Commonwealth of Massachusetts

Supreme Judicial Court

No.SJC-12119

Bharanidharan Padmanabhan MD PhD
Plaintiff-Petitioner(Dr Bharani),

v.

Board of Registration in Medicine (BORIM)
Defendant,

and

Division of Administrative Law Appeals (DALA)
Defendant.

Plaintiff-Petitioner’s en banc Appellant Brief from

the ruling of the Single Justice

Dated June 7, 2016

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Issues presented

This Court must declare that Defendant Board is bound by 801 CMR 1.0 and the various colorable claims in the complaint including discrimination, malice and procedural errors may not be dismissed at the motion to dismiss stage.

The Single Justice court made a fundamental error by claiming Plaintiff-Petitioner is the Defendant

Plaintiff-Petitioner filed his complaint by clearly defining himself as the “Plaintiff” and the Massachusetts Board of Registration in Medicine as the “Defendant” and clearly explained this fact.

The SJC for Suffolk County committed a plain error by defining the Plaintiff-Petitioner as the Defendant and the Board as the Plaintiff and that the appeal was interlocutary.

The Single Justice court made a fundamental error by claiming the complaint is an interlocutory appeal

Plaintiff-petitioner made clear in his complaint that pursuant to 801 CMR, the administrative process was undeniably and truly complete and that this was not an interlocutory appeal. Justice Spina ignored that clear fact and proceeded on Defendant Board’s mischaracterization instead.

By law the administrative process was complete and exhausted well prior to Plaintiff-Petitioner filing his request for certiorari

In his complaint and again in his opposition to Defendant

Board's motion to dismiss Plaintiff-Petitioner quoted a clear regulation that ensures that administrative processes cannot be dragged on indefinitely. 801 CMR 1.01, remarkably for a Massachusetts regulation, imposes clear deadlines on state Agencies and is binding on Defendant Board.

It is staggering that Defendant Board's motion to dismiss is nearly identical to the one filed in November 2014 when Plaintiff-Petitioner first sought this Court's help. In April 2016 Defendant Board has again insisted that the administrative remedies had still not been exhausted, despite the deadlines and regulation imposed on the Agency by 801 CMR.

Justice Spina committed a plain error by granting Defendant Board's motion to dismiss despite the clear regulatory mandate of 801 CMR and repeated orders from the United States Supreme Court to ensure administrative processes are not indefinitely delayed.

Plaintiff-Petitioner, being a trained scientist, was thus staggered to find Justice Spina had disregarded wholesale the mandate of 801 CMR as well as the holdings of the United States Supreme Court. Justice Spina's ruling that 801 CMR does not matter at all is akin to declaring that up is down and down is up. Not every fact can be an opinion.

This applies equally to Defendant Board claiming it "re-

committed the tentative decision for further findings" when that is clearly a false statement.

There was no re-commitment for further findings. As Plaintiff-Petitioner made amply clear in his opposition to Defendant Board's motion to dismiss, Defendant Board violated 801 CMR by openly questioning the Administrative Magistrate's credibility determinations and complained about his rejecting the testimony of it's alleged "expert," the one who lied under oath both on his license renewal application and on the stand and was then granted full immunity in exchange for his testimony. See Commonwealth v. Kelly, 69 Mass. App. Ct. 751 (2007)

The Administrative Magistrate also rejected Defendant Board's bald assertion that notes were substandard and that automatically meant the care provided was substandard too. He clearly wrote there was no legal basis for that assertion.

There will not be "further findings." Defendant Board petulantly desired yet another do-over as once again Plaintiff-Petitioner had been exonerated, the second time around on the very same patients and the very same false charges as in 2011.

What Defendant Board clearly demanded was that the Administrative Magistrate totally repudiate his own credibility determination regarding Defendant Board's immunized witness,

change numerous other alleged errors in his decision and reissue it now declaring that Plaintiff-Petitioner had indeed been guilty of providing substandard care. By no stretch is that "re-committing" for further findings. Defendant Board's demand explicitly violated 801 CMR and proved it's utter contempt for the role of the "independent" Administrative Magistrate and the concept of the administrative remedy itself.

