

RENDERED: DECEMBER 14, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-001817-MR

MARY DENISE THOMPSON, R.N.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE HON BRIAN C. EDWARDS, JUDGE  
ACTION NO. 13-CI-003591

CHARLOTTE F. BEARSON, R.N., ED.D.; AND  
ELIZABETH SUE DEROUEN, R.N.

APPELLEES

**AND**

NO. 2017-CA-000139-MR

MARY DENISE THOMPSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE OLU A. STEVENS, JUDGE  
ACTION NOS. 12-CI-01224 & 14-CI-01706

COMMONWEALTH OF KENTUCKY,  
KENTUCKY BOARD OF NURSING

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, DIXON, AND MAZE, JUDGES.

MAZE, JUDGE: These are consolidated appeals from summary judgments entered by the Jefferson Circuit Court in related matters brought by Mary Denise Thompson, RN (Thompson), against the Kentucky Board of Nursing (the Board), and the Board's Executive Director and Operations Manager. In the first appeal, we agree with the circuit court that the Executive Director and Operations Manager were entitled to qualified immunity in their performance of discretionary functions. Hence, we affirm in that appeal. In the second appeal, we conclude that the circuit court properly denied discovery on Thompson's speculative allegations of bias or *ex parte* contact by the Board. Since the Board's decision was supported by substantial evidence of record, the circuit court properly affirmed the Board's final action relating to Thompson's nursing license.

**I. Facts and Procedural History.**

The relevant facts of this action are not in dispute. Thompson became a licensed registered nurse on March 12, 1987. On May 11, 2009, Thompson entered into a Kentucky Alternative Recovery Effort (KARE) for Nurses Program Agreement (the Agreement) after she tested positive for use of marijuana. As part of the Agreement, she admitted to being chemically dependent on marijuana. The

Agreement, which set out a term of five years, required Thompson to obey all laws and regulations; submit to random drug and alcohol testing; to provide written monthly reports to the KARE Program; and to notify KARE Program staff in writing within 48 hours of any negative work performance evaluation, placement on probation, or termination.

On June 13, 2011, Thompson was notified that she was being suspended from the KARE Program, that her license was being suspended for one year, and that she was to pay a \$600 fine. KARE cited a number of reasons for the suspension, including: Thompson's two dilute drug screens in 2010; her firing from her nursing job after she told a toddler patient, "If you don't close your mouth and stop crying I'm going to put my fist in it"; and her failure to advise the KARE Program of adverse employment actions relating to that conduct within 48 hours, as required by the Agreement.

On March 2, 2012, Thompson filed a Petition for Judicial Review of her suspension by the Board pursuant to KRS<sup>1</sup> 13B.140. No. 12-CI-01224 (hereafter, "the 2012 action"). On December 20, 2012, the circuit court issued an order on cross-motions for summary judgment in that action. The court found that the Board did not violate Thompson's rights in enforcing the KARE Program requirements, and that Thompson's actions in threatening the toddler were grounds

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<sup>1</sup> Kentucky Revised Statutes.

for termination from the KARE Program. However, the circuit court also found that Thompson was entitled to a hearing before the Board prior to her suspension from the KARE Program and of her nursing license. Consequently, the circuit court remanded the matter to the Board for such a hearing. The order specified that Thompson “shall remain enrolled in the KARE Program pending hearing before the Board of Nursing.”

The Board scheduled hearings as directed by the circuit court. While those matters were pending, Thompson filed another action, No. 2013-CI-03591 (hereafter, “the 2013 action”), against Dr. Charlotte F. Bearson, R.N., Ph.D. (Dr. Bearson) as Executive Director of the Board, and Elizabeth Sue Derouen, RN (Derouen), as Operations Manager of the Board. Through her initial and amended complaints, Thompson alleged that the Board’s policies and practices relating to the suspension of her nursing license were in violation of the Kentucky Constitution, her due process rights, and the Board’s statutory authority. Thompson sought to hold Dr. Bearson and Derouen civilly liable, both in their individual and official capacities, for having carried out these policies in suspending her nursing license.

Following the administrative hearings, the Board issued a final order on February 21, 2014. The Board found that Thompson’s dilute urine screens did not violate the Agreement. However, the Board also found that Thompson

violated the Agreement when she failed to timely report her employer's actions following the incident with the toddler patient. The Board also found that this incident also violated the Agreement. Consequently, the Board directed that Thompson be terminated from the KARE Program and that she be placed on limitation and probation for a period of one year.

