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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PAUL W. PRATT, D.C., Petitioner/Appellant, v. PATRICE PRITZL, as Executive Director of the State of Arizona Board of Chiropractic Examiners; and STATE OF ARIZONA BOARD OF CHIROPRACTIC EXAMINERS, an agency of the State of Arizona, Respondents/Appellees.	2 CA-CV 2008-0168 DEPARTMENT A <u>MEMORANDUM DECISION</u> Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20064644

Honorable Michael O. Miller, Judge

AFFIRMED

Eric L. Hager — Tucson
Attorney for Petitioner/Appellant

Terry Goddard, Arizona Attorney General
By Marc H. Harris — Phoenix
Attorneys for Respondents/Appellees

H O W A R D, Presiding Judge.

¶1 Appellant Paul Pratt appeals from the superior court's denial of his petition for special action relief against the Arizona Board of Chiropractic Examiners. Pratt argues the court erred in denying his petition after concluding that the Board had not violated its settlement agreement with Pratt. For the following reasons, we affirm.

Facts and Procedural History

¶2 "When reviewing the superior court's denial of relief in a special action, we view the facts in the light most favorable to sustaining the court's ruling." *Hornbeck v. Lusk*, 217 Ariz. 581, ¶ 2, 177 P.3d 323, 324 (App. 2008). Pratt is a chiropractor licensed to practice in Arizona. He was disciplined by the Arizona Board of Chiropractic Examiners ("the Board") in May 2006. He appealed the Board's disciplinary decision to the superior court. The court granted Pratt partial relief and remanded the case to the Board for reconsideration of its decision to impose probation. Both Pratt and the Board appealed the superior court's decision.

¶3 Pursuant to Rule 30, Ariz. R. Civ. App. P., this court assigned Pratt's appeal to the Arizona Appellate Settlement Conference Program. A settlement conference was conducted on September 21, 2007, which resulted in a one-page settlement agreement signed by Pratt and Patrice Pritzl, the executive director of the Board. The Board adopted the settlement agreement on October 18, 2007, and issued its "Final Board Order Pursuant to

Stipulation" (hereinafter Final Board Order) five days later. This court subsequently dismissed the appeal.

¶4 More than nine months later, Pratt filed a petition for special action relief in superior court, alleging the Board had "failed and refused to execute and comply with the terms of the . . . Court of Appeals Settlement Agreement." The superior court denied Pratt's petition on the merits. This appeal followed.

Jurisdiction of the Special Action

¶5 The Board preliminarily alleges that this court lacks subject matter jurisdiction to consider this appeal. The Board cites A.R.S. § 12-904(A) for the proposition that an action for review of a decision of a state agency must be filed within thirty-five days of the agency action being challenged.

¶6 But the thirty-five-day time limit imposed by § 12-904 applies to an appeal of an administrative decision to the superior court, not to a special action. *State ex rel. Ariz. Dep't of Econ. Sec. v. Kennedy*, 143 Ariz. 341, 343, 693 P.2d 996, 998 (App. 1985); *see also* A.R.S. § 12-905(A). In both his petition for special action relief below and on appeal, Pratt requests that the court "order the [Board] to comply with the Rule 30 [s]ettlement [a]greement," and intervention via special action is therefore a potentially appropriate remedy. *See* A.R.S. § 12-2021. "The only limit on the time within which a special action must be filed lies in the doctrine of laches." *Kennedy*, 143 Ariz. at 343, 693 P.2d at 998.

Although the trial court could have declined jurisdiction in this action based on laches, the state did not ask it to do so and it did not.

¶7 *RCJ Corp. v. Arizona Department of Revenue*, 168 Ariz. 328, 329, 812 P.2d 1146, 1147 (Tax 1991), and *State ex rel. Dandoy v. City of Phoenix*, 133 Ariz. 334, 335, 651 P.2d 862, 863 (App. 1982), cited by the Board, apply to appeals, not special actions. *Tanque Verde Unified School District No. 13 v. Bernini*, 206 Ariz. 200, ¶ 3, 76 P.3d 874, 877 (App. 2003); *Stapert v. Arizona Board of Psychologist Examiners*, 210 Ariz. 177, ¶ 24, 108 P.3d 956, 961 (App. 2005), and *Thielking v. Kirschner*, 176 Ariz. 154, 157, 859 P.2d 777, 780 (App. 1993), also cited by the state, stand for the proposition that courts will generally decline jurisdiction of a special action if the petitioner has failed to appeal. But, again, the state did not request the superior court do that, and it did not. Those cases therefore do not require us to conclude we do not have jurisdiction of this appeal.

