

RENDERED: JUNE 19, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000021-MR

MARCELLO PIETRANTONI, M.D.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 18-CI-002825

KENTUCKY BOARD OF MEDICAL
LICENSURE

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: GOODWINE, LAMBERT, AND K. THOMPSON, JUDGES.

LAMBERT, JUDGE: Marcello Pietrantoni, M.D., has appealed from the
November 28, 2018, order of the Jefferson Circuit Court denying his motion to
vacate an emergency order of suspension issued by the Kentucky Board of Medical

Licensure (the Board). Because we agree with the Board that this appeal is moot as the emergency order of suspension has terminated, we dismiss the appeal.¹

The underlying action began in 2016, when the Board received an anonymous grievance regarding Dr. Pietrantonì's involvement with three patient care events related to pregnant women. Dr. Pietrantonì was licensed to practice medicine in Kentucky and, at that time, specialized in maternal-fetal medicine. After investigating the report and providing Dr. Pietrantonì with the opportunity to respond, which he failed to do, the Inquiry Panel met in February 2018, found that legal grounds existed for disciplinary action, and filed a complaint with the Board. In addition, the panel determined that Dr. Pietrantonì's practice placed the safety and health of his patients at risk and therefore issued an emergency order of suspension on February 16, 2018. Shortly thereafter, Dr. Pietrantonì filed a demand for a hearing on the emergency order of suspension pursuant to Kentucky Revised Statutes (KRS) 13B.125, arguing that 201 Kentucky Administrative Regulations (KAR) 9:240 was illegal and was designed to deny any meaningful due process. He stated that he had not been in the field of maternal-fetal medicine since November 2017, and that he had not received notice that his case was being considered by the Inquiry Panel in February 2018, which deprived him of his due

¹ The parties should take note that this decision is designated as an "opinion and order" and, therefore, falls under Kentucky Rules of Civil Procedure (CR) 76.38. Thus, petitions for rehearing are not authorized under CR 76.32(1)(a).

process rights. Following a hearing, the Board entered a final order affirming the emergency order of suspension on April 16, 2018.

In May 2018, Dr. Pietrantonio filed a petition seeking judicial review of the emergency order of suspension with the Jefferson Circuit Court, continuing to contest the constitutionality of 201 KAR 9:240 as well as the merits of the ruling. After briefing by the parties, the circuit court entered an opinion and order on November 28, 2018, affirming the emergency order of suspension and rejecting both Dr. Pietrantonio's procedural and substantive arguments. This appeal followed.

While the appeal of the emergency order of suspension continued, the Board's proceedings regarding the actual complaint ran parallel. On March 22, 2019, the Board entered a Final Order of Indefinite Restriction, thereby terminating the emergency order of suspension that is the subject of this appeal. Dr. Pietrantonio has sought judicial review of the final order in Jefferson Circuit Court Action No. 19-CI-002491. That petition is still pending. In his brief to this Court, Dr. Pietrantonio stated that, because the emergency order of suspension had been terminated, he would not be seeking our review of whether that order was factually correct or properly entered in accordance with the statute and administrative regulations. However, Dr. Pietrantonio stated he was seeking a ruling from this Court on the constitutional validity of 201 KAR 9:240 § 5.

The Board, in its brief, argues that the appeal should be dismissed as moot because there was no longer an existing controversy for this Court to review as the emergency order of suspension terminated upon the entry of the final order on March 22, 2019. Dr. Pietrantonio did not respond to this argument in his reply brief.

Kentucky courts have recognized, in general, that “unless there is an actual case involving a present, ongoing controversy, the issues surrounding it become moot.” *Commonwealth, Dep’t of Corrections v. Engle*, 302 S.W.3d 60, 63 (Ky. 2010). “Our courts do not function to give advisory opinions, even on important public issues, unless there is an actual case in controversy.” *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992). Exceptions to this rule have emerged. One applies to situations “when a dispute is capable of repetition, yet evading review.” *Engle*, 302 S.W.3d at 63. Another exception is for questions of “substantial public interest” as explained in *Morgan v. Getter*, 441 S.W.3d 94, 102 (Ky. 2014):

Unlike the two-element “capable of repetition” exception, the “public interest” exception commonly has three elements, all of which must be clearly shown:

The public interest exception allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of

public officers; and (3) there is a likelihood of future recurrence of the question.

