No. _____

In The
SUPREME COURT OF THE UNITED STATES

Brent A. Ristow,
Pro se Petitioner,

v.

Amanda Cunningham,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of Minnesota in A21-1204.

APPENDIX TO: PETITION FOR WRIT OF CERTIORARI, RISTOW

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Appendix to Petition in *Ristow v. Cunningham*

TABLE OF CONTENTS

STATE OF MINNESOTA COUNTY OF RAMSEY
DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Personal Injury

Brent Ristow,
Plaintiff,
v.
Amanda Cunningham,
Defendant.

Court File No. 62-CV-19-5039
Judge Laura Nelson

ORDER GRANTING DEFENDANT AMANDA CUNNINGHAM'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND CHANGE OF VENUE

This matter did not come for a hearing before the undersigned and was decided based on party submissions.[1] Based upon the files, records, and proceedings herein, and the arguments of counsel, **IT IS HEREBY ORDERED**:

1. Pursuant to the Ramsey County Chief Judge's Administrative Order of May 19, 2020—a copy of which has been filed in this matter—and in light of the current health pandemic, this motion was considered on the parties' written submissions without oral argument.

1. Defendant Amanda Cunningham's motion for partial summary judgment is **GRANTED** as to Plaintiff's two claims that Defendant communicated defamatory statements to the Minnesota Board of Law Examiners.
2. Defendant's Motion for Change of Venue is **GRANTED**. The venue of Ramsey County court file no. 62-CV-19-5039 shall be transferred to St. Louis County pursuant to Minn. Stat. 542.11 subd. 4. The Court Administrator of Ramsey County shall transfer the contents of the file to the Court Administrator of St. Louis County.
3. The attached Memorandum shall be incorporated into this Order.

IT IS SO ORDERED.

BY THE COURT:

Dated: August 31, 2020

_____/s/_____
LAURA NELSON
JUDGE OF
DISTRICT COURT

MEMORANDUM

Statement of Facts

Plaintiff Brent Ristow ("Ristow") alleges the following facts in his First Amended Complaint ("FAC"): Ristow and Defendant Amanda Cunningham ("Cunningham") were in a romantic relationship starting in 2016 and ending in February 2017. (FAC, ¶¶ 5-8). On or about July 27, 2017, Cunningham contacted Ristow's father, Mr. Dennis Ristow, and told Mr. Dennis Ristow that Ristow had threatened Cunningham's life on multiple occasions and had failed to repay a loan to Cunningham. (FAC, ¶¶ 9-10). On or about August 3, 2017, Cunningham contacted a third-party, Mr. Robert Barnes, and communicated the same allegedly defamatory statements that Ristow had threatened her life and failed to repay a loan. (FAC, ¶¶ 11-12). On or about October 12, 2018, Ristow communicated with the Minnesota Board of Law Examiners (the "Board") via phone and sworn affidavit that Ristow had threatened her life on multiple occasions and failed to repay a loan to her. (FAC, ¶¶ 13-14). Ristow claims he never threatened Cunningham or entered into a loan agreement with her. (FAC, ¶¶ 15-16).

Ristow filed the FAC on August 6, 2019, alleging three counts against Cunningham: (1) Defamation per se for communication to Mr. Dennis Ristow, Mr. Barnes, and the Board of the statement that Ristow had threatened her life, and (2) Defamation for communication to Mr. Dennis Ristow, Mr. Barnes, and the Board of the statement that Ristow had failed to repay a loan to Cunningham. Cunningham filed the instant motion for partial summary judgment on May 8, 2020, and the motion to change venue on May 21, 2020.

I. Cunningham's Motion for Partial Summary Judgment

Every alleged defamatory statement constitutes its own claim. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 675 n.8 (Minn. 2003). The FAC alleges Cunningham made six separate defamatory statements: two to Mr. Dennis Ristow in St. Louis County, two to Mr. Robert Barnes in St. Louis County, and two to the Board, located in Ramsey County. Therefore Ristow alleges six claims of defamation or defamation per se. Cunningham's motion for partial summary judgment seeks summary judgment only as to the two claims related to Cunningham's statements to the Board.

