Ann C. Morrill v. Md. Board of Physicians, No. 1597, September Term 2016.

ADMINISTRATIVE LAW AND PROCEDURE > SUBPOENING POWER

The test to determine the validity of a subpoena issued by an administrative agency requires that the subpoena be authorized by statute, the information sought is relevant to the inquiry and the demand is not too indefinite or overbroad.

ADMINISTRATIVE LAW AND PROCEDURE > CHARGES AND INVESTIGATIONS

In determining whether an administrative agency has the power to issue a subpoena, we must first look at the scope of the private complaint, which then opens the door to the statutory pre-requsite.

ADMINISTRATIVE LAW AND PROCEDURE > CHARGES AND INVESTIGATIONS

The Maryland Board of Physicians' request for a random sampling of medical records so that they could determine whether the allegation was an isolated event, or a pattern of behavior was acceptable and is within the power of the Board.

ADMINISTRATIVE LAW AND PROCEDURE > CHARGES AND INVESTIGATIONS

A subpoena seeking a review of a random sampling of patients in order conduct a practice review, and not all patient records, is reasonable and is not overbroad.

Circuit Court for Baltimore County
Case No. 03-C-16-007138 OC

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1597

September Term, 2016

ANN C. MORRILL

v.

THE MARYLAND BOARD OF PHYSICIANS

Graeff,
Reed,
Friedman,

JJ.

Opinion by Reed, J.

Filed: December 20, 2019

Arthur, Kevin A., J., did not participate in the Court's decision to designate this opinion for publication pursuant to Maryland Rule 8-605.1.

The Maryland Board of Physicians ("the Board") conducted an investigation into Dr. Ann C. Morrill's ("Dr. Morrill") prescribing habits following a complaint alleging she overprescribed opioid pain medications to a patient, even after being informed of the patient's misuse of the drug. Subsequent to a preliminary investigation, the Board subpoenaed Dr. Morrill's medical records for nine additional patients.

On July 7, 2016, Dr. Morrill filed a motion for protective order and/or motion to quash the subpoena. On September 12, 2016, the Circuit Court for Baltimore County denied Dr. Morrill's motions. On October 8, 2016, Dr. Morrill filed a motion to stay enforcement of the order pending appeal, which was denied. Finally, on October 30, 2016, Dr. Morrill filed a motion to reconsider, which was also denied. On October 11, 2015, the Board filed a motion to compel the requested medical records from nine of Dr. Morrill's patients. The circuit court granted the Board's motion on December 27, 2016.

Dr. Morrill now brings this timely appeal from the circuit court's decision to deny her motion for protective order and/or motion to quash the subpoena on September 12, 2016. Dr. Morrill presents one question for our review, which we have rephrased for clarity:

> I. Did the circuit court abuse its discretion where it denied Dr. Morrill's motion for protective order and/or motion to quash the June 28, 2016, subpoena issued by the Board?

For the following reasons, we answer Dr. Morrill's question in the negative and affirm the judgment of the Circuit Court for Baltimore County.

FACTUAL AND PROCEDURAL BACKGROUND

On May 2, 2016, Dr. Morrill received a letter from the Maryland Board of Physicians ("the Board") informing her that a complaint had been filed against her. The complaint, filed by the mother of a previous patient, alleged that Dr. Morrill, "continue[d] to prescribe [opioid pain] medications for [her] daughter despite sending [Dr. Morrill] letters…to tell [Dr. Morrill] that [her daughter] abuses them." The complaint alleged that the patient had two DUIs and was jailed, had her child taken away from her care, and continues to be hooked on opioid pain medication. Finally, the complainant alleges "[she knows] of others that Dr. Morrill has done this to, especially young women that work for her." However, the complaint never lists the name of these young women or the "other's [sic]." Attached to the complaint was a subpoena for the complainant's daughter's medical records as well as Dr. Morrill's personnel file. Dr. Morrill produced the documents on May 26, 2016.

Based on a preliminary investigation, it was determined by the Board that further investigation was needed. As such, the Board opened a full investigation into the allegations asserted in the complaint. On June 28, 2016, the Board sent another letter to Dr. Morrill informing her of the full investigation and requesting the complete medical records of nine patients. The subpoena, attached to the letter, required Dr. Morrill to deliver the documents to the Board within fifteen days of the date on the subpoena.[1] On July 1, 2016,

[1] "This is not the first time the Board demanded that Dr. Morrill produce medical records that were neither related nor relevant to the investigation of a specific complaint. On November 27, 2012, the Board notified Dr. Morrill that a complaint had been filed against her by two of her patients alleging that she was overprescribing Xanax and

Dr. Morrill's counsel sent an email to the Department of Health and Mental Hygiene's ("the Department") Executive Director stating:

> Unless you can explain to me how the records of these nine patients will aid your investigation into whether and how my client got the patient in question 'hooked' on narcotics, I will move to quash this subpoena as none of these patient records could possibly be relevant to your inquiry.

