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Subject: #2756 P.002/008

AUG.06'2004 16:18 5616889447

BRUCE KALEITA PA

04-375PL REM
Closed

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DOCKETING STATEMENT
AND NOTICE OF APPEARANCE OF COUNSEL
(Revised as of May 1, 2001)

The Court requires the following information in order to facilitate disposition of the case.

APPELLANT/PETITIONER: If this case involves an original writ, is an appeal of a non-final order or is a case involving child custody, this docketing statement must be completed and returned within five days. In all other cases, the appellant must file the docketing statement within 20 days from the date of the acknowledgment of the notice of appeal.

APPELLEE/RESPONDENT: Is not required to file a docketing statement unless there are amendments, corrections or additions to the docketing statement filed by the Appellant/petitioner. Appellee/respondent is only required to file a notice of appearance if counsel's name does not already appear on the certificate of service. Appellee's/respondent's docketing statement, if necessary, is due within 5 days from service of the Appellant's/petitioner's docketing statement.

PLEASE PROVIDE THE FOLLOWING INFORMATION:

DOCKETING STATEMENT OF: (CHECK ONE)

APPELLANT/PETITIONER X
APPELLEE/RESPONDENT

1. STYLE OF CASE

DCA CASE
NUMBER

LOWER COURT
CASE NUMBER

LARRY E. SHIMKUS v.
Department of Business and
Professional Regulation

4D04-2961

04-375PL

2a. NOTICE OF APPEARANCE OF COUNSEL FOR APPELLANT (If party is not represented by counsel, party should so indicate and provide accurate mailing address and phone number).

Name Bruce G. Kaleita, Esquire Florida Bar Number 435589
Address Bruce G. Kaleita, P.A., The Barristers Building, 1615 Forum
Place, Suite 500, West Palm Beach, FL 33401.

Attorney For LARRY E. SHIMKUS Phone No.: 561-688-9210 Fax No. 561-688-9447

2b. APPELLEE'S TRIAL COUNSEL AND/OR APPELLATE COUNSEL (IF KNOWN)

Name Gail Scott Hill, Esq. Bar Number: 909289
Address Assistant General Counsel, Dept. of Business and Professional
Regulation, 1940 North Monroe Street, Tallahassee, FL 32399-0750
Attorney For Department of Business and Professional Regulation. Ms.
Hill is presently Appellate Counsel for the Appellee. Ms. Hill's

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Telephone Number is 850-488-0062 and her Fax Number is 850-414-6749.

Appellee's Trial Counsel was Theodore Gay, Esquire, Assistant General Counsel, Department of Business and Professional Regulation, 8685 N.W. 53rd Terrace, Suite 100, Miami, Florida 33166. Mr. Gay's Telephone Number is 305-470-6783 Ext. 2225, and his Fax Number is 305-470-6766. We have been informed that it is possible that Ms. Hill may defer to Mr. Gay to handle this appeal.

3. **INTERESTED PERSONS:** List names of all persons or entities having an interest in this matter. Please clarify whether these persons or entities are parties, lawyers or otherwise, and as to parties, designate whether appellant or appellee.

Appellant: Larry Shimkus, c/o Bruce G. Kaleita, P.A. Mr. Shimkus is a Party.

Counsel for Appellant: Bruce G. Kaleita, P.A., Suite 500, the Barristers Building, 1615 Forum Place, West Palm Beach Florida 33401.

Appellee: The Florida Department of Business & Professional Regulation, Construction Industry Licensing Board, 1940 North Monroe Street, Tallahassee, FL 32399-0750.

Counsel for Appellee: Gail Scott Hill, Esq., Assistant General Counsel, Dept. of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, FL 32399-0750.

4. **JUDGES BELOW:** List the name of all judges, deputy commissioners and hearing officers/examiners who were involved in this action below. Specify the judge who entered the order appealed.

The Hon. Robert Meale, Administrative Law Judge, Florida Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060. Judge Meale entered the "Recommended Order" and purported "Final Order" at issue in this appeal.

5. **JURISDICTION:** State the basis for this court's jurisdiction, including the following: (1) the appellate rule providing jurisdiction claimed: Rule 9.110(k); and/or Rule 9.100(a), Florida Rules of Appellate Procedure; and Section 120.68, Florida Statutes; (2) the date of filing in the lower tribunal of the order appealed: July 12, 2004; (3) if this is an appeal from a final order, the date of the return of verdict in a jury action: This is an appeal from a purported "final order" of a State Administrative Law Judge, contained within a "Recommended Order" of that same Administrative Law Judge. The Recommended Order has not yet been acted upon by the Appellee administrative agency. There is no civil action pending nor was there any jury trial. This is further explained below; (4) the service date of any Fla. R. Civ. P. 1.530 motion: No such motion filed in this action; and the date of entry of the order deciding such motion: Not Applicable.

