

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001748-MR

DENISE J. TEASLEY, M.D.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 17-CI-002720

RANDEL C. GIBSON, D.O.;
C. WILLIAM BRISCOE, M.D.;
RUSSELL L. TRAVIS, M.D.;
TAMELLA B. CASSIS, M.D.;
MICHAEL E. FLETCHER, M.D.;
PATRICK R. HUGHES, ESQ.;
HEIDI M. KOENIG, M.D.;
JOHN J. MCCONNELL, M.D.;
THANGAM RANGASWAMY, PH.D.;
WAQAR A. SALEEM, M.D.;
DALE E. TONEY, M.D., at all times
relevant to this civil action, having been
members of the KENTUCKY
BOARD OF MEDICAL LICENSURE,
and the KENTUCKY BOARD OF
MEDICAL LICENSURE

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

COMBS, JUDGE: Denise J. Teasley, M.D., appeals from an opinion and order of the Jefferson Circuit Court that denied her motion for injunctive relief and dismissed her complaint against the Kentucky Board of Medical Licensure and its members. The circuit court concluded that Teasley was not entitled to a temporary injunction because she failed to show that she would suffer irreparable harm if it were not granted. It also concluded that her civil action warranted dismissal because the Board and its members (sued in their official capacities) are entitled to immunity against Teasley's statutory and civil rights claims. After our review, we affirm.

The Kentucky Board of Medical Licensure (the Board) is the administrative agency which regulates the practice of medicine and osteopathy in the Commonwealth of Kentucky as set forth in KRS¹ 311.530, *et seq.* A comprehensive statutory scheme for the regulation of the practice of medicine and osteopathy is provided by the Kentucky Medical Practice Act, KRS 311.530 – 311.62 and 311.990. KRS 311.571(9) provides that the Board may deny an application without a prior evidentiary hearing if it gives the applicant notice and an opportunity to be heard. KRS 311.595 provides the grounds upon which the Board may deny an application or restrict a license for an indefinite period. The

¹ Kentucky Revised Statutes (KRS).

statute provides specifically that the Board may deny an application for a medical license or limit or restrict a medical license for an indefinite period of time upon proof that: (1) the licensee has had a restriction placed upon a medical license to practice in any other state; or (2) the licensee has been limited or been disciplined by a licensed hospital or the medical staff of a hospital based upon what the hospital or medical staff found to be professional incompetence.

Teasley is a board-certified obstetrician and gynecologist practicing in Goose Creek, South Carolina. In the spring of 2016, she accepted an offer to join the staff of Harrison Memorial Hospital in Cynthiana and applied to the Board for a license to practice medicine in the Commonwealth of Kentucky.

In her application, Teasley answered “Yes” to Question No. 4, Category I, which asked:

Have you ever had any license, certificate, registration or other privilege as a health professional denied, revoked, suspended, probated, restricted or limited or subjected to any other disciplinary action, by a State medical/osteopathic licensing board, or Federal or international authority?

She answered “Yes” to Question no. 5, Category I, which asked:

Have you ever been disciplined by any licensed hospital (including postgraduate training) or the medical staff of any licensed hospital, including removal, suspension, probation, limitation of hospital privileges or any other disciplinary action if the action was based upon what the hospital or medical staff found to unprofessional conduct,

professional incompetence, malpractice, or a violation of a provision(s) of a Medical practice Act?

She also answered “Yes” to Question no. 15, Category I, which asked:

In the past ten (10) years, have you had to pay a settlement or judgment in a malpractice action or other civil action against your medical practice, or are there any malpractice or other civil actions against your medical practice presently pending in any court?”

During the application process, the Board gathered extensive and indisputable information as follows. In October 2013, the Medical Executive Committee of the McLeod Loris Seacoast Hospital in Loris, South Carolina, voted to restrict Teasley’s clinical privileges. The committee believed that its actions were necessary to protect patient safety and were based upon its perception of Teasley’s substandard or inadequate skill level. The restriction required Teasley to notify her department chair and to arrange for a proctor for all gynecologic surgeries -- as well as to participate in an educational training program of essential gynecologic procedures. This action against Teasley’s privileges was promptly reported to the National Practitioner Data Bank (NPDB)² by McLeod Loris Seacoast Hospital.

²The NPDB is an information clearinghouse created by Congress to facilitate comprehensive reviews of the credentials of health care practitioners. Specified entities are required to report adverse actions taken or findings made against physicians to the NPDB pursuant to provisions of the federal Health Care Quality Improvement Act of 1986 and the federal Social Security Act. Federal law provides immunity to individuals and entities in civil actions filed against them based upon their reporting to the NPDB.

