

IN THE SUPREME COURT OF MISSOURI

Case No. SC91302

**MISSOURI ASSOCIATION OF NURSE ANESTHETISTS, INC., GLEN
KUNKEL, M.D., AND KEVIN SNYDERS, CRNA,**

Appellants,

v.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,

Respondent.

**Appeal from the Circuit Court of Cole County
Case No. 09AC-CC00235
Honorable Jon E. Beetem**

SUBSTITUTE REPLY BRIEF OF APPELLANTS

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ARGUMENT

I.

(Responds to Argument I of Respondent's Substitute Brief)

BOHA's principle defense of its action is that it was simply rendering an opinion and an opinion is not a "rule" for purposes of Section 536.010(6), RSMo. Its brief is replete with characterizations of its statements as opinion: "In order to prevail, Appellants would have to show that the opinion expressed by the Board," Brief of Respondent at 8; "The letters challenged by Appellants in this case are no more than an expression of opinion by the Board as to how the provisions of Section 334.100.2(4)(d) apply to the facts posed in an inquiry," Brief of Respondent at 10; "nothing about the opinion expressed by the Board," Brief of Respondent at 10; "the letters challenged in this matter were very general expressions of opinion," Brief of Respondent at 11; "the expression of opinion by the Board," Brief of Respondent at 20. In discussing the *amicus* brief filed by the Missouri Chamber of Commerce, BOHA states its purpose in making the statements on what advanced practice nurses are qualified to do to be "to provide guidance to the community it regulates." On this topic, BOHA continues:

Amicus and Appellants seem to assume that the only alternative the Board had was to undertake a rulemaking process specifying what its decisions would be in the enforcement of a statute within its jurisdiction. This is not, however, the only option the Board had, nor the most likely. The far more probable course the Board could have taken would be to hold its cards close to its chest, decline to answer the inquiry, and consider whether to initiate

disciplinary cases on particular situations as they came to the Board's attention. This course would leave practicing physicians in exactly the area of uncertainty Amicus Chamber deplors, yet it is perfectly legal and immune to any plausible procedural challenge from Appellants. The Board decided instead to communicate openly with the doctors making the inquiry about its intentions.

Brief of Respondents at 26. BOHA goes on to say, "This is exactly the kind of nonregulatory comment licensing boards are often called upon to make for the benefit of the business community they license" and references "the interest of the public in having well-informed professional communities serving them in a manner consistent with the requirements of law." Brief of Respondents at 26. BOHA even wants to suggest that maybe its action comes within the exception to the definition of a rule for contested cases, highlighting that specific exception in opening its argument on this particular issue. Brief of Respondent at 8. Thus it quotes from Section 536.010(6): "The term includes the amendment or repeal of an existing rule, but does not include: . . . (d) A determination, decision, or order in a contested case[.]" Brief of Respondent at 8.

Everything BOHA says solidifies the conclusion, on multiple levels, that its action is a "rule" under Section 536.010(6). First, it is not a contested case. A contested case "means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing[.]" §536.010(4), RSMo. A contested case requires an adversarial hearing with procedural formalities including notice of the issues, evidence taken under oath, cross-examination, application

of rules of evidence, a recording of the proceedings and a written decision that details findings of fact and conclusions of law. *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 507 (Mo. banc 2009). The proceedings by BOHA in furtherance of its actions were not a contested case.

Running throughout BOHA's brief is this theme of contested case and how the issue of the scope of practice of advanced practice nurses might be decided in an appropriate case involving specific facts and specific parties. However, the issue of whether there is a rule under Section 536.010(6) is not based on what could have been done but on what was done. What BOHA has done does not involve specific facts or specific parties. As stated by BOHA, "the letters challenged in this matter were very general expressions of opinion." Brief of Respondent at 11 (emphasis added). This statement admits of both a statement (expression) and its general applicability. An element of the definition of "rule" under Section 536.010(6) is that it be a statement of general applicability. §536.010(6), RSMo. The fact that BOHA could have made a statement limited to a particular individual that was tied to a particular set of facts that occurred prior to BOHA rendering its statement does not change the substance of the statement that was actually made or excuse BOHA from complying with rulemaking requirements when it chose to make a statement that applied generally to all physicians and advanced practice nurses and to their future conduct.

