

NO. A06-1365

State of Minnesota
In Court of Appeals

Fatih M. Uckun, M.D.,

Appellant,

vs.

Minnesota State Board of Medical Practice,

Respondent.

**APPELLANT'S REPLY BRIEF
AND SUPPLEMENTAL APPENDIX**

HENSON & EFRON, P.A.
Stuart T. Williams (#11750X)
Alan C. Eidsness (#26189)
220 South Sixth Street, Suite 1800
Minneapolis, MN 55402
(612) 339-2500

Attorneys for Appellant

OFFICE OF MINNESOTA
ATTORNEY GENERAL
John S. Garry (#208899)
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 282-5719

Attorney for Respondent

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INTRODUCTION

Respondent Minnesota State Board of Medical Practice (“Board”) asserts the extraordinary power to summarily suspend the medical license of Appellant Dr. Fatih Uckun (“Dr. Uckun”) without a full due process hearing based on nothing more than probable cause and then immediately to publicly brand Dr. Uckun as deceptive, unethical, incompetent, unprofessional and as presenting a serious risk of harm to the public before a final Board disciplinary decision on the merits.

The Board further asserts its actions are immune from judicial review until completion of an administrative process which in this case will run for more than a year, well after Dr. Uckun’s professional and personal reputation have been irreparably ruined and his right to earn a living destroyed.

The Board’s asserted powers violate basic principles of due process and plain statutory mandates. For all the reasons detailed in Dr. Uckun’s Brief (“U.Br.”) and in this Reply Brief, the Board’s position should be rejected.

ARGUMENT

I. The Board Cannot Escape Judicial Review of Its Use of Probable Cause.

The Board concedes, as it must, that it used probable cause as the standard of proof for suspending Dr. Uckun’s license pursuant to Minn. Stat. § 147.091, subd. 4. Board’s Brief (“B.Br.”) 3, 9. The Board argues the Court need not review the Board’s use of the probable cause standard because the Board also used preponderance of the evidence. Thus, according to the Board, Dr. Uckun’s challenge to the license suspension

“can succeed only if due process required the Board to apply the even higher standard of clear and convincing evidence.” B.Br. 10.

This non-sequitur cannot stand. Regardless of Dr. Uckun’s due process claim, there is no authority for the Board’s use of probable cause in proceedings pursuant to Minn. Stat. §147.091, subd. 4. The statute itself is silent as to the applicable standard of proof, thus invoking Minn. Rule 1400.7300, subp. 5, which, independent of due process, requires for administrative proceedings “a preponderance of the evidence standard, unless the substantive law provides a different . . . standard.” See In re Wang, 441 N.W.2d 488, 492 (Minn. 1989). The fact the legislature explicitly authorized the Board to use probable cause in physician disciplinary proceedings under two other statutes (Minn. Stat. § 147.092, for sexual misconduct, and Minn. Stat. § 214.104(c), for misconduct involving vulnerable persons), but did not authorize the Board to use probable cause for proceedings under Minn. Stat. § 147.091, sub. 4, further makes clear the Board was not authorized to use probable cause in suspending Dr. Uckun’s license.

The Board makes no attempt to justify or defend its use of probable cause, which is a clear violation of Minn. Rule 1400.7300, subp. 5, and Wang (see U.Br. 20-23), in addition to being a violation of due process. For this reason alone Dr. Uckun is entitled partial summary judgment on Counts I and II declaring the Board’s use of probable cause illegal and enjoining the Board from using that standard of proof in ongoing and future disciplinary proceedings pursuant to Minn. Stat. § 147.091, subd. 4.

II. There Is No Binding Precedent Foreclosing Dr. Uckun’s Due Process Claim.

The Board claims In re Friedenson, 574 N.W.2d 463 (Minn. App. 1998) is binding precedent for the proposition that due process does not require the use of clear and convincing evidence in physician disciplinary proceedings. The Board is dead wrong.

