

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CLAUDIA PATRICIA OROZCO-FANDINO,  
E.O.,

Petitioner,

Case No. 19-4829F

vs.

DEPARTMENT OF HEALTH, BOARD OF  
MEDICINE,

Respondent.

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FINAL ORDER

A final hearing in this matter was held on December 16, 2019, via video teleconference from sites in Tampa and Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Dale R. Sisco, Esquire  
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For Respondent: Allison M. Dudley, Esquire  
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### STATEMENT OF THE ISSUE

The issue is whether Respondent, Department of Health, Board of Medicine (“Department”), was “substantially justified” under section 57.111(3)(e), Florida Statutes, in initiating the underlying action against the electrolysis license of Petitioner, Claudia Patricia Orozco-Fandino, E.O. (“Petitioner” or “Ms. Orozco”).

### PRELIMINARY STATEMENT

On April 20, 2018, the Department filed a two-count Administrative Complaint against Ms. Orozco. Count I alleged that Ms. Orozco violated section 478.52(1)(m), Florida Statutes, by performing cosmetic procedures such as liposuction, Brazilian butt lifts, fat transfers or fat grafting, vampire facials, plasma injections, and/or other invasive/surgical medical procedures, on one or more patients. Count II alleged that Ms. Orozco violated section 456.072(1)(a), Florida Statutes, by making misleading, deceptive, or fraudulent representations in or related to the practice of her profession, electrology.

On May 18, 2018, Ms. Orozco filed an Election of Rights in which she contested the factual allegations of the Administrative Complaint and requested a formal administrative hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes. On July 26, 2018, the Department forwarded the case to DOAH for assignment of an Administrative Law Judge (“ALJ”) and the conduct of a formal administrative hearing. The case was assigned Case No. 18-3899PL.

On October 24, 2018, the Department filed a notice of dismissal in which it dismissed Count II of the Administrative Complaint and stated its intention to pursue only Count I of the Administrative Complaint.

The final hearing was held on November 6 and 7, 2018, before ALJ R. Bruce McKibben. On November 7, 2018, ALJ McKibben entered an Order Placing Case in Abeyance, based on the parties' representation that they had entered into a settlement agreement that required the approval of the Board of Medicine at its meeting in February 2019. The parties understood that ALJ McKibben was retiring from DOAH as of December 31, 2018. ALJ McKibben made certain the parties understood that if the settlement agreement did not become final, then the recommended order in this case would be written by another ALJ. As events transpired, the settlement agreement was not finalized. The undersigned was assigned to review the complete record of the case and write the Recommended Order.

The Recommended Order in Case No. 18-3899PL was entered on April 18, 2019, and recommended that the Department enter a Final Order dismissing Count I of the Administrative Complaint against Ms. Orozco. In making the recommendation, the undersigned examined the extensive medical records and weighed the testimony of the three testifying patients against that of the two physicians who testified that they performed the cosmetic procedures in question. The undersigned found that the Department had not proven by clear and convincing evidence that Ms. Orozco had performed any invasive/surgical medical procedures on the patients. By Final Order dated July 11, 2019, the Department adopted the Recommended Order in full.

On September 12, 2019, Ms. Orozco timely filed her Motion for Attorneys' Fees at DOAH, seeking an award of her attorneys' fees and costs incurred in Case No. 18-3899PL. The fees case was assigned Case No. 19-4829F and was scheduled for hearing on December 16 and 17, 2019. The hearing was convened and completed on December 16, 2019.

On December 10, 2019, the Department filed a Motion in Limine that sought to limit the record in this case to a consideration of the evidence and testimony provided to, and reviewed by, the Board of Medicine's probable cause panel at the time it decided to charge Ms. Orozco with the violations alleged in the Administrative Complaint. The undersigned denied the motion, finding that Ms. Orozco should be allowed to offer exculpatory information that the Department had in its possession but chose not to place before the probable cause panel. The ruling on the Motion in Limine was without prejudice to the Department's ability to argue in its Proposed Final Order that certain evidentiary items should not have been admitted at the hearing.

At the final hearing, Ms. Orozco testified on her own behalf and presented the testimony of Cynthia Demetrovich, a Medical Quality Assurance Investigator with the Department. Petitioner's Exhibits 1, 4, 5, and 11 were accepted into evidence. Petitioner also offered, without objection, Respondent's Composite Exhibit 1, the document package considered by the probable cause panel, which was accepted into evidence. The Department presented no witnesses. Respondent's Exhibits 2 through 4 were admitted into evidence.