Unsatisfied with the Department's response, Dr. Morrill filed a motion for protective order and/or motion to quash subpoena on July 7, 2016. Dr. Morrill argued, among many things, that the request was unduly burdensome, too expensive to comply with, and was irrelevant to the Board's investigation.

Dr. Morrill's motion was denied on September 12, 2016. The court stated, "[u]nder the circumstances of this case, the court has no authority to interfere with the investigation by the Board of Physicians' subpoena it has issued for the medical records of Dr. Morrill." On September 28, 2016, Dr. Morrill filed a notice of appeal with this Court, appealing the circuit court's order.

Shortly after the notice of appeal was filed, the Board filed a Motion to Compel on October 7, 2017, requiring Dr. Morrill to comply with the subpoena and submit the records. Dr. Morrill filed an opposition to the motion and subsequently filed a motion to stay the enforcement of the order pending appeal. On November 22, 2016, that motion was denied

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unspecified pain medication." *See* App't Br. at 4. In that investigation, the Board requested medical records for eight randomly selected patients. The Board closed the investigation into that complaint on September 11, 2013; however, they reopened the case and subpoenaed ten more patient charts. The Board ultimately closed the case with an Advisory letter.

and on December 27, 2016, the Board's motion to compel was granted. On January 3, 2017, the Board received the records requested in the June 28, 2016 subpoena. This appeal follows the September 12, 2016 order.

DISCUSSION

A. Motion to Dismiss

Prior to discussing the merits of Dr. Morrill's appeal, we must first discuss the Board's motion to dismiss. In its motion, the Board asserted that Dr. Morrill's appeal is moot because, following the denial of Dr. Morrill's motion to quash, Dr. Morrill produced the records. A case is moot if "at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer an effective remedy the court can provide." *Attorney Gen. v. A.A. Co. School Bus,* 286 Md. 324, 327 (1979). We agree that there exists a controversy; however, we are unconvinced that there exists an adequate remedy that would satisfy Dr. Morrill.

Regardless, we will continue with analysis concerning the nature of her claims. *See A.A. Co. School Bus*, 286 Md. at 329. ("[A] court may decide a moot question where there is an imperative and manifest urgency to establish a rule of future conduct in matters of important public concern, which may frequently recur, and which, because of inherent time constraints, may not be able to be afforded complete appellate review.") (internal citations omitted). As the opioid epidemic has become a matter of public concern, especially in Maryland, this Court feels it necessary to address Dr. Morrill's claims in light of future litigation that may arise. As such, the motion to dismiss is denied.

B. Parties' Contentions

Dr. Morrill contends that the June 28, 2016, subpoena was not authorized by MD. CODE ANN., HEALTH OCC. §14-401.1. She first argues that the Board's authority, in requesting the nine additional patient charts, is limited to "collecting the 'information necessary' to determine 'whether there is reasonable cause to charge [Dr. Morrill]… with a violation of the Medical Practice Act…because she allegedly over-prescribed [sic] CDS to the complainant's daughter." She believes the Board acted outside of its authority because its request was specifically targeted at her as a "wholesale fishing expedition into [her] filing cabinets." Second, she argues that the nine patient charts and records are irrelevant to the initial complaint. She disagrees with the Board that the charts were needed to investigate other abuses or to get a sufficient sample size. Third, she contends that the subpoena was too indefinite and overbroad because the cost of producing the records was too high. Finally, she asserts that the circuit court applied an incorrect legal standard in determining the validity of a subpoena issued by an administrative agency. She alleges that the standard that should have been used was enumerated in *Banach v. State of Md. Comm'n on Human Relations*, 277 Md. 502, 507 (1976). As such, she believes that, had the court applied the standard in *Banach*, the subpoena would have been denied.

In its brief, the Board argues that it was authorized to investigate any alleged violations of the Medical Practice Act through its subpoena power, and the scope of the subpoena itself has no bearing on whether the subpoena was authorized by statute. Second, it asserts that the randomly selected patient records were necessary for the Board to determine whether the allegations in the complaint were isolated or indicative of a pattern. Third, it maintains the subpoena was neither overbroad nor indefinite because the Board

eventually agreed to share the costs of the production of the patient records. Moreover, it argues that the entirety of the records were necessary because it reflects a "complete picture of the care provided to the patients and…provide[s] the information necessary for the Board to evaluate whether Dr. Morrill's prescribing practices complied with the standard of care." Finally, the Board asserts that there is no merit to Dr. Morrill's argument that the circuit court applied the incorrect legal standard. We agree.

