

IN THE SUPREME COURT OF FLORIDA

Case No. SC20-1814

Lower Tribunal No. 2D20-2750

**STATE OF FLORIDA, AGENCY FOR HEALTH CARE
ADMINISTRATION,**

Petitioner,

vs.

**YBOR MEDICAL INJURY AND ACCIDENT CLINIC, INC.,
Respondent.**

**ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT**

ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This Answer Brief on Merits will refer to Respondent as "Ybor Clinic" and to the Petitioner as "AHCA". The following additional terms will be abbreviated: and Administrative Law Judge ("ALJ").

The Record on Appeal will be designated "R.," followed by any appropriate page number(s). The Transcript will be designated "T.," followed by any appropriate page number(s). References to Appellant's Initial Brief will be denoted by "IB.," followed by any appropriate page number(s) and Amicus Brief will be denoted by "AB.," followed by any appropriate page number(s).

Unless otherwise stated, all references herein are to the 2019 and 2020 versions of the Florida Statutes; Florida Rules of Appellate Procedure, and the Florida Administrative Code Rules.

STATEMENT OF THE CASE AND FACTS

Per Fla. R. App. P. 9.210(c) Respondent deems the corresponding section of the Initial Brief to be satisfactory except as follows: Respondent agrees with AHCA that the facts set forth in the appellate decisions of Beach Club and Ybor Medical Injury are correct. AHCA's extensive statement contains some argument. Respondent maintains that Fla. Stat. § 120.60(4), is applicable to these proceedings. When applied, this section states that

the license in this case shall not expire until finally acted upon by an agency (after appellate review) or a later date fixed by Order of the reviewing Court.

SUMMARY OF THE ARGUMENT

There is a certified direct conflict between the First DCA's decision in Beach Club Adult Ctr., LLC v. Ag for Health Care Admin., 303 So.3d 582 (Fla. 1st DCA 2018) (Beach Club); and the Second DCA's decision in Ybor Injury and Accident Clinic, Inc. v Ag. For Health Care Admin., 310 So. 3d 1060 (Fla. 2d DCA 2020) (Ybor Clinic). The conflict centers on the language of Fla. Stat. § 120.68(3) which grants supersedeas as a matter of right to an appellant that is subject to a decision that "has the effect of suspending or revoking a license" unless supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The Second DCA ruled in Ybor Clinic that an order deeming a license renewal application incomplete and withdrawn from consideration qualified for a stay under the language of section 120.68(3) as having "the effect of suspending or revoking a license" because, like a revocation or suspension, the clinic would be forced to close. The First DCA came to the opposite conclusion in Beach Club where the appellant in the same posture as Ybor Clinic was denied supersedes in its appeal from a similar order deeming its license renewal application incomplete and withdrawn from further consideration.

A. The Second DCA Decision Comports with the Purpose of the Law

The Second DCA's interpretation is the only one that comports with the purpose of the law. Florida courts have consistently stated that the main purpose of the stay is to preserve the status quo while an appeal is pending. If the appellant were denied a stay and instead forced to comply with the order that is being appealed, then the appeal itself might become moot or meaningless. This is especially true where a business is ordered to close its doors, because the financial burden of closure may preclude the business from reopening again even if its appeal is successful.

B. The Second DCA Decision Comports with the Language of the Law

The Second DCA's interpretation of § 120.68(3) is also the only one that comports with the plain language of the law. This Court should adopt the position of the Second DCA and rule that a final order deeming a license renewal application incomplete and withdrawn from further consideration, is governed by § 120.68(3) because such an order has the effect of suspending or revoking a license because, like a revocation or suspension, it forces the closure of the business.

C. Florida Law Supports the Second DCA Opinion

Florida law recognizes the precarious position of a business that is ordered to shut down by a licensing agency. Special rules have been

instituted that help ensure that a business that is ordered to shut down due to a license revocation or suspension, can get a stay of the shut-down order pending appeal, provided that the business does not pose a probable threat to the health, safety, or welfare of the public. Fla. R. App. P. 9.190(e)(2)(C) states that a court “shall grant” a motion for a stay in such circumstances. Fla. Stat. § 120.68(3) goes further by expanding the class of appellants entitled to the presumption of a stay from those who have had a license revoked or suspended, to those who have been subject to any decision that has the effect of a license revocation or suspension.