Friedenson did rule that clear and convincing evidence was not required in physician disciplinary proceedings, citing Minn. Rule 1400.7300, subp. 5. The court there also rejected what it called a “vague” argument to the contrary, “seeming to stem from what [the physician] considers the constitutional strictures on the proceeding.” 574 N.W.2d 466. But these oblique comments cannot be read as passing on the merits of the claim here that (1) Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) and Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804 (1979) mandate the application of a three-part test to determine the standard of proof required by due process -- a three-part test adopted by the Minnesota Supreme Court in Fedziuk v. Commissioner of Public Safety, 696 N.W.2d 340, 344 (Minn. 2005)¹ -- and (2) application of the three-part test here mandates use of the clear and convincing standard in proceedings to suspend a physician’s license. Indeed, Friedenson makes no reference to Mathews or Addington and never uses the words “due process” in its opinion. Accordingly, Friedenson is not precedent, much less binding precedent, for the issues raised in this appeal.

“It is elementary that no decision has any authoritative value beyond the proportions established by its controlling facts.” In re Peterson’s Estate, 230 Minn. 478,

¹ Fedziuk, 696 N.W.2d at 344 (“[w]e employ[] a three-part test established by the United States Supreme Court in Mathews * * * [u]nder Mathews, a court must consider three factors”).

42 N.W.2d 59, 65 (1950). “It is not to be thought that a question not . . . discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered.” United States v. Mitchell, 271 U.S. 9, 14, 46 S.Ct. 418, 419-420 (1926).

The Board cannot create precedent by citing an issue raised in a brief but not addressed by the court in its opinion. See, e.g., Webster v. Fall, 266 U.S. 507, 511, 45 S.Ct. 148, 149 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”); National Cable Television Ass’n., Inc. v. American Cinema Editors, Inc., 937 F.2d 1572, 1581 (Fed. Cir. 1991) (“When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issues arises.”); Coons v. Journeymen, Barbers Local Union No. 31, 222 Minn. 100, 23 N.W.2d 345, 347 (1946) (“the authority of a decision is to be determined only by the facts upon which it was based, [and] it is not permissible in that connection to consider other facts appearing either in the opinion or in the record”).

If the Friedenson court had intended to decide whether the Mathews/Addington due process analysis required clear and convincing evidence as the standard of proof in physician disciplinary proceedings, surely the court would have referred to the two Supreme Court decisions and used the phrase “due process” in its opinion. Even if Friedenson’s reference to the physician’s “vague” reasoning based on unarticulated constitutional strictures could remotely be construed as addressing the claim here, stare decisis does not prevent the Court from addressing Dr. Uckun’s claim. “Stare decisis is

not an inflexible rule of law.” Johnson v. Chicago, Burlington & Quincy R.R. Co., 243 Minn. 58, 66 N.W.2d 763, 770 (1954). “[S]tare decisis does not bind [the court] to unsound principles.” Oanes v. Allstate Ins. Co., 617 N.W.2d 401, 406 (Minn. 2000). As explained in Naftalin v. King, 257 Minn. 498, 102 N.W.2d 301, 302 (1960):

The rule of stare decisis is not an inflexible rule of law. It is a guiding policy of the law when all factors involved in following or not following the rule are taken into consideration. [Citation omitted.] Whether or not the rule of stare decisis should be followed is a question entirely within the discretion of the court which it is again called upon to consider a question once decided.

Perhaps the best, recent discussion of stare decisis by a Minnesota court is found in Wells Fargo & Co. v. Commissioner of Revenue, 2002 WL 1077735 *6-7 (Minn. Tax):

Under the doctrine of stare decisis, courts follow the precedent of former judicial decisions to ensure consistency, and to avoid re-litigation of the same legal issues. Care Inst., Inc. v. County of Ramsey, 576 N.W. 2d 734, 737 (Minn. 1998). If a decision lacks argument directly on point, or makes a conclusion regarding an issue unsupported by legal justification, it is not binding upon determination of that issue by subsequent courts. United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (an issue neither raised in briefs or argument nor discussed in the opinion is not binding precedent on that legal point). Similarly, “[t]he rule of stare decisis is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question.” Fletcher v. Scott, 277 N.W. 270, 272 (Minn. 1938) (citations omitted).*** In Brecht v. Abrahamson, 507 U.S. 619, 631 (1993), the United States Supreme Court reaffirmed the established rule that, if a decision does not directly address an issue, the Court remains “free to later address [that issue] on the merits.” “A point of law merely assumed in an opinion, not discussed, is not authoritative.” In re Stegall, 865 F.2d 140, 142 (7th Cir. 1989).

