NO. 39731-9

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RICHARD J. EGGLESTON, M.D., Petitioner, v. WASHINGTON MEDICAL COMMISSION, Respondent.	WASHINGTON MEDICAL COMMISSION'S MEMORANDUM IN OPPOSITION TO PETITIONER'S EMERGENCY MOTION FOR INJUNCTION PURSUANT TO RAP 8.3

I. INTRODUCTION

The Honorable Judge Brooke Burns of Asotin County Superior Court denied Dr. Eggleston's motion for an injunction on several grounds, including that his declaratory judgement action was not likely to succeed its merits:

> Plaintiff has not established that he is likely to prevail on the merits because The Uniform Declaratory Judgement Act under which Plaintiff seeks relief "does not apply to state agency action reviewable under chapter 34.05 RCW." RCW 7.24.146. The Commission's disciplinary

> proceeding is governed by the Administrative Procedures Act, chapter 34.05. Also, judicial review is only available for final orders and there is no final order for this Court to review. RCW 34.05.570(3); 34.05.010(11).

Order Denying Plaintiff's Motion for Preliminary Injunction (attached to Brewer Decl. as Exhibit 6).

Respondent offers nothing new before this Court. After being denied by the superior court, he now asks this Court to supersede the legislature's decision for this action to be heard administratively by the expertise of the physicians of the Washington Medical Commission. The Commission should be allowed to exercise its statutory power to create a record and apply its expertise through a reconciliation of the facts and laws from the vantage point of medical expertise. After the Commission does so, this case may be properly raised to this Court for review on a final order supported by a factual record. Dr. Eggleston had 10 months since this case was charged to bring this action and waited until the 11th hour to bring the action. The Commission has expert witnesses with busy schedules, the

Commission has convened a panel and the attorneys for the Commission have spent time all to present this case the case to the Commission in two days. Any sense of urgency is created by Dr. Eggleston. The Court should refuse this invitation to thwart the Administrative Procedures Act. The motion for injunction or stay should be denied.

II. STATEMENT OF RELEVANT FACTS

The Commission is a state agency with statutory authority to regulate the competency of physicians and physician assistants and to take action against the licenses it issues in order to protect the public health and safety in the delivery of health care in this state. RCW 18.71.002. The Commission is composed primarily of physicians and physician assistants who exercise their specialized expertise and experience in carrying out the Commission's regulatory functions. RCW 18.71.015. In addition, six Commissioners are members of the public. *Id.*

The Commission's disciplinary proceedings are governed by the state Administrative Procedure Act (APA), chapter 34.05

RCW, and by the Health Professions Uniform Disciplinary Act (UDA), chapter 18.130 RCW. The Commission has specific statutory authority under the APA and the UDA to conduct adjudicatory hearings. These hearings are conducted under procedures specified in RCW 34.05 and WAC 246-11, with a full panoply of due process rights. Under these procedures, Dr. Eggleston may preserve for judicial review challenges to the constitutionality of the disciplinary proceedings. WAC 246-11-480(4). Judicial review of agency orders may include review of the constitutionality of the laws on which the order is based. RCW 34.05.570(3)(a). Finally, an adverse decision in superior court may be appealed to a state appellate court. RCW 34.05.526.

In this case, the Commission received a complaint alleging unprofessional conduct by Dr. Eggleston. *See* Declaration of Kristin G. Brewer (Brewer Decl. ¶ 2). Based on the Commission's investigative findings, expert review, and the Commission's statutory authority, a Commission panel voted to

issue a Statement of Charges (SOC) against Dr. Eggleston's medical license. (Brewer Decl. ¶ 2, Exhibit 1)

The Commission notified Dr. Eggleston of its investigation by letter on October 5, 2021. Brewer Decl. ¶ 2. The Commission served him with the SOC on August 4, 2022, and Dr. Eggleston successfully requested an extension of time to answer. On October 9, 2022, Dr. Eggleston answered. He denied the majority of the allegations and requested a hearing to defend the charges. (Brewer Decl.¶ 2, Exhibit 2). On November 15, 2022, a presiding officer of the Department issued a scheduling order setting a litigation schedule and a hearing date to which the parties had agreed on a prior conference call. (Brewer Decl. ¶ 2, Exhibit 3, Exhibit 4).