Legal Standard for Motion for Summary Judgment

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and either party is entitled to judgment as a matter of law. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998); Minn. R. Civ. P. 56.03. In considering a motion for summary judgment "the district court must view the evidence in the light most favorable to the nonmoving party." *Christensen Law Office, PLLC v. Olean*, 916 N.W.2d 876, 885 (Minn. App. 2018). "A fact is material if its resolution will affect the outcome of the case." *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). A genuine issue of material fact exists when a fact may be reasonably resolved in favor of either party, but "the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69–70 (Minn. 1997) (citation omitted).

Cunningham's Statements to the Board are Subject to Absolute Privilege

The "Minnesota Supreme Court and its appointed board of bar examiners has [the] power to regulate admission to practice law in [Minnesota]." *LaNave v. Minnesota Supreme Court*, 915 F.2d 386, 387 (8th Cir. 1990). The Board was established "to ensure that those who are admitted to the bar have the necessary competence and character to justify the trust and confidence that clients, the public, the legal system, and the legal profession place in lawyers." Rule 1, Rules for Admission to the Bar. The Board is charged by the legislature "with the administration of the rules and with the examination of all applicants for admission to practice law." Minn. Stat. § 481.01. The Board has the authority to "conduct investigations of applicants' backgrounds as may be reasonably related to fitness to practice or eligibility under the Rules, and to require applicants to pay the costs of the investigations." Rule 3.B(5), Rules for Admission to the Bar. Admission to the Minnesota Bar requires "Good character and fitness." Rule 4.A(2), Rules for Admission to the Bar. An applicant for admission to the Minnesota Bar has the duty to cooperate with the Board, including "not discourag[ing] a person from providing information to the Board or retaliat[ing] against a person for providing information to the Board." Rule 4.H(1-2), Rules for Admission to the Bar. "Any person or entity providing to the Board or its members, employees, agents, or monitors, any information, statements of opinion, or documents regarding an applicant, potential applicant, or conditionally admitted lawyer,

is immune from civil liability for such communications." Rule 13.B, Rules for Admission to the Bar. Cunningham argues that Rule 13.B grants her civil immunity from liability for the allegedly defamatory statements she made about Ristow to the Board, and accordingly seeks partial summary judgment against Ristow as to those specific claims. Ristow argues that Cunningham is not entitled to absolute immunity for statements made to the Board because Cunningham's statements to the Board do not meet the requirements for absolute immunity in Minnesota.

"Two categories of privilege exist as defenses against defamation claims—absolute privilege and conditional or 'qualified' privilege." *Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010). "An absolute privilege applies without regard to the intent of the speaker, but a qualified privilege requires a determination of the speaker's mental state." *Id.* at 62. The immunity granted by Rule 13.B is absolute because it is granted without regard to the speaker's intent. "[A]bsolute privilege and [absolute] immunity are often used interchangeably." *Mahoney* at 305 (Minn. 2007). This order will refer to absolute privilege and absolute immunity interchangeably.

In Minnesota "[s]tatements, even if defamatory, may be protected by absolute privilege in a defamation lawsuit if the statement is (1) made by a judge, judicial officer, attorney, or witness; (2) made at a judicial or quasi-judicial proceeding; and (3) the statement at issue is relevant to the subject matter of the litigation." *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 306 (Minn. 2007). "In the context of judicial proceedings, absolute privilege encourages frank testimony by witnesses, by enabling them to testify without fear of civil liability for their statements." *Id.*

Ristow argues that Cunningham's allegedly defamatory statements made to the Board do not qualify for absolute privilege under *Mahoney* because the statements were (1) not made as part of a judicial proceeding, and (2) Cunningham was not a "party or pleader" to Ristow's Bar application as required by *Matthis v. Kennedy*, 67 N.W.2d 413 (Minn. 1954). Addressing Ristow's second point, while *Matthis* does state that someone asserting absolute privilege "must, in character, appear as party or pleader," the court then clarifies that the person asserting the privilege must be "in the character of judge, juror, witness, litigant, or counsel." *Matthis* at 417. Here Cunningham made the allegedly defamatory statements to the Board as a witness in the Board's investigation into Ristow for admission to the Bar. Thus she is not disqualified from asserting absolute immunity on this basis.

