
IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DR. GARY EDWARDS

Appellant,

LAWRENCE M. GERSTEIN, ET AL.

Respondents.

No. WD 66678

Appeal from the
Circuit Court of Cole County, Missouri,
Case No 05AC-CC01021
The Honorable Thomas J. Brown, Circuit Judge

APPELLANT'S REPLY BRIEF

Submitted by:

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ARGUMENT

Mischaracterizations in Respondents' Statement of Facts

Initially, Appellant notes that Respondents mischaracterize the facts underlying Dr. Edwards' cause of action in their Statement of Facts:

1. Respondents state that Dr. Edwards alleged gross negligence against them “for investigating, prosecuting and disciplining him after the Board received complaints against Dr. Edwards.” Dr. Edwards' complaint is not that the Board members took these actions but rather the *outrageous manner in which* they, among other things, aggressively solicited the complaint, pursued the action even after the patient's family members withdrew their complaint by having a Board employee swear out a complaint of which she had no independent knowledge, then deliberately avoided exculpatory information and failed to provide Dr. Edwards with the exculpatory information they did have. L.F. at 10–12. Their actions went beyond any reasonable interpretation of investigating, prosecuting, and disciplining. Respondents' Statement of Facts implies that Dr. Edwards filed suit simply because he was the subject of a standard Board investigation and disciplinary action, which is not borne out in the record.
2. Respondents state that the Board took action “after receiving complaints” against Edwards. In reality, the Board actively and aggressively pursued a complaint; the Board's investigator visited the patient's family members six times before they were able to persuade the mother-in-law to submit a

complaint. L.F. at 10. When the family withdrew their complaints, Board employee Jeannette Stuenkel signed a complaint to which she had no independent knowledge. L.F. at 10. These facts are much different than the impression of the Respondent's brief that the Board passively received complaints against Dr. Edwards and investigated in their usual course of proceeding.

3. Respondents state that Dr. Edwards' claim against Board employee Jeanette Stuenkel was for "malicious prosecution for her role *as an investigator* into the allegations" (emphasis added). To the contrary, Dr. Edward's complaint against Jeanette Stuenkel was that she signed a complaint against him without any independent investigation into the allegations whatsoever. L.F. at 10. Her role was not that of an investigator, but that of an individual swearing to facts of which she had no knowledge.

As support for their statements, Respondents cite to Dr. Edwards' entire petition in the legal file, L.F. 5–13. Nothing in the petition or the legal file supports the Respondents' characterization of the facts.

Quasi-judicial immunity

As noted by Respondents, this is a case of first impression for this Court. Does the legislature have the authority to qualify the common law doctrine of quasi-judicial immunity by statute, particularly in light of the Supreme Court's holding in *Golden v. Crawford*, 165 S.W.3d 147 (Mo. banc 2005), that other common law immunity doctrines have been superseded by statute?

Respondents say that the powers of the Board to initiate proceedings and take disciplinary actions would be rendered meaningless if the Board members did not have authority to decide against whom and how to pursue disciplinary actions. But the Board does indeed have this authority, and quasi-judicial immunity does protect that authority to a great extent. Yet the legislature has determined that this authority should be qualified by a minimal level of responsibility and accountability in cases of *gross negligence*, § 331.100.5, RSMo, and the language of the statute cannot be brushed away with a discussion of the immunity's importance. In *Golden*, 165 S.W.3d 147, the Supreme Court did not weigh the importance of official immunity and the public duty doctrine against the statute; the Court simply discussed the legislature's intent and said that **“the qualified immunity under section 190.307 supplants the absolute immunity under the common law.”** *Golden* at 149.

Respondents rightly note that the Board's duties, “which are of a judicial nature, are statutorily granted or ‘imposed’ on the Board members.” Likewise, potential liability is statutorily imposed on Board members who act with gross negligence. There is no basis for acknowledging the legislature's authority to impose duties on the Board members but denying the legislature's authority to impose minimum limits on the Board members' powers in carrying out those duties.

Citing *Kwoun v. Southeast Mo. Professional Standards Review Org.*, 811 F.2d 401 (8th Cir. 1987), Respondent notes the availability of the review process to act as a check on overzealous prosecutions. But this remedy was stifled for Dr. Edwards.¹ If the Board members are protected even to the point that they can act with gross negligence, despite the legislature's mandate otherwise, individuals such as Dr. Edwards will have no recourse regardless of the great personal and professional damage they might suffer. The Board strategically dropped their complaints against Dr. Edwards before they were forced to reveal the truth. L.F. at 10. But the dropped complaint was small consolation as Dr. Edwards had already lost his business, lost his reputation, and suffered grave humiliation and embarrassment, not to mention the attorney fees incurred in his defense. L.F. at 10. The legislature's provision of a cause of action in such cases of gross negligence cannot be ignored.

Respondents rely heavily on *Group Health v. State Board of Registration*, 787 S.W.2d 745 (Mo. App. E.D. 1990) for their argument of absolute immunity. It should be noted that the court in *Group Health* did not have the benefit of the

¹Dr. Edwards sought review of the Board's discipline against his license. His case came to this Court, which reversed and remanded, at which point the Board dropped its complaint rather than provide the discoverable information as mandated by this Court. L.F. at 10.

