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 & ACCIDENT CLINIC, INC.,

Respondent.

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

REPLY BRIEF ON THE MERITS

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ARGUMENT

A. Section 120.68(3), Florida Statutes', Presumptive Supersedeas Provision and Florida Rule of Appellate Procedure 9.190(e)(2)(C) Do Not Apply to AHCA's Final Order Deeming the Licensure Renewal Application Incomplete and Withdrawn from Review.

Contrary to Appellant Ybor Medical Injury and Accident Clinic, Inc.'s ("Ybor Clinic") claims, the Second District Court of Appeal ("DCA") in Ybor Medical Injury and Accident Clinic, Inc. v. Agency for Health Care Administration, 310 So. 3d 1060 (Fla. 2d DCA 2020), committed reversible error by applying section 120.68(3)'s presumptive supersedeas provision and rule 9.190(e)(2)(C) to grant Ybor Clinic a stay as a matter of right.

Ybor Clinic incorrectly argues the Second DCA's reading of section 120.68(3)'s presumptive supersedeas provision comports with the plain statutory terms, but it does not. (AB.3, 8-12). As AHCA argues, and as the First DCA concluded in Beach Club Adult Center, LLC v. Agency for Health Care Administration, 303 So. 3d 582, 582-83 (Fla. 1st DCA 2018), section 120.68(3)'s presumptive supersedeas provision plainly and unambiguously states its applies when an "agency decision has the effect of **suspending or revoking** a **license.**" (Emphasis added); (IB at Argument B.1)[1]. Section

[1] AHCA's Initial Brief on the Merits is referenced as "Initial Brief" or "IB," followed by any pertinent section(s) and/or subsection(s). Ybor Clinic's

120.68(3)'s presumptive supersedeas provision does not apply here, since (1) AHCA did not act on "a license," but on a licensure renewal application; and (2) AHCA's decision did not "have the effect of suspending or revoking," but the effect of "deeming incomplete" and "withdrawing from further review" a licensure renewal application. Beach Club, 303 So. 3d at 582-83; (R.37-48; IB at Argument B.1-2); contra (AB.7-12, 14-16).

Ybor Clinic claims section 120.68(3)'s presumptive supersedeas provision should be "**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 …" (AB.9-16) (quotation at AB.9-10, emphasis modified). This argument does not comport with the plain statutory language and requires additional terms to be read into the text that were not authorized by the Legislature. Further, it arbitrarily limits the application of section 120.68(3)'s presumptive supersedeas provision to circumstances where an agency's decision has an effect "upon a business." And it fails to give full effect to the provisions of the Health Care Licensing Procedures Act, chapter 408, part II, Florida Statutes ("HCLPA"). § 408.801, Fla. Stat.; (IB at Argument B.2); infra Argument B, D.

Answer Brief on the Merits is referenced as "Answer Brief" or "AB," followed by any appropriate page numbers.

AHCA does not contend the application of section 120.68(3)'s presumptive supersedeas provision is limited only to cases where an agency actually suspends or revokes a license, as Ybor Clinic suggests. (AB.11-12). For example, section 120.68(3)'s presumptive supersedeas provision may apply if an agency places limitations on a license so restrictive that the holder cannot use the license, either permanently or temporarily. Or it may apply if an agency, pursuant to a governing statutory scheme, takes some other action on a license that is not called a suspension or revocation, but has the same effect. Importantly, each state agency responsible for issuing licenses is governed by different licensing statutes and rules, and thus has different procedures and processes to which section 120.68(3)'s presumptive supersedeas provision may apply. § 120.50, Fla. Stat. But in no event can the language "ha[ve] the effect of suspending or revoking a license" be applied to an agency decision to **deem incomplete and withdrawn from review** an **application** to renew a license that is about to expire, whether under the HCLPA or any other statutory licensing scheme. §§ 120.68(3), 408.806(3)(b), Fla. Stat.; (IB at Argument B.1-2).

