IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MISSOURI ASSOCIATION OF NURSE ANESTHETISTS, INC., GLENN KUNKEL, M.D., and KEVIN SNYDERS, CRNA,	)	
Appellants,	)	**WD72412**
v.	)	**OPINION FILED: September 21, 2010**
STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,	)	
Respondent.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Judge

Before Division I: James M. Smart, Jr., Presiding Judge, and Mark D. Pfeiffer and Cynthia L. Martin, Judges

The Missouri Association of Nurse Anesthetists, Inc. ("MANA"), Glenn Kunkel, M.D., and Kevin Snyders, CRNA[1] (Appellants collectively referred to as "Practitioners"), appeal the Circuit Court of Cole County's ("trial court") grant of summary judgment in favor of the State Board of Registration for the Healing Arts (the "Board"). Practitioners raise two points on appeal, claiming the trial court erred in granting summary judgment in favor of the Board

[1] "'Certified registered nurse anesthetist,' a registered nurse who is currently certified as a nurse anesthetist by the Council on Certification of Nurse Anesthetists, the Council on Recertification of Nurse Anesthetists, or other nationally recognized certifying body approved by the board of nursing." § 335.016(8), RSMo.

because (1) the Board's statements on the scope of practice for advanced practice nurses[2] ("APNs") constitute a rule under section 536.010(6)[3] and is subject to the rulemaking requirements of Chapter 536 and section 334.125 RSMo 2000 and, in the alternative, (2) even if the Board's statements are not a rule, Practitioners are still entitled to a declaratory judgment declaring that the Board is without jurisdiction or authority to make statements defining the scope of practice for APNs. We affirm.

Factual and Procedural Background

On September 21, 2007, the Board received a letter from the Missouri State Medical Association ("MSMA") requesting the Board adopt a position prohibiting APNs from performing injections, under fluoroscopic control, of therapeutic agents around the spinal cord (the "procedure"). MSMA maintained that the procedure "constitutes the practice of medicine and the performance of such should be restricted to licensed physicians in the State of Missouri."

On October 23, 2007, the Board received a letter from Dr. Kunkel opposing MSMA's request. Dr. Kunkel stated that he employed APNs, currently Mr. Snyders, in the delivery of fluoroscopic procedures and that he "believed [APNs] should continue to be able to provide therapeutic fluoroscopic guided injections with direction of a physician." Two days after receiving Dr. Kunkel's letter, the Board received a letter from Dr. Donald James[4] requesting the Board consider some additional factors relating to the issue submitted by MSMA.

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[2] "'Advanced practice registered nurse' [Advanced Practice Nurse], a nurse who has education beyond the basic nursing education and is certified by a nationally recognized professional organization as a certified nurse practitioner, certified nurse midwife, certified registered nurse anesthetist, or a certified clinical nurse specialist." § 335.016(2), RSMo.

[3] All statutory references are to Revised Statutes of Missouri Cumulative Supplement 2009 unless otherwise noted.

[4] Dr. James is not a party to this lawsuit and, although the record on appeal reflects that the Board intended to communicate a similar response as it did for MSMA and Dr. Kunkel, the record on appeal does not contain any documentation confirming the communication from the Board to Dr. James. The letter to Dr. Kunkel also references a Dr. Van Way. Again, however, there is no other mention of Dr. Van Way or any other communication to Dr. Van Way. Likewise, Dr. Van Way is not a party to this lawsuit.

MSMA's request was taken up by the Board at its October 25, 2007 meeting. However, the Board did not render a position; rather, it directed two members to investigate the request. Ultimately, on or around February 7, 2008, the Board directed its Executive Director to communicate via letter to the doctors and MSMA the following statement, in pertinent part:

> After researching the current statute, rules, and regulations governing the practice of medicine and the practice of nursing it was the Board's decision to advise [MSMA and Dr. Kunkel] that Chapter 334 RSMo. authorizes a physician to delegate professional responsibilities to a person who is qualified by training, skill, competency, age, experience, or licensure to perform such responsibilities. *Based on the information provided to the Board*, it was their opinion that [APNs] *currently* do not have the appropriate training, skill or experience to perform these injections. If you disagree with the Board's interpretation *please provide us with documentation* that shows that [APNs] have the appropriate training, skill and experience to perform these injections.

(Emphasis added.) MSMA, thereafter, published this language in the February 2008 *Progress Notes*, a newsletter of the MSMA.