In February 2014, the committee voted to continue the restrictions on Teasley's privileges at least through August 31, 2014. Based upon a report from a fellow physician, the committee revised the restriction to include: requiring her to notify patients before performing any gynecologic procedures that she must first consult with another gynecologic physician to confirm that the surgical procedure is medically necessary and appropriate to treat the patient's condition; requiring her to provide the hospital with the patient's written consent to the consultation and the written consultation report prepared by the consulting physician before performing the surgical procedure; and requiring her to arrange for another qualified gynecologist to be present for any hysteroscopies. The committee also strongly encouraged Teasley to participate in further educational training programs to improve her clinical judgment and technical skills. This modification of the previous action against Teasley's privileges was also promptly reported to the NPDB by the hospital.

As required, Teasley reported to the South Carolina State Board of Medical Examiners that her surgical procedures had been limited after an evaluation for surgical competency indicated that she had fallen below the appropriate standard of care expected of a physician. As a result, the South Carolina Department of Labor, Licensing, and Regulations undertook an investigation into the allegation of professional misconduct. On the basis of its

determination that Teasley's conduct constituted a danger to public health and safety, the Board of Medical Examiners entered an interim order in June 2014, which prohibited Teasley from performing *any* gynecologic procedures without first obtaining a second gynecologic consultation. It also prohibited her from performing *any hysteroscopy without a second gynecologic consultation attesting to the appropriateness of the procedure.*

In June 2014, Teasley was terminated from McLeod Physician Associates. In February 2015, Teasley's privileges at McLeod Loris Seacoast Hospital expired.

In March 2015, Teasley participated in the week-long University of San Diego Physician Assessment and Clinical Education Program. Following completion of the program, it was recommended that Teasley be proctored for a minimum of six (6) surgical cases upon her return to full practice. Teasley filed a request to return to unrestricted practice.

In July 2015, the South Carolina Board of Medical Examiners issued a second interim order that provided for Teasley's return to practice on a restricted basis. The order required Teasley to have a minimum of six (6) surgical cases proctored by a Board-approved proctor and the submission to the Board of a written report by the proctor.

In November 2015, the South Carolina Department of Labor, Licensing, and Regulation completed its investigation. It determined that no violation of the state's Practice Act had occurred. The Board of Medical Examiners dismissed the case, but it issued to Teasley a letter of caution that was to be kept on file. Her license to practice on an unrestricted basis was restored.

The Kentucky Board of Medical Licensure considered Teasley's application at its June 2016 meeting. Teasley was provided notice in advance that her application would be considered at the meeting, and she was informed that there appeared to be *sufficient grounds to deny her a license to practice medicine in the Commonwealth*. Teasley appeared and addressed the Board. The Board voted to defer making a decision with respect to Teasley's application until two pending malpractice actions had been resolved.

Before the malpractice actions had been resolved, Teasley requested that her application be considered again at the Board's September 2016 meeting. She appeared with counsel and again addressed the Board. Teasley acknowledged to Board members that she had not performed surgery in two years. The Board deferred its decision, giving Teasley an opportunity to undergo a clinical skills assessment at the Center for Personalized Education for Physicians.

The skills assessment indicated that there was room for improvement in Teasley's documentation in patient charts. It indicated that her communication

skills with simulated patients was inadequate. The assessment report included a recommendation that Teasley participate in a structured, individualized education intervention to address the identified areas of concern. It was recommended that Teasley have *100% direct supervision with appropriately graduated levels of independence as she re-acclimated to the surgical and labor and delivery settings*. It was also recommended that she have 100% supervision with regard to medically assisted treatment of opioid addiction.

The Board considered Teasley's application again at its March 2017 meeting. Although members of the Board felt that sufficient grounds existed to deny the application, the Board voted to grant Teasley a license -- contingent upon her entering into an agreed order that contained restrictions providing for adequate supervision and continued education. Teasley declined to enter into the agreed order and requested the Board to grant her an unrestricted license. The Board refused to reconsider its decision of March 17. It would grant her a license only upon the proviso that she agree to execute an agreed order restricting that license to provide for adequate supervision and continued education. The Board reported the culmination of the proceedings to the NPDB. Teasley initiated a process of responding to and disputing the NPDB report filed by the Board. We are not privy to the resolution of those federal administrative proceedings.