Rule 9.190(e)(2)(C) expressly states it only applies "[w]hen an agency has suspended or revoked a license other than on an emergency basis …." By claiming section 120.68(3)'s presumptive supersedeas provision expands

rule 9.190(e)(2)(C) to also encompass "decision[s] ha[ving] the effect of suspending or revoking a license" – an argument that has no merit in law or fact – Ybor Clinic implicitly concedes rule 9.190(e)(2)(C) is narrower in scope. (AB.7-8). And since AHCA's Final Order does not "suspend[] or revoke[] a license …," rule 9.190(e)(2)(C) is inapplicable and the Second DCA erred by applying it. (R.27-47; IB at Argument A.2, B.1-2, D); contra (AB.7-8).

B. Ybor Clinic's Claim That a Stay Is Necessary to Preserve the Status Quo Is Meritless.

Ybor Clinic's claims regarding the "purpose" of Section 120.68(3)'s presumptive supersedeas provision are inapposite. The plain language of section 120.68(3)'s presumptive supersedeas provision requires that an agency decision must have the "effect of suspending or revoking a license" before it may apply. It is the text of the statute, not Ybor Clinic's views on the purpose behind it, that should control.

Additionally, while Ybor Clinic is not entitled to supersedeas under section 120.68(3)'s presumptive supersedeas provision, it could have moved AHCA or a court for a discretionary stay and demonstrated why the requested stay was warranted. (IB at Argument A, C). A discretionary stay is equally as effective to preserve the status quo for appeal as supersedeas granted under section 120.68(3)'s presumptive supersedeas provision. Yet

Ybor Clinic fails to acknowledge that it has alternative means of obtaining a stay/supersedeas in its Answer Brief. See generally (AB).

AHCA agrees the purpose of a stay is to preserve the status quo and that this consideration comes into play when a discretionary stay is requested, particularly when the agency or court considers whether an appellant has an adequate remedy at law absent a stay. (IB at Argument A.3, C). But no inquiry is made into whether it is necessary to preserve the status quo when supersedeas is requested under section 120.68(3)'s presumptive supersedeas provision. Contra (AB.6, 12-16, 20). Rather, section 120.68(3)'s presumptive supersedeas provision requires that supersedeas be granted **regardless** of need, unless AHCA can demonstrate it would "constitute a probable danger to the health, safety, or welfare of the public."

Ybor Clinic wants a stay primarily to extend its existing license during the pendency of its appeal. (AB.6, 12-16, 20). But the subject of AHCA's Final Order is its incomplete licensure renewal application, not its license. (R.37-48). A stay is not necessary to preserve the Second DCA's ability to adequately address the application on appeal. And while Ybor Clinic claims a stay is necessary to prevent the expiration of its license, the status quo for that license per the HCLPA is that it should have already expired. By staying the Final Order, the Second DCA has artificially extended the existing license

far beyond the two-year effective period, with limited extensions, afforded by the Legislature.

Indeed, Ybor Clinic's existing license is only implicated and still active because: (1) its two-year effective period was extended by section 408.806(2)(a) while the licensure renewal application remained pending; and (2) then AHCA chose to extend the effective period for an additional 30 days in its Final Order "for the sole purpose of allowing the safe and orderly discharge of clients," under section 408.815(6), Florida Statutes. (R.37-38).

Section 408.806(2)(a) only extends a license's effective period "during the agency's review of the renewal application," and review is clearly over when AHCA renders a final order deeming an application incomplete and withdrawn from review per section 408.806(3)(b). And section 408.815(6) provides: (a) a license-holder has no right to an extension of a license that is about to expire; (b) AHCA has sole discretion whether to grant an extension; and, (c) in any event, an extension may only be granted for "up to 30 days" and "for the sole purpose of allowing the safe and orderly discharge of clients," not for the facility to continue its normal operations.

It follows that, had AHCA chosen not to extend the effective period of Ybor Clinic's license for 30 additional days, the license would have automatically expired and become void on the same date the Final Order

was issued and the expired license could not subsequently have been resurrected by the appeal or extended via the Second DCA's stay order. §§ 408.806(2)(a), (3)(b), (6), 408.808(1), 408.815(6), Fla. Stat. By granting Ybor Clinic a stay that lets the facility continue normal operations indefinitely while the appeal remains pending, the Second DCA has contravened the HCLPA, including section 408.815(6)'s plain language limiting extensions of a license after a final order to "30 days" and "for the sole purpose of allowing the safe and orderly discharge of clients."