All the charts in question are five (5) years old, there can be no further live testimony after an 8-day hearing in early 2015 and nor is one even envisaged. Four patients named in the Statement of Allegations themselves testified that Plaintiff-Petitioner's care was superior. There is not one single patient victim. We are already 136 days from the date of the January 21st Board meeting and 123 days from the day the 180-day clock ran out. And all this time Defendant Board is fully aware it has blocked a physician from earning a living for almost 6 years.

It is inexcusable that Defendant Board can even claim that the 180-day clock has not begun when it waited 165 days before holding it's first meeting about the tentative decision and still did not issue a final decision. Defendant Board waited 165 days before considering the tentative decision for the very first time to deliberately drag the process out in bad faith.

Going by Defendant Board's self-serving theory, the 180-day

clock shall never ever be triggered as Defendant Board can simply wait till day-135 again and again claim to have "re-committed" the case to DALA in an infinite series of administrative ping pong. If this Court declares that Agencies may ignore 801 CMR, lawlessness is assured. This Court should note that nowhere in Defendant Board's consciously false pleadings does it mention the deadline for "further findings." One is to assume that after whenever DALA gets around to it there will be another 180 days for the Administrative Magistrate to issue his second tentative decision and Defendant Board will have another 180 days to review the second tentative decision and on the second day-135 Defendant Board can "re-commit" back to DALA and the 180 day clock resets all over again.

The regulation 801 CMR was written explicitly to avoid this self-serving and lawless state of affairs. 801 CMR clearly incorporates the will of the state legislature, Congress and the US Supreme Court to ensure private citizens are not harassed endlessly by "rogue Agencies," an intent clearly not shared by Defendant Board.

<u>This Court must rule that Defendant Board must not be accorded any deference</u>

Just as electronic health records have been sold as vital to reduce medical errors and save lives, the administrative

process was sold as being speedy and efficient compared to moving the courts. In 1926 itself the US Supreme Court determined and declared this was very far from the truth. Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926)

The US Supreme Court and other high courts have ruled repeatedly that where there is clear evidence of severe administrative delay and a party applies to the court for relief, such relief must be provided and the court must impose justice and oversight. Coit Independence Joint Venture v. FSLIC, 489 U.S. 561 (1989), Boettcher v. Secretary of Health and Human Services, 759 F.2d 719 (9th Cir.1985), Klein v. Sullivan, 978 F.2d 520 (9th Cir. 1992).

Vargas v. INS, 831 F.2d 906 (9th Cir.1987) which held that due process claims alleging "procedural errors" are exempt from the exhaustion requirement is particularly relevant here as Plaintiff-Petitioner has detailed in his complaint numerous conscious procedural errors over the past five years.

Justice Spina was fully authorized to reject Defendant Board's assertion that administrative remedies still had not been exhausted, two (2) years after the first complaint to the SJC, and in fact was required to have done so.

The First Circuit has also held that a court should grant a Rule 12(b)(6) motion based on the affirmative defense of "not

exhausted administrative remedies" only if the facts establishing that defense are "definitively ascertainable from the complaint and other allowable sources of information" and "suffice to establish the affirmative defense with certitude." Gray v. Evercore Restructuring, 544 F.3d 320 (1st Cir. 2008)

There was no such certitude here. 801 CMR proved conclusively that the administrative process was over and the final Agency decision was in place. It is undeniable.

It is also undeniable that Justice Spina did not treat Plaintiff-Petitioner as the plaintiff, the injured party here who sought relief. Plaitiff-Petitioner also remains puzzled that his complaint was suddenly tossed by Justice Spina when he had been informed by the clerks that his case had been taken under advisement by Justice Hines.