¶8 Additionally, as the Board correctly notes, A.R.S. § 12-902(B) states: "Unless review is sought of an administrative decision within the time and in the manner provided in this article, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of the decision." But the statute also states, in the event of a failure to file required documents for administrative review, "the decision is not subject to judicial review *under the provisions of this article* except for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter." *Id.* (emphasis added). Therefore, § 12-902(B) bars judicial review under title 12, chapter 7, article 6, A.R.S., but does not bar a special action. *See Kennedy*, 143 Ariz. at 343, 693 P.2d at 998. Accordingly, this court has jurisdiction to consider the merits of Pratt's appeal.

Denial of Special Action Relief

¶9 Pratt contends the superior court erred in denying his petition for special action relief after concluding that the Board did not breach the Rule 30 settlement agreement.[1] Pratt argues that the Board breached the agreement when it incorporated its "original Findings of Fact/Conclusions of Law/Order" into the Final Board Order and when it reported information about Pratt's disciplinary proceedings to the National Practitioner Data Bank.[2] We review a superior court's decision to deny special action relief for an abuse of discretion. *Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App. 2001). Because the superior court's decision in this case involved the interpretation of a contract, however, we review that interpretation de novo. *See Taylor v. Graham County Chamber of Commerce*, 201 Ariz. 184, ¶ 29, 33 P.3d 518, 526 (App. 2001); *Emmons v. Superior Court*, 192 Ariz. 509, ¶ 14, 968 P.2d 582, 585 (App. 1998) (construction of settlement agreement governed by general contract principles).

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[1]This court does not enter an order incorporating a settlement agreement reached in the settlement program and does not enforce the agreement as a court order. Any enforcement must be obtained through normal contract enforcement procedures. *See Emmons v. Superior Court*, 192 Ariz. 509, ¶ 14, 968 P.2d 582, 585 (App. 1998) ("enforcement of settlement agreements" governed by "general contract principles").

[2]Pratt mentions other instances in which he alleges the Board failed to comply with the settlement agreement, but these instances were not mentioned below and are therefore waived. *See Yarbrough v. Montoya-Paez*, 214 Ariz. 1, n.6, 147 P.3d 755, 762 n.6 (App. 2006).

Incorporation of Original Findings of Fact and Conclusions of Law into Final Board Order

¶10 We will uphold the trial court if it is correct for any reason. *Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006). If a party fails to seek review of an administrative decision as provided by statute, that decision becomes final and res judicata. *Olson v. Morris*, 188 F.3d 1083, 1086 (9th Cir. 1999); § 12-902(B); *see also Hawkins v. Ariz. Dep't of Econ. Sec.*, 183 Ariz. 100, 103-04, 900 P.2d 1236, 1239-40 (App. 1995); *Gilbert v. Bd. of Med. Exam'rs*, 155 Ariz. 169, 176, 745 P.2d 617, 624 (App. 1987). Accordingly, under the doctrine of res judicata, "an unappealed administrative decision is 'conclusively presumed to be just, reasonable, and lawful.'" *Dommisse v. Napolitano*, 474 F. Supp. 2d 1121, 1128 (D. Ariz. 2007), *quoting Olson*, 188 F.3d at 1086. Pratt did not appeal the Final Board Order. Therefore, even though we have jurisdiction of this appeal, the Board's decision is conclusively presumed to be just and lawful, and we must affirm.

¶11 Even if we address the merits of Pratt's claim, he fares no better. Pratt first argues the Board breached the Rule 30 settlement agreement when it incorporated its original findings of fact, conclusions of law, and order into the Final Board Order. When interpreting any contract, this court must determine and enforce the parties' intent. *See US West Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996). To determine the parties' intent, "the court will [first] look to the plain meaning of the words [in the contract] as viewed in the context of the contract as a whole." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983).

¶12 The first paragraph of the settlement agreement states that "[t]he Board has agreed to modify its final disciplinary order consistent with the terms of this agreement." The agreement then contains eight separate provisions that specify the term of Pratt's probation, an ethics education requirement, a fine, and other requirements. The sixth of these provisions states: "The Board will place the following in Dr. Pratt's Board file: 'An anonymous complaint relating to advertising,' and use this language in its required report to the National Data Bank." None of the provisions specifically mentions the Board's original findings of fact and conclusions of law.

¶13 The plain meaning of the settlement agreement requires that the Board issue a final order after approving the settlement agreement. And nothing in the plain meaning of those words requires that the Board delete any findings of fact or conclusions of law from its original order or approve the Final Board Order at a subsequent Board meeting. Rather, the settlement agreement merely required that the original Board order be modified to include the terms of the agreement, which primarily dealt with the sanctions against Pratt. And Pratt did not contest the contents of the Final Board Order until more than nine months after it was issued. Accordingly, once the Board approved the terms of the settlement agreement, it was required to *modify* its original order to be consistent with the settlement agreement and therefore to include portions of the original order that were not explicitly changed by the agreement.

