

IN THE SUPREME COURT OF MISSOURI

Case No. SC89809

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,

Appellant,

v.

FAISAL J. ALBANNA, M.D.,

Respondent.

Transfer from the Missouri Court of Appeals, Western District
Case No. WD67905

RESPONDENT'S SUBSTITUTE REPLY BRIEF

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INTRODUCTION

Both the Circuit Court and the Court of Appeals reversed the finding of the Administrative Hearing Commission that Dr. Albanna's license was subject to discipline for unprofessional conduct and for incompetence. Respondent, Dr. Albanna, believes that his Substitute Brief in this Court adequately addresses those issues, and that the Board provides nothing new in its Brief to justify further response.

Because both the Circuit Court and the Court of Appeals remanded the issue of discipline in light of their modifications of the AHC decision, neither addressed Dr. Albanna's due process and equal protection issues. Dr. Albanna believes that his Substitute Brief adequately addresses this issue, and that the Board's Brief provides nothing new to require further response.

Respondent, Dr. Albanna, will address the Board's assertion that Dr. Albanna failed to properly raise and preserve certain issues; and will reply to the Board's response to the arguments about the legal standards to be applied pursuant to Section 334.100.2(5), RSMo.

ARGUMENT

I.

DR. ALBANNA PROPERLY RAISED AND PRESERVED FOR JUDICIAL REVIEW IN THE CIRCUIT COURT AND THE COURT OF APPEALS THE APPLICATION OF THE MEDICAL JUDGMENT RULE IN DISCIPLINARY PROCEEDINGS (Appellant's Substitute Brief, page 29); THE QUESTION OF THE APPROPRIATE LEGAL STANDARD BY WHICH TO JUDGE CONDUCT OR PRACTICE WHICH IS OR MIGHT BE HARMFUL TO THE PHYSICAL OR MENTAL WELL BEING OF A PATIENT OR THE PUBLIC (Appellant's Substitute Brief, page 48); REVIEW OF THE AHC'S FINDING OF INCOMPETENCE (Appellant's Substitute Brief, pages 63, 64); AND DR. ALBANNA'S EQUAL PROTECTION ARGUMENT (Appellant's Substitute Brief, page 72.)

Neither statute nor rule require a petitioner seeking judicial review of an agency action to specify precisely in his petition the issues to be reviewed. The circuit court may require amendment of the petition under the rules, but the petitioner will specify the issues for review in his brief or other written submissions to the circuit court. *Bird v. Missouri Bd. of Architects*, 259 S.W.3d 516, 521 (Mo. banc 2008). Dr. Albanna timely raised and preserved all issues presented to this Court.

The Circuit Court’s opinion clearly reflects that Dr. Albanna raised the application of the medical judgment rule to disciplinary proceedings. At page 19 of its Opinion (Respondent, Dr. Albanna’s Appendix A41), the Circuit Court stated:

Physicians are allowed a broad range in the exercise of their judgment and discretion. *Hasse v. Garfinkel*, 14 S.W.2d 108, 114 (Mo. 1967). When there is an honest difference regarding which medical treatments to use, a physician cannot be held to be negligent when he uses his own best judgment. *Id.* In the facts before the Commission, the experts proffered a variety of medical treatments. Petitioner was not shown to be negligent when he used his own best judgment in the selection of one of these treatments for his patient. Missouri follows the “honest error of judgment” rule, *Id.*, holding that such honest error is within treatment decisions upon which physicians may disagree are not negligent at all.

At pages 48 and 49 of its Substitute Brief, the Board suggests that Dr. Albanna has not preserved as an issue the misapplication of the appropriate legal standard by the AHC in finding Dr. Albanna subject to discipline for conduct or practice which is or might be harmful to the physical or mental health of a patient or the public. The Circuit Court discussed the applicable legal standard at pages 14 to 16 (Respondent’s Appendix, A36-A38). Although Respondent’s argument on the legal standard has evolved during the

appellate process, it has preserved for this Court's full review the issue of the appropriate legal standard pursuant to the first clause of Section 334.100.2(5), RSMo 2000.