Appellant’s Supplemental Appendix (“S.A.”) 5. Friedenson did not directly address the due process claim in this case -- or even come close -- because Friedenson was never squarely confronted with the issue. Friedenson cannot be made into a “silk purse”; and

the Board cannot hide behind Friedenson as an excuse for violating Dr. Uckun's due process rights.

The Board also misreads Steadman v. Securities and Exchange Commission, 450 U.S. 91, 101 S.Ct. 999 (1981), cited in Section I.B. of its Brief in discussing Friedenson. The Board asserts that in Steadman "the United States Supreme Court has not required the clear and convincing standard in [administrative] proceedings, even where the disciplinary action can result in loss of one's profession." B.Br. 15.

Steadman, however, never addressed the issue of due process. The sole issue in Steadman was whether 5 U.S.C. § 556(d) required the preponderance of the evidence standard in disciplinary proceedings before the SEC. 450 U.S. 97, 101 S.Ct. 1005-1006 ("The answer to the question presented in this case turns therefore on the proper construction of" 5 U.S.C. § 556(d)). Steadman thus involved only a question of statutory construction. Contrary to the Board's suggestion, Steadman did not involve a due process claim, as demonstrated by the Supreme Court's pointed statement that "[p]etitioner makes no claim that the Federal Constitution requires application of a clear-and-convincing evidence standard." 450 U.S. 98 n.15, 101 S.Ct. 1006 n.15.

III. The Supposedly "Temporary" Nature of Dr. Uckun's License Suspension Alters Nothing.

The Board suggests the supposedly "temporary" nature of Dr. Uckun's license suspension means the Mathews/Addington due process analysis does not require application of the clear and convincing standard of proof. This argument fails, because the suspension is temporary in name only. Dr. Uckun was stripped of his license in

January 2006; and testimony in the ongoing administrative proceeding now is scheduled into December 2006. A decision by the Administrative Law Judge after the close of evidence and a final decision by the Board will not occur until sometime in 2007.

Furthermore, the Board ignores the fact Dr. Uckun has not only been deprived of a protected property right in the loss of his license but also that his protected liberty interests have been violated. As explained in Dr. Uckun's Brief at 11 and undisputed by the Board, the stigma to Dr. Uckun's reputation when the Board published its interim disciplinary decision coupled with his loss of license independently invokes due process protection. Thus, it is not only the "temporary" loss of license but also the stigma to Dr. Uckun's reputation which requires application of the clear and convincing standard under the Mathews/Addington analysis.

The Board misreads Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642 (1979) for the proposition that the "use of probable cause standard for temporary suspension of harness racing trainer's license, pending an adversarial evidentiary hearing, did not violate due process." B.Br. 13. The Board repeats its misreading of Barry by later citing the case as holding "that due process does not require the highest civil standard of clear and convincing evidence as the standard of proof in a summary proceedings for a temporary suspension." B.Br. 17-18. Barry stands for neither proposition.

In Barry, a trainer's license was summarily suspended pending an administrative hearing. The sole due process issue before the Supreme Court was whether due process required a pre-deprivation hearing.

We agree with appellants that § 8022 does not affront the Due Process Clause by authorizing summary suspensions without a presuspension hearing, and we reject Barchi's contrary contention. * * * We do not agree with Barchi's basic contention . . . that an evidentiary hearing was required prior to the effectuation of his suspension.

443 U.S. 63, 64, 99 S.C. 2648, 2649. The constitutionality of the standard of proof was never an issue in the case. Thus Barry provides no precedent for the Board.

IV. The Exhaustion Doctrine Is Inapplicable.

The Board argues Dr. Uckun may not seek declaratory or injunctive relief regarding the Board's use of an unconstitutional standard of proof because of the doctrine of exhaustion of administrative remedies, citing Thomas v. Ramberg, 240 Minn. 1, 60 N.W.2d 18 (1953) and State ex. rel. Sheehan v. District Court, 253 Minn. 462, 93 N.W.2d 1 (1958). Neither case is applicable.