The one-volume Transcript of the hearing was filed at DOAH on January 8, 2020. At the conclusion of the hearing, the parties agreed that their proposed final orders would be filed within 20 days of the filing of the Transcript at DOAH. Both parties timely filed their Proposed Final Orders on January 28, 2020.

All references are to Florida Statutes (2019), unless otherwise noted.

## FINDINGS OF FACT

1. Case No. 18-3899PL was initiated by the Department, a “state agency” for purposes of section 57.111(3)(f).

2. Ms. Orozco qualifies as a “small business party” as defined in section 57.111(3)(d). Because the Final Order in Case No. 18-3899PL was entered in her favor, Ms. Orozco is a “prevailing small business party” under section 57.111(3)(c)1.

3. The Department has stipulated that the \$55,185.50 in attorneys’ fees and \$2,226.53 in costs claimed by Ms. Orozco are reasonable.

4. The only issue remaining at hearing was whether the Department was substantially justified in bringing the initial action against Petitioner’s electrolysis license.

5. Section 57.111(3)(e) states that 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.”

6. Starting in or around 2003, Ms. Orozco owned and operated Orozco Medical Center (“OMC”), a facility that is no longer in operation. OMC provided a range of cosmetic surgical procedures, including liposuction, Brazilian butt lifts, fat transfers or fat grafting, and vampire facials.

7. Since 2013, Ms. Orozco has been the president of Orozco Surgical Center (“OSC”), which remained in operation as of the hearing date. OSC currently provides only facials and acupuncture services.<sup>1</sup>

8. The Board of Medicine’s probable cause panel decides whether there is a sufficient legal and factual basis for the Department to move forward with formal charges in license discipline cases. In Ms. Orozco’s case, Department Case No. 2017-13921, the information presented to the probable cause panel included an investigative report prepared by the Department’s investigator,

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<sup>1</sup> Ms. Orozco is a licensed electrologist, acupuncturist, facial specialist, and body wrapper.

Cynthia Demetrovich. This 743-page report served as the basis for the probable cause determination made by the probable cause panel on April 20, 2018.

9. As described in the investigative report, the investigation in Department Case No. 2017-13921 began on August 9, 2017, and was triggered by Ms. Orozco's arrest by officers of the Hillsborough County Sheriff's Office. She had been charged with four felony counts of aggravated battery, four felony counts of practicing medicine without a license, and four felony counts of fraud.<sup>2</sup>

10. Between August 24, 2017, and October 16, 2017, Ms. Demetrovich and Christopher Heuerman, another Department investigator, interviewed 15 OMC patients.

11. Patients K.H., S.H., L.H., C.W., A.M., D.A., C.P., and M.A. underwent a surgical procedure known as a "Brazilian butt lift" ("BBL") at OMC. A BBL is a specialized fat transfer procedure that augments the size and shape of the buttocks without implants. Excess fat is removed from the hips, abdomen, lower back, or thighs with liposuction, and a portion of this fat is then strategically injected into the buttocks.

12. All eight of the patients stated that they witnessed Ms. Orozco perform their BBL procedures. Patients K.H., S.H., L.H., C.W., and A.M. expressed their willingness to testify in court about their experiences at OMC.

13. Patients K.H., S.H., W.P., C.W., O.H., A.M., and C.P. stated that Ms. Orozco represented herself as a doctor when they met with her at OMC.

14. Patient P.J. stated that Ms. Orozco treated her for weight loss by injecting her with HCG and vitamin B12 at OMC. HCG, or human chorionic

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<sup>2</sup> The criminal case against Ms. Orozco was resolved by a Pre-trial Intervention Agreement.

gonadotropin, is a hormone produced during pregnancy that is sometimes used as a weight loss medication.

15. Patients T.M. and L.H. stated that Ms. Orozco gave them phentermine as an appetite suppressant at OMC. Phentermine is a prescription drug.

16. Patient K.O. stated that she was treated by Ms. Orozco at OMC for weight loss. Ms. Orozco administered HCG injections and personally gave an appetite suppressant to Patient K.O., who could not recall the name of the suppressant.

17. Patient O.H. stated that Ms. Orozco injected dermal fillers into her face at OMC.

18. Patients N.M. and K.B. stated that Ms. Orozco administered vampire facials to them at OMC. A “vampire facial,” or “platelet-rich plasma facial,” is a procedure in which blood is drawn from a patient’s arm and placed in a centrifuge. The resulting platelet-rich plasma is then injected into the patient’s face.

