

IN THE SUPREME COURT OF FLORIDA

**Case No. SC20-1814
Lower Tribunal No. 2D20-2750**

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

Petitioner,

vs.

YBOR MEDICAL INJURY & ACCIDENT CLINIC, INC.,

Respondent.

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

AMENDED RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUES

Whether This Court should decline Jurisdiction in the appeal of the Second District Court of Appeals' order of November 13, 2020 which certified a conflict with the First District's decision in Beach Club Adult Center, LLC v. Agency for Health Care Administration, 43 Fla. L. Weekly D1493 (Fla. 1stDCA June 28, 2018).

STATEMENT OF THE CASE AND FACTS

Appellant, Ybor Injury & Accident Clinic Inc. ("Ybor Clinic"), hereby adopts the Statement of the Case and Facts as stated in the State of Florida, Second District Court of Appeal's ("Second DCA") Order, but adds the following to help the reader distinguish the legal posture of Ybor Clinic from the posture of other license applicants referred to in case law:

A. About Ybor Clinic

Ybor Clinic obtained its first license in 2001 and has been in continuous operation since that time. Ybor Clinic has successfully renewed its license every two years from the time of its' inception until the most recent renewal period.

ARGUMENT

SUMMARY: This court clearly has discretionary jurisdiction in this case under two different provisions of the Florida Constitution, Article V, Sections 3(b)(3) and 3(b)(4), both of which grant discretionary jurisdiction in cases of conflict between two different district courts of appeal. Yet, this Court should decline review of this case because it is not representative of the full range of future cases that may be affected by a decision in this case and could set precedent inappropriate to some classes of licensees.

A. This Court Has Discretionary Jurisdiction under the Florida Constitution Article V, Section 3(b)(4) as a Certified Direct Conflict.

Article V, Section 3(b)(4) reads: The Supreme Court “May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal”. Here the Second District Court of Appeals certified a conflict with the First District in Beach Club Adult Center, LLC v. Agency for Health Care Administration, 303 So.3d 582 (Fla. 1st DCA 2018). The Court said, “We certify conflict with the First District in Beach Club”. (App-A, 9).

B. This Court Has Discretionary Jurisdiction under the Florida Constitution Article V, Section 3(b)(3) as a Decision that Directly Conflicts with a Decision of Another District Court of Appeal.

Article V, Section 3(b)(3) of the Florida Constitution reads in part that the Supreme Court may review any decision that “...directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” Here the Second DCA adopted the point of law that the words of Fla. Stat. § 120.68(3) “has the effect of suspending or revoking a license...” encompasses cases where, like here, the agency did not revoke or suspend a license but instead declined to renew a license. (App-A, 5). The Second DCA’s opinion on that point of law stands in direct conflict with the First DCA’s opinion on the same point of law in Beach Club, that a denied license renewal application does not fall within the meaning of the words “has the effect of suspending or revoking a license...”. Fla. Stat. § 120.68(3).

C. This Court Should Decline Jurisdiction because this Case Does Not Fully Represent the Panoply of Future Cases that May be Affected by a Decision in this Case. A more expensive facility, or a facility regulated by an over-zealous agency would better illustrate the wisdom of placing a failed license renewal within the meaning of the words “having the effect of suspension or revocation”.

Fla. Stat. § 120.68(3) and Fla. R. App. P. 9.190(e) (2)(C) have broad applicability that covers many state agencies responsible for licensure, including Agency for Health Care Administration and the Florida Department of business and Professional Regulation. Facilities subject to licensing range from professional offices and small clinics to large facilities that cost millions and employ hundreds. In some cases, a temporary closure pending litigation over a license renewal will not unduly harm a business.

In others a failed license renewal without a stay pending appeal, can break a business financially so that it cannot re-open even if it wins its appeal. Customers find other service providers. Employees scatter in search of jobs. Expenses continue even if revenues do not. In such cases it is far more important that the broad language of Fla. Stat. § 120.68(3) be applied to license renewals as well as to revocations or suspensions. The plain language of the statute as interpreted by the Second DCA does that. It applies to agency actions that merely "...have the effect of suspending or revoking a license". Fla. Stat. § 120.68(3). (App-A, 7).

Another group of license renewal applicant for whom it is crucial to fall under the umbrella of Fla. Stat. § 120.68(3) are those regulated by an over-zealous agency who may be prone to abuse of discretion.

Both Fla. Stat. § 120.68(3) and Fla. R. App. P. 9.190(e) (2)(C) provide appellants with the right to apply directly to the district court of appeal rather than going first to the agency that threatens their license. Fla. Stat. § 120.68(3) states: "...a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas". Fla. R. App. P. 9.190(e) (2)(C) similarly grants the right of direct appeal to the DCA, stating: "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".

Fla. Stat. § 120.68(3) and Fla. R. App. P. 9.190(e) (2)(C), taken together provide an enhanced degree of protection for licensees facing decisions that have the effect of license suspension or revocation compared to licensees threatened with other kinds of agency action. Both the statute and the rule grant licensees a stay as a matter of right, and both the statute and rule place the burden of proof on a licensing agency that objects to a stay, to show that a stay would constitute a "...probable danger to the health, safety, or welfare of the state". Fla. Stat. § 120.68(3) and Fla. R. App. P. 9.190(e) (2)(C). These rights are crucial when the license and livelihood of a business is threatened by agency action regardless of whether it is a denied renewal or an actual suspension or revocation.

CONCLUSION

For the reasons stated above, This Court has discretionary jurisdiction, but should decline review of this case.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of February, 2021, I electronically filed the foregoing using the Florida Courts eFiling Portal, which system will send a notice of electronic filing and copy to counsel of record: Nicholas A. Merlin, Senior Attorney **(NicholasMerlin@ahca.myflorida.com)** and Tracy Lee Cooper George, Chief Appellate Counsel for Agency for Health Care Administration, **(TracyGeorge@ahca.myflorida.com)** 2727 Mahan Drive, MS#3, Tallahassee, FL 32308.

/s/ Frank John Bane
Frank John Bane, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Respondent's Brief on Jurisdiction complies with the font and word count requirements of Fla. R. App. P. 9.045(e).

/s Frank John Bane
Frank John Bane, Esquire