Thomas and Sheehan hold that a party may not enjoin an administrative proceeding merely out of concern about a possible future adverse decision and must instead allege imminent and irreparable injury. Unlike the plaintiffs in Thomas and Sheehan, Dr. Uckun has done just that. As alleged in paragraph 22 of the Complaint, the Board's use of the probable cause and preponderance of the evidence standards of proof in disciplinary proceedings against him "has and will cause Dr. Uckun immediate and irreparable harm." A. 6. Beyond this allegation, which is deemed true on this appeal, it is undisputed that the Board's actions have deprived Dr. Uckun of his license to practice medicine, prevented him from earning a living in his chosen profession for going on nine months, violated his liberty interests, and irreparably stained his reputation.

The Board mistakenly asserts that the futility exception to the exhaustion doctrine does not apply in this case because the Board is free to reconsider its firm stance that clear and convincing evidence is not the applicable standard of proof. But the Board already has unequivocally rejected the clear and convincing standard at least three times in this case, when the Board (1) explicitly rejected the clear and convincing standard in its Temporary Suspension Order dated January 27, 2006 (A. 17-18), (2) opposed Dr. Uckun's motion before the Administrative Law Judge for use of the standard in the ongoing administrative proceedings (Respondent's App. 22-25), and (3) moved in district court for summary judgment for dismissal of Dr. Uckun's claim that the standard was constitutionally required. The Board has plainly committed itself on the use of the clear and convincing standard; and the exhaustion doctrine therefore has no application here. State Board of Medical Examiners v. Olson, 295 Minn. 379, 206 N.W.2d 12, 17 (1973) (two state boards unequivocally committed themselves, thereby invoking the futility exception to the exhaustion doctrine, by taking a position on the issue in question in pleadings filed with the court).

Indeed, the Board has done far more than commit itself to the position that clear and convincing evidence is not the applicable standard. The Board has acted on its position by using lower standards of proof to strip Dr. Uckun of his license.

V. The Board's Jurisdictional Argument Is Without Merit.

The Board argues courts do not have jurisdiction under the Declaratory Judgment Act to decide an issue in an ongoing administrative proceeding before the agency has issued its final decision, citing as sole authority for this proposition Southern Minnesota

Constr. Co. v. Minnesota Dep't. of Transportation, 637 N.W.2d 339 (Minn. App. 2002).

Southern Minnesota provides no such precedent.

Southern Minnesota held only that the lawsuit there was premature because the agency action in question had not yet affected the plaintiffs' rights. 637 N.W.2d 344 ("Until the administrative action ripens, it is premature to say that appellants' legal interests are prejudicially affected."). In this case, Dr. Uckun's rights unequivocally have been prejudicially affected -- the Board has suspended his license to practice medicine in violation of his constitutional rights and publicly branded him a dangerous charlatan. It is nonsense for the Board to assert there is no jurisdiction under the Declaratory Judgment Act because Dr. Uckun has not yet been injured.

A constitutional challenge is a controversy requiring judicial intervention, and a declaratory judgment is an appropriate remedy. See Neeland v. Clearwater Mem. Hospital, 257 N.W.2d 366, 368-369 (Minn. 1977); Farrell v. City of Minneapolis, 2004 WL 885692 *2 (Minn. App.) ("[D]eclaratory judgment is an appropriate remedy for a controversy regarding legal rights that require judicial interpretation [citation omitted] [a]nd a constitutional challenge of a statute or ordinance is a controversy that requires judicial interpretation") (Appellant's S.A. 8).

The Board's attempt to distinguish Connor v. Township of Chanhassen, 249 Minn. 205, 81 N.W.2d 789 (1957) as contrary authority is unpersuasive. Connor holds that there is jurisdiction under the Declaratory Judgment Act to address a constitutional question notwithstanding a claim that administrative remedies have not been exhausted, because "[t]he existence of another adequate remedy does not preclude a judgment for

declaratory relief in cases where it is appropriate,” quoting from Barron v. City of Minneapolis, 212 Minn. 566, 4 N.W.2d 622, 624 (1942). 81 N.W.2d 793-794. The Board argues Connor should be distinguished because the challenge there was to the constitutionality of an ordinance rather than a challenge to the constitutionality of the township’s actions under the ordinance; B.Br. 21 n.5; but Connor makes no such distinction.