On May 30, 2017, Teasley filed a verified complaint consisting of 46 pages seeking declaratory and permanent injunctive relief in Jefferson Circuit Court. She represented that she “has never, at any time, been disciplined by any final decision of any licensed hospital or medical staff as contemplated by KRS 311.595(21), nor has she ever had her license to practice medicine revoked, suspended, restricted, or limited by any final order of any State licensing authority as contemplated by KRS 311.595(17).” She alleged that the Board had erred: (1) by refusing to give full faith and credit to the final decision of the South Carolina Board of Medical Examiners in violation of the United States Constitution and (2) by proposing to place restrictions upon her license that were so burdensome that she would be unable to practice medicine in Kentucky because she would not be able to obtain medical liability insurance from any carrier.

She emphasized that South Carolina had issued her a *final* order that restored her unrestricted license. In light of South Carolina’s final order, she alleged the invalidity of provisions included in the agreed order proffered to her by the Board referring to the actions of the Medical Executive Committee of McLeod Loris Seacoast Hospital; her termination from McLeod Physician Associates; and the interim orders of the South Carolina State Board of Medical Examiners. She contended that the restrictions to be imposed upon her by the terms of the tendered agreed order were “designed so that [she] cannot succeed and cannot exercise her

liberty and property interest in practicing her profession.” Finally, Teasley alleged that in its decisions, the Board and its members had: abused their discretion; acted arbitrarily and unreasonably; violated provisions of the United States Constitution; exceeded their authority; violated the statutory procedure for disciplinary actions; and violated provisions of the Kentucky Constitution.

Teasley sought permanent injunctive relief requiring the Board to grant to her an unrestricted license to practice in Kentucky. She alleged that without judicial relief, she would suffer irreparable harm -- including the loss of her ability to practice medicine, deprivation of her livelihood, and damage to her reputation. Teasley also sought a declaration that the Board and its members denied her both property and liberty without due process of law and denied her equal protection all in view of her claim filed pursuant to 42 United States Code (U.S.C.) § 1983. She also sought to recover her attorney fees.

Instead of answering the complaint, the Board and its members filed a motion to dismiss the action pursuant to the provisions of CR³12.02(f). The Board and its members argued that they were not amenable to suit as they were not “person[s]” pursuant to the provisions of 42 U.S.C. §1983. The Board asserted that it was entitled to sovereign or governmental immunity. Its members argued that they were entitled to absolute official immunity since they had been sued in

³ Kentucky Rules of Civil Procedure (CR).

their official capacities. Teasley responded and filed a motion requesting a temporary injunction. She asked the trial court to order the Board to withdraw the report filed with the NPDB and to grant Teasley an unrestricted license to practice medicine in Kentucky. Following oral argument, the circuit court rendered an opinion and order denying the request for a temporary injunction. Furthermore, it dismissed the entirety of the underlying civil action. This appeal followed.

On appeal, Teasley contends first that the trial court erred by dismissing the action. She argues that the trial court erred by concluding that the Board and its members, sued in their official capacities, were immune from suit. She argues that the court erred in failing to conclude that the Board and its members had clearly acted arbitrarily and beyond their authority. She also contended that the court erred in failing to find that they abused their discretion by tendering the agreed order that restricted her ability to practice and by filing a report with the NPDB. Furthermore, Teasley contends that the trial court erred by denying her motion for a temporary injunction. We disagree with both of these assertions. We address them in reverse order.

The provisions of CR 65 govern injunctive relief in Kentucky. The rule has been construed to require the trial court to deny injunctive relief except where it finds: (1) that there is a substantial possibility that the movant will ultimately prevail with respect to the merits of the underlying action; (2) that the

movant's legal remedy will be impaired irreparably absent the extraordinary relief requested; and (3) that an injunction will not unduly harm other parties or disserve the public. *Norsworthy v. Kentucky Bd. of Medical Licensure*, 330 S.W.3d 58, 62 (Ky. 2009).

Teasley argues that the refusal of the circuit court to issue a temporary injunction pursuant to the provisions of CR 65.04 was improper since she "will suffer the loss of ever being able to practice medicine again, anywhere." She contends that the Board's act of filing the adverse NPDB report and proffering an agreed order restricting her medical license "are denying her the capacity to practice OB/GYN at [Harrison Memorial Hospital] and eliminating her from being credentialed by health insurers and medical liability insurers." She maintains that the harm she is suffering is irreparable.