On December 16, 2022, Plaintiff Eggleston filed a Notice of Torts. On March 10, 2023, Dr. Eggleston and other plaintiffs filed a Motion for a Temporary Restraining Order and a Motion to Expedite Hearing on that motion in the United States District Court, Eastern District of Washington. On March 17, 2023, the

court issued an order granting an expedited hearing and denying the motion for TRO. (Brewer Decl. ¶ 3, Exhibit 5).

The prehearing conference for the administrative matter was held on April 28, 2023. In an oral ruling, confirmed by written order on May 18, 2023, the health law judge denied Dr. Eggleston's motion to dismiss and prehearing rulings were made as to each side's allowed witnesses and exhibits. (Brewer Decl. ¶ 4, Exhibit 6). On May 8, 2023, Dr. Eggleston filed a motion for a TRO in Asotin County Superior Court. On May 18, 2023, after briefing and a hearing, the motion was denied. (Brewer Decl. ¶ 5, Exhibit 7). On May 19, 2023, Dr. Eggleston filed the instant action in this court. The administrative case is ready to proceed to hearing in two days beginning May 24-26, 2023.

III. ISSUES

1. May a party to an administrative action petition for declaratory judgment when the action is reviewable under chapter 34.05 RCW, there is no final order, the party has failed to exhaust administrative remedies, and where the

constitutional issues raised are as applied challenges to the disciplinary statutes at issue?

No. The Uniform Declaratory Judgments Act does not apply to matters reviewable under chapter 34.05 RCW. The APA provides for effective relief by declaratory judgment, RCW 34.05.574, and a mechanism for seeking a stay, if warranted, pending resolution of judicial review. RCW 34.05.550.

2. Does the Commission require a hearing to establish the compelling interests if, *arguendo*, Appellant's Constitutional rights are infringed?

Yes. Whether or not the standing of the medical profession is lowered, whether Dr. Eggleston's untrue writings endangered the public health and safety, and other such factual issues must be determined by the Medical Commission at hearing.

IV. ARGUMENT

A. Dr. Eggleston Cannot Meet the Requirements to Warrant a Stay of the Commission's Hearing

No stay or injunction of the Commission's hearing should "be granted where there is a plain, complete, speedy and adequate remedy at law." *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 791, 638 P.2d 1213, 1216 (1982). Here, Dr. Eggleston has such a remedy. First, he may prevail and be exonerated at hearing. If not, he may immediately seek a stay

of the final order from the Presiding Officer. RCW 34.05.467. He may file for Judicial Review of the final order, including direct review by this Court. RCW 34.05.518. And he may immediately seek a judicial stay of the final order. RCW 34.05.550. Upon judicial review of the final order, Dr. Eggleston may not only have the final order reversed, but also achieve a declaratory judgment of his First Amendment Constitutional rights and the application of the disciplinary statues at issue. RCW 34.05.574. No stay or injunction is equitably necessary from this Court.

Under Washington law, a party seeking a preliminary injunction must establish the following:

> (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either have or will result in actual and substantial injury.

Beauregard v. Wash. State Bar Ass'n, 197 Wn.2d 67, 72, 480 P.3d 410 (2021) (internal quotation omitted). "It is necessary, however, to clarify that since injunctions are addressed to the

equitable powers of the court, the listed criteria must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public." *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). To examine whether a "clear legal or equitable right" exists, the court examines "the likelihood that the moving party will prevail on the merits." *Id*. at 73 (internal quotations omitted).

The Court should deny Dr. Eggleston's motion to enjoin the administrative proceeding set for hearing in two days because he is not likely to prevail on the merits of his declaratory judgment action. The Commission's disciplinary proceeding is governed by the APA and is reviewable only under the judicial review tenets of that act. RCW 18.130.140; RCW 34.05.510. Further, only final orders are reviewable. RCW 34.05.570(3); 34.05.010(11). There is no final order for this Court to review, and the Uniform Declaratory Judgments Act under which Dr. Eggleston's claim rises, "does not apply to state agency

action reviewable under chapter 34.05 RCW." RCW 7.24.146. Dr. Eggleston has asked this Court to rule on a matter that the legislature has explicitly foreclosed. He cannot prevail on the merits of his complaint because he cannot plead a claim on which he is entitled to relief. *See* CR 12(b)(6).