19. “Electrolysis or electrology” is defined by section 478.42(5) as “the permanent removal of hair by destroying the hair-producing cells of the skin and vascular system” using equipment and protocols approved by the Board of Medicine. An electrologist is not competent to perform surgical procedures such as BBLs; to treat a patient for weight loss; to prescribe or administer weight loss drugs; to inject dermal fillers; or to perform vampire facials.

20. On August 10, 2017, the Department mailed a letter to Ms. Orozco advising her that a case had been opened against her and that she had 20 days from receipt of the letter to submit a response or schedule an interview.

21. Ms. Orozco’s counsel responded by letter dated August 28, 2017, addressed to Ms. Demetrovich. The letter enclosed a copy of Ms. Orozco’s curriculum vitae and stated that she intended to “vigorously defend the criminal allegations which were the subject of her arrest.” Counsel noted that formal charges had yet to be filed against Ms. Orozco and concluded by

requesting the Department “to refer to my correspondence in the related Department of Health Investigation No. 2016-16104.”

22. The referenced correspondence included two letters from Ms. Orozco’s attorneys. Both letters were addressed to Ms. Demetrovich and addressed an earlier Department investigation of Ms. Orozco. The first letter, dated July 7, 2016, included a three-page chart identifying the names of patients, their dates of surgery, and the names of the physicians who performed the surgeries. The chart listed 46 patients whose procedures were stated to have been performed by Mark Kantzler, D.O., and 12 patients whose procedures were stated to have been performed by Amina Edathodu, M.D.

23. The second letter, dated August 26, 2016, asserted that Ms. Orozco was a “certified Surgical First Assistant,” and set forth the job description and duties of a surgical assistant as defined by the American Board of Surgical Assistants and the Association of Surgical Assistants. The letter stated that all surgical procedures at OMC were performed by licensed physicians with assistance from certified surgical assistants, including Ms. Orozco.

24. The August 28, 2017, letter from Ms. Orozco’s counsel was included in Ms. Demetrovich’s investigative report. However, the referenced letters of July 7, 2016, and August 26, 2016, were not included in the investigative report and therefore were not placed before the probable cause panel.

25. Ms. Demetrovich testified that she is not allowed to “share cases,” i.e., to mix materials from separate investigations into a single file. Because the letters dated July 7, 2016, and August 26, 2016, were in reference to Department Case No. 2016-16104, Ms. Demetrovich did not include them in her investigative report for Department Case No 2017-13921.

26. The investigative report included the complete medical records, including before and after photographs, received from OMC for Patients K.H., S.H., C.W., O.H., N.M., K.B., T.M., A.M., D.A., A.B., K.O., P.J., C.P., and M.A.



27. The investigative report also included the Hillsborough County Sheriff's Office criminal report affidavit and arrest report for Ms. Orozco. The criminal report affidavit named four additional patients who told detectives that Ms. Orozco performed their BBL or liposuction procedures at OMC.

28. All four patients named in the criminal report affidavit stated that Ms. Orozco led them to believe she was a medical doctor who could perform the surgical procedures offered by OMC. The patients variously stated that Ms. Orozco referred to herself as "doctor," conducted the preoperative consultations, or showed them pictures of previous surgeries she had performed.

29. Patient N.M. stated that another non-physician, Marlon Barcelo, performed the fat removal in her procedure. Mr. Barcelo was a surgical assistant employed by Ms. Orozco. Patient N.M. stated that Ms. Orozco performed the fat injection portion of the procedure.

30. Patients U.L., A.B., and H.P. stated that their liposuction procedures were performed entirely by Ms. Orozco.

31. The criminal report affidavit stated that on April 22, 2016, a Hillsborough County Sheriff's detective interviewed Dr. Edathodu, who stated that she had worked at OMC. Dr. Edathodu referred to Ms. Orozco as a "doctor" and stated that Ms. Orozco had performed fat removal and injection procedures at OMC.

32. Dr. Edathodu reviewed the medical records for Patient N.M., which indicated that Dr. Edathodu performed her procedure. Dr. Edathodu denied to the detective that the signatures and handwriting on N.M.'s medical records were hers.

33. The criminal report affidavit stated that on May 5, 2017, a Hillsborough County Sheriff's detective interviewed Dr. Kantzler, who stated that he would be present in the OMC facility while liposuction procedures were performed, but that the surgical assistants performed them.

34. The criminal report affidavit stated that Patient A.B. reported that about two weeks before she met with the detective, she received a text message from Ms. Orozco. The text message stated that if Patient A.B. got a phone call from anyone, she should tell them that Dr. Kantzler had performed her surgery.