The Board similarly misreads McKee v. County of Ramsey, 310 Minn. 192, 245 N.W.2d 460 (1976) for the proposition that an aggrieved person may sue an agency before a final agency action on a claim that the agency is acting pursuant to an unconstitutional statute or ordinance but may not sue the agency on a claim that the agency is acting in violation of due process guarantees under the federal and state constitutions. Such a proposition makes no legal or common sense. If, as here, the exhaustion doctrine does not apply because the Board has unequivocally committed itself to the position that clear and convincing evidence does not apply in physician disciplinary proceedings, Dr. Uckun’s right to seek immediate judicial relief does not and cannot turn on whether the Board asserts statutory authority for its unconstitutional actions.

VI. The Board Fails to Address -- and Thus Defaults on -- the Merits of Dr. Uckun’s Due Process Claim.

Dr. Uckun’s due process claim is straightforward. See U.Br. 6-17. Application of Mathews and Addington requires the Board to use clear and convincing evidence as the standard of proof in disciplinary proceedings against Dr. Uckun, both in the proceeding

which resulted in the Temporary Suspension Order dated January 27, 2006, and in all subsequent proceedings seeking to strip him of his license to practice medicine.

The Board never responds to the merits of Dr. Uckun's due process claim. Indeed, the Board fails in its Brief to cite, much less to discuss, Mathews and Addington. Instead, the Board asserts Dr. Uckun's claim should be dismissed because its claim is based on "selected cases from other states." B.Br. 27-28. Not so -- Dr. Uckun's due process claim is based on Mathews and Addington. Mathews and Addington are listed by Dr. Uckun in the "Legal Issues" section of his Brief as the two most apposite cases on the issue of due process and are subsequently cited fourteen times in Dr. Uckun's Brief. See U.Br. iii, 1. The Board's failure to mention either case even once in its Brief speaks volumes.

The Board correctly notes that the Minnesota and United States Supreme Courts have not held due process requires clear and convincing evidence in physician disciplinary proceedings, but that is merely because neither court has been asked to rule on the issue. In the absence of binding precedent, this Court therefore is called upon to apply the constitutional analysis adopted by Mathews and Addington.

The Board is selective in its treatment of decisions from other state courts. Although six of the last eight state supreme courts to address the issue have held that clear and convincing evidence is the required standard in physician disciplinary proceedings,² the Board rejects without analysis all six decisions. Instead, the Board

² Nguyen v. Washington Dept. of Health Medical Quality Assurance Commission, 144 Wash.2d 516, 29 P.3d 689, 692 (2001); In re Setliff, 2002 S.D. 58, 645 N.W.2d 601, 608;

argues this Court should follow a lower court opinion from Wisconsin³ and an opinion from New Jersey,⁴ which both predate the six more recent supreme court decisions which examined the issue.

The Board disingenuously asserts that “[t]he majority of other states do not require the use of the clear and convincing standard in medical disciplinary proceedings,” citing the dissent in Nguyen v. Washington Dept. of Health Medical Quality Assurance Commission, 144 Wash.2d 516, 29 P.3d 689 (2001). B.Br. 15-16. The Board ignores the fact the majority in Nguyen listed the states which have addressed the issue as being evenly divided and Nguyen’s finding that “the more recent decisions trend toward requiring the higher standard.” 29 P.2d 691 n.3. The Board also ignores the fact the cited dissent’s statement in Nguyen regarding what other states have done relies on the dissent in Johnson v. Board of Governors of Registered Dentists, 913 P.2d 1339 (Okla.

Painter v. Abels, 998 P.2d 931, 941 (Wyo. 2000); Johnson v. Board of Governors of Registered Dentists, 913 P.2d 1339, 1345 (Okla. 1996); Mississippi State Board of Nursing v. Wilson, 624 So.2d 485, 493 (Miss. 1993); Davis v. Wright, 243 Neb. 931, 503 N.W.2d 814 (1993).