BOHA also wishes to leave the Court with the impression that its action was simply a matter of correspondence between BOHA and three physicians and that this exchange of letters was nothing more than an interpretive or advisory opinion. Thus, it

states, “The letters challenged by Appellants in this case are no more than an expression of opinion by the Board as to how the provisions of Section 334.100.2(4)(d) apply to the facts posed in an inquiry.” Brief of Respondent at 10. In its treatment of the Chamber’s *amicus* brief, BOHA refers to its action as providing guidance for its regulated community and as responding to the physicians concerning their inquiry. Brief of Respondent at 26. As the facts show (discussed below), this is a gross mis-characterization of what BOHA was doing and is offered by it now as a post hoc justification for its action. Even if its action could anywhere near be characterized as polite correspondence between BOHA and those receiving its correspondence, the characterization is likewise of no avail to BOHA.

A maxim of statutory construction is *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of another). *Missouri Board of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 443 (Mo. App. 1991). Among the exceptions to the definition of “rule” is “A declaratory ruling issued pursuant to section 536.050, or an interpretation issued by an agency with respect to a specific set of facts and intended to apply only to that specific set of facts[.]” §536.010(6)(b), RSMo. BOHA does not claim that its action comes within this exception. It has also shown that it is capable of referencing a specific exception when it thinks the exception might apply. Brief of Respondent at 8 (reference to exception (6)(d)). Even so, BOHA cannot refer to its action as “very general expressions of opinion,” Brief of Respondent at 11, and as having the purpose of providing guidance to the regulated community as a whole while at the same time maintain that its expression of opinion is intended to apply only to those

making the inquiry as to the specific set of facts presented. Further, neither BOHA's official action at its meetings or the letters sent to the MSMA and Drs. Kunkel and James contained any language limiting their application to those three individuals or specifying the facts to which the opinion applied and was limited. L.F. 31, 32, 34. BOHA's statements do not come within the definitional exception of rule for advisory opinions because of their general nature and application. Since the Legislature sought to except only particularized advisory opinions from the definition of "rule," application of *expressio unius est exclusio alterius* shows the Legislature's intent that generalized interpretations be within the definition of "rule." *Levine*, 808 S.W.2d at 443.

BOHA also contradicts itself in its assertion that its actions have no direct effect on physicians or advanced practice nurses. BOHA admits that the purpose of its statements was to provide guidance to the community it regulates, to advise that community of BOHA's interpretation and application of its disciplinary statute, to inform them of the regulated community's responsibilities in light of BOHA's interpretation and application, i.e., to control and influence the conduct of physicians in the performance of their professional duties. Brief of Respondent at 25-26. BOHA cannot ascribe a purpose of controlling and influencing the conduct of its regulated community through its generalized statements and then pretend that it has engaged in nothing more than "nonregulatory comment," Brief of Respondent at 26, that has no direct impact on those regulated or those within the effective zone of what is proscribed. BOHA's own argument clearly indicates not only its recognition that its statements do have an impact in the real world but also its intent that they do so.

Perhaps in recognition of this, BOHA contorts the prior legal authority and would have the Court re-write the decisional law on rulemaking. BOHA would engraft new language onto Section 536.010(6) by imposing a “direct action and governmental reliance” requirement on the definition of rule. In other words, a rule is a rule only if it “directly changes some aspect of its dealings with members of the public, and the agency relied on these actions for the authority to alter the rights, liabilities, or obligations of members of the public.” Brief of Respondent at 16. BOHA goes even further in proposing what the definition of “rule” should be by saying a rule is a rule if its action had the “direct effect of changing some aspect of the aggrieved party’s relationship with the government agency[.]” Brief of Respondent at 24.