After receipt of the Board's letter and learning of the report's publication in *Progress Notes*, Dr. Kunkel sent a reply letter to the Board outlining the education and training of his CRNA, Mr. Snyders. Dr. Kunkel insisted Mr. Snyders was fully competent to continue injecting therapeutic agents under fluoroscopic guidance. Upon producing this additional information, the Board continued to disagree with Dr. Kunkel and advised him so.

Over a year later, on April 22, 2009, Practitioners filed a petition with the trial court alleging that the Board's letter to Dr. Kunkel constitutes a rule, and because it was not properly promulgated, it is "null, void and unenforceable." Practitioners sought an injunction and declaratory judgment prohibiting the enforcement of the "letter rule," declaring the rule void as it was not properly promulgated, and declaring that the rule is void as the making of such rule is outside the scope of authority of the Board.

On December 2, 2009, the Board filed a motion for summary judgment arguing that because the letter is not a rule, Practitioners are not entitled to the relief they seek. Practitioners filed a motion for partial summary judgment on December 31, 2009, arguing the opposite position. On March 22, 2010, after a hearing on the motions, the trial court entered judgment in favor of the Board. Practitioners timely appealed.

Standard of Review

Our review of a grant of summary judgment is "essentially *de novo.*" *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id.* "The propriety of summary judgment is purely an issue of law." *Id.* "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *Id.* When considering an appeal from summary judgment, we review the record in the light most favorable to the party against whom judgment was entered. *Id.* "We accord the non-movant the benefit of all reasonable inferences from the record." *Id.* Summary judgment will only be upheld on appeal if: "(1) there is no genuine dispute of material fact, and (2) the movant is entitled to judgment as a matter of law." *Brock v. Blackwood*, 143 S.W.3d 47, 61 (Mo. App. W.D. 2004); *see also* Rule 74.04(c).[5] Because the material facts are undisputed, the focus of our analysis will be whether the Board is entitled to a judgment as a matter of law.

Analysis

Practitioners seek a declaratory judgment that the Board violated the rulemaking requirements of Chapter 536 when, via letter, it communicated an opinion to Dr. Kunkel and

[5] All rule references are to Missouri Rules of Civil Procedure 2010, unless otherwise indicated.

MSMA in the form referenced above. Practitioners alternatively argue that, if the Board's statements do not constitute a rule, Practitioners are still entitled to a declaratory judgment stating that the Board lacks authority to render opinions that define the scope of practice for APNs.

The purpose of a declaratory judgment is to "dispel uncertainty as to legal rights." *Doe v. Worsham*, 290 S.W.3d 809, 811 (Mo. App. S.D. 2009). It is appropriate only "where a plaintiff can obtain relief against the defendant." *Id.* "The declaratory judgment act is not a general panacea for all legal ills nor is it a substitute for existing remedies." *King Louis Bowling Corp. v. Mo. Ins. Guar. Ass'n*, 735 S.W.2d 35, 38 (Mo. App. W.D. 1987). Thus, the circuit court may grant a declaratory judgment only if it is presented with:

> (1) a justiciable controversy that presents a real, substantial, presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; (2) a plaintiff with a legally protectable interest at stake, "consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief," (3) a controversy ripe for judicial determination; and (4) an inadequate remedy at law.

Lane v. Lensmeyer, 158 S.W.3d 218, 222 (Mo. banc 2005) (citation omitted). Furthermore, the Missouri Administrative Procedure Act ("MAPA") establishes authority for courts of this state to render declaratory judgments that challenge the validity of a rule or the threatened application of such rule. § 536.050.1. Pursuant to MAPA, "a declaratory judgment under MAPA, therefore, is not available unless the administrative action in question constitutes a rule." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003). Because Practitioners have not demonstrated a right to declaratory judgment, summary judgment in favor of the Board is proper.

i. The State Board of Registration for the Healing Arts

The Board itself and its authority to act were created and limited by Chapter 334. Pursuant to sections 334.125 RSMo 2000 and 334.100, respectively, the Board may promulgate rules governing its actions and discipline a licensee subject to its authority. In pertinent part, section 334.100.2 provides:

> The board may cause a complaint to be filed with the administrative hearing commission as provided by Chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter . . . for any one or any combination of the following causes:
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> . . . .
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> (4) Misconduct, fraud, misrepresentation, dishonesty, unethical conduct or unprofessional conduct in the performance of the functions or duties of any profession licensed or regulated by this chapter, including but not limited to, the following:
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> . . . .
>
> (d) Delegating professional responsibilities to a person who is not qualified by training, skill, competency, age, experience or licensure to perform such responsibilities[.]

