, and does not destroy their separate identities." CDI Contractors, 836 So. 2d at 1033 (citation omitted).

Indeed, the very administrative rule that authorized consolidation of the proceedings in this case states that "separate matters which involve similar issues of law or fact may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party." Fla. Admin. Code R. 28-106.108 (emphasis added). If the ALJ's interpretation of section 120.595(2) were to prevail, no rule challenge under section

120.56(2) could be consolidated with another because the consolidation would prejudice the petitioners' statutory rights to recover their attorney's fees. Because all petitioners would be seeking a common result, their substantive entitlement to attorney's fees would be reduced to only a share of that awarded under an aggregate $50,000 cap solely because of the consolidation. Cf. Aguilar v. Kohl's Dep't Stores, Inc., 68 So. 3d 356, 359 (Fla. 1st DCA 2011) (rejecting a statutory interpretation in a workers' compensation case that "would provide a disincentive to the administrative consolidation of cases for convenience, encouraging the development of an arbitrarily burdensome system for dispute resolution").

In effect, the ALJ fashioned an exception to a prevailing petitioner's statutory right to recover up to $50,000 in attorney's fees, when the legislature prescribed no such exception. This was beyond the ALJ's authority. "Even when an agency is pursuing the policy objectives underlying the statutory scheme it is charged with enforcing, the agency may not disregard or expand upon the terms of the statutes themselves." Amalgamated Transit Union Local 1593 v. Hillsborough Area Reg'l Transp., 139 So. 3d 345, 351 (Fla. 2d DCA 2014).

The Department argues that applying the fee limitation on a per-petition basis could incentivize petitioners to band together, hire the same attorney, prosecute virtually identical rule challenges, and then each recover full attorney's fees. The premise that petitioners might coordinate their efforts is not unfounded. Indeed, the ALJ noted that the rule challenges in this case were "with few exceptions, identical" and had "pervasive similarities" "that suggest a high degree of coordination among the Petitioners." But for two reasons we are unpersuaded by the Department's fear that

attorneys might reap double-recovery windfalls. First, section 120.595(2) mandates an award of "reasonable" fees. If petitioners share the workload or if an attorney uses his or her work on behalf of one petitioner in the representation of another, that economy of scale must necessarily be factored into the assessment of a reasonable fee, and it thereby would redound to the benefit of the agency. In any case, the statute's reasonableness requirement and the factors outlined in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), should protect against the abuse feared by the Department. Second, even if the Department's concerns were well founded, they would present a policy question that is for the legislature. The agency is not empowered to alter the terms of a statute based on its own policy determinations. Amalgamated Transit, 139 So. 3d at 351.

For the foregoing reasons, we hold that in a consolidated rule challenge the $50,000 limitation on attorney's fees prescribed in section 120.595(2) cannot be applied on an aggregate basis but rather must be applied to each petition. Therefore, we reverse the ALJ's order and remand for further proceedings consistent herewith.

Reversed and remanded.

VILLANTI, J., Concurs.
BLACK, J., Concurs specially.

BLACK, Judge, Specially concurring.

I join in the majority opinion except to the limited extent that it relies upon legislative intent to interpret section 120.595(2), Florida Statues (2017). In my view,

reversal is required in light of the plain language of the statute after giving effect to the related statutory provisions; it is unnecessary to resort to the principles of statutory construction to determine legislative intent. See State v. Peraza, 259 So. 3d 728, 730, 732-33 (Fla. 2018); Bank of N.Y. Mellon v. Glenville, 252 So. 3d 1120, 1127-28 (Fla. 2018).