In Heckler v. Day, 467 U.S. 104 (1984), the US Supreme Court declared that courts may not impose deadlines and time limits on the Secretary of HHS and judicially invade into executive branch territory. Happily in this case the deadline is imposed not by the courts but by a clear state regulation - 801 CMR. All Justice Spina needed to do was declare that the regulation precluded entirely Defendant Board's affirmative defense and a dismissal at this stage was not appropriate. Justice Spina instead defied the Supreme Court, a clear state

regulation and the rule of law.

The SJC for Suffolk County has already rejected automatic deference specifically with regard to Defendant Board. Justice Cordy correctly ruled against Defendant Board and ordered this Agency to stop suspending the licenses of physicians without even the preponderance of evidence. For decades this Agency has been blocking the ability of physicians to earn a living without even a preponderance of evidence to support it's action. The Court totally ended that practice with one decision, which was just and proper. Randall v. BORIM, SJ-2014-0475 (2015)

Similarly Defendant Board must not be accorded any deference where it has consciously blocked a physician from earning a living for more than five (5) years without ANY evidence at all, knowing that it was merely providing a hospital with a second bite at the apple, knowing it was using it's state power to administratively drive a physician out of practice without touching his license though he had already been exonerated of the very same charges five (5) years prior and knowingly inviting the hospital's Dr Rachel Nardin to repeat false statements that had already been proved false once and relying on the false testimony of Dr Rachel Nardin even after the Administrative Magistrate accepted that she committed perjury at the DALA hearing. Defendant Board has not denied the

charges were fabricated.

Defendant Board also must not be accorded any deference given it has discriminated against Plaintiff-Petitioner, treated him disparately, consciously violated his civil and human rights and there is a viable colorable Constitutional challenge. Webster v. Doe, 486 U.S. 592 (1988), Mathews v. Eldridge, 424 U.S. 319 (1976)

The dismissal must be reversed and this Court may even sua sponte decide the underlying complaint on the merits.

Defendant Board's prosecution was entirely pretextual

Plaintiff-Petitioner proved Medicare/Medicaid fraud at Cambridge Hospital and that the official brain MRI reports did not match the actual images. The hospital summarily suspended him and tried mightily to show at a Fair Hearing that he did not know anything about multiple sclerosis or reading brain MRI scans as a way of impeaching him as a potential witness at any forthcoming qui tam action. In order to be with the times (opioid crisis) Plaintiff-Petitioner was also suddenly and falsely accused of prescribing drugs to known addicts though an effort post-hoc to find even one addict proved futile.

The hospital's effort failed. The Fair Hearing panel, hand-selected by the hospital itself, looked at the evidence impartially and exonerated Plaintiff-Petitioner of the false

charges. This still left the hospital with the liability of Plaintiff-Petitioner's professional reputation remaining intact in any forthcoming qui tam action.

The hospital filed a second set of false charges with Defendant Board as detailed in the complaint before this Court.

The Board's Statement of Allegations mirror exactly the goals of the hospital and are not related even remotely to the actual charges listed on Defendant Board's website against Plaintiff-Petitioner.

It gets worse.

After Plaintiff-Petitioner was exonerated by the Fair Hearing panel, the hospital paid $7185 to the Greeley Company and custom-ordered a report re-asserting the false charges that had been disproved by the Fair Hearing. This Greeley Report was unsworn and anonymous and remains so to this day.

On January 28, 2013, Defendant Board quoted verbatim from this Greeley Report to support the issuance of the Statement of Allegations against Plaintiff-Petitioner, that he was an imminent danger to public safety and that his license must be summarily suspended. Again, the actual charges on Defendant Board's website were never mentioned. Addendum 1

At that same meeting Plaintiff-Petitioner declared robustly that Defendant Board had just quoted verbatim from a secret

unsworn anonymous report paid for by the hospital. That same day he informed Defendant Board of this by certified letter and protested vigorously Defendant Board acting as the hospital's proxy and not acting on behalf of the people of Massachusetts.