The Board does not have the unilateral authority to interpret or apply these standards. The Board may not impose discipline without seeking and obtaining a determination of the Administrative Hearing Commission ("AHC") that there is cause for discipline upon a particular set of facts. § 334.100.4. Stated differently, the AHC shall conduct hearings and make independent findings of fact and conclusions of law regarding the Board's complaint. § 621.045.1. The limits on the Board's authority ensure the constitutional mandates of due process are abided by.[6]

[6] Not so coincidentally, there is presently a separate proceeding pending before the AHC styled *State Board of Registration for the Healing Arts v. Glenn A. Kunkel, M.D.*, Case No. 09-1259 HA, in which the Board has initiated a Complaint against Dr. Kunkel, in part, ***alleging*** that Dr. Kunkel improperly delegated professional responsibilities in violation of Chapter 334 (i.e. injections under fluoroscopic control). That administrative hearing before the AHC is scheduled for final hearing on June 6, 2011. Importantly, the charging "rule" is Chapter 334, not a "letter rule" pursuant to an advisory opinion letter sent to Dr. Kunkel in February 2008. Also, the acts complained of in the Board's Complaint against Dr. Kunkel are for acts that ***pre-date*** the February 2008 letter to Dr. Kunkel,

ii. The Board's Motion and Subsequent Letter Was Not A Rule

MAPA defines a rule as "each agency statement of general applicability that implements, interprets, or prescribes, law or policy, or that describes the organization, procedure, or practice requirements of any agency."[7] § 536.010(6). The Missouri Supreme Court has noted that "[n]ot everything that is written or published by an agency constitutes an administrative rule." *United Pharmacal Co. of Mo. Inc. v. Mo. Bd. of Pharmacy*, 159 S.W.3d 361, 365 (Mo. banc 2005). Moreover, "[n]ot every generally applicable statement or 'announcement' of intent by a state agency is a rule." *Baugus v. Dir. of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994). The statement must set a standard of conduct intended to have a general and prospective application. *Mo. Soybean*, 102 S.W.3d at 23. "'[A] properly adopted substantive rule establishes a standard of conduct which has the force of law.'"[8] *Id.* (quoting *Pac. Gas & Electric Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974)). "Implicit in the concept of the word 'rule' is that the agency declaration has a potential, however slight, of impacting the substantive or procedural rights of some member of the public." *Baugus*, 878 S.W.2d at 42.

In this case, the Board has made no attempt to comply with the requirements for proper promulgation of a rule. In fact, the Board admits it did not follow the requirements because it never intended to establish a rule. Rather, the Board's letter was a mere expression of opinion as to how the provisions of section 334.100.2(4)(d) apply to facts posited in an inquiry. The Board

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further illustrating that the Board's alleged legal authority for its "opinion" existed ***prior*** to any opinion letter sent to Dr. Kunkel in February 2008.

[7] However, it has been observed that "'MAPA's definition of a "rule" is of little assistance because it is "broad enough to encompass virtually any statement an agency might make in any context."'" *United Pharmacal Co. of Mo. Inc. v. Mo. Bd. of Pharmacy*, 159 S.W.3d 361, 365 n.3 (Mo. banc 2005) (quoting Christopher R. Pieper, Note, *No Harm, No Rule: The Muddy Waters of Agency Policy Statements and Judicial Review Under the Missouri Administrative Procedure Ac*t, 69 Mo. L. Rev. 731, 738-39 (2004) (citations omitted)).

[8] Section 536.021 provides the promulgation requirements for a procedurally valid rule. In order to propose, adopt, amend, or rescind a rule, the agency must file a notice of proposed rulemaking and a subsequent final order of rulemaking with the Secretary of State. § 536.021. Failure to follow rulemaking procedures renders void the agency's action. *United Pharmacal*, 159 S.W.3d at 365.

acknowledges that its statements are without the force of law and, therefore, without the potential of impacting the substantive or procedural rights of some member of the public.

Practitioners, however, argue that the Board responded to a particular and specific request to adopt a standard of conduct for the scope of the practice of APNs, which the Board intended to have a general and prospective application. In addition, Practitioners argue that the letter commanded those subject to its regulatory power – physicians – to refrain from using APNs for the procedure and that this had a substantive effect on the rights and obligations of APNs and physicians in the state.

