

Summary of SC91302, *Missouri Association of Nurse Anesthetists, Inc., Glenn Kunkel, M.D., and Kevin Snyders, CRNA v. State Board of Registration for the Healing Arts*

Appeal from the Cole County circuit court, Judge Jon E. Beetem

Argued and submitted March 23, 2011; opinion issued June 28, 2011

Attorneys: Kunkel, Snyders and the nurse anesthetist association were represented by Thomas W. Rynard and James B. Deutsch of Blitz, Bardgett & Deutsch LC in Jefferson City, (573) 634-2500; and the board was represented by Patricia J. Churchill and Edwin R. Frownfelter of the attorney general's office in Jefferson City, (573) 751-3321. The Missouri Chamber of Commerce & Industry Inc., which filed a brief as a friend of the Court, was represented by its general counsel, Richard M. AuBuchon, of Jefferson City, (573) 634-3511. The American Association of Nurse Anesthetists, which also filed a brief as a friend of the Court, was represented by Marshall V. Wilson and Michael G. Berry of Berry Wilson LLC in Jefferson City, (573) 638-7272.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A doctor, nurse anesthetist and organization of nurse anesthetists appeal the trial court's summary judgment in favor of the state's healing arts board in a case involving whether doctors may delegate to nurse anesthetists the responsibility of performing certain pain management injections. In a unanimous decision written by Chief Justice William Ray Price Jr., the Supreme Court of Missouri reverses the trial court's judgment and remands (sends back) the case. Declaratory judgment is appropriate for this dispute. The doctor, nurse anesthetist and nurse anesthetist association are entitled both to declaratory judgment that the board's letter is void and of no effect as a rule as well as to an injunction prohibiting the board from enforcing its letter as a "rule." Further, the record does not support summary judgment in the board's favor as a matter of law.

Facts: Chapter 334, RSMo, gives the state board of registration for the healing arts authority over all licensed physicians, surgeons and midwives in Missouri, including Dr. Glenn Kunkel, an anesthesiologist in Rolla who practices with two advanced practice nurses (APNs), including Kevin Snyders, who also is a certified registered nurse anesthetist (CRNA). Kunkel frequently delegates certain professional responsibilities to Snyders, including the use of fluoroscopic procedures, which improve the safety and accuracy of pain medication injections. The Missouri Association of Nurse Anesthetists is a not-for-profit organization whose members, such as Snyders, are CRNAs. In late 2007, the healing arts board received a series of letters regarding the propriety of instances in which a physician delegates fluoroscopic procedures to APNs. In one, the Missouri State Medical Association asserted that APNs were unqualified to perform this procedure and asked the healing arts board to adopt a position prohibiting physicians from delegating the procedure to APNs. Kunkel and a colleague opposed the association's request, arguing that APNs were qualified. In February 2008, the board sent the medical association and Kunkel a letter stating in pertinent part that, after having conducted research, it was the board's opinion that APNs "do not have the appropriate training, skill or experience to perform these injections." The board did not follow any of the rulemaking procedures of the state's administrative practice act or section 334.125.2 to promulgate formally as a rule the position it took in the letter. The board subsequently denied Kunkel's request that it amend its position. In

April 2009, the nurse anesthetist association, Kunkel and Snyders (the anesthetists) filed suit, seeking injunctive relief prohibiting the healing arts board from enforcing its “letter rule,” a declaratory judgment that this alleged rule was void and of no effect, and an order directing the board to disseminate a retraction of its “letter rule.” In its answer, the board admitted its statement is not a rule. In September 2009, the healing arts board filed a complaint against Kunkel alleging he improperly delegated professional responsibilities in violation of chapter 334 for acts that predate the issuance of the board’s letter. That case is scheduled to be heard before the administrative hearing commission in October 2011. In March 2010, the trial court granted the board’s motion for summary judgment, holding the statements in the board’s letter did not constitute a rule as defined in chapter 536, RSMo, and denied the other relief requested. The anesthetists appeal.

REVERSED AND REMANDED.

Court en banc holds: (1) Declaratory judgment is appropriate for this dispute. Because there is no promulgated rule or rule that purports to have been promulgated, declaratory judgment under section 536.050 does not apply. Declaratory judgment under chapter 527, RSMo, and Rule 87 is available when there is a justiciable controversy that is real, substantial, presently existing and capable of specific relief; the plaintiff has a legally protectable interest at stake; the controversy is ripe (ready) for judicial determination; and there is no other adequate legal remedy available.