Thompson filed another timely appeal from the Board's final action, No. 14-CI-01706 (hereafter, "the 2014 Action). That case was consolidated with the 2012 action. The statutory appeals and the 2013 action proceeded separately in circuit court to motions for summary judgment. On October 5, 2015, the circuit court granted the motion for summary judgment in the 2013 action in favor of Dr. Bearson and Derouen. The court concluded that they were entitled to immunity in both their official and individual capacities. The court specifically held that Dr. Bearson and Derouen were entitled to rely upon the Board's delegation of authority to issue a license suspension. Thus, the court rejected Thompson's argument that they did not act in good faith. Consequently, the court dismissed Thompson's claims against Dr. Bearson and Derouen. On October 5, 2012, the circuit court denied Thompson's motion to alter, amend or vacate the summary judgment order.

On December 21, 2016, the circuit court granted the Board's motion for summary judgment on Thompson's statutory appeals in the 2012 and 2014

actions. The court expressed doubt that Thompson's delays in reporting the adverse employment actions amounted to a significant violation of the Agreement. However, the court found substantial evidence to support the Board's finding that Thompson's behavior toward the toddler patient violated the applicable nursing standards of practice and the Agreement. Therefore, the court concluded that Thompson's remark was a proper basis for her termination from the KARE Program and probation of her nursing license.

Thompson filed timely notices of appeal from the summary judgments entered in the 2013 action and in the 2012 and 2014 actions. This Court directed that the appeals be consolidated before the same merits panel. But while the appeals arise from a common set of facts, they relate to different parties and distinct issues of law. Therefore, we shall address each appeal separately.

## **II. Standard of Review**

The trial court addressed each matter on motions for summary judgment. "The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR<sup>2</sup> 56.03. The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. *Steelvest*, 807 S.W.2d at 480. The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. *Id.* Since a summary judgment involves no fact-finding, this Court’s review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

### **III. 2016-CA-001817 (Appeal from 2013 Action)**

In her first appeal, Thompson argues that the trial court erred in finding that Dr. Bearson and Derouen were entitled to qualified official immunity for their actions relating to her termination from the KARE Program and the 2011 suspension of her nursing license. In *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), our Supreme Court explained that, when a public officer is sued in his or her individual capacity, qualified immunity affords protection from damages liability made in a legally uncertain environment. *Id.* at 521.

Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the

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<sup>2</sup> Kentucky Rules of Civil Procedure.

exercise of discretion and judgment, or personal deliberation, decision, and judgment, (2) in good faith; and (3) within the scope of the employee's authority. An act is not necessarily "discretionary" just because the officer performing it has some discretion with respect to the means or method to be employed. Qualified official immunity is an affirmative defense that must be specifically pled.

Conversely, an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, *i.e.*, one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts. "That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature."

*Id.* at 521–522 (Cleaned up).

As the circuit court noted, Thompson did not waive her right to a pre-suspension hearing when she executed the Agreement in 2009. Furthermore, KRS 13B.030(1) specifically provides that "[a]n agency head may not . . . delegate the power to issue a final order unless specifically authorized by statute . . . ." *See also Baker v. Commonwealth*, 50 S.W.3d 770, 773 (Ky. App. 2001). The parties agree that there was no statute authorizing the Board to delegate its authority to issue a final order or suspension. Rather, the Board had issued an internal policy purporting to authorize the Executive Director or her designee to do so. In the absence of any statutory authority, Thompson contends that the actions by Dr. Bearson and Derouen in terminating her from the KARE Program and suspending



her license were not within the scope of their official duties and were not made in good faith. Therefore, Thompson asserts that they are subject to individual liability for their actions.

However, in this appeal, Thompson concedes that the Board and its agents cannot be liable in their official capacities. The document from the Board delegating authority to the Executive Director was prepared and issued by the General Counsel and was signed by the Board President. Furthermore, the document authorized Dr. Bearson or her designee to exercise discretion in terminating individuals from the KARE Program. Dr. Bearson and Derouen acted in accordance with and reliance upon that document.

Qualified immunity shields an officer or employee from suit when she makes a decision that, even if constitutionally or statutorily deficient, reasonably misapprehends the law governing the circumstances she confronted. *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 487 (Ky. 2006). Thus, even if the Board improperly attempted to delegate its authority to issue a final order of suspension, Dr. Bearson and Derouen cannot be held personally liable for exercising discretionary functions in reliance upon the Board's direction. In addition, the statutory appeal process already provides a remedy for any error. Therefore, we conclude that the circuit court properly granted summary judgment for Dr. Bearson and Derouen.