Supreme Court's 2005 decision in *Golden v. Crawford*, which made it clear that a common law immunity doctrine is supplanted by statute.

It is also noteworthy that the court in *Group Health* does not at all address the governing statute. In addition, *Group Health* stands for the proposition that the agency officials are immune from liability for their parts in *deciding whether to initiate proceedings*, which is not the primary basis for the claim in the present case. Though the Board member's initiation of proceedings may have been unfair, it was their continued press against Dr. Edwards in spite of the withdrawal of any public complaints against him, their willful disregard of exculpatory evidence, their communication of derogatory information about him without basis, and their general refusal to deal fairly with him that are the basis of this claim.

Therefore, even if this Court determines that the legislature does not have authority to qualify quasi-judicial immunity as they have done in § 331.100.5, Dr. Edwards still has a cognizable claim because the actions of the Board members went well beyond their judicial roles.

Jeanette Stuenkel

Official Immunity

Jeanette Stuenkel was not named as a defendant in this claim for "her actions as an investigator for the Board and pursuing a complaint against [Dr. Edwards]," as asserted in Respondents' brief. Rather, the claim against Stuenkel is that she swore out a complaint against Dr. Edwards, having no independent

knowledge of its accusations and without attempting to verify the accuracy of the allegations before swearing to their truth, or indeed, to make any investigation whatsoever. L.F. at 10.

As noted by Respondents, the defendants in *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761 (Mo. App. E.D. 1981), were not public officials because their duties did not involve the exercise of the sovereign's power, and because their duties and authority were not statutorily granted.

Official immunity can apply to employees *if* they exercise the sovereign's power. From the facts available, it is unlikely that Stuenkel had any such authority. Though her exact job responsibilities are unclear without further discovery, it is clear that she stepped outside of her role when she signed the complaint against Dr. Edwards.

Respondents claim that § 331.100.3's grant of power to the Board to employ personnel (including Stuenkel) equates to making her duties and authority statutorily granted. But this directly contradicts *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761 (Mo. App. E.D. 1981), in which the court said, "While our legislature has provided for employment of physicians by the superintendents of mental health facilities such statutory provisions did not create immunity for these public employees." *Id.* at 764. The same could be said in this case: "While our legislature has provided for employment of [support staff] by the [Board of Chiropractic Examiners] such statutory provisions did not create immunity for these public employees." Indeed, the facts of *Gaertner* parallel the facts of the

present case on this issue.

A review of the other cases cited by Respondents in attempting to establish official immunity for Stuenkel reveal that they deal either with directors and supervisors or with employees such as physicians and police officers who must exercise high degrees of discretion in the exercise of their job duties.

Even if the official immunity doctrine would have applied, Stuenkel was not acting within the scope of her authority when she signed the complaint; therefore her act, while not ministerial, was also not a discretionary *official* act protected by the official immunity doctrine.

Public duty

Respondents ignore the trial court's mischaracterization of the public duty doctrine. The public duty doctrine protects from suit against an individual member of the public for breach of a duty owed to the general public. *See, e.g., Heins Implement v. Hwy. & Transp. Com'n*, 859 S.W.2d 681, 694 (Mo. banc 1993). Had Stuenkel been sued by, for example, a chiropractor's patient for some failure to ensure that the chiropractor met the qualifications for receiving a license, she would have been protected by the doctrine. But Dr. Edwards' claim is not based on any breach of a duty Stuenkel owed to the public, and he is not a member of the public to be protected under these circumstances. Therefore, the public duty doctrine does not apply.

Regardless, it is difficult to find merit in a claim that Stuenkel was fulfilling her responsibility to protect the public when she only signed a complaint against

Dr. Edwards because no member of the public was willing to maintain a complaint against him.

Venue

Respondents raise no arguments not addressed in Appellant's initial brief.

CONCLUSION

Appellant requests that this Court reverse the trial court's dismissal and remand with directions to transfer the case to Jackson County for a trial on the merits or, in the alternative, to remand with directions to proceed with a trial on the merits.

RULE 84.06(c) and (g) CERTIFICATION

The undersigned appellant's counsel hereby certifies that:

- (1) This brief contains the information required by Rule 55.03;
- (2) This brief complies with the limitations contained in Rule 84.06(b);
- (3) This brief contains 1,787 words as calculated by a Microsoft Word 2003 computer count;
- (4) This brief contains 187 monospaced lines;
- (5) The 3.5 inch floppy disk which accompanies the original of this Brief and also the floppy disk provided to counsel for respondent have been scanned with Norton (Symantec) Antivirus Software and are virus free.

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CERTIFICATE OF SERVICE

The undersigned certifies that on _____, 20 _____, two hard copies of Appellants' Reply Brief along with a digital copy thereof on a 3.5 floppy disk in Microsoft Word 2003 format, scanned for viruses using and up-to-date Norton (Symantec) Anti-Virus program and found to be virus free, were mailed, postage prepaid, to each other party not in default in this action, or upon that party's legal representative, as required by Rule 84.06.

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