D. Florida Case Law Supports the Second DCA Opinion

Florida case law suggests that a litigant denied a license renewal should be afforded the same protection as a litigant subject to a license revocation, regarding the burden of proof at the level of clear and convincing evidence, in hearings where the agency must prove its case. This similar treatment should carry over to the treatment of each type of case under section 120.68(3) by granting to litigants whose license renewal application has been denied or withdrawn by the agency, and a stay should be granted as a matter of right.

E. In Response to AHCA’s and the Attorney General’s Concerns

The Attorney General expressed concern that adoption of the Second DCA Opinion would cause a regulatory burden by clogging up the system with frivolous cases. This is unlikely because appeals are far more expensive and time consuming than simply filing a correct renewal application to start with. AHCA expressed concern there would not be adequate time to inspect the facilities operating under a stay. The law however has provisions to allow AHCA to conduct its inspections in its own time and still be able to challenge a stay on grounds that the facility is a danger to the health and welfare of the state.

STANDARDS OF REVIEW

The standards of review in this case are as follows:

A lower tribunal's findings of fact are upheld if supported by competent substantial evidence. Review of a lower courts legal conclusions are de novo. Planned Parenthood of Greater Orlando inc. v. MMB props., 211 So. 3d 918, 926 (Fla. 2017). "Whether an automatic stay must be entered under the circumstances presented in this case presents a matter of law that we review de novo" RL Reynolds Tobacco Co. v. Sikes, 191 So. 3d 491, 492(Fla. 1st DCA 2016).

In this case where the Court is asked to interpret a statute the review is de novo. "Because this is a question of law arising from undisputed facts,

the standard of review is de novo” Aills v. Boemi, 29 So. 3d 1105, 1118 (Fla. 2010).

ARGUMENT

A. Summary of the Law Governing Stays

1. Purpose of the Stay

Petitioner correctly states that “The purpose of an appellate stay is to maintain the status quo in the lower tribunal while an appeal proceeds”. (IB-27) quoting QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass’n, Inc., 94 So. 3d 541, 555 (Fla. 2012). The guiding principle of law in deciding whether or not to grant supersedeas is to ensure that proceedings in the lower tribunal do not “...interfere with the power of the appellate court to make its jurisdiction effective”. Hirsch v. Hirsch, 309 So. 2d 47, 50 (Fla. Dist. Ct. App. 1975). Discretionary supersedeas should not be granted if “...it would permit status of subject-matter to be changed so as to render subsequent proceedings ineffectual”. Hathaway v. Munroe, 97 Fla. 28 (1929). This long line of decisions consistently states that the goal and purpose of the decision whether to grant supersedeas is to preserve the relative position of the parties, i.e., the status quo, so that the case is decided by the appellate court rather than by outside forces that might otherwise disadvantage one party.

2. The Special Place of Licensing in the Law of Stays

Ordinarily, in cases where a license is not at issue, a movant seeking a stay must prove entitlement to a stay by satisfying a four-factor test. The four factors, established by case law, are: (1) a likelihood of irreparable harm if the stay is not granted; (2) the unavailability of an adequate legal remedy; (3) a likelihood of success on the merits; and (4) that considerations of the public interest support granting the stay. Howell v. Orange Lake Country Club, Inc., 303 So. 3d 1009, 1011 (Fla. Dist. Ct. App. 2020), *citing* “Dispoto v. Marion Cty.”, 969 So. 2d 423, 425 (Fla. 5th DCA 2007).