As noted above, an agency declaration cannot constitute a rule unless it has a potential impact on the rights of some member of the public. *Id.* Here, the Practitioners can point to no potential impact of the Board's letter. "Rather than identifying the *potential impact of a rule* . . . the [Practitioners] prophesy *the impact of a potential rule*." *Mo. Soybean*, 102 S.W.3d at 24. Practitioners merely "point to an agency declaration that could impact their rights if certain later regulations would occur." *Id.*

To expound, the only result arising from the Board's expression of opinion is that the three physicians are more fully informed concerning the Board's potential exercise of discretion. The Board is simply informing the three physicians as to the likelihood of the Board filing a complaint with the AHC if such facts, as detailed in the requests, came to its attention. The Board's letter in no way ordered physicians to refrain from using APNs for the procedure. The Board did not create any new obligations or liabilities which affected an individual. Nor were any individual's rights directly determined by the Board's expression of its opinion. Practitioners have the same freedom to act whether or not the Board makes known its opinion as to its discretion to file a complaint. Should the physicians be required to defend their conduct to

the AHC, and the AHC subsequently determines that the delegation of the procedures to APNs violates section 334.100.2(4)(d), the physician will be subject to discipline – not because the Board expressed its opinion, but because the Board's opinion is correct.[9]

Further evidencing that the letter is not a rule but rather an expression of opinion is the fact that, in the letter, the Board leaves open the possibility for Dr. Kunkel to provide more information that may be helpful in the Board's determination of the issue.[10] This shows that the Board did not intend to alter or create any rights or obligations, but only intended to respond to the specific inquiry at hand. The letter is merely an expression of the Board's opinion, without any force or legal effect.

iii. The Practitioners' Challenge Regarding the Board's Authority Fails

Practitioners argue that regardless of how the Board's letter is characterized, a rule or policy statement, the Board is without authority and jurisdiction to render such letter. However, because Practitioners adamantly contend the Board's letter constitutes a rule, we review the challenge to validity under both Chapter 536 and Chapter 334, rather than Chapter 334 solely.

An agency rule is not valid if: "(1) [t]here is an absence of statutory authority for the rule or any portion thereof; or (2) [t]he rule is in conflict with state law; or (3) [t]he rule is so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected." § 536.014 RSMo 2000. Furthermore, "[o]nly rules promulgated by an administrative agency with properly delegated authority have the force and effect of law." *Psychcare Mgmt., Inc. v. Dep't of Soc. Servs. Div. of Med. Servs.*, 980 S.W.2d 311, 313-14 (Mo.

[9] Whether or not the Board's opinion is correct will soon be administratively decided by the AHC in the case styled *State Board of Registration for the Healing Arts v. Glenn A. Kunkel, M.D.*, Case No. 09-1259, set for final hearing in June 2011.

[10] In pertinent part, the letter states: "If you disagree with the Board's interpretation please provide us with documentation that shows that advance practice nurses have the appropriate training, skill and experience to perform these injections."

banc 1998); *see Mo. Soybean*, 102 S.W.3d at 22-23. "Any person who is or may be aggrieved by any rule *promulgated* by a state agency shall have standing to challenge any rule *promulgated* by a state agency and may bring such an action pursuant to the provisions of section 536.050." § 536.053 RSMo 2000 (emphasis added). Standing to challenge validity of a rule is presupposed by the existence of a *promulgated* rule, "or at least, a rule that purports to have been promulgated." *United Pharmacal*, 159 S.W.3d at 366.

As previously discussed, the Board did not promulgate or attempt to promulgate the letter as a rule. The Missouri Supreme Court has stated, "[t]here simply cannot be a suit regarding an administrative rule's statutory authority, conflict with state law, or arbitrary and capriciousness when there was never a rule promulgated or an attempt to promulgate a rule." *Id.* Consequently, the Practitioners' challenge to the Board's authority and jurisdiction to make policies, interpretations, or determinations that define the scope of practice for APNs is not proper.

What's more, even if we review the challenge to authority solely under Chapter 334, as the Practitioners urge, we still find that the challenge is without merit because the letter does not attempt to regulate the scope of practice of nurses or APNs. The letters do not authorize the Board to take action against APNs for the unauthorized practice of medicine nor do they discipline physicians for allowing nurses to carry out the challenged procedure. The letter merely advises physicians regarding adherence to Chapter 334, which physicians clearly have a responsibility to follow.

iv. Controversy Ripe for Determination

Finally, an examination of the third prerequisite to a declaratory judgment further supports the trial court's grant of summary judgment in favor of the Board. Pursuant to constitutional dictates, a court cannot render a declaratory judgment unless the petition presents a

controversy ripe for judicial determination. *Mo. Soybean*, 102 S.W.3d at 26 (citing *Mo. Health Care v. Att'y Gen. of the State of Mo.*, 953 S.W.2d 617, 620 (Mo. banc 1997)). "[T]he ripeness doctrine allows a court 'to apply a pragmatic test to determine whether the agency action is sufficiently binding and sufficiently clear in scope and implications to be susceptible to judicial evaluation . . . .'" *Mo. Soybean*, 102 S.W.3d at 26 (quoting KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.1, at 306 (3d. ed. 1994)). Furthermore, the ripeness doctrine "'prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Mo. Soybean*, 102 S.W.3d at 26 (quoting *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136, 148-49 (1967) (overruled on other grounds)).