35. On December 27, 2017, counsel for the Department provided Ms. Orozco's counsel with a CD copy of the Department's complete investigative file for Department Case No. 2017-13921. In the accompanying letter, counsel for the Department reminded Ms. Orozco's counsel that he had 20 days in which to file a written response to the information contained in the investigative file, pursuant to section 456.073(10).

36. On April 20, 2018, the Department's probable cause panel met to review and discuss the investigative report. The panel found probable cause for both counts of the Administrative Complaint.

37. At the hearing in the instant fee case, Ms. Orozco contended that the probable cause panel's determination was based on an incomplete record. She argued that the Department's investigative report omitted exculpatory material and that Ms. Demetrovich failed to make inquiries that might have led the probable cause panel to a different decision.

38. Ms. Orozco noted that Ms. Demetrovich began investigating OMC in 2016, well before the investigative report in Department Case No. 2017-13921 was prepared.

39. Ms. Orozco testified that Ms. Demetrovich visited the offices of OMC on August 11, 2016, in the guise of accompanying a Department dispensing practitioner inspector. While at OMC, Ms. Demetrovich interviewed Ms. Orozco directly and took photographs of every room in the building. She photographed the surgical suite and the equipment therein.

40. Ms. Demetrovich testified that she did not interview Ms. Orozco on August 11, 2016. She testified that if any photographs were taken during the visit, they were taken by the other inspector.

41. Ms. Orozco contended that at the time she submitted her investigative report, Ms. Demetrovich was aware that the OMC surgical suite contained a drape between the patient's head and the surgical field that wholly obstructed the patient's view of who was performing their surgery. Ms. Orozco contended that if this information had been provided to the probable cause panel, the panel would have discounted the numerous patient statements attesting that Ms. Orozco performed their surgeries.

42. Ms. Orozco also questioned why Ms. Demetrovich did not ask the patients how they could possibly know Ms. Orozco was performing their procedures when they could not see the surgical field.

43. Ms. Orozco noted that the 2016 investigation prompted her counsel to submit the July 7, 2016, and August 26, 2016, letters referenced above. Ms. Orozco questioned why the contents of those letters were not included in the investigative report.

44. Ms. Orozco pointed out that the medical records that were included in the investigative report were replete with indications that the surgeries were performed by Dr. Edathodu and Dr. Kantzler, including the consent forms in which the patients expressly acknowledged the name of the physician who would perform the procedure. Ms. Orozco contends that Ms. Demetrovich was obliged to confront the patients with this evidence and ask them to reconcile it with their statements that Ms. Orozco performed their procedures.

45. Ms. Orozco argued that Ms. Demetrovich should have interviewed Dr. Edathodu, Dr. Kantzler, and other members of the OMC staff before completing her investigative report.

46. Ms. Demetrovich testified that Dr. Edathodu evaded several attempts to interview her. Ms. Demetrovich stated that she interviewed Dr. Kantzler in another case, but did not include a summary of that interview in the investigative report of this case.

47. Ms. Demetrovich testified that neither Dr. Edathodu nor Dr. Kantzler submitted affidavits in relation to this case.

48. Ms. Demetrovich testified that her role in the investigation of Ms. Orozco and OMC did not include evaluating records obtained from the subjects of the investigation, or their attorneys, apart from checking for completeness. She testified that the determination as to whether to pursue disciplinary action based on the investigation rested with the Department's attorneys. Ms. Demetrovich's testimony as to the limits of her job responsibilities is credited.

49. The investigative report included an identification key with the full names of the patients. Ms. Demetrovich acknowledged that she neglected to include the full names of Patients W.P. and L.H. in the identification key.

50. It is found that the information before the probable cause panel was sufficient to support the panel's decision to pursue an Administrative Complaint against Ms. Orozco.

51. The investigative report included interviews with eight OMC patients who stated to the Department's investigators that Ms. Orozco had performed BBLs on them. All eight patients stated that they witnessed Ms. Orozco perform the procedure. Five of the eight stated their willingness to testify against Ms. Orozco in any future court proceeding.

52. Seven patients stated that Ms. Orozco had presented herself to them as a physician.

53. Four other patients interviewed by the Department's investigators stated that Ms. Orozco had provided them with injections of medications. Two patients stated that Ms. Orozco had performed vampire facials on them. One patient stated that Ms. Orozco administered dermal fillers to her.