¶14 Pratt contends, however, that, because the settlement agreement contained some but not all of the Board's original factual findings and legal conclusions, the principle of contract interpretation, expressio unius est exclusio alterius, or the expression of one thing is the exclusion of another, requires that all findings and conclusions not contained in the settlement agreement also be excluded from the Final Board Order. Pratt also claims the Board terminated his probation before he had fulfilled various requirements outlined in both the original and Final Board Orders and argues this implies the Board understood that the settlement agreement voided the "original Findings of Fact/Conclusions of Law/Order."

¶15 But the doctrine of expressio unius is a secondary rule of construction that applies only if this court cannot determine the parties' intent from the plain language and surrounding circumstances of the contract. *Cf. Mining Inv. Group, LLC v. Roberts*, 217 Ariz. 635, ¶ 16, 177 P.3d 1207, 1211 (App. 2008) (if contract language clear, court does not construe); *State v. Story*, 206 Ariz. 47, ¶ 14, 75 P.3d 137, 141 (App. 2003) (doctrine of expressio unius not a rule of law and only applies to help construe ambiguous statute); *Estate of Tovrea v. Nolan*, 173 Ariz. 568, 573, 845 P.2d 494, 499 (App. 1992) (*quoting Black's Law Dictionary* in applying expressio unius to contracts). We have already observed that the settlement agreement is not ambiguous. The plain language of the agreement clearly states that the Board modify, rather than delete, portions of its disciplinary order. Therefore, the doctrine of expressio unius is inapplicable to the settlement agreement.

¶**16** Additionally, the settlement agreement deals primarily with the sanctions imposed against Pratt and not with the factual finding that Pratt violated ethical rules in his advertising. Therefore, the expressio unius doctrine would not require Pratt's interpretation. And nothing in the record shows whether Pratt completed the requirements outlined in the orders. Accordingly, the trial court did not err in denying his petition for special action relief and in finding that the settlement agreement did not require the removal of the Board's findings of fact and conclusions of law.[3]

Report to National Practitioners Data Bank

¶**17** Pratt also contends that the Board breached the settlement agreement when it reported all of its findings to the National Practitioners Data Bank (hereinafter Data Bank). But the settlement agreement required the Board to "place" the clause, "An anonymous complaint relating to advertising," in the report, not to delete anything.

¶**18** Furthermore, nothing in the record shows the Board actually reported anything to the National Practioners Data Bank. Instead, the record shows that the Board reported to the Healthcare Integrity and Protection Data Bank (HIPDB), pursuant to 45 C.F.R. § 61.1. The HIPDB is a separate entity from the Data Bank and is governed by its own regulations.

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[3]Because we conclude the plain language of the settlement agreement required the Board to modify, rather than delete, terms of its disciplinary order and the Board was therefore permitted to incorporate portions of its original findings of fact and conclusions of law, we need not address its contention that several challenged provisions in the Final Board Order are moot. Moreover, Pratt did not challenge these provisions below. Accordingly, any argument concerning them is waived. *See Yarbrough*, 214 Ariz. 1, n.6, 147 P.3d at 762 n.6.

See 45 C.F.R. § 61.1(b), (c). Accordingly, an argument concerning one data bank is not directly applicable to the other. To the extent that Pratt intended to challenge the Board's report to the HIPDB, he did not raise this issue below or in this court, and it is therefore waived. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, n.10, 181 P.3d 219, 240 n.10 (App. 2008). In any event, there is nothing in the settlement agreement pertaining to the HIPDB so the Board's report to it could not have violated the agreement. *Cf. id.* ¶ 28 (argument not based on actual facts in record is waived).

¶19 In his reply brief, however, Pratt argues for the first time that the Final Board Order is a nullity because it was entered without an open meeting pursuant to A.R.S. § 38-431. He further argues the Order is a nullity because the Board did not consider it separately from the settlement agreement. This latter contention appears to be based on Pratt's claim that the Final Board Order is different from and contradicts the settlement agreement. We have rejected this claim previously. To the extent Pratt makes these arguments in response to the Board's claim that we lack subject matter jurisdiction, we have already decided that issue in his favor. And, more importantly, to the extent he makes these arguments to undermine the trial court's judgment, arguments raised for the first time in the reply brief are waived. *See In Re Marriage of Pownall*, 197 Ariz. 577, n.5, 5 P.3d 911, 917 n.5 (App. 2000).

Conclusion

¶20 In light of the foregoing, we affirm the trial court's denial of Pratt's petition for special action relief. We deny Pratt's request for attorney fees.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge