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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/15/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

MICHELLE L. CABRET-CARLOTTI,) 1 CA-CV 09-0586
M.D., DDS,)
) DEPARTMENT C
Plaintiff/Appellant,)
)
v.)
)
ARIZONA MEDICAL BOARD; LISA WYNN,) MEMORANDUM DECISION
in her capacity as Executive) (Not for Publication -
Director of the Arizona Medical) Rule 28, Arizona Rules of
Board,) Civil Appellate Procedure)
)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. LC2009-000354-001 DT

The Honorable Robert C. Houser, Judge (Retired)

AFFIRMED

Jaburg & Wilk, P.C. Phoenix
by Kraig J. Marton
and
Birch Horton Bittner and Cherot Anchorage
by Gregory S. Fisher
Co-counsel for Plaintiff/Appellant

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P O R T L E Y, Judge

¶1 Michelle L. Cabret-Carlotti ("Doctor") appeals the dismissal of her complaint for lack of subject matter jurisdiction. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 A former patient filed a complaint in March 2008 with the Arizona Medical Board ("the Board"), alleging that Doctor improperly performed a cosmetic medical procedure and misled her about Doctor's medical board certification. In response, the Board began an investigation.

¶3 The Board forwarded the complaint to an outside medical consultant. After an investigation, which included reviewing the medical records and related photographs, the consultant issued a report. Doctor received a copy of the report and filed a response. The Board informed Doctor on March 6, 2009, that its staff recommended issuing a non-disciplinary advisory letter to resolve the complaint.¹ The letter informed

¹ An advisory letter is statutorily defined as:

a nondisciplinary letter to notify a licensee that either:

- (a) While there is insufficient evidence to support disciplinary action, the board believes that continuation of the activities that led to the investigation may result in further board action against the licensee.
- (b) The violation is a minor or technical violation that is not of sufficient merit to warrant disciplinary action.

Arizona Revised Statutes ("A.R.S.") § 32-1401(3)(a)-(b) (Supp. 2009).

Doctor that she could personally address the Board at its next meeting and would have thirty days to respond to the Board's decision, which was not subject to appeal.

¶4 Doctor did not attend the scheduled meeting. After reviewing the complaint and evidence, the Board voted to issue a non-disciplinary advisory letter pursuant to A.R.S § 32-1451(E) (Supp. 2009) for inadequate medical records and for failing to adequately disclose her medical board certification on her website.² Doctor was advised of the Board's decision by letter dated April 10, 2009. The letter advised her that the decision was not subject to review, citing *Murphy v. Board of Medical Examiners*, 190 Ariz. 441, 949 P.2d 530 (App. 1997). The letter, moreover, advised Doctor that she could respond to the Board's ruling in writing, and if she responded, her response would be attached to the Board's advisory letter, maintained in her permanent file, and hyperlinked to her profile on the Board's website. Doctor submitted a response to the advisory letter on June 2, 2009.³

¶5 Doctor filed a complaint for judicial review of the Board's administrative decision in superior court on May 20, 2009. The Board filed a successful motion to dismiss for lack

² The Board took no action on the claim of improper care.

³ The record does not contain a copy of the response letter, but it is available online. See Ariz. Med. Bd., *Advisory Letter*, <http://azmd.gov/GLSuiteWeb/Repository/0/0/9/1/edcd42b1-fdc0-44e7-a194-afd34fd2bab1.pdf> (last visited Feb. 4, 2011).

of jurisdiction. Doctor appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶16 Doctor argues that the Board's issuance of an advisory letter is a final decision subject to review by the superior court. We review a dismissal for lack of jurisdiction de novo. *Satterly v. Life Care Ctrs. of Am., Inc.*, 204 Ariz. 174, 177, ¶ 5, 61 P.3d 468, 471 (App. 2003).

¶17 The superior court found that it did not have jurisdiction pursuant to *Murphy* and dismissed the complaint. We agree. Dr. Murphy, the medical director for an insurance company, was accused of unprofessional conduct and medical incompetence. *Murphy*, 190 Ariz. at 443-44, 949 P.2d at 532-33. After the Board voted to issue an advisory letter of concern at an open meeting, the doctor sought judicial review in superior court. *Id.* at 444-45, 949 P.2d at 533-34.

¶18 On appeal, we determined that the Board's advisory letter⁴ was not a final decision subject to review by the agency

⁴ *Murphy* interpreted a prior version of A.R.S. § 32-1401(14), which provided:

a nondisciplinary advisory letter to notify a physician that, while there is insufficient evidence to support disciplinary action, the board believes the physician should modify or eliminate certain practices and that continuation of the activities which led to the information being submitted to the board may result in action against the physician's license.

or the superior court because the letter did not affect Murphy's legal rights, duties, or privileges as a licensee. *Id.* at 448-49, 949 P.2d at 537-38. Because Doctor, like Murphy, received an advisory letter to end the investigation, we find no reason to depart from *Murphy*.