No such requirement is found in the cases that BOHA discusses in its brief, either in support of its position or in its attempt to distinguish the cases on which MoANA, Dr. Kunkel and Kevin Snyders relied. In contrast to the gloss BOHA would put on the cases dealing with Section 536.010(6), the common element in all the cases dealing with this section is whether the agency has announced a standard of conduct. Thus, in *Young v. Children’s Division, State of Missouri Department of Social Services*, 284 S.W.3d 553 (Mo. banc 2009), the agency statements of general applicability were standards and criteria for determining eligibility for participation in the behavioral foster care program. Similarly, in *NME Hospitals, Inc. v. Department of Social Services*, 850 S.W.2d 71 (Mo. banc 1993), *Department of Social Services v. Little Hills Healthcare*, 236 S.W.3d 637 (Mo. banc 2007), and *State ex rel. Barnett v. Missouri State Lottery Commission*, 196 S.W.3d 72 (Mo. App. 2006), a standard or criteria was set. In contrast, in *Baugus v.*

Director of Revenue, 878 S.W.2d 39 (Mo. banc 1994), the agency did not establish a standard or criteria of conduct but simply made a ministerial decision on the label to be applied to titles. There was similarly no standard or criteria setting in *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10 (Mo. banc 2003), but a simple listing.

In this case, by contrast, BOHA has announced a specific standard intended to effect future action by its regulated community in conformance with that standard. After consideration of the issue, BOHA has made a determination that “it is beyond the scope of practice for an advanced practice nurse to inject therapeutic agents under fluoroscopic control,” L.F. 31, and notified the regulated community that “advance practice nurses currently do not have the appropriate training, skill or experience to perform these injections.” L.F. 32. BOHA has made a prospective announcement to its regulated community concerning procedures that cannot be delegated to advanced practice nurses. It has effectively prohibited such delegations under threat of potential disciplinary action against anyone who would violate the prohibition. Its statements are both a warning and a threat. BOHA wants the Court to believe that its action has produced no reaction, or that any such reaction is simply an indirect ripple effect, but such a position is blinded to reality. When the regulatory agency announces a prohibition as a warning combined with the threat of potential license discipline, there is a direct and immediate reaction within the regulated community and, in this instance, those who might be outside the jurisdiction of BOHA but within the zone of regulated conduct and directly affected by it.

What BOHA is arguing is also clearly inconsistent with its actions. If, as BOHA says, its statements did not set a standard or accomplish a change in policy or practice, why was it necessary for BOHA to place the question on the agenda at two separate meetings, why was it necessary for BOHA to direct one of its members to research the nursing statutes, why was it necessary for the entire board to take up the issue for consideration, and why was it necessary for BOHA to hold a formal vote and take formal action on the matter as reflected in its minutes? If, as BOHA says, its statements did not set a standard or accomplish a change in policy or practice, it would have been a very simple thing for BOHA's executive director or legal counsel to send a response to the MSMA on what BOHA now claims was its already established policy. The reality is, however, that BOHA had no policy on the subject pain management procedures in light of Section 334.100.2(4)(d) and the action taken at its meeting was to formally adopt a policy through a vote of its members regarding those procedures. Adopting a policy where one had not previously existed is clearly a change in policy. In the more generalized terms relating to the power and authority of administrative agencies to make rules, the Board was taking formal action to fill in the details and supplement the broader language of Section 334.100.2(4)(d). *See, e.g., State ex rel. Danforth v. Riley*, 499 S.W.2d 40, 44 (Mo. App. W.D. 1973) (rulemaking involves filling in the details and supplementing a statute).

BOHA also argues that its action doesn't constitute a rule because it was made in the course of what BOHA characterizes as private correspondence and, thus, is not a statement of general applicability. Brief of Respondent at 11. Legally, this argument has

been rejected by the courts. A statement is generally applicable if by the terms of the statement it applies to a class of persons. *Little Hills Healthcare*, 236 S.W.3d at 642.