The Second DCA and Ybor Clinic have expressed concern that, absent a stay or supersedeas, a health care facility whose licensure renewal application is deemed incomplete and withdrawn must cease operations and activities that require licensure temporarily while it applies for another license. §§ 408.804(1), 408.806, 408.812, Fla. Stat.; Ybor Clinic, 310 So. 2d at 1062; (AB.12-20). But the Legislature, in enacting the HCLPA, has afforded only two opportunities for an applicant to timely complete its renewal application before it must be deemed incomplete and withdrawn from review. § 408.806(2)(a), (3)(a)-(b), Fla. Stat.; (IB at Argument B.2); infra Argument D. Moreover, as AHCA pointed out in the Initial Brief at Argument C, additional considerations – including public policy considerations – support placing the burden on an applicant for health care licensure to demonstrate

that AHCA's final order withdrawing its application for licensure renewal should be stayed pursuant to the case law stay factors. See (IB at Argument A.3) (describing the case law stay factors). Among them, allowing a health care facility that has failed to demonstrate it meets minimum requirements for licensure to continue operations indefinitely pursuant to a stay places the public at unnecessary risk and affords a movant/licensure applicant a windfall, especially where the movant/applicant has no demonstrable likelihood of succeeding on the merits of its appeal.

C. Because the Second DCA Erroneously Applied the Wrong Standards, It Placed the Wrong Burden of Proof on the Wrong Party and Has Run Afoul of Case Law.

Because the Second DCA erroneously applied section 120.68(3)'s presumptive supersedeas provision and rule 9.190(e)(2)(C) in this case, it placed the wrong burden of proof on the wrong party. More specifically, the court improperly shifted the burden onto AHCA to show supersedeas would constitute "a probable danger to the health, safety, or welfare of the state" to oppose the stay, rather than placing the burden on the licensure applicant, Ybor Clinic, to show that a stay was merited under case law stay factors and the facts and circumstances presented. § 120.68(3), Fla. Stat.; Fla. R. App. P. 9.190(e)(2)(A), (e)(2)(C).

This improper burden shifting runs afoul of case law, including from

this Court. It is contrary to the "fundamental principle" that the "burden of ultimate persuasion at each and every step" of a licensee application proceeding is on the applicant to demonstrate it is qualified and fit for licensure. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996) (internal citations omitted); accord Dep't of Child. & Fams. v. Davis Fam. Day Care Home, 160 So. 3d 854, 857 (Fla. 2015) (discussing Osbourne Stern). It is also inconsistent with the broad discretion afforded AHCA, as an agency responsible for regulating an occupation practiced as a privilege and potentially injurious to the public, to determine the fitness of licensure applicants. Davis, 160 So. 3d at 856-57; Osborne Stern, 670 So. 2d at 934; Astral Liquors, Inc. v. Dep't of Bus. Reg., 463 So. 2d 1130, 1132 (Fla. 1985); Silver Show, Inc. v. Dep't of Bus. & Prof'l Reg., 763 So. 2d 348, 350 (Fla. 4th DCA 1998); (IB at Statement of the Case & Facts B, Argument B.2-3, C).

D. Section 120.68(3)'s Presumptive Supersedeas Provision Should Not Be Applied to Afford Property Rights or Legal Expectations That Are Otherwise Not Available Under the HCLPA.

Ybor Clinic's arguments that the law favors continuity in health care licensing and that it has a property right to continued licensure are contrary to, and do not consider, the HCLPA and the limited rights and legal expectations health care facilities are afforded by its provisions. (Initial Brief

at Statement of the Case & Facts B, Argument B.2); (AB.12-18).

Health care licenses under the HCLPA have definite temporal limits; they are effective for a two-year period and expire by operation of law on the date printed on the license face. §§ 408.806(2)(a), (4)(a)-(b), (6), 408.808(1), Fla. Stat.; (IB at Argument B.2-3). While the HCLPA refers to "licensure renewal," its provisions require: (a) an application must be adjudged on its own merits and does not merely supplement or ride on the coattails of a previous application or license; and (b) any license granted via the renewal process is a separate, two-year, standard operating license with an effective period that abuts that of the existing license, rather than an extension of that existing license. §§ 408.806(1)-(2)(a), (3)(a)-(7)(a), (7)(c), 408.8065, 408.808(1), 408.809-.811, Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)-(7); (IB at Argument B.2-3). Ybor Clinic is correct that when AHCA grants a license to a health care facility via the renewal procedures, it puts the same license number on the new license; but this practice is a convenience to the facility, as a change in licensure number would require the facility to notify other parties, such as Medicare, Medicaid, insurance companies, and third-party payors or vendors. (AB.18).

A facility that holds a health care license under the HCLPA has a very specific bundle of rights. It has: (1) the right to operate for the two-period

effective period of its license; (2) the right to apply to AHCA for licensure renewal for the subsequent two-year period, but the facility must timely file and complete its licensure renewal application and be fit to have any expectation of obtaining a new license; and (3) the right to have the procedures and requirements of Administrative Procedures Act (chapter 120, Florida Statutes), the HCLPA, Florida Administrative Code chapter 59A, and the authorizing statutes and rules enforced. §§ 408.804, 408.806(1)-(2)(a), (3)(a)-(7)(a), (7)(c), 408.808(1), 408.809-.811, Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6). An applicant for licensure renewal has certain advantages over an applicant for initial licensure in that: (a) for some facility types, it may not be required to submit as much information with its application or go through as extensive of an inspection; and (b) it may operate while its renewal application is pending review. See §§ 408.806(1)-(2)(a), (3)(a)-(7)(a), (7)(c), 408.8065, 408.809-.811, Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6). But that is all.

The HCLPA places the onus on a health care facility to timely file and complete its licensure renewal application and affords two opportunities for the facility to get the job done right. §§ 408.806(2)(a), (3)(a)-(7)(a), (7)(c), 408.808(1), Fla. Stat. The facility may submit a timely and complete its application to start with or it may file any omitted information necessary to

complete its application within 21 days of receiving AHCA's notice of omissions. § 408.806(3)(a)-(c), Fla. Stat. If the facility does not take advantage of these opportunities to complete its application, section 408.806(3)(b) provides AHCA **"shall"** (i.e. has no option but to) deem the facility's application incomplete and withdraw it from further review. (Emphasis added).

For all these reasons, and as explained in the Initial Brief at Argument B.2-3, an applicant that does not timely complete its application has no property right or legal expectation that it will be issued a new license or be permitted to continue operations under the HCLPA. Section 120.68(3)'s presumptive supersedeas provision should not be read to grant health care facilities property rights or legal expectations not afforded to them by the HCLPA. More specifically, the provision should not be applied to modify, negate, or render superfluous the terms of the more specific licensing statutes; rather, a tribunal considering a motion for stay or supersedeas must read section 120.68(3)'s presumptive supersedeas provision and the HCLPA in concert and give effect to both. Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008) (quoting Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 199 (Fla. 2007) & Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 898 (Fla. 2002)). This necessarily means giving full effect to the specific

licensure application processes, license terms, and bundle of rights afforded licensees prescribed by the Legislature in the HCLPA, too.

Ybor Clinic's reliance on sections 408.815(2) is misplaced as, again, this case does not involve a "denial" or a "revocation." (AB.13). Notably, while some HCLPA provisions reference both the withdrawal or denial of an application and the suspension or revocation of an active license, this does not mean the actions are equivalent; it merely means the specific statutory provision applies in multiple circumstances. It is no more than the Legislature's streamlining of the health care licensing statutes, which is the stated purpose of the HCLPA. § 408.801(2), Fla. Stat.

Likewise, Ybor Clinic's reliance on section 120.60(4), Florida Statutes, is inappropriate because it only applies when renewal is sought of a "license which does not automatically expire by statute." (AB.13-14). Again, licenses issued under the HCLPA expire by operation of statute on their stated expiration date, unless the facility has timely applied for renewal. §§ 408.806(2)(a), (4)(a)-(b), (6), 408.808(1), Fla. Stat.

E. Case Law Does Not Support Treating the Withdrawal of A Licensure Renewal Application As Equivalent to Revocation of An Active License.