The preclusion of review of APA cases as declaratory judgment actions is not a technicality of law. The APA exists to allow the appropriate regulatory body to apply its expertise. Here, that body is composed of primarily of physicians to hear medical and scientific evidence and make findings using their expertise. RCW 34.05.461(5). The U.S. Supreme Court has recognized the necessity of reliance on such expertise in the medical profession for well over a century:

> Few professions require more careful preparation by one who seeks to enter it than that of medicine. . . . Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications.

Dent v. State of W.Va., 129 U.S. 114, 122–23, 9 S. Ct. 231, 233, 32 L. Ed. 623 (1889). This Court should reject Dr. Eggleston's request that this Court ignore the legislature's mandate that in the first instance, the Commission should hear Commission disciplinary cases.

The Commission must also be allowed to carry out its statutorily mandated hearing in order to create a record for appellate review and have issues of fact and credibility determined with the expertise of the Commission. Several key issues of material fact require resolution by hearing and the Commission is uniquely suited to resolve those issues. The First Amendment issues that Dr. Eggleston asks this Court to resolve require the determination whether Dr. Eggleston's writings constitute the practice of medicine under RCW 18.71.011, whether his statements of fact were demonstrably false, whether his statements misled the public and caused risk of harm, and whether his conduct lowered the standing of the medical profession in the eyes of the public. These issues, among others,

require the expertise of the Commission to determine. *See Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 743, 818 P.2d 1062 (1991) (physicians to determine moral turpitude standards for medical profession under RCW 18.130.180(1)).

Dr. Eggleston also does not have a well-grounded fear that his rights will be invaded. When the Commission has performed its fact finding duty and exercised the legislatively created authority to adjudicate the allegations of unprofessional conduct, Dr. Eggleston may raise this case to this Court again on judicial review under the APA, chapter 34.05 RCW, consistent with plain statutory mandates. This process is not futile. It is the one required for all litigants with constitutional concerns in actions arising under the Uniform Disciplinary Act, chapter 18.130 RCW, and the APA. *See Alsager v. Bd. of Osteopathic Med. & Surgery*, 196 Wn. App. 653, 384 P.3d 641 (2016) (*inter alia*, superior court denial of interlocutory petition for declaratory judgment regarding Fifth And Fourth Amendment claims of physician against Board of Osteopathic Medicine and Surgery

affirmed in consolidated appeal). Dr. Eggleston is afforded the right to make a record of his constitutional claims before the agency, and to ask for full declaratory relief on judicial review. RCW 34.05.574 (types of relief).

This case was charged in August of 2022. Dr. Eggleston has waited for over 10 months with no change in his position. He now attempts to enjoin the administrative process two days before hearing after having participated in it willingly to this point. Any sense of urgency here is entirely of Dr. Eggleston's own making. He requested the three-day hearing and participated in the scheduling of it. His claim now that he is under time pressures and that his motion to enjoin the Commission's hearing must be granted in order to protect him from irreparable harm is not compelling. Dr. Eggleston could have brought a motion for preliminary injunction at any time within the last 10 months.

This Court should agree with the federal district court and the Asotin County Superior Court and deny Dr. Eggleston's

attempt to circumvent the regular course of disciplinary proceedings.

In addition, there is no irreparable injury or loss to Dr. Eggleston by participating in the adjudicative proceeding in the disciplinary case. He is represented by counsel and can present his defenses to the allegations of unprofessional conduct. He may prevail at hearing. He may seek a stay from the Presiding Officer, RCW 34.05.467, from a reviewing court, RCW 34.05.550, and may seek direct review by this Court. RCW 34.05.518. Dr. Eggleston makes no showing that he is injured or prejudiced, other than what was contemplated by the legislature in enacting the APA. The Commission's action is not a prior restraint, nor is the outcome of the hearing certain.