BOHA's official action, memorialized in its minutes, and the announcement of its decision that it made to MSMA by letter refer to physicians and advanced practice nurses generally and do not single out particular individuals. L.F. 31, 34. Clearly, MSMA understood that the announcement applied generally to all physicians and all advanced practice nurses seeking to perform a general set of procedures when it notified all its members of the decision in its newsletter. L.F. 34.

BOHA's insistence on portraying its statements as a simple matter of private correspondence is also belied by the facts. Dr. Van Way was not making a personal inquiry, he was writing on behalf of the MSMA. L.F. 23-24. He states in his letter, "It is MSMA's position," "We urge," "MSMA believes," "We, therefore, request." L.F. 23-24. He signed this letter as "President." L.F. 24. The MSMA's letter nowhere refers to a specific set of facts. L.F. 23-24. Clearly, what the MSMA was doing was petitioning BOHA for a blanket adoption of a position consistent with the opinion of the Association. L.F. 23-24. Further, neither Dr. Kunkel nor Dr. James were making inquiries of BOHA. They were responding to BOHA placing this issue on their agenda for formal action. L.F. 25-27. They were, in effect, participating in an issue being determined in open meeting by BOHA.

BOHA would like free itself from rulemaking and the participation of the public in the rulemaking process. It wishes to set policy, indicate what conduct is prohibited and warn and threaten those regulated by it without any accountability. This is the real effect

of BOHA’s argument—it doesn’t want to be fettered with exposing their statements of general applicability of policy and standards to public review and comment, nor does it want to be forced to give consideration to public input and either amend or justify their proposed action in light of that input. It simply wants to tell physicians and advanced practice nurses what they can do and have them toe the agency line. As *amicus* American Association of Nurse Anesthetists pointed out in its brief, though, “The formal requirements of the Administrative Procedures Act are designed to assure carefully considered decisions based on knowledge and good policy—exactly what did not happen here.” Brief of Amicus AANA at 7. This Court agreed with that sentiment, noting that the rulemaking requirements exist to allow participation by those who oppose or support the proposed rule, to properly inform the agency on the propriety of what it is proposing, to force the agency to justify its action in light of comments received and to give the agency the opportunity to modify its proposal after careful reflection and consideration of public comments. *NME Hospitals*, 850 S.W.2d at 74. To proceed in derogation of these requirements “undermines the integrity of the procedure.” *Id.* Given BOHA’s present attempt to back away from its action and suggest alternative meanings for what it said, who can say whether it would have proceeded with its ill-considered and extra-jurisdictional statement had its action gone through the rule-making procedure? The rulemaking requirements of Chapter 536 were not intended to be so easily circumvented as BOHA proposes by its argument that a rule is not a rule unless and until it has gone through the rulemaking procedures.

II.

(Responds to Argument II of Respondent's Substitute Brief)

The statements that BOHA made which are the subject of this appeal are: “it is beyond the scope of practice for an advanced practice nurse to inject therapeutic agents under fluoroscopic control,” L.F. 31, and “advance practice nurses currently do not have the appropriate training, skill or experience to perform these injections.” L.F. 32, 34. These are the full text of these statements and their meaning and intent is to be taken from the words chosen by BOHA.

However, having extensively briefed this matter before the trial court and at the Court of Appeals, BOHA now suggests for the first time that these “very general statement[s] of opinion can be read multiple ways.” Brief of Respondent at 29. It suggests that the statements could be read to apply to all advanced practice nurses except CRNAs; or it could be read to apply only to individual advance practice nurses who lack the appropriate training, skill or experience to perform the subject injections, thereby leaving it open for the individual, properly trained CRNA to be outside BOHA’s prohibition; or it could be read as not intended to be a final and conclusive determination of the abilities of advanced practice nurses because it included the qualifier, “at this time.” Brief of Respondent at 29-30. This attempt at semantic gymnastics is not only disingenuous but is supported only by employing a rule of construction that words in a statement can be made to mean anything so long as we ignore what was actually said and add language that was not present. Perhaps most telling on this argument is that BOHA simply says that its statements could be given these wholly different meanings. It does

not say that these limited meanings are what it really intended to say and it has not taken any action to clarify what it inartfully stated so that the limited application of the statements was made clear. In reality, BOHA wanted to prohibit advanced practice nurses, which includes CRNAs pursuant to Section 335.016(2), from performing the subject injections, and used blanket language as the means to obtain its goal.