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6. **PENDING MATTERS IN LOWER TRIBUNAL:** Are there any matters, including counts of claims or counterclaims, still pending in the lower tribunal? If yes, please explain exactly what remains pending.

Answer:

The Appellant has filed exceptions to the Recommended Order as to Paragraph 99 thereof as is permitted under Chapter 120, Florida Statutes; and has asked the Administrative Law Judge to strike the portion of his Recommended Order in which he purports to issue a "Final Order", an order which was not yet within his jurisdiction to issue. said paragraph. However, with the filing of this appeal, the Division of Administrative Hearings no longer has jurisdiction of this action.

7. **CURRENT AND PRIOR PROCEEDINGS IN THIS COURT:** List by style and case number of this court, all cases which are or have been pending before this court involving issues arising from the same lower tribunal case and the current status of same:

None.

Criminal appeals: List by style and case number of this court all co-defendants currently or previously on appeal to this court.

None.

Similar Issues: List by style and case number of this court, all cases which are or have been pending before this court which are related to this action or which involve an issue which will be similar or determinative to the issue in this case on appeal.

DCA Case #4D04- 2271, styled LARRY E. SHIMKUS, Appellant, v. CONSTRUCTION INDUSTRY RECOVERY FUND, A DIVISION OF THE FLORIDA CONSTRUCTION INDUSTRY LICENSING BOARD, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, STATE OF FLORIDA, Appellee.

The foregoing case is related to the instant case only in that it arose from the same events and occurrences, but the legal and factual issues posed in said case are entirely different from those posed in the instant case.

If you become aware of appeals filed subsequent to the submission of this docketing statement involving a co-defendant in a criminal case, the same controversy or parties, or substantial similar issues, please file an amended response to this question.

8. **COURT TRANSCRIPT:**

Do you intend to order any portion of the transcript for the appeal?

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Yes: We shall furnish a copy of the transcript of the administrative hearing to the court. The transcript is already completed. The transcript contains 755 pages. The name and address of the court reporter for this transcript is: Official Court Reporting Service, 524 S. Andrews Avenue, Suite 302N, Ft. Lauderdale, FL 33301. Its telephone number is (954) 467-8204.

The Appellee agency has already furnished to the court the "Record of the Appeal", which includes all but the transcript of the hearing. This was done for the Appellee by letter from the Agency Clerk, Sarah Wachman, to Marilyn Beuttenmuller, Clerk of the District Court of Appeal, dated July 30, 2004.

9. CUSTODY STATUS IN CRIMINAL APPEALS: Is the appellant in custody and serving a sentence imposed as a result of a conviction which is the subject of this appeal? Not applicable
If so, state the length of the sentence imposed. Not applicable

10. ISSUES: If this case involves the determination of the constitutionality of a statute, cite the statute involved.

Constitutional Issues. This case does not involve any challenge to the constitutionality of any statute. There may be a later case, once the Appellee enters a Final Order in this action, in which an "as-applied" challenge is made to the constitutionality of a state statute as applied to the Appellant. That case is not yet before this court

Issues in This Case. This appeal, is an appeal of a portion of a "Recommended Order", issued by an Administrative Law Judge, prior to the return of the Recommended Order to the state administrative agency for final agency action, due to the attempt by the Administrative Law Judge to enter a "Final Order" as a part of his "Recommended Order". This is explained below.

The Recommended Order dismissed all of Appellee's administrative charges brought against the Appellant, a state licensee. But then, at Paragraph 99 thereof, at the end of the Recommended Order, the Recommended Order denies the Appellant his prevailing party attorneys fees which were requested under Section 57.111, Florida Statutes. This Paragraph goes on to state that this denial is a "Final Order", and that no other order will be entered on this issue.

Appellant maintains that, as a matter of law, there is no Final Agency Action here, and no true "Final Order", only the "Recommended Order" with its purported "Final Order" in Paragraph 99. Therefore, we do not yet reach the "as applied" constitutional

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challenge to Chapter 489 raised in the action below. This will be raised only after the Appellee enters its Final Order if there is an appeal of that Order.

Please state in short form the anticipated issues raised. For example, on criminal issues: denial of motion for judgment of acquittal, denial of motion to suppress evidence, error in sentence; on civil issues, award of alimony, error in valuation of assets for equitable distribution, error in determining contract damages; error in admission of hearsay at trial.

Anticipated Issues Raised In This Appeal.