C. Standard of Review

We review a circuit court's order denying a Motion to Quash under the abuse of discretion standard. *See Unnamed Attorney v. Attorney Grievance Comm'n*, 409 Md. 509, 520 (2009) ("…[W]e ordinarily review a court's order denying a motion under an abuse of discretion standard."). A trial court abuses its discretion only if no reasonable person would have taken the view adopted by the trial court in denying the Motion to Quash. *See Jones v. Rosenberg*, 178 Md. App. 54, 56 (2008). An abuse of discretion may be found when the court acts "without reference to any guiding rules or principles." *Board v. Baltimore County, Maryland, et. al.*, 220 Md. App. 529, 566 (2014). Moreover, a trial court can abuse its discretion where the ruling is "clearly against the logic and effect of facts and inferences before the court, or where the ruling is violative of fact and logic." *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (internal quotation marks and citations omitted).

When assessing whether the circuit court abused its discretion in allowing an administrative agency's subpoena, courts generally have a wide range of discretion. *See Equitable Trust Co. v. State Comm'n on Human Relations,* 287 Md. 80, 97 (1980)

("Because they are on the scene and intimately acquainted with the details at the time, they are in a better position than are appellate judges to evaluate such an issue as oppressiveness or burdensomeness and to contrive means of lessening the burden and yet at the same time permitting investigations to go forward.").

D. Analysis

In *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186 (1946), the Supreme Court articulated a three-part test to determine the validity of a subpoena issued by an administrative agency. The Court of Appeals of Maryland adopted that test, known as the *Walling* test, in *Banach v. State Comm'n on Human Relations*, 277 Md. 502, 506 (1976). The test requires: (1) the subpoena must be authorized by statute; (2) the information sought must be relevant to the inquiry; and (3) the demand must not be too indefinite or overbroad. In support of our decision, we will apply each factor to Dr. Morrill's arguments.

1. The Subpoena was authorized by MD. CODE ANN., HEALTH OCC. § 14-206.

Dr. Morrill asserts that Maryland's Health and Occupations ("Health Occ.") does not authorize the type of subpoena granted by the circuit court because it "cast[s] a wider net" than what is required to investigate the complainant's claim. The Board advances the argument that the nine randomly selected patients were requested in order to determine whether other patients were treated in a similar manner by Dr. Morrill. We agree that the subpoena was authorized by statute.

In determining whether an administrative agency has the power to issue a subpoena, we must first look at the scope of the private complaint, which opens the door to the statutory pre-requisite. *See Maryland Comm'n on Human Relations v. Baltimore County*,

46 Md. App. 45, 54 (1980) ("In order to determine whether the statute authorized the inquiry, the complaint must comply with statutory prerequisites…") (internal citations omitted). MD. CODE ANN., HEALTH OCC. §14-206(a) grants the Board the power to investigate any written complaint that alleges a physician violated the licensing and conduct code of physicians in the State of Maryland. The Board also has the authority to issue subpoenas for medical records in order to conduct an investigation into whether a physician has violated one of the standards of care. *See* HEALTH OCC. §§ 14-206(a); 14-401.1(i) (both stating that the Board, or the disciplinary panel "may issue subpoenas…in connection with any investigation under this title and any hearings or proceedings before it."); *see also,* MD. CODE ANN., HEALTH §4-307(v)(1) ("in accordance with a subpoena for medical records on specific patients: to health professional licensing and disciplinary boards for the sole purpose of an investigation regarding licensure, certification, or discipline of a health professional or the improper practice of a health profession..."); *Solomon v. Bd. Of Physician Quality Assurance*, 132 Md. App. 447, 453-54 (2000) ("… There [is no] dispute that the Board has the authority to issue subpoenas in furtherance of an investigation."); *Miller v. Baltimore County Police Dept.*, 179 Md. App. 370, 398 (2008) ("…as a question of statutory interpretation, an agency's subpoena power may extend to its investigatory functions, based upon the legislative intent, the specific statutory language employed, and the nature of the agency and its undertaking.").

Turning to the case at bar, we believe that Dr. Morrill's contention misses the mark. The *Walling* test concerns itself with the power of an administrative agency to issue a subpoena and not the scope of the subpoena itself. In fact, in the cases that address this

issue in Maryland, the inquiry is limited to whether certain statutes give administrative agencies the power to impose a subpoena on a person. *See Miller*, 179 Md. App. 370, 398 (2008) (this Court held that Md. CODE ANN., PUBLIC SAFETY §3-104 does not grant subpoena power during an investigation or interrogation of police officer regarding disciplinary matters). From this Court's vantage point, it does not appear that the Board was going beyond its statutorily granted powers. In fact, according to the Board, Dr. Morrill's investigation was necessary to determine whether she had violated the standard of care by improperly prescribing medication or committing an act enumerated in HEALTH OCC., §14-404(a). Thus, the subpoena was authorized by statute and satisfies the first prong of this analysis. Accordingly, we hold that there was no abuse of discretion committed by the circuit court in determining that the Board's subpoena power is established by statute.