Missouri courts have found a controversy is ripe for adjudication when a sufficient immediacy and reality is established. *Buechner v. Bond*, 650 S.W.2d 611, 614 (Mo. banc 1983); *see also Ports Petrol. Co., Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 241 (Mo. banc 2001). "Ripeness does not exist when the question rests solely on a probability that an event will occur." *Buechner*, 650 S.W.2d at 614. Accordingly, "[d]etermining whether a particular case is ripe for judicial resolution requires a two-fold inquiry [the "*Abbott* Test"]: a court must evaluate (1) whether the issues tendered are appropriate for judicial resolution, and (2) the hardship to the parties if judicial relief is denied."[11] *Mo. Soybean*, 102 S.W.3d at 27 (citing *Abbott Labs.*, 387 U.S. at 149).

[11] The ripeness doctrine in Missouri is much the same as stated in *Abbott*. *State ex rel. Kan. Power & Light Co. v. Pub. Serv. Comm'n*, 770 S.W.2d 740, 742 (Mo. App. W.D. 1989).

Courts have considered several factors when applying the *Abbott* Test, including whether: the regulations were a final agency action; the issue for consideration was a purely legal one; further administrative proceedings were contemplated; the impact of the regulations was sufficiently direct and immediate; the regulation requires an immediate and significant change in the plaintiff's conduct with serious penalties attached to noncompliance; delayed review of the case would cause hardship to the plaintiff; judicial intervention would inappropriately interfere with further administrative action; and the courts would benefit from further factual development of the issues presented. *See Abbott Labs.*, 387 U.S. at 149, 152; *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

In this case, withholding judicial review will not cause the parties significant hardship. The Board's letter does not command physicians or APNs to do anything or to refrain from doing anything; the letter does not subject physicians or APNs to civil or criminal liability; nor does the letter create any legal rights or obligations. Moreover, the numerous steps and procedural requirements that must be observed before any liability will attach to a physician or APN, significantly remove the Board's expression of opinion from any harm that will purportedly be suffered.[12] Only when there is a substantive action against the interests of the Practitioners, i.e. a promulgated rule or an actual legal proceeding, will there be an imminent and more certain harm and, therefore, a controversy ripe for judicial review. That proceeding, however, does not exist in the present case before us.[13]

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[12] *See Mo. Soybean*, 102 S.W.3d at 27 (discussing *Ohio Forestry* and the numerous steps that would have to occur before an immediate and significant harm would attach to the Sierra Club) ("Although the plan made logging in the forest more likely, before the Forest Service could permit logging, it had to: (a) propose a particular site and specific harvesting method, (b) ensure that the project was consistent with the overall plan, (c) provide affected parties with notice and an opportunity to be heard, (d) conduct an environmental analysis of the project, and (e) make a final decision to permit logging which decision affected persons could challenge through administrative avenues and in court.").

[13] Such a contested proceeding does presently exist in a case pending before the AHC styled *State Board of Registration for the Healing Arts v. Glenn A. Kunkel, M.D.*, Case No. 09-1259 HA, which illustrates the appropriate

Conclusion

The Board's letter to Dr. Kunkel and MSMA is nothing more than the Board's expression of opinion based upon a fact pattern presented to the Board. The Board's expression of opinion did not regulate the scope of practice of nursing. Finally, there is no controversy between these parties that is ripe for review. For these reasons, the trial court's grant of summary judgment in favor of the Board was proper. We affirm.

Mark D. Pfeiffer, Judge

James M. Smart, Jr., Presiding Judge, and
Cynthia L. Martin, Judge, concur.

forum for the resolution of Dr. Kunkel's disagreement with the Board's opinion (resulting in a formal complaint by the Board against Dr. Kunkel) that his delegation of fluoroscopically controlled injections to his nurse was, in fact, not a violation of Chapter 334, relating to the delegation of professional responsibilities to those persons whom must be "qualified by training, skill, competency, age, experience or licensure to perform such responsibilities."