³ Gandhi v. State Med. Examining Board, 483 N.W.2d 295 (Wis. App. 1992).

⁴ In re Polk, 90 N.J. 550, 449 A.2d 7 (1982). The Board seeks unearned mileage from Polk, asserting that “this Court has cited [Polk] where the New Jersey Supreme Court rejected the claim that due process requires use of the clear and convincing standard in medical disciplinary proceedings.” B.Br. 15. The two cases cited by the Board are In re Kane, 473 N.W.2d 869 (Minn. App. 1991) and In re Schultz, 375 N.W.2d 509 (Minn. App. 1985); but neither case endorsed Polk’s ruling on due process. In Schultz, Polk received a “see also” cite with no mention of due process. 375 N.W.2d 514. In Kane, Polk is cited only for the proposition that equal protection does not require clear and convincing evidence in license revocation proceedings; again with no mention of due process. 473 N.W.2d 874.

1996), where the majority held that due process requires application of the clear and convincing standard of proof. Furthermore, the dissent in Johnson, relied on by the dissent in Nguyen, cannot count opinions.⁵

VII. The Board Ignores Key Portions of Dr. Uckun’s Argument Regarding Publication of the Temporary Suspension Order and Errs in Concluding that Minn. Stat. §§ 147.01, subd. 4(b), 147.02, subd. 6, and 214.103, subd. 9, Require Publication of the Order.

Dr. Uckun argues that the Temporary Suspension Order dated January 27, 2006, is inextricably linked to and is the product of the Board’s ongoing civil investigation of him and thus is classified by the Minnesota Government Data Practices Act (“MGDPA”), Minn. Stat. §§ 13.39, subd. 2(a) and 13.41, subd. 4, as non-public data which pursuant to Westrom v. Minnesota Department of Labor, 686 N.W.2d 27 (Minn. 2004) may not be disclosed. U.Br. 32-34. See also Navarre v. South Washington County Schools, 652 N.W.2d 9, 24, 28 (Minn. 2002) (disclosing comments about complaints under investigation before a final disciplinary action violates the MGDPA; and disclosure of information that “teacher had been suspended before there had been a final disposition of a disciplinary action” violates the MGDPA). The Board chooses not to refute or respond to this argument, failing to discuss the statutes, Westrom or Navarre in its Brief.

⁵The dissent in Johnson said research in 1996 located only four states which had struck down the preponderance of the evidence standard: Mississippi, Wyoming, Nebraska and California. 913 P.2d 1353 n.1. The Johnson dissent overlooked such cases as In re Zar, 424 N.W.2d 598, 602 (S.D. 1989) (“we determine that the appropriate standard [for revoking a professional license] is clear and convincing evidence”) and Bernard v. Bd. of Dental Exam’s, 2 Or. App. 22, 465 P.2d 917, 924 (1970) (adopting clear and convincing evidence as the standard for revoking a dental license).

Dr. Uckun also argues that the MGDPA and the Medical Practice Act (“MPA”), Minn. Stat. § 147.01, subd. 4, as construed and applied by Doe v. State Board of Medical Examiners, 435 N.W.2d 45 (Minn. 1989), prohibits the Board from disclosing interim disciplinary decisions until and unless the interim charges are sustained in a final disciplinary decision. The Board also fails to refute or respond to this argument.

Instead, the Board limits its defense to publishing the Temporary Suspension Order to the argument that three statutes require publication of the Order: Minn. Stat. §§ 147.01, subd. 4(b), 147.02, subd. 6, and 214.103, subd. 9. The Board does not reconcile its reading of those three statutes with the MGDPA, Westrom, Navarre or Doe.

Minn. Stat. § 214.103, subd. 9, provides that a health licensing “board shall furnish to a person who made a complaint a description of the actions of the board relating to the complaint.” But the statute says nothing about when that information is to be provided to the complainant. Consistent with the requirements of the MGDPA, MPA, Westrom, Navarre and Doe, Minn. Stat. § 214.103, subd. 9, easily can be read to provide for disclosure of the Board’s action to a person who made a complaint only after final disciplinary action by the Board. There is nothing in the statute which requires premature publication of interim actions by the Board during an ongoing investigation pending a final decision.