While Ristow claims that absolute immunity requires a judicial proceeding, *Mahoney* makes clear that absolute immunity can apply to statements made at judicial or quasi-judicial proceedings. *Mahoney* at 306. The Minnesota Supreme Court has held that a quasi-judicial proceeding is one "which among other things, provides for the issuing of subpoenas, the administering of oaths, and the production of books and papers, and requires that charges be in writing with an opportunity to be heard." *Jenson v. Olson*, 273 Minn. 390, 392–93, 141 N.W.2d 488, 490 (1966). An applicant to the Board for admission to the Minnesota Bar may, *inter alia*, request a hearing, be represented by counsel, and subpoena and present witnesses and evidence. Rule 15.A-F, Rules for Admission to the Bar. Therefore the Board's administration of the Bar, and specifically their evaluation of Ristow, which included Cunningham's communications with the Board, is considered quasi-judicial proceeding. *See also LaNave v. Minnesota Supreme Court*, 915 F.2d 386, 387 (8th Cir. 1990) (holding the Board's administration of the Bar was a quasi-judicial proceeding). Ristow also argues that Cunningham's statements to the Board were not made "during" any actual proceeding. Absolute privilege, however, "extends to statements published prior to the judicial proceeding." *Mahoney* at 306.

Applying the three *Mahoney* factors for analyzing absolute privilege, Cunningham clearly meets the first two: she (1) made statements to the Board as a witness, and (2) made the statements during a quasi-judicial proceeding. In determining the third *Mahoney* requirement, the "all-important question" is whether the statement has "reference to and relation to the subject matter of the action." *Matthis*, 67 N.W.2d at 418. The privilege "embraces anything that may possibly be pertinent." *Id.* at 420. "In determining what is ... related to the subject under inquiry, much latitude must be allowed to the discretion of those who are entrusted with the conduct of a cause in court." Id. If there is a "relat[ion] in any manner, then all doubt must be resolved in favor of the defendant under the absolute-privilege rule." Id. In short, "relevance is defined broadly." *Mahoney* at 308. Here the Board was investigating Ristow's good character and fitness. Cunningham's allegedly defamatory statements to the Board go to the nature of Ristow's good character and are therefore clearly relevant to that investigation. Therefore the third *Mahoney* factor is satisfied. Because Cunningham's statements to the Board are subject to absolute privilege pursuant to Rule 13.B, and because Cunningham's statements to the Board meet the three-part *Mahoney* test for absolute privilege, Cunningham is immune from civil liability for her statements made to the Board about Ristow and Cunningham's motion for partial summary judgment is granted as to Ristow's two claims that Cunningham communicated defamatory statements to the Board.

II. Cunningham's Motion for Change of Venue

"All actions not enumerated in sections 542.02 to 542.08 and 542.095 shall be tried in a county in which one or more of the defendants reside when the action is begun or in which the cause of action or some part thereof arose." Minn. Stat. §542.09. Cunningham argues that (1) because she and her witnesses live in St. Louis County roughly 150 miles from Ramsey County the Court should grant a change of venue for the "convenience of witnesses" and to promote the "ends of justice" pursuant to Minn. Stat. §542.11; and (2) because only Ristow's defamation claims against Cunningham related to her statements to the Board arose in Ramsey County, and those claims are now dismissed, venue is no longer appropriate in Ramsey County. Ristow argues that Cunningham is time-barred by Minn. Stat. §542.10, which requires a demand for change of venue as a right within 20 days of the plaintiff's service of the summons on a defendant. Ristow's argument fails, however, because the 20-day deadline for a demand of change of venue under Minn. Stat. §542.10 is different than a court-ordered change of venue under Minn. Stat. §542.11, which the court can grant at any time on its own initiative or upon a party's motion.

"[A] decision to change venue under section 542.11(4) rests within the sound discretion of the trial court." *In re Cont'l Cas. Co.*, 749 N.W.2d 797, 799 (Minn. 2008) (citations omitted). In this case Ristow's claims arising in Ramsey County are dismissed pursuant to this order, and Ristow's remaining causes of action arise in St. Louis County. Further, Cunningham and the witnesses live in St. Louis County. Accordingly, the Court finds that granting Cunningham's motion for change of venue will promote "the convenience of witnesses and the ends of justice." Minn. Stat. §542.11.

LEN

STATE OF MINNESOTA
COUNTY OF SAINT LOUIS
DISTRICT COURT
SIXTH JUDICIAL DISTRICT
Case Type: Personal Injury

Brent Ristow,
Plaintiff,
v.
Amanda Cunningham,
Defendant.