The Board asserts that Dr. Albanna has not preserved for judicial review the AHC's finding that Dr. Albanna's license is subject to discipline for incompetence. However, the Circuit Court clearly addressed the issue at pages 16 and 17 (Respondent's Appendix, A38-A39) in its opinion. The Board appears to object to Dr. Albanna's citation to different record evidence in his Substitute Brief, but cites no authority for the proposition that limits reference to the record in successive appellant briefs to those made. The provision in Rules 84.04, 84.05, and 83.08 for new and separate briefs at the appellate level demonstrate that the parties are expected to refine and revise the presentation of the issues made to the circuit court.

At page 72 of its Substitute Brief, the Board asserts that Dr. Albanna has failed to preserve an equal protection issue for review. Although neither court decided the issue, the Circuit Court notes Dr. Albanna's equal protection and due process arguments in its opinion at page 21 (Respondent's Appendix, A43); likewise, the Court of Appeal notes, without deciding, that Dr. Albanna alleged the Board's discipline was imposed "on unlawful procedure without fair trial. He argues that the Board violated his constitutional rights by treating him differently and more harshly due to his sex, age, training and nationality." (Western District Slip Opinion, page 22; Respondent's Appendix, A22).

The foregoing establishes that Respondent, Dr. Albanna, has adequately raised and preserved all of the issues addressed in his Substitute Brief in this Court.

II.

THE BOARD PROVIDES NO RATIONALE FOR ENGRAFTING ORDINARY NEGLIGENCE ONTO THE STATUTORY DISCIPLINARY PROCESS.

A. Background

An overriding principle in consideration of the issues raised on this appeal is that the purpose and function of tort actions (for medical negligence) and the purpose and function of regulatory actions are not the same. Tort actions function to vindicate private wrongs and compensate victims. *See, Zueck v. Oppenheimer Gateway Properties*, 8098 S.W.2d 384, 388 (Mo. banc 1991); *Lawrence v. Bainbridge Apartments*, 957 S.W.2d 400, 404 (Mo. App. 1997). The primary purpose of statutes authorizing discipline of a doctor's license is to protect the public health and welfare from unauthorized and dangerous professional practices. *Missouri Bd. of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 442 (Mo. App. 1991).

The General Assembly has established an extensive comprehensive regulatory regime to govern the practice of medicine. It begins with the application and education requirements of Section 334.035; the examination requirements of Section 334.040, RSMo; requirements for continuing professional education, Section 334.075, RSMo; and culminates with the disciplinary procedures, Section 334.100, RSMo. Although the focus of this case is on the disciplinary structures, those structures are only one part of the overall regulatory scheme. This legislative program provides a context from which to determine the public protection

purpose of Chapter 334, RSMo. Interpretations which do not fit the context and do not serve the purpose should be rejected.

This Court has held that the General Assembly did not authorize the Board to discipline physicians for acts of ordinary negligence. *Tendai, infra*. Dr. Albanna suggests that, in particular, the provisions for discipline for “conduct that is or might be harmful” and “repeated negligence” in Section 334.100.2(5), RSMo, address only gross departures from professional standards in harmony with the accompanying provisions and consistent with the purpose of Section 334.100.2(5). The legislature relies on the market forces of the tort system, not on the regulatory system, to address instances of ordinary negligence by physicians.

In Points II and III of his Substitute Brief, Dr. Albanna asks this Court to reexamine the legal standards the General Assembly adopted as grounds for discipline in Section 334.100.2(5), RSMo. The Board’s continued insistence in its Substitute Brief that the statute authorizes it, under various guises, to discipline licensees for ordinary negligence highlights the need for this Court to do so.

B. Argument

The Board sheds no light on the proper construction of the General Assembly’s comprehensive statutory regulation of the medical profession. As expected, the Board is quite content with the standardless application of the disciplinary statutes, which give a roving commission to the Board. We rely on this Court to instead confine the Board to the authority granted by law.