Where a license is at issue, the rules bypass the four-part test established by case law. Fla. R. App. P. 9.190(e)(2)(C) reads:

*When an agency has suspended or revoked a license other than on an emergency basis, a licensee may file with the court a motion for stay on an expedited basis. The agency may file a response within 10 days of the filing of the motion, or within a shorter time period set by the court. Unless the agency files a timely response demonstrating that a stay would constitute a probable danger to the health, safety, or welfare of the state, **the court shall grant the motion and issue a stay.** (emphasis added).*

Fla. R. App. P. 9.190

Here, a special process is created to address the special circumstance where an agency suspends or revokes a license. The rule recognizes implicitly, that in these circumstances, where an agency has suspended or revoked a license, preserving the status quo requires that the stay be issued.

The operative line is that “...the court *shall* grant the motion and issue a stay”, unless the agency can demonstrate that a stay would constitute a probable danger to the health, safety, or welfare of the state. The burden of proof is reversed, and the stay is presumed.

Fla. Stat. § 120.68(3) extends protection of the status quo further by gathering under its’ protective shield not only movants who have had their license suspended or revoked, but also to movants that are subject to any decision that “...has the *effect* of suspending or revoking a license”. (emphasis added). The statute reads as follows:

*The filing of the petition does not itself stay enforcement of the agency decision, **but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable**, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency also may grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. In any event the court shall specify the conditions, if any, upon which the stay or supersedeas is granted. (emphasis added).*

Fla. Stat. § 120.68

B. Applicability of Fla. Stat. § 120.68(3) to Ybor Clinic

- 1. The plain language of Fla. Stat. § 120.68(3) broadens the presumption of supersedeas beyond decisions to suspend or**

revoke a license, to any decision that has the effect of suspending or revoking a license. An order that withdraws a license renewal application and results in the closure of a business has the effect of suspending or revoking a license.

AHCA agrees with the 2nd DCA that the terms “effect” and “result” are the same when interpreting § 120.68(3). (IB-33,34).

At issue is whether AHCA’s Final Order, rendered September 3rd, 2020, to withdraw Ybor Clinic’s license renewal application falls within § 120.68(3)’s language of having the *effect of suspending or revoking a license*. (R-37)

The Second DCA ruled that AHCA’s order to deem Ybor Clinic’s license renewal application incomplete and withdrawn from consideration had the “effect of suspending or revoking” Ybor Clinic’s license because the order would result in the shut-down of Ybor Clinic’s business just as a license suspension or revocation would. Ybor Med. Injury & Accident Clinic, Inc. v. Ag. For Health Care Admin., 310 So. 3d 1060 (Fla. 2d DCA 2020) (“Ybor Clinic”). The Second DCA’s decision properly focused on the Final Order’s effect upon the business and its closure. The meaning of the words “...but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right...” is correctly

interpreted to mean "...but if the agency decision has the effect **upon a business** of suspending or revoking a license, supersedeas shall be granted as a matter of right...". The Second DCA put it this way: "The clinic wants to maintain its license and continue its operations; that is why it submitted a renewal application and contested AHCA's notice of intent. AHCA's final order "withdraw[s]" the clinics renewal application. We view that act as "ha[ving] the effect of" i.e., producing the same "result" as, a revocation". Ybor Clinic, 310 So. 3d 1060, 1062 (Fla. 2d DCA 2020).

AHCA contests this view, claiming instead that the Final Order's effect upon the business is not the issue, but rather the Final order's effect upon the license itself. AHCA claims that section 120.68(3) requires that the effect of the Final Order must be on "a license" in order for the supersedeas provision to apply (IB-35). AHCA criticizes the Second DCA opinion as follows: "Indeed, the Second DCA failed to follow section 120.68(3)'s plain language that "the decision ha[ving] the effect" be on "a license" when it concluded, since the facility **would not be licensed or would have a licensure gap** because of AHCA's decision **on the application**, that was sufficient to trigger section 120.68(3)'s presumptive supersedeas provision" (IB-36).