Court File No. 69DU-cv-20-1564
Judge Jill Eichenwald

ORDER FOR ENTRY OF JUDGMENT *NUNC PRO TUNC*

WHEREAS, it has come to the Court's attention that due to a clerical error, no Judgment was entered in this action, pursuant to the Court's Order for Judgment dated July 23, 2021; and

WHEREAS, said Order contains a directive: "LET JUDGMENT BE ENTERED ACCORDINGLY", that mandates entry of a judgment by the Court Administrator;

Now, Therefore;
IT IS ORDERED:

That the Court Administrator for St. Louis County, Minnesota shall enter a Judgment pursuant to the Court's Order for Judgment dated July 23, 2021; and further, that said Judgment shall be entered *nunc pro tunc* to July 23, 2021.

LET JUDGMENT BE ENTERED ACCORDINGLY NUNC PRO TUNC TO July 23, 2021

BY THE COURT:
Eichenwald, Jill
Sep 16 2021 10:49 AM
Judge of District Court

Judgment
I hereby [certify] that the. [foregoing] order
Constitutes the Judgment of Court
Court Administrator, St Louis County by
NUNC PRO TUNC TO JULY 23, 2021

Sep 16 2021 12:59 PM

Linda P. Christensen

Sep 16 2021 1:00 PM

This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1204

Brent A. Ristow,
Appellant,

vs.

Amanda Cunningham,
Respondent.

Filed April 18, 2022
Affirmed
Johnson, Judge

St. Louis County District Court
File No. 69DU-CV-20-1564

Brent Alan Ristow, West Saint Paul, Minnesota (*pro se* appellant)

Jerome D. Feriancek, Julie R. Benfield, Trial Group North, Duluth, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Brent A. Ristow was denied admission to the Minnesota bar based on a determination by the Board of Law Examiners that he lacks the required good character and fitness to practice law. He later learned that Amanda Cunningham, with whom he previously had had a romantic relationship, had provided both an oral statement and a written statement to the board before it made its decision. Ristow sued Cunningham for defamation. The district court rejected Ristow's claims on Cunningham's motion for partial summary judgment. We conclude that Cunningham is immune from liability on Ristow's defamation claims based on a rule governing admission to the bar. Therefore, we affirm.

FACTS

Ristow graduated from law school in 2014. He passed the bar examination that year but was denied admission because the board determined, for 14 reasons, that he had not satisfied his burden to show good character and fitness to practice law. See Minn. R. Admission to Bar 5.B.

Between early 2016 and early 2017, Ristow and Cunningham had a romantic relationship. After the relationship ended, Cunningham sued Ristow in conciliation court to recover $3,641 that she claimed to have lent him to pay for a repair of his vehicle. A conciliation court judge found that the parties had not agreed that Ristow would repay Cunningham for the amount of the repairs and entered judgment in favor of Ristow.

In December 2017, Ristow applied for admission to the bar a second time. He passed the bar examination in February 2018. The board again conducted an assessment of his character and fitness. In October 2018, a member of the board's staff called Cunningham to gather information. Cunningham told the staff member that Ristow had threatened to kill her on two occasions. The staff member asked Cunningham to provide an affidavit restating the information that she had shared during the telephone call. Cunningham submitted an affidavit in which she stated that Ristow twice had said that he would shoot her if he ever found her with another man. She also stated in the affidavit that Ristow had not repaid money that she had lent him.

In February 2019, an attorney representing the board sent Ristow a ten-page letter informing him that his application for admission to the bar was denied, for multiple reasons, including a pattern of dishonesty in financial dealings, failure to timely file income-tax returns, and false statements to the board and others. The letter did not mention Cunningham and did not refer to the statements that she had provided to the board.

Ristow pursued an administrative appeal of the board's adverse determination. The board held an evidentiary hearing in July 2019. Cunningham testified under oath at the hearing. The board upheld its decision to deny Ristow admission to the bar.

Shortly after the board's evidentiary hearing, Ristow commenced this action against Cunningham in the Ramsey County District Court. A month later, Ristow amended the complaint. In the amended complaint, Ristow alleges that Cunningham defamed him by making statements in October 2018 to the board staff member that he had threatened to kill her and that he had not repaid a debt to her. In addition, Ristow alleges that Cunningham made the same two statements to two other persons.