Minn. Stat. § 147.02, subd. 6, provides that “[a]t least annually the board shall publish and release to the public a description of all disciplinary measures taken by the board.” Again, the statute can be read to provide for disclosure of the Board’s disciplinary measures after, but not before, the measures become final. This reading does

not alter the meaning of the statute but rather construes the statute consistent with the MGDPA, MPA, Westrom, Navarre and Doe which bar the publication of interim disciplinary measures before a final agency decision.

Minn. Stat. § 147.01, subd. 4(b), is the crux of the dispute between the Board and Dr. Uckun regarding publication of the Temporary Suspension Order. The statute states in relevant part:

If the board imposes disciplinary measures of any kind, whether by contested case or by settlement agreement, the name and business address of the licensee, the nature of the misconduct, and the action taken by the board are public data.

Dr. Uckun's reading of the statute -- consistent with the MGDPA, MPA, Westrom, Navarre and Doe -- is detailed at pages 30-42 of Dr. Uckun's Brief and will not be repeated here.

The Board's points in opposition are not persuasive. The Board reads the statute in isolation by arguing that the qualifying phrase "whether by contested case or by settlement agreement" does not limit and define the preceding phrase "disciplinary measures of any kind." In doing so, the Board asserts the word "any" in the first phrase should be read broadly and the word "whether" in the second phrase should not be read as a word of limitation. But contrary constructions of such individual words can easily be found.

Thus, "any" may mean "some" and is not dispositive as to the breath of the statute. See, e.g., Mississippi State Board of Nursing v. Wilson, 624 So.2d 485, 493 (Miss. 1993) ("any" is defined in Black's Law Dictionary as 'some; one out of many; an indefinite number'); United States v. Alvarez-Sanchez, 511 U.S. 350, 357, 114 S.Ct. 1599, 1603

(1994) (“We believe respondent errs in placing dispositive weight on the broad statutory reference to ‘any’ law enforcement officer or agency without considering the rest of the statute.”).

The Board does not dispute the holding in State v. Wilson, 524 N.W.2d 271, 273 (Minn. App. 1994) that a “whether” clause qualifies an immediately preceding phrase in a statute. The Board also does not dispute the fact the Board’s line of cases from other jurisdictions construing the word “whether” in other statutes as not a word of limitation are all derived from an 1845 Pennsylvania opinion, which is not controlling here and for which no counterpart in Minnesota case law is cited by the Board.⁶ See Galbreath v. Gulf Oil Corp., 294 F.Supp. 817, 824 (N.D. Ga. 1968), aff’d 413 F.2d 941 (5th Cir. 1969) (tracing the line of cases to the 1845 Voegtly opinion from Pennsylvania). Even Galbreath, cited by the Board, quotes from an earlier case which notwithstanding Voegtly recognizes that in construing certain statutes “an enumeration after the word whether might be held as exclusive.” 294 F.Supp. 824 (quoting from Board of Supervisors v. Vicksburg Hospital, 173 Miss. 805, 163 So. 382 (1935)).

In a nutshell, the Board would have the Court read the “whether” clause as expanding on the meaning of the preceding clause, and Dr. Uckun would have the Court read the “whether” clause as limiting or defining the preceding clause. But parsing the

⁶ The Board misreads Avery v. Campbell, 279 Minn. 383, 157 N.W.2d 42, 45-46 (1968) for the proposition that a “whether clause in a court rule did not limit the rule’s scope.” B.Br. 33-34. In fact, the court there held that the whether clause “injected [ambiguity] into the meaning of this rule” and went on to hold that the rule -- not the whereas clause - - “was not intended as a limitation” based on the court’s reading of other precedent. 157 N.W.2d 46.

meaning of the words in Minn. Stat. § 147.01, subd. 4(b), in isolation and based on what other courts in other states have said about the word “whether” in other statutes is not informative.