2. The Records were Relevant to the Board's Investigation

Dr. Morrill contends that when the Board requested the medical records of the nine randomly selected patients, it was neither necessary nor relevant to the Board's investigation. To that end, she states, "there is no credible evidence that Dr. Morrill allegedly did 'this' to 'other patients.'" She claims this is merely a "wholesale fishing expedition into Dr. Morrill's filing cabinets" one that is not authorized by statute. Moreover, she advances the argument that there is no statute that allows the Board to investigate patterns of detrimental conduct. Even if there was a statute that permitted this, she argues, it was premature. We are again unconvinced by Dr. Morrill's argument.[2]

[2] In her reply brief, Dr. Morrill raises another issue, outside of the factors enumerated by the Supreme Court in *Walling*. She argues that the Board does not have the statutory

Dr. Morrill was accused by a complainant of overprescribing opioids – highly addictive pain medication – to a patient who is alleged to have an addiction problem. The Board, in investigating whether this was an isolated event or a pattern of behavior, requested nine randomly selected patients' medical records. We have previously ruled that this type of request by the Board is acceptable. This Court in *Solomon v. State Bd. Of Physician Quality Assur.*, 155 Md. App. 687, 700 (2003) held that the "review of a random sampling of those records would undoubtedly yield information regarding the quality of medical care Dr. Solomon provided…" Dr. Morrill attempts to distance her case from Dr. Solomon's. However, Dr. Morrill's case is not distinguishable from Dr. Solomon's. Furthermore, this is not the first time Dr. Morrill was accused of overprescribing medication. *See supra* note 1. Therefore, we hold that requesting a random sampling of patients was within the subpoena powers of the Board. Thus, we find no abuse of discretion by the circuit court in finding that the records were relevant to the Board's investigation.

3. The Subpoena was not Indefinite or Too Overbroad

Dr. Morrill argues that the Board's access to her files constitutes a fishing expedition, one that is unreasonable and unenforceable per the *Walling* test. The Supreme Court in *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946), examined whether the scope of a subpoena was calling for "documents so broadly or indefinitely that it was thought to approach in this respect the character of a general warrant or writ of assistance,

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authority to conduct a practice review when investigating an individual incident. As we will rule below, the Board absolutely has that authority. Even if we were to assume that it did not, it would have been a harmless error by the circuit court, one that does not amount to the level of an abuse of discretion.

odious in both English and American history." There, the Court stated that "it is contrary to the first principles of justice to allow a search through all [of an individual's] records, relevant or irrelevant, in the hope that something will turn up." *Walling*, 327 U.S. at 207, n. 40.

Appellate courts in Maryland follow the maxim that a summons that is unreasonable will not be enforced. *See Equitable Trust Co. v. State Comm'n on Human Relations,* 287 Md. 80, 96 (1980) ("A summons will be deemed unreasonable and unenforceable if it is overbroad and disproportionate to the end sought. The Government cannot go on a 'fishing expedition' through appellants' records, and where it appears that [its purpose]… is a 'rambling exploration' of a third party's files, it will not be enforced.") (internal citations omitted).

As this Court previously stated in *Solomon*, a subpoena seeking a review of a random sampling of patients is reasonable and is not overbroad. Such information does not provide *all* patient information; instead, "those records would undoubtedly yield information regarding the quality of medical care . . . provided, including diagnostic and treatment information." *Solomon*, 155 Md. App. at 701. Here, such records were pertinent because they provided information relating to Dr. Morrill's prescription practices. As such, the subpoena was not indefinite or too overbroad.

CONCLUSION

Dr. Morrill makes a facially attractive policy argument in her reply brief by asserting:

> If this Court were to find that the Board does, in fact, have the authority to conduct a 'practice review' in cases where a single incident of misconduct is alleged and in the absence of any finding that the Medical Practice Act has been violated, this Court would provide the Board with a tool that could be used to terrorize and hamstring every physician in this State.

This Court is not willing to accept that policy argument, as this Court is not authorizing the Board to "terrorize and hamstring every physician" in the State of Maryland. Even if we were convinced by this argument, which we are not, the subpoena was acceptable per the *Walling* factors. As such, we discern no abuse of discretion by the Circuit Court for Baltimore County, and the motion was properly denied.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

The correction notice for this opinion can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/1597s16cn.pdf