Sole Issue. Due to the facts related in the foregoing paragraphs, the sole issue raised in this action is, basically, whether an Administrative Law Judge with the Florida Division of Administrative Hearings, in a case referred to the Division for a Section 120.57, F.S., Formal Administrative Hearing, may rule, as a purported "Final Order", upon the motion of a "small business party" for the award of his attorneys fees under Section 57.111, F.S., in his Recommended Order, prior to the entry of the Appellee's Final Order under Chapter 120, F.S., and without complying with the statutory prerequisites for such a ruling set forth in Section 57.111, F.S., to wit:

- A. Section 57.111(3)(c), F.S., which states that a small business party [who seeks the award of his prevailing party attorneys fees in an action between him and a state agency] does not become a "prevailing party" until one of the following events has occurred:

"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."

and

- B. Section 57.111(4)(d), F.S., which requires the Administrative Law Judge to hold an evidentiary hearing on the request for attorneys fees after the small business party does become a "prevailing party".

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No such hearing was held on the attorneys fees issue, quite simply because the proceedings had not reached the point at which there was a final order entered.

11. TYPE OF CASE: PLACE A CHECK BY THE MOST APPROPRIATE TYPE OF CASE:

A. Civil

- 1. Domestic Relations - divorce, child custody, paternity or support
- 2. Child dependency
- 3. Adoption/Termination of Parental Rights
- 4. Professional Malpractice
- 5. Products Liability
- 6. Negligence
- 7. Contract or Indebtedness
- 8. Condominium - rules violations, developer suits
- 9. Foreclosure - mortgage, lien
- 10. Inmate Appeal - gain time, rule challenges, disciplinary action
- 11. Attorney's Fees
- 12. All others - specify:
Appeal from final administrative order.

B. Criminal

- 1. Direct Appeal - judgment and sentence
- 2. Direct Appeal - sentence only
- 3. Direct Appeal - juvenile
- 4. Collateral Attack - (Rule 3.850 or habeas corpus) judgment and sentence
- 5. Collateral Attack - (Rule 3.800, Rule 3.850 or habeas corpus) - sentence only
- 6. Collateral Attack - juvenile
- 7. Appeal by the State
- 8. All Others - specify

C. Administrative

- 1. Department of Professional Regulation
- 2. Unemployment Appeals Commission
- 3. Rule Challenge - specify agency
- 4. All others - specify

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by both United States Mail and facsimile transmission this 6 day of


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August, 2004, to: Gail Scott Hill, Esquire, counsel for Appellee, c/o DBPR Office of General Counsel, 140 N. Monroe Street, Tallahassee, FL 32399-0750; Theodore R. Gay, Esquire, Assistant General Counsel, Department of Business and Professional Regulation, 8685 N.W. 53rd Terrace, Suite 100, Miami, Florida 33166; and the Agency Clerk for the Division of Administrative Hearings, Ann Cole, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060.

CERTIFICATION AS TO FONT SIZE

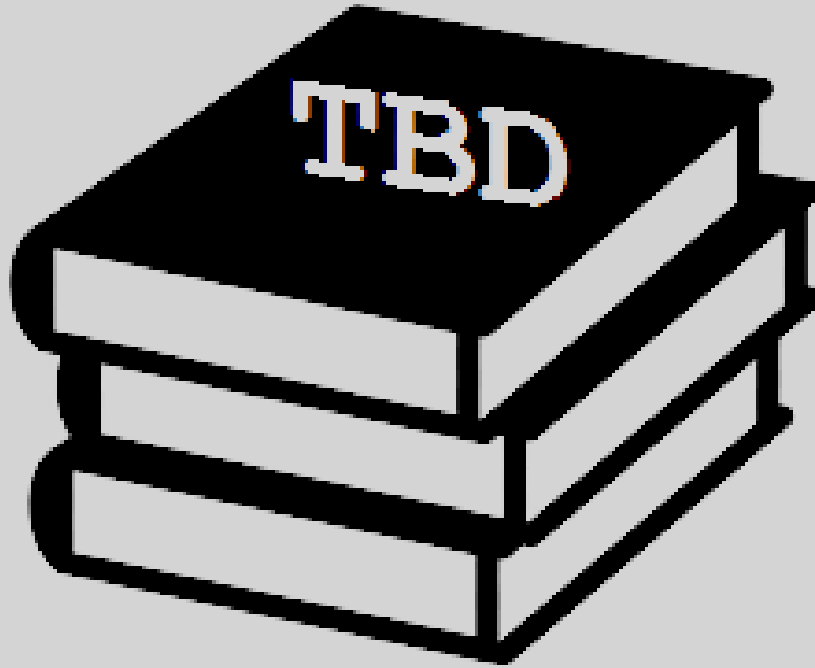
I HEREBY CERTIFY that in accordance with Rule 9.210, Florida Rules of Appellate Procedure, the size and style of type used in the answers of the Appellant furnished in this document is Courier New Font in 12 point Type.


Bruce G. Kaleita, Esquire
Attorney for the Appellant
c/o Bruce G. Kaleita, P.A.
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