AHCA's reading of Section 120.68(3) is too restrictive and consequently construes the supersedeas provision in a way that is at odds with both the language and the purpose of the statute. By claiming that an order must have the same effect *upon a license* as a suspension or revocation of a license, AHCA's reading would limit qualifying orders to ones that actually do suspend or revoke a license. Such an interpretation renders meaningless, the wording of the statute that says "*...but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right.*" That language is broad and is clearly meant to include agency decisions other than suspension or revocation decisions alone. As the Second DCA stated "Moreover, if the legislature had intended to limit the availability of a stay to situations in which an agency revokes or suspends a license, it easily could have employed more restrictive wording" Ybor Clinic, 310 So. 3d 1060, 1062 (Fla. 2d DCA 2020). AHCA unreasonably claims the opposite; that if the legislature meant to include orders, such as the one at issue here, it would have foreseen them and provided for them specifically in the text of the statute (IB 36). AHCA claims "If the legislature had intended an agency decision to deem a licensure renewal incomplete and withdrawn from

consideration and/or any subsequent expiration of the existing license by operation of statute to trigger a presumptive stay or supersedeas, it could have said so in the text of section 120.68(3). But it did not (IB 36-37).

AHCA's restrictive reading of section 120.68(3) would effectively deny the presumption of supersedeas in cases other than actual suspensions or revocations, harming an entire class of business litigants meant to be protected by the statute, and disrupting the status quo by forcing the closure of those businesses pending their appeals.

2. Florida Law Supports Continuity in Health Care Licensing and is Consistent with a Broad Reading of Section 120.68(3)

The legislature has provided protections for licensed health care facilities to help ensure continuity in licensing.

Section 408.806(2)(a) provides that a licensed facility will not experience a gap in licensing while the agency considers a renewal application. It states as follows:

*The applicant for a renewal license must submit an application that must be received by the agency at least 60 days but no more than 120 days before the expiration of the current license. An application received more than 120 days before the expiration of the current license shall be returned to the applicant. **If the renewal application and fee are received prior to the license expiration date, the license shall not be deemed to have expired if the license expiration date***

occurs during the agency's review of the renewal application.

Fla. Stat. § 408.806

Section 408.815(2) treats a license denial and a revocation the same while the licensee is in litigation over the license, recognizing that a denial and a revocation have the same effect on the licensee. This is consistent with the broad language of Section 120.68(3) which includes more than just revocation and suspension orders.

*If a licensee lawfully continues to operate **while a denial or revocation is pending in litigation**, the licensee must continue to meet all other requirements of this part, authorizing statutes, and applicable rules and file subsequent renewal applications for licensure and pay all licensure fees. The provisions of ss. 120.60(1) and 408.806(3)(c) do not apply to renewal applications filed during the time period in which the litigation of the denial or revocation is pending until that litigation is final. (emphasis added)*

Fla. Stat. § 408.815

Further, APA section 120.60(4) which has general application to licenses issued by most state agencies also provides for license continuity during litigation. It states:

When a licensee has made timely and sufficient application for the renewal of a license which does not automatically expire by statute, the existing license shall not expire until the application for renewal has been finally acted upon by the agency or, in case the application is denied or the terms of the license are limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

Fla. Stat. § 120.60

AHCA argues that a license renewal application that is withdrawn by the agency, is both different and less severe in its effects than a revocation and should therefore be treated differently for purposes of Section 120.68(3)'s presumption of supersedeas. In support of this claim AHCA lists seven differences of effect between the two types of cases: 1) Revocation is punitive, a withdrawn renewal application is not, 2) revocation requires the filing of an administrative complaint, a withdrawn renewal application does not, 3) revocation involves a determination that the facility is unfit for licensure, a withdrawn renewal application does not, 4) a revocation takes action against a current license while an application for a prospective license acquired through renewal application does not, 5) the revocation action negatively affects the license such that it may not be used during its' effective period, while a withdrawn renewal application does not, 6) revocation has a negative impact on a facilities' future license applications, while a withdrawn renewal application does not, and, 7) different standards of proof apply at administrative hearings for the two types of cases (IB, 38-39).