In disputing Dr. Albanna's observation that the "legislature has only authorized the Board to discipline the gross departures from the standards of practice that the public safety demands, and for which monetary discipline is insufficient," the Board's entire legal position and support appears to be that: "this view is not supported by any language in the statute, and flies in the face of the stated purpose of the Board, which is to protect the public." (Respondent's Substitute Brief, p. 36.) The Board cites no case authority for its assertion, nor does it provide a perspective or comment on the legislative program for licensing and disciplining the practice of medicine. No rationale for how Albanna's assertion "flies in the face" of the purpose of the statutes is articulated. In short, the Board is entirely absent from the discussion on the proper construction of the statutes it is charged with enforcing.

In *Tendai v. State Bd. of Registration for the Healing Arts*, 161 S.W.3d 358, 368 (Mo. banc 2005) the Court held that the Board has no authority to discipline for ordinary negligence. In *Tendai*, as the Board notes in its Substitute Brief, p.59, the Court was construing the second clause of section 334.100.2(5). However, in response to Dr. Albanna's argument that the first clause of Section 334.100.2(5) also does not sanction discipline under the standards for ordinary negligence, the Board states: "To read the statute otherwise [than to permit discipline for ordinary negligence] would severely inhibit the Board's authority to discipline physicians in the name of protecting the public, and it disregards the plain language of the statute of the legislature." (Respondent's Substitute Brief, p.59.) There is no authority, rationale or reason to support the Board's assertion. The Board simply argues that it "should" have disciplinary authority over mere negligence (even

if only by another name) in order to perform its role. It is respectfully suggested that the legislature is the better branch of government to direct this argument to.

In asserting that the medical judgment rule does not apply to license discipline cases where negligence is an issue, the Board states at page 30 of its Substitute Brief:

“Dr. Albanna’s argument is essentially that any time a physician can find any expert who states that the physician did not violate the standard of care, then there is a ‘difference of opinion’ within the medical profession, a physician can never be found guilty of negligence. This argument runs contrary to Missouri law and in the sense of Board disciplinary cases, this view frustrates the ability of the Board to protect the public.”

The Board offers no support for its assertion. From this analysis, the Board should be equally opposed to the converse of its position - that the Board’s medical orthodoxy can be undisputably established simply by the testimony of a single Board “expert” physician, whose practice is far removed from Missouri; and no contrary opinion should be allowed. This is the reason why a medical judgment rule is necessary. The Board’s criticism of the medical judgment rule lacks merit. More importantly, it utterly fails to negate the important public policy underpinning the medical judgment rule in negligence actions, which applies with equal force in regulatory actions. *See, e.g., Williams v. Chamberlain*, 316 S.W.2d 505, 511 (Mo. 1958) (*** if a failure to cure or a bad result were held to be evidence of negligence, then “ * * * few would be courageous enough to practice the healing art, for they

would have to assume financial liability for nearly all the ‘ills that flesh is heir to.’”); *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W3d 146, 159 (Mo. banc 2003) (“Application of this standard [repeated negligence pursuant to section 334.100.2(5)] does not merely require a determination of what treatment is most popular. Were that the only determinant of skill and learning, any physician who used a medicine for off-label purposes, or who pursued unconventional courses of treatment, could be found to have engaged in repeated negligence and be subject to discipline. This would not be consistent with section 490.065.”) It is respectfully submitted that rejection of the medical judgment rule, because of its inconvenience to the Board, is not consistent with Section 334.100.2(5) either.

The Board has not provided the Court, or Dr. Albanna, with a construction of Chapter 334 that is consistent with the purpose and object of the chapter, with the language of the statutes, with this Court’s prior construction of those statutes, or with the needs of the profession providing medical services for regulatory clarity. The Board’s legal interpretation is at best a radical overreach under the guise of a false assertion of the public’s need for protection.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Administrative Hearing Commission, and the disciplinary decision of the Board based thereon.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Substitute Appellant's Brief of Respondent, Faisal J. Albanna, M.D. complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

- (A) It contains 2,279 words, as calculated by counsel's word processing program;
- (B) A copy of this Brief is on the attached 3 ½" disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

James B. Deutsch

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Substitute Reply Brief was sent by U.S. Mail, postage prepaid, this 16th day of April, 2009, to:

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