#### **IV. 2017-CA-000139 (Appeal from 2012 and 2014 actions).**

Thompson does not directly challenge the sufficiency of the evidence supporting the Board's decision. Rather, she raises a due process challenge, arguing that the Board and its agents engaged in misconduct relating to their consideration of the matter. She further alleges that she was entitled to discovery from the Board on these matters, pursuant to *Maggard v. Kentucky Board of Examiners of Psychology*, 282 S.W.3d 301 (Ky. 2008). The circuit court found that Thompson's allegations were too speculative or otherwise insufficient to warrant discovery.

Thompson contends that the Board ignored the initial misconduct in her admission to the KARE Program (requiring her to admit to being addicted/dependent upon marijuana); that the Agreement required her to forego treatment for a chronic pain condition; that the Board improperly tied dismissal of her civil action to the outcome of her disciplinary matter. Thompson argues that she was entitled to discovery concerning the alleged bias and misconduct by Board members. She also asserts that the bias and misconduct by the Board were sufficient to vacate the disciplinary action against her.

KRS 13B.150(1) limits judicial review of a final agency order to matters within the administrative record, "unless there is fraud or misconduct involving a party engaged in administration of this chapter." If properly pleaded and proven, the court may consider such allegations of fraud or misconduct to the

extent that they are relevant to the issues and defenses presented in the statutory appeal. *Commonwealth v. Samaritan All., LLC*, 439 S.W.3d 757, 762-63 (Ky. App. 2014). A party alleging fraud or misconduct by an administrative agency is entitled to discovery on those issues. *Maggard*, 282 S.W.3d at 305.

The Court in *Maggard* emphasized that claims of fraud or bias by an administrative agency are not subject to the particularity requirements of CR 9.02. However, KRS 13B.150 requires that such allegations indicate either arbitrariness in the decision-making process or *ex parte* contact that affected the fairness of the administrative proceeding. We agree with the circuit court that Thompson's allegations fail to meet this threshold.

Most of Thompson's misconduct or arbitrariness claims relate to her objections about how the KARE Program was managed. But to the extent that the Board improperly delegated its authority to suspend or terminate a license, that matter has already been addressed. The circuit court set aside the 2011 suspension and remanded the matter for a proper administrative hearing. Any alleged misconduct relating to the 2011 suspension is not relevant to this appeal.

Likewise, we conclude that Thompson's other complaints about how the KARE Program was managed are not relevant to this appeal. To the extent that Thompson failed to raise these matters the 2012 action, she cannot raise them in challenging the Board's final action following remand. Moreover, even if these

matters were properly raised in this appeal, Thompson does not show how they would be relevant to an arbitrariness review in the 2014 action.

Finally, Thompson asserts that the Board's most recent action was improperly influenced by bias and *ex parte* contact. Thompson suggests that members of the Board concealed their knowledge of *ex parte* information. She also asserts that the Board improperly attempted to tie settlement of 2013 action to outcome of disciplinary matter. *Ex parte* contact is condemnable when it is relevant to the merits of the proceeding between an interested person and an agency decision maker. *Louisville Gas and Elec. Co. v. Commonwealth, ex rel. Cowan*, 862 S.W.2d 897, 900 (Ky. App. 1993).

The matters relating to the proposed settlement of the 2013 action were clearly collateral to the disciplinary matter on remand. Furthermore, we conclude that settlement negotiations regarding Thompson's claims against Dr. Bearson and Derouen for their actions taken at the Board's direction did not implicate any bias affecting the fundamental fairness of the administrative proceedings.<sup>3</sup> Moreover, none of Thompson's allegations of bias or *ex parte* contact rises above the level of mere speculation. In the absence of any substantial showing that discovery would lead to the production of relevant evidence

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<sup>3</sup> We also note that Thompson's counsel was an active participant in those negotiations and had full knowledge of the scope and extent of those discussions.

supporting these allegations, we must conclude that the circuit court properly denied Thompson's motions for discovery. On the basis of the record before it, the circuit court properly affirmed the Board's final action.

**V. Conclusion**

Accordingly, we affirm the summary judgments entered by the Jefferson Circuit Court in the 2013 action and in the 2012 and 2014 actions.

ALL CONCUR.

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