Contrary to Ybor Clinic's claims, Florida case law **does not** support treating the withdrawal of an application to renew a license that is about to

expire as equivalent to the revocation of an active license, including for purposes of section 120.68(3)'s presumptive supersedeas provision. (AB.16-19). This Court's Opinions in Davis, 160 So. 3d at 855-57, and Osborne Stern, 670 So. 2d at 933-35, and the DCAs' Opinions in Terrell Oil Co. v. Department of Transportation, 541 So. 2d 713, 714-15 (Fla. 1st DCA 1989), Silver Show, 763 So. 2d at 349-50, and Beach Club, 303 So. 3d at 582-83, are instructive and apply for the reasons explained in the Initial Brief at Argument B.3-C, and herein at Argument C.

Davis and Osborne Stern are controlling Florida Supreme Court precedents that supersede all prior contrary cases, including Coke v. Department of Children and Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998), and Davis Family Day Care Home v. Department of Children and Family Services, 117 So. 3d 464 (Fla. 2d DCA 2013). Contra (AB.16-19). Indeed, this Court's opinion in Davis, 160 So. 3d 854, quashed the Second DCA's opinion in Davis, 117 So. 3d 464. Thus, Ybor Clinic's reliance on Coke and Davis, 117 So. 3d 464, is misplaced. (AB.16-19). Certainly, there have been no cases decided since this Court's decision in Davis, 160 So. 3d 854 – except the Second DCA's decision in the instant case – that lend any support to Ybor Clinic's position.

F. Reply Regarding Other Considerations.

Ybor Clinic claims incorrectly that AHCA's "restrictive reading" of section 120.68(3)'s presumptive supersedeas provision would effectively prevent its application in cases other than actual suspensions or revocations and harm an entire class of business litigants, forcing the closure of businesses pending their appeals. (AB.12). As explained previously, AHCA's reading of section 120.68(3)'s presumptive supersedeas provision does not limit its application to actual suspension or revocation cases. Supra Argument A. Further, the HCLPA provides a health care facility an opportunity to timely file and complete its licensure renewal application and another opportunity to file any omitted information necessary to complete its application. If a business does not take advantage of these opportunities to timely complete its licensure application, AHCA has no choice but to follow the law and deem its application incomplete and withdrawn from further review. § 408.806(3)(b), Fla. Stat.; supra Argument B, D. When this occurs, the business's own inaction is the reason its license is not renewed; the blame cannot be laid on AHCA, which is merely carrying out the statutory directives of the Legislature. Further, even if a business's licensure renewal application is deemed incomplete and withdrawn, the business has a remedy: it can file an initial application for a new license. § 408.806(1), Fla.

Stat.; supra Argument B. Therefore, Ybor Clinic's claim that AHCA's reading of Section 120.68(3)'s presumptive supersedeas provision would harm an entire class of business litigants and force the closure of their businesses is without merit.

Contrary to Ybor Clinic's claims, rule 9.190(e)(2)(D) does not offer a reasonable or acceptable "solution" to AHCA's concern that the Second DCA's application of the wrong standards incorrectly shifts the burden onto AHCA to demonstrate a "probable danger to the health, safety, or welfare of the state" to oppose supersedeas. (AB.19-20); supra Argument A, C. Rule 9.190(e)(2)(D) allows AHCA to move to dissolve supersedeas granted as a matter of right, if it can show a "probable danger to the health, safety, or welfare of the state" at a later date. But that is all.

AHCA agrees with the Amicus Brief, including its argument that the incorrect imposition of section 120.68(3)'s presumptive supersedeas provision to licensure application cases risks damaging the efficient operation of the HCLPA's licensure scheme, for all of the reasons explained in the Initial Brief and herein. Ybor Clinic's argument regarding the high cost of an appeal does not consider that all a facility must do to get the benefit of section 120.68(3)'s presumptive supersedeas provision is to file the appeal and pay the filing fee. (AB.20). Even if the facility subsequently dismisses

the appeal without ever filing a brief, it may achieve continued licensure for a significant period in this manner. Further, facilities may see a cost advantage in pursuing an appeal to its end simply to artificially extend the life of an existing license via a section 120.68(3)'s presumptive supersedeas. These problems are less likely to occur when a stay is discretionary, as the movant's likelihood of success on the merits of the appeal is considered by the tribunal when determining whether to grant the stay requested.

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, and John E. Terrel, Esquire, jetlawyer@yahoo.com, 1700 N. Monroe Street, Suite 11-116, Tallahassee, Florida 32303, on September 27, 2021.

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CERTIFICATE OF COMPLIANCE

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