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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ASSOCIATION OF HOMES AND
SERVICES FOR THE AGING, INC.,
d/b/a LEADINGAGE FLORIDA,

Petitioner,

vs.

Case No. 17-5388RE

AGENCY FOR HEALTH CARE
ADMINISTRATION, AND DEPARTMENT
OF ELDER AFFAIRS,

Respondents.

_____/

FLORIDA ASSISTED LIVING
ASSOCIATION, INC., A FLORIDA NOT
FOR PROFIT CORPORATION,

Petitioner,

Case No. 17-5409RE

vs.

FLORIDA DEPARTMENT OF ELDER
AFFAIRS,

Respondent.

_____/

FLORIDA ARGENTUM,

Petitioner,

Case No. 17-5445RE

vs.

DEPARTMENT OF ELDER AFFAIRS,

Respondent.

**LEADINGAGE FLORIDA AND FLORIDA ARGENTUM'S
EMERGENCY JOINT MOTION FOR CLARIFICATION**

Florida Association of Homes and Services for the Aging, Inc., d/b/a LeadingAge Florida ("LeadingAge") and Florida Argentum, Inc. ("FL Argentum") jointly file this emergency motion to seek clarification regarding the effect of the determination in the final order that Emergency Rules 58AER17-1 and 59AER17-1 are invalid. In particular, Petitioners seek clarification that the invalid Emergency Rules are void *ab initio*. On Friday, October 27, 2017, the Division entered a final order determining that the Emergency Rules were each invalid exercises of delegated legislative authority, and that the greater weight of evidence demonstrated that there was not an immediate danger that would justify the Emergency Rules.¹ Within hours of the Division's ruling, the Agency for Health Care Administration and Department of Elder Affairs (the "Agencies") announced that the Emergency Rules remained in effect, regardless of the final order, and advised that nursing homes and assisted living facilities must continue to act in compliance. The Agencies did not explain their reasoning.

An imminent deadline of Tuesday, October 31 looms over all assisted living facilities and nursing homes. If the Emergency Rules are indeed still in effect, then those facilities must submit updated emergency plans by that date pursuant to the Emergency Rules, or face severe penalties including \$1,000 per day fines and the threat of license revocation.

The Division of Administrative Hearings retains jurisdiction to enter a stay if one is requested, and may similarly determine that no stay, automatic or otherwise, is in effect. *See Fla.R.App.R. 9.190(e)(2)(A).*² Guidance from the Division is necessary because of the Agencies' insistence that nursing homes and assisted living facilities comply with impossible deadlines set forth in the Emergency Rules, or face severe penalties. Because no automatic stay applies, and because no stay has been requested by the Agencies, the Division should clarify that the

¹ *See* Final Order, pp. 36-39, 42-44.

² That Rule provides that a stay may be sought from the lower tribunal, in this case the Division of Administrative Hearings, or, with good cause shown, from an appellate court. *See id.*

Emergency Rules are void *ab initio* and, therefore, not currently in effect. Support for this motion follows.

I. No Automatic Stay Applies to Appeals of Emergency Rule Decisions

A. No Automatic Stay is Available under the Florida Rules of Appellate Procedure.

For many years, governmental agencies were entitled to an automatic stay of adverse administrative orders pursuant to Florida Rule of Appellate Procedure 9.310. In 2008, the Florida Supreme Court amended appellate rules so that automatic stays would not be available "in administrative actions under the Administrative Procedure Act, or as otherwise provided by chapter 120, Florida Statutes."³ Prior to the effective date of that change, a public agency could obtain an automatic stay simply by filing a notice of appeal. That is no longer the case. Since 2009, Florida Rule of Appellate Procedure 9.310 specifically exempts appeals from administrative decisions, like the rule challenge decision made in this case, from automatic stays. See Katherine E. Giddings & Mark D. Schellhase, Florida Administrative Law Section Newsletter, March 2009 Ed., *Florida Supreme Court Eliminates Automatic Stay Pending Review for Governmental Entities in APA Proceedings*.

Florida Rule of Appellate Procedure 9.190 was amended at the same time, making it clear that the filing of a notice does not invoke an automatic stay except in limited circumstances:

(e) Stays Pending Review.

³ See *In re Amendments to the Florida Rules of Appellate Procedure*, 3 So. 3d 89, 2008 WL 4876766, * 2 (Mem)(Fla. 2008). The amendment added the following, underlined language, making administrative actions exempt from automatic stays:

(2) Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, in administrative actions under the Administrative Procedure Act, or as otherwise provided by chapter 120, Florida Statutes, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

(1) Effect of Initiating Review. The filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay, except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2) or chapter 120, Florida Statutes, or when timely review is sought of an award by an administrative law judge on a claim for birth related neurological injuries.

As mentioned above, proceedings under the Administrative Procedure Act are exempt from the automatic stay available in Rule 9.310(b)(2). Thus, the filing of a notice of appeal by the Agencies did not create an automatic stay pursuant to either Rule 9.190 or 9.310. A stay is only available if a provision of chapter 120 specifically provides for such a stay. As explained below, no automatic stay is available under Chapter 120 in this case.