The one effect that AHCA fails to consider is this; both a revocation or suspension, and a withdrawn license renewal application,

absent a stay, have the effect of closing a business during the pendency of appeal. This is the effect that goes to the heart of the purpose of a stay- to preserve the status quo while the appeal is pending. Absent a stay, a closed business might lose its lease, its customer base, its employees, even its whole existence, while waiting for a decision on the merits of its case, rendering the appeals court decision ineffective. The Second DCA acknowledged that the withdrawal of Ybor Clinics renewal application was less severe than a revocation or suspension but still found that the decision withdrawing Ybor Clinics license renewal application fell under the protection of section 120.68(3) because it had the effect of a license suspension or revocation because it would, like a suspension or revocation force the clinic to close its doors during the appeal, absent a stay. The Second DCA explained, “Finally, to the extent that the legislature has provided an opportunity for a licensee to maintain its license pending appeal in the face of agency action as serious as revocation or suspension of its license, it seems reasonable that the same opportunity would be available when the agency takes some lesser action against the license that, as here “has the effect of” a suspension or revocation”. Ybor Clinic, 310 So. 3d 1060, 1063 (Fla. 2d DCA 2020). The Second DCA further explained that the Order in this case had the effect of a revocation or suspension, even if Ybor Clinic

can re-apply for a new License, because the Order on appeal could "...be seen as having the effect of suspending the clinic's license to operate". *Id* at 1063

3. Fla. Stat. § 120.68(3) in Florida Case Law is Contradictory and Unsettled but Strongly Suggests that a Denial of a License Renewal Application Should be Treated like a Revocation and Qualify for the Presumption of Supersedeas.

The certified conflict in the instant case is with Beach Club Adult Ctr., LLC v. Ag. for Health Care Admin., 303 So. 3d 582 (Fla. 1st DCA 2018) (Beach Club). Beach Club relies upon Terrel Oil Co. v. Department of Transportation, 541 So. 2d 713 (Fla. 1st DCA 1989) (Terrel Oil), and Silver Show Inc. v. Dept. of Bus. & Prof Reg., 763 So. 2d 348 (Fla. 4th DCA 1998) (Silver Show). As the 2nd DCA explains in Ybor Clinic, 310 So. 3d 1060, at 1063 (Fla. Dist. Ct. App. 2020) the first DCA drew the wrong conclusions from each of them. Terrell Oil stands for the proposition that because there is a qualitative difference between a license renewal that is denied, and one that is revoked, it follows that a denied license renewal does not have the effect of a revocation for purposes of section 120.68(3). Terrel Oil, 541 So. 2d 713, at 714 (Fla. 1st DCA 1989). Yet a license renewal application denied causes the closure of a business as surely as a license revoked. It is this effect that qualifies a license renewal denial for the presumption of supersedeas under section 120.68(3) because the

plain language of the statute expands the class of litigants covered by the presumption of supersedeas to those subject to a decision that merely has the effect of a revocation. Beach Club similarly draws the wrong conclusion from Silver Show. In Silver Show, the license application at issue was an initial application rather than a renewal application. As the Second DCA noted, “By applying to orders that have the effect of “suspending or revoking a license”, section 120.68(3) necessarily presupposes that a license already exists, and by definition, a license that does not yet exist cannot be “suspended or revoked” Ybor Clinic, 310 So. 3d 1060, at 1063 (Fla. 2d DCA 2020).

In Silver Show, the 4th DCA did acknowledge that an existing license may have property rights that are missing in the case of an initial application. The court explained:

“A licensee may have a valuable property right in an existing license, but a mere applicant for a beverage license has at best the hope of qualifying. Reid v. Florida Real Estate Comm’n, 188 So. 2d 846 (Fla. 2d DCA 1966); Delk v. Dept. of Prof’l Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992)”.

Silver Show Inc. v. Dept. of Bus. & Prof Reg., 763 So. 2d 348, at 349 (Fla. 4th DCA 1998). AHCA contends that Ybor Clinic’s license is temporary and limited to the two-year life cycle of renewal after which it expires on its own

if not renewed, claiming that this belies any claim to a property interest in the license, or to an entitlement to the protections under the law afforded in cases of revocation or suspension. (IB, 21,43). Although Ybor Clinic's license is subject to renewal every two years, it is an existing license which shows on its face the same license # HCC5231 upon each new updated certificate that is issued every two years (R, 63-70).