54. Four patients interviewed by detectives from the Hillsborough County Sheriff's Office stated that Ms. Orozco presented herself as a medical doctor. Three of the four stated that Ms. Orozco performed their liposuction procedures.

55. The patient statements alone justified a finding of probable cause.

56. Ms. Orozco pointed to contrary evidence in the investigative report, such as the patient consent forms that clearly indicated the surgeries were performed by Dr. Edathodu and Dr. Kantzler. Such documentation might weigh against the patient statements, but is insufficient to support a finding that the probable cause panel should have disregarded the word of 19 patients that Ms. Orozco performed procedures on them that exceeded the scope of her professional licensure.

57. Further, the probable cause panel would have been justified in discounting the patient consent forms in light of the statements the two physicians gave to the Hillsborough County Sheriff's detectives that surgical procedures were in fact performed by Ms. Orozco and/or Mr. Barcelo.

58. None of the items that Ms. Orozco claims were omitted from the investigative report would change this finding. The July 7, 2016, letter from her counsel naming the patients and their respective physicians was of no more significance than the signed consent forms that were included in the report.

59. The August 26, 2017, letter setting forth the definitions of "surgical assistant" and stating that licensed physicians performed all surgeries at OMC merely contradicted the patients' statements. It did not disprove or invalidate the patients' statements in such a way as to justify their disregard by the probable cause panel.

60. Finally, it was a matter of dispute whether Ms. Demetrovich had in her possession photos of the OMC surgical suite that she declined to include in the investigative report. Nothing prevented Ms. Orozco from submitting such photos on her own if she believed they would help her case. Such photos might raise questions, but again would not disprove or invalidate the

statements of 19 patients to the degree that the probable cause panel could reasonably disregard the patients' statements to the investigators and detectives.<sup>3</sup>

#### CONCLUSIONS OF LAW

61. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 57.111(4), Florida Statutes.

62. Section 57.111, the Florida Equal Access to Justice Act, provides, in pertinent part, as follows:

(4)(a) 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.

63. 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 establish by a preponderance of the evidence that it prevailed in the underlying disciplinary action and that it was a small business party at the time the disciplinary action was initiated. Once the party requesting the award has met this burden, the burden of proof shifts to the agency to establish that it was substantially justified in initiating the disciplinary action. *See Helmy v. Dep't of Bus. & Prof'l Reg.*, 707 So. 2d 366, 368 (Fla. 1st DCA 1998); *Dep't of Prof'l Reg., Div. of Real Estate v. Toledo Realty, Inc. and Ramiro Alfert*, 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

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<sup>3</sup> Even if the probable cause panel found that the draping procedure in the surgical suite completely discredited the statements of the patients who received BBLs and other liposuction procedures, there would remain the patients who allegedly received vampire facials, injections, and prescription drugs from Ms. Orozco. Even taking the view most favorable to Ms. Orozco, one cannot find that the probable cause panel should have dismissed the case entirely.

64. Ms. Orozco prevailed in the underlying proceeding. § 57.111(3)(c)1., Fla. Stat.

65. Ms. Orozco is a “small business party” as contemplated by section 57.111(3)(d).

66. The sole issue in this proceeding is whether the Department's actions were “substantially justified.” Section 57.111(3)(e) provides that 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.*” (Emphasis added). The “substantially justified” standard falls somewhere between the “no justiciable issue” standard of section 57.105, and an automatic award of fees to a prevailing party. *Helmy*, 707 So. 2d at 368.

67. In *Department of Health v. Cralle*, 852 So. 2d 930, 932 (Fla. 1st DCA 2003), the court set forth the following temporal limitation on the required analysis, quoting from *Fish v. Department of Health*, 825 So. 2d 421, 423 (Fla. 4th DCA 2002):

In resolving whether there was substantial justification or a reasonable basis in law and fact for filing an administrative complaint, “one need only examine the information before the probable cause panel at the time it found probable cause and directed the filing of an administrative complaint.”

*See also Ag. for Health Care Admin. v. Gonzalez*, 657 So. 2d 56 (Fla. 1st DCA 1995)(proper inquiry is whether evidence before a probable cause panel was sufficient for institution of disciplinary action).

68. In *Fish*, the Department of Health commenced an investigation against Dr. Fish pursuant to a complaint filed by a fellow dentist. After the investigation was completed, the Department forwarded the investigative file to the probable cause panel. Dr. Fish had disputed the allegations and filed a timely written response, but the Department chose not to forward his response to the probable cause panel. *See Fish* 825 So. 2d at 422. The panel found probable cause and forwarded the matter to the Division of

Administrative Hearings. The Department subsequently dismissed the case, and Dr. Fish petitioned for attorney's fees pursuant to section 57.111.