Defendant Board did acknowledge receipt of this certified letter. Addendum 2

Defendant Board did not issue a Statement of Allegations in January 2013. What it did do was hire a Dr Steven Horowitz to paraphrase and rewrite the hospital's purchased unsworn anonymous Greeley Report to now create out of whole cloth the so-called Horowitz Report. This Horowitz Report was about the very same patients and false charges contained in the Greeley Report and made the exact same accusations. This Horowitz Report was in the hands of Defendant Board in April 2013.

Plaintiff-Petitioner respectfully requests this Court to take judicial notice of the fact that Dr Rachel Nardin testified at the DALA hearing that it was she who sent that list of patients and accusations to the Greeley Company for including in the Greeley Report.

The new Horowitz Report thus also relies on the involvement of Dr Rachel Nardin.

Plaintiff-Petitioner repeatedly informed Defendant Board and Defendant Board is fully aware of the clear finding by the

Connecticut Supreme Court that having the same person involved in “arranging” two sequential administrative procedures that alleged to be independently providing a physician with administrative remedies was absolute evidence of malice and pretext. Harris v. Bradley Memorial Hospital, 296 Conn. 315 (2011)

In May 2014 Plaintiff-Petitioner was called in to a meeting before Defendant Board. This was a year after Defendant Board had contrived the existence of the Horowitz Report expressly to conceal it’s reliance on the Greeley Report that had been put together by Dr Rachel Nardin and paid for by Cambridge Hospital.

It was at this point that Defendant Board felt confident to issue a formal Statement of Allegations against Plaintiff-Petitioner. Defendant Board continued to insist it had never set eyes on the Greeley Report. Addendum 3

However, Defendant Board insisted on also relying on the Greeley Report as well in order to claim an array of “independent experts” had determined that Plaintiff-Petitioner is an imminent danger to public safety whose license must be summarily suspended. More numbers were needed to conceal the fact that real evidence was missing.

In fact in it’s Remand Letter to the Administrative Magistrate, Defendant Board even complains that the Magistrate

did not give enough weight to the unsworn anonymous Greeley Report.

During the DALA Hearing, Plaintiff-Petitioner subpoenaed the Greeley Company to reveal the name and voir dire of the author of the unsworn anonymous Greeley Report.

It is inexcusable that Defendant Board, allegedly on behalf of the people of Massachusetts whose safety Defendant is allegedly passionately committed to, filed a motion to quash said subpoena. And the Administrative Magistrate granted it, thereby ensuring that a report relied on by Defendant Board remains unsworn and anonymous to this day.

This is what Defendant Board means by administrative remedies.

This is not even a case with substantial evidence, which already was declared to be an insufficient standard when a doctor's livelihood is at stake. This is a case where there was no evidence from the beginning and Defendant Board has by it's actions proved that it was conscious of this fact right along.

There was no legitimate public interest in hiring Dr Horowitz to paraphrase the Greeley Report or fight to quash a subpoena that aimed at revealing the credentials of the author.

Allowing Justice Spina's dismissal to stand would ensure the death of the "rule of law" and would doom the people of

Massachusetts as it would chill greatly any efforts by doctors in the future to blow the whistle on neglect and fraud.

Also, the foregoing more than meets the definition of “procedural errors” that the US Supreme Court has ruled calls for direct judicial review of proceedings that began in the administrative sphere in order to provide much needed relief to private citizens. If the foregoing does not meet the definition of “procedural errors” then nothing will. A good governance advocate observed and prepared an affidavit describing the conduct of the DALA hearing. Addendum 4

Furthermore, this Court has ruled on the sufficiency of circumstantial evidence to support a showing of pretext and declared that it is the Defendants who at the summary judgment stage, "as the moving part[ies], 'ha[ve] the burden of affirmatively demonstrating the absence of a genuine issue of material fact on every relevant issue, even if [they] would not have the burden on an issue if the case were to go to trial.'" Bulwer v. Mt. Auburn, SJC-11875, (Feb. 2016).