BOHA also disagrees with the application of *Sermchief v. Gonzales*, 660 S.W.2d 683 (Mo. banc 1983). BOHA argues that it has the authority and responsibility to enforce Section 334.100(4)(d) as part of determining whether a physician has improperly engaged in “delegating professional responsibilities to a person who is not qualified by training, skill, competency, age, experience or licensure to perform such responsibilities.” §334.100(4)(d). Interestingly, BOHA admits that the scope of practice of nursing is defined by Chapter 335, RSMo. Brief of Respondent at 28. But it ignores that the Court in *Sermchief* recognized that the nursing statutes do not define or confine the scope of nursing practice to specified procedures or activity but instead the statutes defined the scope of nursing practice to be the assumption of duties and responsibilities that were consistent with the nurse’s specialized education, judgment and skill in the delivery of care. 660 S.W.2d at 689. Having made this determination concerning the statutory scope of nursing practice, the Court further determined that it was outside the power of BOHA to define the scope of practice of nursing, a determination that was also based on a specific statute removing any such authority from BOHA. *Id.*, citing §334.155, RSMo.

BOHA can no more define and enforce a blanket restriction on the scope of practice of advanced practice nurses through the exercise of its disciplinary power under

Section 334.100 than it could under the statutory provision under which it was acting in *Sermchief*. Section 334.100.2(4)(d) allows BOHA to determine whether an individual health care provider (e.g., an advanced practice nurse) is licensed or not and, if licensed, whether the individual possesses the training, skill, competency, etc., to undertake the particular responsibility or procedure. However, Section 334.100.2(4)(d) does not allow BOHA to do what it has done here, which is to decide as a matter of course for all advanced practice nurses, and in derogation of the authority of the Board of Nursing, to impose a blanket prohibition on the scope of care an advanced practice nurse might provide under his or her nursing license. As *Sermchief* points out, the Board lacks the authority to regulate the practice of professional nursing, *Id.* at 690, and nothing could be a more direct regulation of the practice of nursing than defining blanket limits of procedures that nurses, or a class of nurses, cannot do, and effectively prohibiting them from engaging in those procedures through the physicians who would call on nurses to perform those functions.

It should not be ignored that BOHA may have been acting for mixed motives (to give it the benefit of the doubt), one of which was economic protectionism for its regulated physicians who also perform pain management procedures in economic competition with advanced practice nurses who are licensed to perform the same procedures. As the amicus American Association of Nurse Anesthetists points out in its brief, MSTTA has a substantial economic interest in carving out and preserving the field of pain management for its members. Brief of AANA at 2. The Federal Trade Commission similarly sees the anti-competitive potential for restricting the pool of pain management

practitioners to physicians. Brief of AANA at 5. *Sermchief's* separation of the regulatory functions between nurses and physicians, and its emphasis on characteristics of professionalism as determinant of the scope of nursing practice (“specialized education, judgment and skill based on knowledge and application of principle derived from the biological, physical, social and nursing sciences”), 660 S.W.2d 689, erects a necessary bulwark against mis-use of administrative power by a professional licensing agency for economic protectionism.

Contrary to the established regulatory framework, the Board has undertaken to regulate the practice of professional nursing. Its formal action prohibits advanced practice nurses from performing the identified procedures and directly impacts their ability to engage in the practice of nursing under their license. There is no distinction between *Sermchief* and this case.

