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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 DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Appellee, State of Florida, Agency for Health Care Administration ("AHCA") hereby adopts the facts as stated in the State of Florida, Second District Court of Appeal's ("Second DCA") Order,[1] but adds the following to aid the reader:

A. About Health Care Clinic Licensure.

A license issued by AHCA is required to operate a health care clinic in Florida. §§ 400.991(1)(a)-(b), 400.9925(1), 408.802(24), 408.803(8), (12), 408.804(1), 408.808, Fla. Stat. Each health care clinic license expires by operation of law two years from its date of issue, unless the licensee applies for and ultimately obtains renewal from AHCA. §§ 400.991(1)-(6), 400.9925(1)-(3), 408.802(24), 408.803(2), (8)-(9), 408.805-.8065, 408.808(1), Fla. Stat.; Fla. Admin. Code R. 59A-33.001(1), 59A-33.002(1). See § 400.9905(1)-(2), 408.803(1)-(2), (8)-(9), (11)-(12), Fla. Stat. (definitions). When a licensee files a licensure renewal application prior to the license expiration date, the effective period of the existing license is automatically extended until the date AHCA rules on the application, per Section 408.806(2)(a), Florida Statutes. If AHCA denies the

[1] Pursuant to Florida Rule of Appellate Procedure 9.120(d), this jurisdictional brief is accompanied by an Appendix. It includes the Second DCA's Order in Ybor Medical Injury & Accident Clinic, Inc. v. Ag. for Health Care Admin., -- So. 3d --, 2020 WL 6683034 (Fla. 2d DCA Nov. 13, 2020), which is abbreviated as "Order" or "Ord."

licensure renewal application or withdraws it from further review, its Final Order may further extend the effective period for up to 30 additional days to allow for the safe and orderly discharge of clients, per Section 408.815(6), Florida Statutes. See also §§ 400.191(1), 408.802(24), Fla. Stat.

Section 120.68(3) states that a licensee, when seeking judicial review of an agency decision, is entitled to a stay "as a matter of right" so long as "the agency decision has the effect of suspending or revoking a license." A court may not issue the stay, however, if the court, upon petition from the agency, determines that the stay "would constitute a probable danger to the health, safety, or welfare of the state." § 120.68(3), Fla. Stat.; Fla. R. App. Pro. 9.190(e)(2)(C).

B. Facts of this Case.

Appellant, Ybor Medical Injury & Accident Clinic, Inc. ("Ybor Clinic") is an AHCA-licensed health care clinic located in Tampa, Florida, and is subject to Chapters 400 and 408, Florida Statutes. Ybor Clinic applied to AHCA for the renewal of its health care clinic license. (Order 2). The ensuing facts are accurately explained in the Second DCA's Order at page 2. Ultimately, AHCA rendered a Final Order that withdrew Ybor Clinic's licensure renewal application from further review because of its failure to timely correct omissions in the application. (Order 2). AHCA extended the effective period of Ybor Clinic's existing license for 30 additional days per Section 408.815(6). (Order 2).

Ybor Clinic then (a) appealed AHCA's Final Order to the Second DCA and (b) filed a motion claiming entitlement to a stay of the Final Order during the pendency of the appeal. Ybor Clinic cited to Section 120.68(3), Florida Statutes, and Florida Rule of Appellate Procedure 9.190(e)(2)(C), as governing authority requiring the stay. (Order 2-3).

The Second DCA rendered a non-dispositive Order, granting the motion for stay. (Order 1-7). It reasoned that while AHCA's Final Order "does not 'suspend or revoke' the Clinic's license per se," it does "ha[ve] the effect of suspending or revoking that license." (Order 4). Under that standard, the Second DCA concluded that AHCA failed to show that Ybor Clinic's continued operation "would constitute a probable danger to the health, safety, or welfare of the state." (Order 4, 6). The court expressly acknowledged that its view conflicted with the State of Florida, First District Court of Appeal's ("First DCA") decision in Beach Club Adult Center, LLC v. Agency for Health Care Administration, 303 So. 3d 582 (Fla. 1st DCA 2018) (holding the statutory text does not entitle licensee to an automatic stay where the license renewal application has been withdrawn from review). And thus, the Second DCA certified conflict to this Court per Article V, Section 3(b)(4) of the Florida Constitution.

AHCA filed a timely Notice invoking this Court's jurisdiction and now requests this Court accept jurisdiction for the reasons stated below.

SUMMARY OF ARGUMENT

This Court has discretionary jurisdiction to review this appeal, and it should do so for two reasons. First, the Second DCA certified a direct conflict under Article V, Section 3(b)(4) of the Florida Constitution. Second, this case is eligible for discretionary review because the Second DCA's decision "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." See Art. V, § 3(b)(4), Fla. Const. Indeed, the intermediate appellate courts of the state reached opposite conclusions on the same issue of law. This Court should accept jurisdiction over the instant case because the Second DCA's decision, in departing from the First DCA's logic, misconstrues the governing statute and rule, ignores precedent from this Court, and creates a situation where the agencies and license applicants are subject to different standards in different courts.

ARGUMENT

ISSUE: THIS COURT HAS DISCRETIONARY JURISDICTION AND SHOULD ACCEPT REVIEW.