The circularity of the Board’s expansive reading of the statute is apparent. The Board argues the “[p]hrase ‘disciplinary measures of any kind’ clearly refers to all disciplinary measures.” B.Br. 32. The Board then argues that the modifying clause “whether by contested case or by settlement agreement” “emphasizes the breath of the disciplinary measures encompassed by the preceding term ‘any kind’.” *Id.* But if the phrase “disciplinary measures of any kind” means “all measures,” there is no need to emphasize the breath of the phrase. There is no need to expand the scope of what the Board claims is already an all encompassing phrase. Thus, under the Board’s reading of the statute, the qualifying phrase “whether by contested case or by settlement agreement” impermissibly becomes superfluous. See, e.g., Minn. Stat. § 645.16 (“Every law shall be construed, if possible, to give effect to all its provisions.”); Anderson v. Commissioner of Taxation, 253 Minn. 528, 93 N.W.2d 523, 525 (1958) (“a statute is to be construed as a whole so as to harmonize and give effect to all its parts, and where possible, no word, phrase, or sentence will be held to be superfluous, void, or insignificant”).

For the phrase “whether by contested case or settlement agreement” to have any meaning, the phrase must serve as a limitation on the preceding phrase. The only way to give meaning to the limitation is to read the modified phrase “disciplinary measures of any kind” to refer to the “types” or “kinds” of disciplinary measures the Board is authorized to impose by Minn. Stat. § 147.141. See U.Br. 36 & n.7. The Board errs in

not doing so and instead reading “disciplinary measures of any kind” to refer to the fact of discipline regardless of whether the disciplinary process has been completed.

Perhaps the Board’s reading might have some merit if the statute were read in isolation and without context. But Minn. Stat. § 147.01, subd. 4(b), must be read in pari materia with Minn. Stat. § 13.41, subd. 4 (renumbered in 2000 from subd. 5, see U.Br. 38 n.8) as required by Doe and must be read in conjunction with Westrom, Navarre and the MGDPA which classify as nonpublic data ongoing civil investigations and interim orders inextricably linked to the investigations.

Pursuant to Doe, the Board may not disclose disciplinary charges which are not sustained in a final Board decision. The Board’s reading of Minn. Stat. § 147.01, subd. 4(b), would allow the Board to subvert Doe by authorizing publication of interim charges before a final decision, interim charges which may well be found wanting by the Board after the physician is afforded due process. The Board in its brief never reconciles its reading of Minn. Stat. § 147.01, subd. 4(b), with Doe.

The Board repeatedly asserts that to construe applicable sections of the MGDPA and MPA and Doe, Westrom and Navarre as prohibiting the publication of a temporary license suspension “would lead to absurd results that prevent the public from being informed that a physician’s license has been temporarily suspended.” B.Br. 30-31.

But the public is fully protected because Dr. Uckun is prohibited from practicing medicine pending a final decision by the Board. (There is no evidence, allegation, or even suggestion by the Board that Dr. Uckun has practiced or will practice medicine during the term of his license suspension. As the Board notes, it is unlawful to practice

medicine without a license.) Furthermore, as noted by Dr. Uckun in his Brief at 42 and undisputed by the Board, nothing in this case prevents the Board from advising the public who is licensed and who is not.

The Board's citation to Minneapolis Star & Tribune Co. v. Minnesota State Board of Medical Examiners, 282 Minn. 86, 163 N.W.2d 46 (1968) for the proposition that the public is entitled to know if disciplinary action has been taken against a physician is misplaced. The opinion was rendered prior to the adoption of the MGDPA and the current version of the MPA; and there is nothing in the opinion to suggest the court there was referring to interim decisions by the Board. In fact, the Board and the court in that case expressed concern about the disclosure of unevaluated charges, which if disclosed prior to a final decision would unfairly injure the character and reputation of innocent persons; 163 N.W.2d 49 & n.5; the same concern applicable here to probable cause allegations against Dr. Uckun which have not been vetted by due process and which, if dismissed by the Board after a due process hearing, Doe bars from disclosure.

HENSON & EFRON, P.A.

Dated: October 6, 2006

By Stuart T. Williams

Stuart T. Williams, #11750X

Alan C. Eidsness, #26189

Suite 1800

220 South Sixth Street

Minneapolis, Minnesota 55402-4503

Telephone: 612-339-2500

Attorneys for Appellant

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).