This ruling issued many weeks prior to Justice Spina dismissing Plaintiff-Petitioner’s complaint without a hearing on the merits or Defendant Board meeting their burden to prove the absence of material fact on every issue in the complaint. Also see Verdrager v. Mintz Levin, SJC-11901 (May. 2016)

Justice Spina also defied a landmark US Supreme Court ruling: “Individual interests have weighed heavily where resort to the administrative remedy would occasion undue prejudice to subsequent assertion of a court action, where there is some doubt as to whether the agency is empowered to grant effective relief, or where the administrative body is shown to be biased or has otherwise predetermined the issue before it.” McCarthy v. Madigan, 503 U.S. 140 (1992) Emphasis added.

This applies squarely here.

Justice Spina’s dismissal must be reversed and the pretext, procedural errors and conscious ongoing collusion between Cambridge Hospital and Defendant Board that Plaintiff-Petitioner complained about must be examined impartially by this Court.

Defendant Board’s actions come under the cat’s paw standard

In 2011 the US Supreme Court set the standard for cat’s paw discrimination cases. This was five years ago. Staub v. Proctor Hospital, 562 US 411 (2011)

Justice Spina thus was on notice from Plaintiff-Petitioner’s detailed complaint that the Supreme Court’s standard on cat’s paw discrimination must be applied. Justice Spina once again defied a clear Supreme Court ruling by simply dismissing the complaint. Discrimination by Defendant Board is

much worse than discrimination by one employer.

Justice Spina's dismissal must be reversed and this Court must fully consider the complaint and the arguments in this brief on it's merits.

Defendant Board was in error to allege Plaintiff-Petitioner prescribed without a Massachusetts Controlled Substance Registration Certificate

Plaintiff-Petitioner by law possessed a valid Massachusetts Controlled Substance Registration Certificate. By law that certificate, once issued by DPH, is valid as long as the physician maintains practice within Massachusetts. G.L.c. 94 §7

By law the certificates can be recalled only for just cause such as improper practice by the physician. In order to generate recurring fees without actually changing the law, the executive branch has been "recalling" the certificates at an arbitrary date. Plaintiff-Petitioner's certificate was "recalled" in 2009 and he paid the unlawful $150 fee demanded by the government.

Interestingly, despite an alleged "recall" the certificate's registration number continues unchanged demonstrating the intrinsically false nature of the "recall."

In 2011 after joining a different physician's office in Middleboro, Plaintiff-Petitioner filed a written change of address form with both the Federal DEA and the Massachusetts state.

Plaintiff-Petitioner entered into evidence a photocopy of the filled and signed form he mailed in. This form is no longer in use as DPH has since moved out of the Hinton labs.

The law, G.L.c. 94 §7, and regulation, 105 CMR 700.004, also clearly state that the burden is on DPH to inform the physician of any "recall." DPH entered evidence into the record, a certified letter returned as undeliverable, that it had mailed to Cambridge Hospital, months after it had been informed that Plaintiff-Petitioner had changed his address.

DPH and Defendant Board therefore have clear evidence that DPH had not met it's burden to notify Plaintiff-Petitioner of any "recall." And yet Defendant Board falsely alleged that Plaintiff-Petitioner prescribed medicines with an expired certificate.

This directly defies this Court's own ruling in Crosscup where the burden was declared to be on the government to prove receipt of notice of suspension of a license and that mere proof of mailing was insufficient. Commonwealth v. Crosscup, 369 Mass. 228 (1975).

The landmark SJC ruling in Crosscup applied in that case to a driver's license. A driver's license is vitally important to many without access to reliable public transportation. It can even be necessary in order to remain employed but there are many

who do not depend on a driver's license for their livelihood.

How much more important is it for a physician to possess a Controlled Substance Registration Certificate? Without one a physician cannot write a single prescription. Unable to write a single prescription the physician immediately becomes unemployable.

Therefore, the loss of a Controlled Substance Registration Certificate is even greater than the loss of a driver's license and directly impacts the ability of every single physician to earn a living.