A. This Court Has Discretionary Jurisdiction because the Second DCA Certified Conflict.

Article V, Section 3(b)(4) of the Florida Constitution affords this Court discretionary jurisdiction to review "any decision of a district court of appeal ... that is certified by it to be in direct conflict with a decision of another district court

of appeal." Here, the Second DCA certified direct conflict between its decision and the First DCA's decision in Beach Club Adult Center, LLC v. Agency for Health Care Administration, 303 So. 3d 582 (Fla. 1st DCA 2018), on the same point of law. See (Order 7) ("We certify conflict with the First District in Beach Club."). Therefore, this Court may review the Second DCA's decision.

B. This Court Has Discretionary Jurisdiction because the Second DCA's Decision Expressly and Directly Conflicts with the First DCA's Decision on the Same Point of Law.

The Second DCA's order holds that a final order withdrawing a licensure renewal application from review "ha[s] the effect of suspending or revoking a license," such that a licensee/applicant is entitled to a stay of that final order pending appeal under Section 120.68(3) and Rule 9.190(e)(2)(C). (Order at 3-5). As the Second DCA observed and certified, this holding expressly and directly conflicts with the First DCA's decision in Beach Club, a case in which the First DCA held that a final order withdrawing a licensure renewal application from review does not qualify for stay under Section 120.68(3). (Order 6-7); Contra 303 So. 3d at 582-83. Because of the direct conflict between the intermediate appellate court rulings, this Court has jurisdiction to review the Second DCA decision.

C. This Court Should Accept Review because the Second DCA's Decision Misconstrues Section 120.68(3) and Rule 9.190(e)(2)(c), Ignores Decisional Authorities from this Court, and Creates A Situation in which the Agencies and License Applicants Are Subject to Different Standards in Different Courts.

This Court should accept review of the Second DCA's decision because it creates inconsistency in the legal landscape and misinterprets Section 120.68(3) and Rule 9.190(e)(2)(C).

Section 120.68(3) and Rule 9.190(e)(2)(C) provide for a stay when an agency decision "has the effect of suspending or revoking a license." Whether this language entitles a licensee to a stay when AHCA deems an application withdrawn was reviewed by the First DCA in Beach Club. There, the court determined that the statute did not apply as a textual matter because the final order did not suspend or revoke the Appellant's license. Beach Club, 303 So. 3d at 583. It relied on Terrell Oil Co. v. Department of Transportation, 541 So. 2d 713, 715 (Fla. 1st DCA 1989), in which the First DCA found that the decision to suspend or revoke a license is "qualitative[ly] different" from an order denying the "renewal of a license that has expired or is about to expire." And it relied on Silver Show, Inc. v. Department of Business & Professional Regulation, 763 So. 2d 348, 349 (Fla. 4th DCA 1998), in which the State of Florida, Fourth District Court of Appeal ("Fourth DCA") held that an agency's decision to deny a license application is regulatory in nature, not a sanction. Id.

The First DCA's interpretation was consistent with this Court's previous holdings implicitly recognizing that withdrawing an incomplete licensure renewal application from review is not the same as an order suspending or revoking an existing license. In Florida Department of Children and Families v. Davis Family Day Care Home, 160 So. 3d 854 (Fla. 2015) and Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996), this Court held that an agency's determination of the fitness of a licensure applicant for a license—a privilege—is fundamentally different from a penal action to revoke an existing license; agencies thus face different burdens of proof when pursuing each action. 160 So. 3d at 856-57; 670 So. 2d at 934.

The First DCA decision faithfully applied the statutory text and ensured consistency in the law.

The Second DCA's decision, in contrast, departed from the statute's text in favor of a functionalist analysis, and it failed to acknowledge the critical distinctions between the licensing suspension and revocation decisions for which the statute unambiguously contemplates stay and the application-withdrawal decision at issue in this matter.

In essence, the Second DCA asked whether the agency decision deprived a licensee of a license. This functionalist inquiry wholly tracks what a reader could understand as the spirit of Section 120.68(3), but not its text. As the First DCA

explained, the stay statute speaks of license suspension and revocation only. These terms apply where a licensee has established an entitlement to a license. 303 So. 3d at 582-83. Deprivation is a penal act. A stay is logical in that context; further review is necessary to ensure a penal action is proper.

Withdrawal of an application for renewal is different in kind. As the Fourth DCA explained in Silver Show, "[a] licensee may have a valuable property right in an *existing* license, but a mere applicant for a . . . license has at best the hope of qualifying." 763 So. 2d at 349 (italicized in original). Deeming a renewal application withdrawn is a regulatory decision. The Second DCA's decision missed that critical distinction. The effect of the Second DCA's decision cannot be ignored. The decision creates confusion and uncertainty on a point of law that was not previously subject to debate. And it will affect AHCA and other state agencies responsible for licensure. Indeed, if not modified through review, AHCA and other licensing agencies have the burdensome task of arguing different standards in different courts, undermining predictability in the law. This is an undesirable position that will result in the disparate treatment of licensure renewal applicants seeking to stay a final order, both by agencies and by Florida's DCAs. There is no reason to continue this uncertainty. This Court should accept review to resolve the ongoing conflict among the courts.

CONCLUSION

For all of the foregoing reasons, this Court has discretionary jurisdiction pursuant to both a certified conflict and an express and direct conflict, and it should accept review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document has been furnished by Electronic Mail to Counsel for Appellant, Frank Bane, Esquire, frankbanelaw@gmail.com, 605 75th Avenue, St. Petersburg, Florida 33706, on December 28, 2020.

/s/ *Nicholas A. Merlin*
Nicholas A. Merlin

CERTIFICATE OF COMPLIANCE

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

/s/ *Nicholas A. Merlin*
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