(a) Here, the controversy is justiciable; there is a genuine disagreement and substantial controversy between the parties as to whether physicians appropriately may delegate fluoroscopy procedures to advanced practice nurses and whether such nurses may perform the procedures.

(b) The plaintiffs have a legally protectable interest at stake, giving them standing (the legal authority to sue). Kunkel is impacted directly and adversely by the healing arts board’s statements. The board licenses him, he is subject to its authority and it has a pending disciplinary action against him. Snyders also is impacted adversely because if doctors cannot delegate the fluoroscopy procedure to advanced practice nurses such as him, then they cannot perform a procedure they previously have been allowed to perform. Likewise, the Missouri Association of Nurse Anesthetists has associational standing to bring the action on behalf of its members. Its members otherwise would have standing to bring the suit in their own right, and it seeks to protect its members’ rights to participate in this collaborative practice between advanced practice nurses and their physicians. Further, the invalidation of the board’s statements, which is the relief requested, is prospective only and does not involve monetary damages or other relief specific to individual members.

(c) The case is ripe for judicial determination because the issues are fit for judicial resolution and the parties will face a hardship if judicial relief is denied. No further factual development is required for judicial determination because the letter expresses the board’s policy opinion and the record shows the board has finished developing its policy as it attempted to enforce its position through a disciplinary proceeding against Kunkel. Judicial resolution is needed when plaintiffs are faced with the dilemma physicians such as Kunkel now face: comply with the board’s position or risk serious penalties by continuing and waiting for the agency to bring disciplinary actions. Advanced practice

nurses, in turn, cannot perform the procedure if physicians are unable to delegate it to them.

(d) No other adequate legal remedy exists. There is no question that no other adequate judicial remedy exists. Though disputed by the board, there also is no adequate administrative remedy available. Generally, a party that fails to exhaust all available administrative remedy may not obtain declaratory judgment. Although sufficiently impacted by the board's letter, advanced practice nurses are governed by chapter 335, RSMo, are not subject to the board's authority and, therefore, have no administrative remedy available to challenge the board's letter under chapter 334, which governs the board. Although Kunkel is a licensee subject to the board's authority, the board waited nearly a year and a half after it issued its letter – and more than four months after Kunkel and the others sued – to initiate disciplinary proceedings against Kunkel. Physicians should not be foreclosed from declaratory judgment and forced to practice their profession at the mercy of the board for such a span of time, thereby jeopardizing their license to practice. *See, e.g., Sermchief v. Gonzales*, 660 S.W.2d 683 (Mo. banc 1983).

(2) The board's letter is void and has no legal effect as a "rule." To promulgate a rule, section 536.020.1 requires an agency to file with the secretary of state notice of proposed rulemaking and a subsequent final order of rulemaking, both of which must be published in the Missouri Register. Further, section 334.125.2 requires the board to submit any proposed rules to the joint committee on administrative rules. An agency statement that fails to follow the prescribed procedures is null, void and unenforceable, with no legal force or binding effect. There is no dispute the board here failed to comply with the rulemaking procedures prescribed by chapters 536 and 334 and so the letter is void and of no legal effect as a "rule." Kunkel, Snyders and the nurse anesthetist association are entitled both to declaratory judgment that the board's letter is void and of no effect as a rule as well as to an injunction prohibiting the board from enforcing its letter as a "rule."

(3) The record does not support summary judgment in the board's favor as a matter of law. Section 334.155.3 explicitly states that the provisions of chapter 334 "shall not prevent a licensed physician from ... delegating responsibilities to" nurses lawfully practicing within the provisions of chapter 335, which governs the practice and licensure of nurses in Missouri and gives the state board of nursing the authority to enforce the provisions of the chapter. In addition, section 334.104 permits physicians to enter into collaborative practice arrangements with registered professional nurses and authorizes the healing arts board and the nursing board to promulgate rules jointly regulating the use of such arrangements that take effect after they have been approved by a majority vote of a quorum of each board. But it is unclear whether, in its letter, the healing arts board is attempting to regulate the practice of physicians, which it is empowered to do, or to regulate the practice of nursing, which it is not. There is no evidence in the record as to the contents of the collaborative practice arrangement under which any physician and advanced practice nurse were practicing; whether their practice violated regulations jointly promulgated by the two boards; the skill, training and experience necessary to perform the fluoroscopy procedure; or the custom and practice of the medical industry regarding this procedure.