In re Alfred H.H., [233 Ill.2d 345, 910 N.E.2d 74, 80 (Ill. 2009)].

A third is the collateral consequences exception as set forth in *Calhoun v. Wood*, 516 S.W.3d 357, 360 (Ky. App. 2017):

An example of the “collateral consequences” exception is where a criminal sentence is expired but this does not render the appeal of the judgment of conviction moot “because there remain consequences of the conviction (such as the loss of various civil rights) deemed sufficient to keep alive the appellant’s personal stake in the outcome of the appeal.”

(Citation omitted.)

The Board specifically asserts that the first exception – for cases that are capable of repetition, but evading review – does not apply to this case, and we agree. As the Board argues, it is speculative to believe that all emergency orders subject to review under KRS 13B.140 and KRS 311.592 will terminate and be rendered moot before judicial review may be completed. And the factual circumstances of this case have ended, meaning that this issue will not likely affect Dr. Pietrantoni again. We also hold that neither of the other exceptions applies in this case. Therefore, the appeal is moot and must be dismissed.

We have also located a similar unpublished case that further supports our holding.² In *O'Donoghue v. Kentucky Board of Medical Licensure*, No. 2007-CA-000142-MR, 2008 WL 275166 (Ky. App. Feb. 1, 2008), the physician was seeking review of the dismissal of his declaratory action in which he argued that KRS 311.592(2) was unconstitutional. He sought declaratory relief in the same petition in which he sought review of the emergency order of restriction the Board had entered. In our opinion, we stated:

Dr. O'Donoghue then sought judicial review of this final order [the emergency order of restriction] in Jefferson Circuit Court. As part of that review, Dr. O'Donoghue moved the court to enjoin the Board from enforcing its emergency order of restriction. Over the Board's objection, the court issued a temporary injunction pending completion of the judicial review.

On April 13, 2006, Dr. O'Donoghue and the Board finally resolved the complaint by entering into an agreed order. On July 20, 2006, the Board filed a motion to dismiss the petition for review on the grounds that the emergency order of restriction had become moot and no longer had legal effect following the entry of the agreed order resolving the complaint. The court agreed in an opinion and order and dismissed the petition for judicial review. Dr. O'Donoghue filed a motion to alter, vacate, or amend, which was denied. This appeal followed.

² We cite this unpublished opinion pursuant to CR 76.28(4)(c), which states: "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court."

Dr. O'Donoghue argues that it was improper for the court to dismiss his motion for declaratory judgment seeking to have KRS 311.592(2) declared unconstitutional. We disagree.

The law is clear that courts will not decide abstract or academic questions and will dismiss a case when it becomes moot. *Board of Education of Berea v. Muncy*, 239 S.W.2d 471 (Ky. 1951); *Brown v. Baumer*, 301 Ky. 315, 191 S.W.2d 235 (Ky. 1945); *Reeves v. Talbott*, 289 Ky. 581, 159 S.W.2d 51 (Ky. 1941). This is particularly true where the parties have resolved the underlying controversy by settlement. *Stairs v. Riley*, 306 Ky. 645, 208 S.W.2d 961 (Ky. 1948).

In the case at hand, the parties entered into an agreed order which informally resolved the underlying controversy. In this order, Dr. O'Donoghue signed a waiver of rights which stated, "I waive my right to demand an evidentiary hearing or to *raise additional constitutional or statutory objections in this matter*" (emphasis added). Contrary to Dr. O'Donoghue's contention, his motion for declaratory judgment is not a separate action from the administrative appeal. Therefore, the court was correct in rendering this issue moot given the explicit waiver of his right to raise constitutional issues arising from this matter in the agreed order.

O'Donoghue, 2008 WL 275166, at *2. While *O'Donoghue* included a settlement of the underlying complaint where the physician waived his right to seek review of any constitutional issues unlike in the case before us, we are nevertheless persuaded that its holding is applicable here.

For the foregoing reasons, the above-styled appeal is ORDERED DISMISSED as moot the date of entry of this order.

GOODWINE, JUDGE, CONCURS.

K. THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

ENTERED: June 19, 2020

/s/ James H. Lambert
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

J. Fox DeMoisey
Louisville, Kentucky

BRIEF FOR APPELLEE:

Leanne K. Diakov
Louisville, Kentucky