In order to obtain a preliminary injunction, the alleged harm that would result in the absence of the injunction must be truly *irreparable* -- not merely substantial. *See Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). Additionally, "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson*, 415 U.S. 61, 90, 94 S.Ct. 937, 953 (quoting *Virginia Petroleum Jobbers Ass'n v. Federal Power*, 259 F.2d 921, 925 (D.C. Cir. 1958)). *See Zirkle v. District of Columbia*, 830 A.2d 1250, 1256-1257 (D.C. 2003) ("[F]or

it is well established that economic and reputational injuries are generally not irreparable.”).

However, Teasley failed to offer **any** proof whatsoever that the Board's proffer of an agreed order and its communication with the NPDB will prevent her from “ever being able to practice medicine again, anywhere.”

“An injunction will not be granted on the ground merely of an anticipated danger or in apprehension of it, but there must at least be a reasonable probability that the injury will be done if no injunction is granted.” *Hamlin v. Durham*, 235 Ky. 842, 32 S.W.2d 413, 414 (1930).

Teasley remains a board-certified obstetrician and gynecologist. She represented in her brief to this Court that she practices medicine even now in South Carolina. Clearly, the Board’s actions have not prevented Teasley from continuing to practice her profession in South Carolina. She fails to establish the level of harm necessary to justify entry of the relief she seeks from this Court based on the Board’s decision not to immediately grant her an unrestricted license to practice medicine in Kentucky and her resulting inability to accept a position with Harrison Memorial Hospital under the terms of the hospital’s offer.

Nor do we conclude that Teasley established the requisite “substantial possibility” that she would prevail on the merits of the underlying action. Thus,

we are persuaded that the circuit court did not err by dismissing the action in its entirety pursuant to the provisions of CR 12.02.

The provisions of CR 12.02(f) authorize judgment in favor of a movant on the basis of the plaintiff's "failure to state a claim upon which relief can be granted[.]" Whether a court should dismiss an action pursuant to CR 12.02 is a question of law. *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002). Consequently, we conduct a *de novo* review of the trial court's order dismissing the civil action. *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599 (Ky. 2011). Since the very jurisdiction of a court is called into question when issues of sovereign immunity are raised, the issue is susceptible of resolution through a motion to dismiss pursuant to CR 12.02.

Teasley argues that the Board and its members acted arbitrarily, that they abused their discretion, and that they acted beyond their authority in part: by failing to apply correctly provisions of state law pertaining to the licensure of medical doctors by the Commonwealth on the basis of her licensure by a sister state; by failing to afford the decision of the South Carolina Board of Medical Examiners full faith and credit under Article IV of the U.S. Constitution; and by filing a false report to NPDB in violation of the provisions of 42 U.S.C. §11132(a). Hence, she argues that the Board and its members violated their state and federal statutory and adjudicative duties; violated provisions of the Fourteenth

Amendment; and violated provisions of the Kentucky Constitution. Teasley contends that the trial court erred by concluding that the Board and its members, sued in their official capacities, were immune from suit based upon this conduct. We disagree.

Sovereign or governmental immunity is the privilege of the sovereign not to be sued without its consent. *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 131 S. Ct. 1632, 179 L. Ed. 2d 675 (2011). The specific indignity against which sovereign immunity protects is the insult to a State of being hauled into court without its consent. This immunity extends to “arm[s] of the State,” *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), including state agencies and state officers acting in their official capacity. *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717 (Ky. 2007).

As Teasley correctly notes, the doctrine does not preclude private actions against state agencies or state officials for prospective or declaratory relief (as opposed to money damages including attorney fees) designed to remedy ongoing violations of law. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). However, this finely nuanced exception does not salvage the action filed against the Board and its members in their official capacities for the simple reason that Teasley’s action does not seek merely prospective or declaratory relief

pertaining to any *ongoing* violation of state or federal law. Instead, these civil proceedings are aimed at reviewing and enjoining the actions already taken by the Board and its members and at recovering her attorney's fees. Because Teasley's requests for relief are not aimed solely at enjoining ongoing violations of law, her action against the Board's members is barred by the doctrine of sovereign or governmental immunity. Thus, that exception defined by the United States Supreme Court in its *Young* doctrine is inapplicable.

Moreover, the Board has not entered a final order denying Teasley a license to practice in the Commonwealth, nor has it rendered some disciplinary action against her. Consequently, Teasley has not shown that she was entitled to the circuit court's review of any administrative procedure or action undertaken by the Board. The circuit court did not err by dismissing the action.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kent Masterson Brown
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BRIEF FOR APPELLEES:

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