IN THE SUPREME COURT OF THE STATE OF NEVADA

DEPARTMENT OF HEALTH AND HUMAN SERVICES, NEVADA DIVISION OF PUBLIC AND BEHAVIORAL HEALTH, MEDICAL MARIJUANA ESTABLISHMENT PROGRAM,

Appellant,

vs.

SAMANTHA INC., d/b/a SAMANTHA'S REMEDIES, a Domestic Corporation,

Respondent.

No.: 71123

District Court No.: A710874

Electronically Filed
Dec 05 2016 03:51 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S REPLY BRIEF

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ARGUMENT

In their opposition, SAMANTA REMEDIES is requesting this Court to overturn its decision in *Private Inv. Licensing Bd. v. Atherley*, 98 Nev. 514, 654 P.2d 1019 (1982). In *Atherley,* this Court found that the Nevada Administrative Procedures Act does not render all administrative decision subject to judicial review and according to NRS 233B.130(1)(b), the district court only has jurisdiction to review "contested cases." *Atherley,* 98 Nev. at 515. In addition, the Nevada Legislature has since incorporated the ruling in *Atherley* in its amendment to NRS 233B.127 to expressly provide that the Nevada Administrative Procedure Act does not apply in the denial of a license unless notice and opportunity for hearing are provided by law.

SAMANTHA REMEDIES cannot point to any language in Chapter 453A of the Nevada Revised Statutes where the Nevada Legislature has provided for notice and opportunity for hearing as part of the legislative scheme. In addition, the Nevada Legislature did not create a direct right to a petition for judicial review without an administrative hearing for medical marijuana establishments as it did specifically for issues related to patients. Finally, SAMANTHA REMDIES did not cite to any authority supporting the application of case law concerning property rights to a revocable privilege. The Division contends that a revocable privilege is

different than other licensing decisions and neither requires an administrative hearing nor should be subject to judicial review.

Instead, SAMANTHA REMEDIES appears to argue that right to petition for judicial review should exist regardless of what language the Nevada Legislature uses to exempt an agency or limit the scope of administrative decisions subject to such a review. According to SAMANTHA REMEDIES, due process dictates that either the legislature or the Division must create such a remedy to challenge the decisions related to medical marijuana establishments through Chapter 233B of the Nevada Revised Statutes. Further, SAMANTHA REMEDIES seems to suggest that the right for a petition for judicial review should be extended beyond the denial of a license to encompass any grievance or "legal wrong" that an individual attributes to governmental action.

This approach of failing to recognize that the Legislature both creates and defines the scope of the remedy of a petition for judicial review would have quite an impact on both administrative agencies and the court system. The Division continues to assert that only the Nevada Legislature should define the parameters of a petition for judicial review. In their opposition, SAMANTHA REMEDIES continues to ignore that a petition for judicial review cannot provide relief for the unique process of medical marijuana establishments which were chosen as part of a competitive process for a limited number of locations. The Division submits that

decisions related to the registration of establishments can be challenged through a writ of mandamus or that the rights of parties can be defined through declaratory relief in order to meet the goals of the legislation and ensure that all necessary parties are before the Court.

If this Court concludes that SAMANTHA REMEDIES can proceed with a petition for judicial review, the Division does not have the burden to point to errors in the order of the District Court as suggested by SAMANTHA REMEDIES. Instead, this Court reviews the decision of the Division for clear error or abuse of discretion and SAMANTHA REMEDIES has failed to establish that the Division was arbitrary or capricious in scoring the application of SAMANTHA REMEDIES. In their opposition, SAMANTHA REMEDIES failed to identify how the tool used by the Division failed to conform with the statutory requirements contained in NRS 453A.328 for purposes of the application of SAMANTHA REMEDIES. For instance, SAMANTHA REMEDIES does not explain why the allegedly missing blueprints or architectural drawings would be necessary or make any difference in a score when the applicant had ample opportunity in its narrative to describe and explain the benefits of their proposal.

In their opposition, SAMANTHA REMEDIES takes the position that the Division should not have scored each section separately without reference to the rest of the application. This approach was not arbitrary or capricious because the

Division intended to ensure a more objective process with portions being evaluated without identification of the applicant. Even if this Court were to conclude that this process was deficient, it would not be a problem exclusive to SAMANTHA REMEDIES because all of the applications were reviewed in the same way.

SAMANTHA REMEDIES finds fault with the Division for not submitting the entire application as part of its Appendix. However, even the extensive application of SAMANTHA REMEDIES provides an incomplete record for the administrative decision because the Division had to consider and compare all of the applications competing for the twelve dispensary slots in the City of Las Vegas. The Nevada Supreme Court cannot be asked to perform the function of scoring applications that the Nevada Legislature delegated to the Division.

As indicated by their scores and ranking, SAMANTHA REMEDIES submitted an excellent application but other applicants scored better to obtain one of the limited number of dispensary registrations. If SAMANTHA REMEDIES is allowed to challenge their score through a petition for judicial review, other applicants will have the same right if their registration is revoked due to any change in the ranking of SAMANTHA REMEDIES. The needs of the community that SAMANTHA REMEDIES wish to serve will not be met by endless petitions for judicial review and the resulting instability in the supply for the patients.

CONCLUSION

The District Court lacked jurisdiction to hear this petition for judicial review because the application process was not a contested case. The Division is entitled to deference in scoring and ranking applications for medical marijuana dispensaries. The Division was not arbitrary and capricious and acted within the parameters of legislative requirements. Finally, the District Court exceeded its authority to order the Division to issue a registration to SAMANTHA REMEDIES when it could not address the removal of the registration of another dispensary. The Division respectfully requests this Court to overturn the decision of the District Court.

Dated: December 5, 2016.

ADAM PAUL LAXALT
Attorney General

By: */s/ Linda C. Anderson*
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in proportional spaced typeface using Microsoft Word 2010 in Times New Roman in 14 point font size. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed thirty (30) pages. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I further certify that I have read this Appellant's Reply Brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: December 5, 2016.

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By: */s/ Linda C. Anderson*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing by using the electronic filing system on the 5th day of December, 2016. The following participants in this case are registered electronic filing system users and will be served electronically:

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