Finally, the Commission is charged with protecting the public from the allegations contained in the statement of charges.

> This chapter is passed: (1) In the exercise of the police power of the state to protect public health, to promote the welfare of the state and to provide an adequate public agency to act as a disciplinary body for the members of the medical profession licensed

> to practice medicine and surgery in this state; (2)Because the health and well-being of the people of the state are of paramount importance; (3) Because the conduct of members of the medical profession licensed to practice medicine and surgery in this state plays a vital role in preserving the health and well-being of the people of the state;. . . .

RCW 18.71.003.

The Commission must hold the hearing in order to protect the public from the conduct of Dr. Eggleston. Delay thwarts the duty of the Commission and leaves the public exposed to Dr. Eggleston's unprofessional conduct. On balance, the Commission's duty to protect the public outweighs Dr. Eggleston's interest in judicial intervention into the legislatively decreed administrative process.

B. The Commission is Likely to Prevail on the Constitutional Merits on Appeal

As shown above, Dr. Eggleston is not likely to prevail in the underlying action because he seeks a remedy under the UDJA that does not exist in the UDJA. But even if he could overcome this impassable obstacle, he cannot show a likelihood of

prevailing on his constitutional claims. First, the disciplinary statutes the Commission is enforcing are content neutral. They target any kind of immoral, dishonest, misleading, or corrupt conduct by doctors, whether or not they are effected by means of speech and regardless of viewpoint. The requirement is that the conduct be committed by a physician and be related to the practice of the profession. As such, it is highly unlikely that strict scrutiny will apply. Nevertheless, factual determinations must be made with the expertise of the commission to determine whether Dr. Eggleston's conduct met the definition of the statute, constituted moral turpitude, whether his statements of fact were medically false and misleading, and whether they constituted the practice of medicine.

Dr. Eggleston has failed to brief any balancing test of First Amendment scrutiny for the exercise of his right. Assuming *arguendo* that his First Amendment rights are infringed by the Commission's actions, this does not necessarily result in the conclusion that the action is unconstitutional. Even if strict

scrutiny is applied, the Commission posits two compelling interests for its action that are well grounded in First Amendment jurisprudence.

First, the Commission and the state more broadly have a compelling interest in protecting the public health and safety from dangerous infections disease and rogue physicians. *E.g. Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27, 25 S. Ct. 358, 362, 49 L. Ed. 643 (1905) ("Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."); *Dent*, 129 U.S. at 122–23. Dr. Eggleston's remarks may be considered as lethal statements as physician witnesses at the Commission hearing are expected to testify. *See* allegation in Statement of Charges, Brewer Decl., Exhibit 1 The Commission's duty to protect the public and regulate practitioners is only more compelling during a pandemic. The Commission interest persists after the pandemic because it must act when it can and must prevent such egregious

conduct for the next pandemic through clear delineation of what the profession and medicine require.

Second, the Commission has a compelling interest in preserving the integrity of the medical profession and its standing in the eyes of the public. Without trust in physicians, the general public is without effective means to protect itself from disease. When physicians act as Dr. Eggleston has, it makes it easy for those with scientifically unsupportable opinions to mislead or prey upon the public for corrupt purposes or simply out of ignorance. The Commission is charged with policing the imprimatur that it grants to physicians through licensure. *Tingley v. Ferguson*, 47 F.4th 1055, 1082 (9th Cir. 2022) (When a health care provider "acts or speaks about treatment with the authority of a state license, that license is an imprimatur of a certain level of competence." (internal quotation omitted)).

Facts must be established at hearing to support or contest these interests. There must be a record for this court to apply to Dr. Eggleston's as applied challenge.

V. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court deny Dr. Eggleston's request for a preliminary injunction.

This document contains 3046 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 22nd day of May, 2023

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on May 22, 2023, I served a true and correct copy of ***Washington Medical Commission's Memorandum in Opposition to Petitioner's Emergency Motion for Injunction Pursuant to RAP 8.3; Declaration of Kristin G. Brewer in Support of Memorandum in Opposition to Petitioner's Emergency Motion for Injunction Pursuant to RAP 8.3*** by e-mail through the Court's e-filing system:

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