¶9 Doctor argues that the primary issue on appeal is whether the advisory letter affects legal rights, duties, or privileges under A.R.S. § 12-905(A) (2009) because both parties agree the advisory letter is a "decision." We do not see how the Board conceded that an advisory letter is a "decision," because its position throughout this case has been that *Murphy* holds that an advisory letter does not meet the statutory definition of an administrative final decision subject to review.

¶10 The superior court has jurisdiction to "review final administrative decisions." A.R.S. § 12-905(A) (2003). An "administrative decision" is defined as "any decision, order or determination of an administrative agency that is rendered in a case, that affects the legal rights, duties or privileges of persons and that terminates the proceeding before the

Murphy, 190 Ariz. at 448, 949 P.2d at 537 (quoting A.R.S. § 32-1401(13) (1992)). An "advisory letter of concern" was statutorily renamed an advisory letter. 1999 Ariz. Sess. Laws, ch. 218, § 3 (1st Reg. Sess.).

administrative agency." A.R.S § 12-901(2) (2003).⁵ Although an advisory letter terminates the proceeding, *Murphy* specifically held that because "a letter of concern is not an adjudicative decision of the Board" that affects the legal rights, duties, or privileges of a doctor, it was not a "final decision" subject to review. 190 Ariz. at 448-49, 949 P.2d at 537-38. Accordingly, *Murphy* applies here.

¶11 Doctor, however, seeks to distinguish *Murphy*. First, she argues that *Murphy*'s case is dissimilar because he was neither in private practice nor seeking to build and maintain a client base. She argues that the final advisory letter may negatively affect her reputation and impact her ability to receive referrals from colleagues or otherwise secure private patients.⁶

¶12 We addressed and rejected a similar claim in *Murphy*. There, the doctor claimed the possibility of reputational harm because the Board could use the advisory letter against him in future disciplinary proceedings. We determined, however, that because the claim of future harm was purely speculative, it did not involve property rights. *Id.* at 449, 949 P.2d at 538. Similarly, any alleged harm Doctor may suffer if she cannot

⁵ Our legislature has not otherwise included an advisory letter within the definition of an "administrative decision."

⁶ In her complaint, Doctor failed to raise the issue of possible reputational injury or impact on referrals.

attract patients, directly or by referral, because of the advisory letter, is speculative.

¶13 Doctor also argues that the advisory letter can now be located on the Board's website, which was not the case when we decided *Murphy*. Although a person no longer has to go to the Board's office to review a file, the fact that the information is online does not change the public nature of the letter. See, e.g., *Smith v. Doe*, 538 U.S. 84, 99 (2003) (finding that using a public safety website is analogous to visiting an official archive of criminal records). Consequently, ease of access of information does not change the public nature of the records to warrant departure from *Murphy*.

¶14 Finally, Doctor argues that *Murphy* should be distinguished because it did not involve due process allegations or property rights.⁷ We disagree.

⁷ Doctor also claims her procedural due process rights were violated when the Board issued the advisory letter without responding to her request to reconsider. Doctor claims, citing *Carroll v. Commission on Judicial Conduct*, 215 Ariz. 382, 160 P.3d 1140 (2007), that she was entitled to a hearing on the nondisciplinary letter because an informal sanction "may lead to enhanced sanctions in further disciplinary proceedings." *Id.* at 384, 160 P.3d at 1142. *Carroll* is distinguishable because the case involved actual discipline not the issuance of a nondisciplinary advisory letter. Moreover, *Carroll* is limited to judges by the Arizona Constitution and our supreme court's promulgation of the Rules of the Commission on Judicial Conduct. See Ariz. Const. art. 6.1; Ariz. R. of the Comm'n on Judicial Conduct 1.

¶15 Although doctors have property rights in their medical licenses, see *Comeau v. Arizona State Board of Dental Examiners*, 196 Ariz. 102, 106, ¶ 18, 993 P.2d 1066, 1070 (App. 1999), the Board never sought to suspend Doctor's license. Accordingly, her property rights have not been harmed.

¶16 *Murphy*, moreover, discussed due process. Although Dr. Murphy argued that the letter of concern affected his rights and privileges because it was public and could be used against him in future disciplinary proceedings, we found that he "fail[ed] to identify any legal right or privilege affected by the Board's placement of the letter in [his] file; their allegations of harm are purely speculative and involve no property rights triggering due process concerns." *Murphy*, 190 Ariz. at 448, 949 P.2d at 537. The same is true here.

CONCLUSION

¶17 Based on the foregoing, we affirm the dismissal of the complaint for lack of subject matter jurisdiction.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

PATRICIA A. OROZCO, Judge