Finally, BOHA attacks the sufficiency of the pleadings in County III of the petition, contending that MoANA, Dr. Kunkel and Kevin Snyders failed to plead a basis for declaratory judgment. BOHA contends that the pleadings are insufficient because there is no allegation that pleads that advanced practice nurses or CRNAs have the requisite skill, training, competency, age, experience or licensure to perform the subject procedures.

There are two flaws in BOHA's argument. First, it is a long-recognized principle relating to sufficiency of pleadings, that if documents are attached to a pleading and incorporated by reference, they are to be considered in determining the sufficiency of the pleadings. *Travelers Indemnity Co. v. Chumberly*, 394 S.W.2d 418, 419 (Mo. App. 1965).

The exhibits attached to the petition from both Dr. Kunkel and Dr. James state clearly the facts that advanced practice nurses have the requisite qualifications to perform the procedures in question.¹ L.F. 25-27. Dr. Kunkel states that he utilizes a collaborative practice agreement with the CRNA in his office relating to the procedures and that CRNAs are capable of performing the pain management procedures given their detailed knowledge, skills and experience. L.F. 25. Dr. James definitively states his disagreement with the MSMA's opinion that only licensed physicians have the skill and intellectual understanding to perform the procedures; points to numerous procedures that advanced practice nurses and CRNAs perform on a regular basis that involve the same skill and knowledge required for the subject procedures; and notes that the MSMA's position is contradicted by the principles of and experience with collaborative practice arrangements between physicians and advanced practice nurses. L.F. 26-27. In a second letter to BOHA which was attached to the petition, Dr. Kunkel unequivocally states, that the CRNA working in his pain clinic "has the education, training and competence to utilize fluoroscopy guided procedures in our clinic." L.F. 37. Assuming *arguendo* that it was necessary to specifically plead that advanced practice nurses or CRNAs have the requisite qualifications to perform the procedures at question, such allegations were within the petition.

¹ Significantly, in the context of the true procedural posture of this action, this information was a part of the summary judgment record before the trial court.

Second, if BOHA wishes to have the trial court's action on Count III treated on the basis of the sufficiency of the allegations, then it should not be allowed to avoid the rules and principles applicable to such a challenge. Under those rules, it would be permissible to terminate the proceedings only on a determination that the pleadings fail to state a cause of action and it is apparent that no set of facts can exist under which a cause of action can be stated. *Moore v. Moore*, 657 S.W.2d 37, 39 (Mo. App. W.D. 1983). As the preceding paragraph shows, if it hasn't already been pleaded that advanced practice nurses and CRNAs have the requisite qualifications to perform the subject procedures, the facts certainly exist that they can do so.

III.

(Responds to Argument III of Respondent's Substitute Brief)

The arguments made by BOHA under Point III of their Brief are adequately contravened by the arguments under Point III of the Substitute Brief of Respondent.

These issues are not re-argued here.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Respondent's Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

- (A) It contains 5,002 words, as calculated by counsel's word processing program;
- (B) A copy of this Brief is on the attached CD-ROM disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

Thomas W. Rynard

Certificate of Service

I hereby certify that a true and correct hard copy of the above Brief was sent by U.S. Mail, postage prepaid, and an electronic version by CD-ROM included with the brief, to Edwin R. Frownfelter, Assistant Attorney General, 615 E. 13th Street, Suite 401, Kansas City, Missouri 64106, edwin.frownfelter@ago.mo.gov, Attorney for Respondent; Marshall Wilson, Berry & Wilson, LLC, 304 E. High Street, P.O. Box 1606, Jefferson City, MO 65101, MarshallWilson@berrywilsonlaw.com, Attorney for Amicus Curiae American Association of Nurse Anesthetists; and Richard M. Aubuchon, General Counsel, Missouri Chamber of Commerce & Industry, Inc., P.O. Box 149, Jefferson City, Missouri 65102, raubuchon@mochamber.com, Attorney for Amicus Curiae Missouri Chamber of Commerce and Industry, Inc., on this 24th day of February, 2011.

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