The "recall" apparently took place in January 2012 but Defendant Board did not accuse Plaintiff-Petitioner in January 2013 until after he proved Defendant Board's collusion with the hospital. It was only in May 2014, after the docket had been kept open for 3 years, 6 months and 17 days at that point, that Defendant Board introduced this allegation to claim it could not be traced back to the hospital. Except that the recall notice was mailed to the hospital which mailed it back.

This is the actual sworn testimony of the DPH official responsible for managing the certificates:

> "Q. Are you familiar with the legal statute that is underlying Mass. Controlled Substance License registrations?
> A. Somewhat. I haven't memorized them.

Q. The statement that Magistrate Bresler reported to you is lifted straight from the Massachusetts General Laws, correct?
A. I do not recall seeing that in the Massachusetts General Laws.
Q. Ms. Audet, the page in question is from the Department of Public Health's own website. Would a document purporting to be frequently asked questions about a Massachusetts Controlled Substances Registration not be based on Massachusetts General Law?
A. Insofar as our regulations are based on the law.
Q. Is it correct that a practitioner once issued a Massachusetts Controlled Substance Registration can continue to maintain that same registration until the end of his career or her career as long as he or she maintains active practice in this Commonwealth?
A. No."
DALA transcript, January 29, 2015, pages 914-915

The DPH official testified to her defiance of the law.

Justice Spina wrote the decision in Parenteau that continued the ruling in Crosscup. Commonwealth v. Parenteau, 460 Mass. 1 (2011). Justice Spina was therefore fully aware of the facts in Plaintiff-Petitioner's complaint regarding notification from the government. His instant dismissal therefore was itself disparate and counter to his own ruling in Parenteau.

This Court must compel both this Agency and DPH to ensure their actions comply with this court's clear mandate in Crosscup and declare that where there is no proof of receipt and especially as here, there is proof that there was no receipt, the burden is on the state to ensure notification is received by a physician. This is totally easy in the case of physicians as Defendant Board always has any physician's current address.

Conclusion

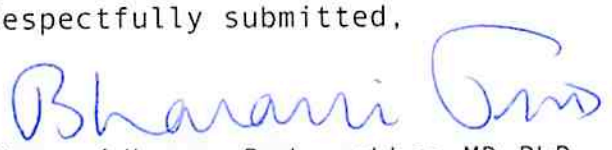
Based on clear regulation, law and court precedent, the dismissal of Plaintiff-Petitioner's complaint must be immediately reversed. Defendant Board must be forced to accept the primacy of 801 CMR and the 180-day deadline.

This Court may also sua sponte rule in favor of Plaintiff-Petitioner thus ensuring the long-standing desire of the US Supreme Court to provide justice speedily to private citizens and protect them from consciously discriminatory acts by state Agencies that violate Constitutional protections and shock the conscience.

This court must also declare that suspension of a physician's license requires the "clear and convincing" standard. Innocent physicians must not have their livelihood taken away on a lower standard than one that applies to convicted child rapists. John Doe, SORB NO. 380316 vs. Sex Offender Registry Board, SJC-11823 (2015)

This court must end the practice of routine "recalls" of Controlled Substance Registration Certificates as it is counter to the law. Also the government must be ordered to provide proof of receipt of any recall notice before disciplinary action is pursued by Defendant Board regarding that certificate and a physician's very livelihood is threatened.

Respectfully submitted,



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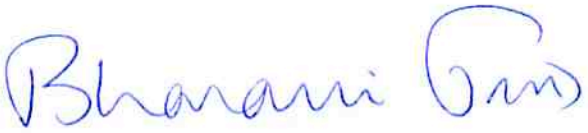
Certificate of Compliance

Dr Bharani, pro se, certifies to the best of his knowledge and ability that this brief complies with the written notices mailed to him by the clerk.



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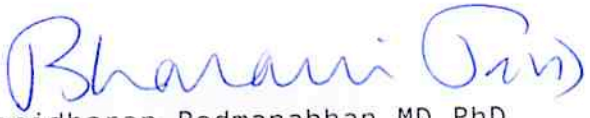

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