B. No Automatic Stay is Available under Chapter 120, Florida Statutes.

1. Section 120.68(3) does not impose an automatic stay

The Administrative Procedure Act makes it clear that an automatic stay is not available. Section 120.68, Florida Statutes governs appellate review of administrative decisions. It provides:

(3) 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.

§ 120.68(3), Fla. Stat. (2017) (emphasis added).

2. Section 120.56(3)(b), does not impose an automatic stay

Section 120.56, Florida Statutes governs challenges to agency rules, including proposed, effective and emergency rules. Section 120.56(3) governs challenges to "rules in effect." That subsection provides:

(3) (b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Register in the first available issue after the rule has become void.

Subsection (3) of Section 120.56 declares that invalidated rules "in effect" become void only when the time for appeal has expired. An appellate opinion has interpreted this statute to mean that appeals of determinations that existing rules are invalid do not render the existing rule void until the time for an entire appeal has expired. *See Abbott Laboratories. v. Mylan Pharm., Inc.*, 15 So. 3d 642, 653 (Fla. 1st DCA 2009). Although *Abbott Laboratories* suggests that invalidated rules may continue to be relied upon during the pendency of an appeal, *Abbott Laboratories* does not control when the invalidated rules are *emergency* rules. Subsection (3) makes sense for non-emergency rules that have been in effect for years, and therefore have been entitled to a similarly long period of assumed validity. Emergency rules have not been in effect for years and therefore do not have a similar long period of assumed validity, as emergency rules are only valid for 90 days. Rather, emergency rules fall under the Division's jurisdiction pursuant subsection (5) rather than subsection (3) of Section 120.56, and pursuant Section 120.54(4) for purposes of reviewing the agencies' findings of immediate danger, necessity and procedural fairness. *See JAMES NEWBERRY, JR., Petitioner v. BOARD OF ORTHOTISTS AND PROSTHETISTS*, 1998 WL 866213 at 6, ¶ 56, (Fla. DOAH May 28, 1998)("Newberry I").

When an administrative law judge declares an emergency rule invalid, such emergency rule is also determined to be void *ab initio*. *See JAMES NEWBERRY, JR., Petitioner v. BOARD OF ORTHOTISTS AND PROSTHETISTS*, 1998 WL 866213 (Fla. DOAH May 28, 1998)("Newberry I"); *JAMES NEWBERRY, JR., Petitioner v. BOARD OF ORTHOTISTS AND PROSTHETISTS*, Respondent, 1998 WL 930082 (Fla. DOAH September, 1998)("Newberry II").

In *Newberry I*, an Administrative Law Judge determined that emergency rules adopted by the Board of Orthotists and Prosthetists, were invalid and void *ab initio*. The ALJ reasoned as follows:

Based on its statement of reasons for finding an immediate danger to the public health, safety, and welfare, the Board exceeded its authority under Section 120.54(4) when it promulgated an emergency rule establishing fees for provisional licensure and licensure by endorsement, and these portions of the emergency rule are invalid and void. **Given that there was no emergency justifying the adoption of fees for provisional licensure and licensure by endorsement, the Board acted without authority or power and its emergency rule should be ruled void *ab initio*.** If an emergency rule exceeds the legislative authority of an Agency, then no portion of the rule should be salvaged.

Newberry I at 11.

Newberry II involved a motion for attorney's fees related to *Newberry I*. In *Newberry II*, the Division characterized its holding in *Newberry I* as a "rejection of the Agency's assertion that Section 120.56(3), governing existing rules, was applicable to the underlying challenge of an emergency rule . . ." *Newberry II* at 4.

The Division should now clarify, as it did in *Newberry I and II*, that the invalid emergency rules are void *ab initio* and no longer in effect. The requested clarification is further consistent with the fact that emergency rules require emergency action on the part of those regulated, thus if an emergency rule could remain in effect during the pendency of an appeal absent a stay, any relief granted by the Division invalidating an emergency rule would necessarily be nullified.

3. The requested relief is appropriate as an order *nunc pro tunc*

The purpose of an order *nunc pro tunc* is to make effective an earlier ruling that was not sufficiently described at the time. "Orders are entered *nunc pro tunc* generally for the purpose of making effective a judicial act previously taken which is not apparent from the record."

Rodriguez v. Palm Beach County Div. of Animal Care & Control, 988 So. 2d 738, 738–39 (Fla. 4th DCA 2008)(citing *Robinson v. Tootalian*, 691 So. 2d 52, 53 (Fla. 4th DCA 1997)). "The purpose of a *nunc pro tunc* order is to supply an omission in the record of action previously done which omission was made through inadvertence or mistake." *Applestein v. Alberring*, 291 So. 2d 206, 207 (Fla. 3d DCA 1974).

As provided in *Newberry I* and *II*, when an emergency rule is determined invalid, it is also simultaneously determined *void ab initio*.

Petitioners, through this motion, request that the Division issue an order *nunc pro tunc* that the Final Order entered on October 27, 2017 declared the Emergency Rules *void ab initio* and with no automatic stay attached.

The undersigned has conferred with counsel for the Agency and Department and is authorized to represent that the Agency and Department oppose this motion .

Respectfully submitted on this 30th day of October 2017.

Respectfully Submitted,

/s/ Marc Ito

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2017, a copy of the foregoing was electronically served on the following:

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