A number of District Courts of Appeal have found that denying a license renewal is similar to a penal action affecting property rights in that it requires proof by clear and convincing evidence to support the denial. Coke v. Dept. of Children & Fam Services, 704 So. 2d 726 (FLA. 5th DCA 1998) (Coke); Davis Family Day Care Home v. Dep't of Children & Fam., 117 So. 3d 464, 469 (Fla. 2d DCA 2013). In Coke the 5th DCA said, "The Department agrees that in this proceeding it had the burden of proving her lack of entitlement to a renewal of her license and that the evidence needed to be clear and convincing" Coke, at 726.

The language of section 120.68(3) only requires that an agency decision have the effect of a license revocation to qualify for the presumption of supersedeas. It does not differentiate between a notice of intent to deny, withdraw from consideration or any other device used by the

agency to effect a closure. Because the withdrawal of a license renewal application is treated similarly to revocation in hearings where the license is at issue, such withdrawal from consideration should also be treated like a revocation for purposes of the supersedeas under section 120.68(3).

C. Response to Other Considerations Raised by AHCA and by the Attorney General's Office in its Amicus Brief.

Both AHCA and the Attorney General claim that the Second DCA opinion in Ybor Clinic, if upheld, would cause undue burdens upon AHCA. AHCA claims that it lacks the resources to conduct an inspection of a facility in the short time period (10 days, per Fla. R. App. P. 9.190(e)(2)(C)) between the filing of a motion for stay, and the time the agency is required to respond as to whether the facility poses a probable danger to the health, safety, or welfare of the state (IB, 51). Fla. R. App. P. 9.190(e)(2)(D) offers AHCA a solution to the time crunch. It states:

When an order suspending or revoking a license has been stayed pursuant to subdivision (e)(2)(C), an agency may apply to the court for dissolution or modification of the stay on grounds that subsequently acquired information demonstrates that failure to dissolve or modify the stay would constitute a probable danger to the public health, safety, or welfare of the state.

Fla. R. App. P. 9.190

AHCA needn't worry about the short time window for inspecting the facility because AHCA can move later for a dissolution of the stay if it is

warranted by a finding that the facility poses a probable danger to the health, welfare, or safety of the state.

The Attorney General claims that the Second DCA's decision "...risks seriously damaging the efficient operation of the administrative scheme" (AB, 10). The Attorney general claims that the presumption of supersedeas would tempt licensees to abuse the system by filing an appeal and claiming a stay whenever they feel uncertain about their prospects for a successful renewal application, thereby extending their license without securing a renewal (AB, 10). This may prove true in some cases, but it is doubtful that the problem would rise to the level where it seriously damages the efficient operation of the administrative scheme. Appeals are time consuming and expensive, so the incentive will always be to try to secure a renewal without resort to the courts. It should also be considered that the burden faced by a facility facing closure is more dire than the burden faced by an agency that must monitor a facility operating under a stay.

CONCLUSION

For all the foregoing reasons, the Second DCA' decision in Ybor Clinic correctly applied section 120.68(3)'s presumptive supersedeas provision to grant a stay of AHCA's Final Order where Ybor Clinic's license renewal

application was deemed incomplete and withdrawn from consideration.

Accordingly, Ybor Clinic respectfully requests this Court:

1. Resolve the interdistrict conflict between the First DCA's Beach Club Order and the Second DCA's Ybor Clinic Order by holding that section 120.68(3)'s presumptive supersedeas provision does apply to an agency order deeming a license renewal application incomplete and withdrawn from further consideration; and
2. Affirm the Ybor Clinic Order.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that the foregoing was electronically filed with the Florida Court E-portal filing system, which will furnish by email the foregoing document by Electronic Mail to Counsel for AHCA, Tracy Lee Cooper George, at Tracy.George@ahca.MyFlorida.Com, 2727 Mahan Dr, MS#3, Tallahassee FL, 32308, on this 27th day of July, 2021.

CERTIFICATE OF COMPLIANCE

I **HEREBY CERTIFY** that the foregoing Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Frank John Bane

Frank John Bane, Esquire