69. One of the grounds asserted by Dr. Fish was that the Department denied him due process by failing to forward his response to the probable cause panel. In affirming the Administrative Law Judge's conclusion that the Department was substantially justified in proceeding against Dr. Fish, the court reasoned as follows:

Notwithstanding the existence of a procedural due process error due to the Probable Cause Panel's failure to review appellant's timely response, we nevertheless conclude that there existed competent substantial evidence to support the ALJ's finding of substantial justification. Although the charges brought against appellant were subsequently withdrawn and the DOAH action dismissed, a review of the record and investigative file reveals that the Department was substantially justified at the time it initiated its disciplinary action. The DOAH action against appellant was dismissed, not because of any procedural irregularity, as espoused by appellant, but because two of the Department's key witnesses died and one witness had a disciplinary history with the Florida Bar. Thus, the Department strategically decided to forego any further prosecution against appellant.

The record supports the conclusion that the Probable Cause Panel had the complete investigative file before it prior to its consideration of appellant's case. And, while the Probable Cause Panel should have considered appellant's response prior to its determination to proceed with an administrative complaint, there is no evidence to conclude that the Probable Cause Panel would have reached a different result had it considered his response. Appellant's response to the investigative file disputed the allegations against him, but did not disprove or conclusively rebut those allegations.



In fact, appellant's response highlighted the fact that there were disputed issues of fact as to the charges against him.

*Id.* at 423.

70. In *Fish*, as in the instant case, the information before the probable cause panel substantially justified the panel's determination, and the question was whether the panel's decision was skewed because it did not have *all* of the relevant information before it. The *Fish* court found that the agency's failure to place the petitioner's response to the allegations before the probable cause panel constituted a procedural due process error. However, the court went on to hold that such a procedural error was insufficient to overturn the finding that the agency's actions were substantially justified, unless that procedural error compromised the accuracy and integrity of the probable cause process.

71. In the instant case, it is questionable whether there was a due process error at all. The due process error in *Fish* consisted of the Department's conscious decision to withhold Dr. Fish's response from the probable cause panel. In the instant case, the Department did not withhold Ms. Orozco's written response to the charges in Department Case No. 2017-13921. The materials allegedly withheld were written materials submitted by Ms. Orozco's counsel in a previous case and referenced in her response to Department Case No. 2017-13921. These materials did no more than reiterate Ms. Orozco's position that she acted only as an assistant to the physicians who performed the procedures. The record evidence was insufficient to establish that these materials would have changed the result reached by the probable cause panel in light of the 19 witness statements contained in the investigative report.

72. Ms. Orozco also complained that the investigation was insufficiently thorough. The statements of the OMC patients were taken at face value. The

patients were not questioned about the layout of the surgical suite or about the consent forms that appeared to be signed by attending physicians.

73. Ms. Demetrovich persuasively testified that her role as a Department investigator is to gather the evidence to be placed before the Department's attorneys and the probable cause panel. Her role is not to cross-examine potential witnesses or discredit their statements.

74. The consent forms were part of the investigative report. The probable cause panel was capable of giving them due consideration and weighing them against the witness statements of the patients. "[A] decision to prosecute that turns on a credibility assessment has a reasonable basis in fact and law." *Dep't of Health v. Thomas*, 890 So. 2d 400, 401 (Fla. 1st DCA 2004).

75. The evidence was conflicting regarding the Department's knowledge of the surgical suite. Even if the probable cause panel accepted that the patients were draped in such a way that they could not actually watch their procedures, the panel did not necessarily have to disregard the patient statements. As found above, photos of the surgical suite might raise questions but would not disprove or invalidate the statements of all of the surgical patients to the degree that the probable cause panel could reasonably disregard the patients' statements to the investigators and detectives. Further, discrediting the statements of the surgical patients would have no effect on the statements of the non-surgical patients.

76. In summary, Ms. Orozco was the prevailing small business party in the underlying proceeding. However, the Department established that its actions were substantially justified, in that it had a reasonable basis in law and fact at the time probable cause was found.

#### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Motion for Attorneys' Fees filed by Claudia Patricia Orozco-Fandino, E.O., is denied.

DONE AND ORDERED this 26th day of February, 2020, in Tallahassee, Leon County, Florida.



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LAWRENCE P. STEVENSON  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of February, 2020.

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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.