In May 2020, Cunningham moved for partial summary judgment. Cunningham argued that Ristow's claims concerning her statements to the board are barred by the doctrine of absolute privilege and that she is immune from liability based on rule 13.B. of the Minnesota Rules Governing Admission to the Bar.

In August 2020, the district court filed an order in which it granted Cunningham's motion. In an accompanying memorandum, the district court discussed both the doctrine of absolute privilege and the immunity provided by rule 13.B. In the same order, the district court granted Cunningham's motion to transfer venue to St. Louis County, where she lives.

In March 2021, Cunningham moved for summary judgment on Ristow's remaining claims, which concern statements Cunningham allegedly made to two other persons. The St. Louis County District Court granted Cunningham's second summary-judgment motion in July 2021. The district court entered final judgment in September 2021.

Ristow appeals. He challenges only the grant of partial summary judgment on his claims concerning statements that Cunningham made to the board.

DECISION

Ristow argues that the district court erred by granting Cunningham's motion for partial summary judgment on the ground that her allegedly defamatory statements to the board are not protected by the doctrine of absolute privilege. In response, Cunningham argues that she is entitled to summary judgment on Ristow's claims based on her statements to the board for two reasons: absolute privilege and rule 13.B. immunity.

A district court must grant a motion for summary judgment "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp.*, Inc., 751 N.W.2d 558, 564 (Minn. 2008). We apply a *de novo* standard of review to the district court's legal conclusions on summary judgment and view the evidence in the light most favorable to the party against whom the motion was granted. *Commerce Bank v. West Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

To prevail on a defamation claim, a plaintiff must prove that:

> (1) the defamatory statement was communicated to someone other than the plaintiff; (2) the statement is false; (3) the statement tends to harm the plaintiff's reputation and to lower the plaintiff in the estimation of the community; and (4) the recipient of the false statement reasonably understands it to refer to a specific individual.

Larson v. Gannett Co., 940 N.W.2d 120, 130 (Minn. 2020) (quotation omitted). If a plaintiff establishes these four elements, a defendant nonetheless may avoid liability if the allegedly defamatory statement is protected by the doctrine of absolute privilege. *Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014). Absolute privilege applies if the allegedly defamatory statement is "(1) made by a judge, judicial officer, attorney, or witness; (2) made at a judicial or quasi-judicial proceeding; and (3) . . . relevant to the subject matter of the litigation." *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 306 (Minn. 2007).

In this case, the district court applied the *Mahoney* three-part test and determined that each requirement is satisfied. Ristow challenges the district court's reasoning with respect to the second requirement. He contends that Cunningham did not make statements to the board in a quasi-judicial proceeding because she did not make the statements in an adversarial hearing for which Ristow was given notice and was in attendance. Rather, he contends, she made the statements in a private telephone call and in an affidavit. The parties have cited caselaw in which the absolute-privilege doctrine has been applied to statements made in adversarial quasi-judicial proceedings. *See, e.g., Jenson v. Olson*, 141 N.W.2d 488, 489-90 (Minn. 1966) (civil-service hearing reviewing city employee's termination); *Cole v. Star Trib.*, 581 N.W.2d 364, 367, 369 (Minn. App. 1998) (Board of Pardons hearing); *Kellar v. VonHoltum*, 568 N.W.2d 186, 189, 191-92 (Minn. App. 1997) (Department of Commerce bank-charter-application hearing), *rev. denied* (Minn. Oct. 31, 1997); Freier v. Independent Sch. Dist. No. 197, 356 N.W.2d 724, 726-27, 729 (Minn. App. 1984) (school-board hearing concerning employment matter). The parties have not cited any precedential opinion in which the absolute-privilege doctrine has been applied to statements made during a government agency's *ex parte*, non-adversarial investigation.

We need not decide whether the absolute-privilege doctrine applies in the circumstances of this case. Rule 13.B. provides a more straightforward means of resolving the appeal. That rule provides, "Any person or entity providing to the Board or its members, employees, agents, or monitors, any information, statements of opinion, or documents regarding an applicant, potential applicant, or conditionally admitted lawyer, is immune from civil liability for such communications." Minn. R. Admission to Bar 13.B. It is undisputed that Cunningham provided, to an employee of the board, information and statements regarding Ristow, who then was an applicant for admission to the bar. Accordingly, rule 13.B. applies. The plain language of the rule provides that Cunningham is immune from civil liability for the information and statements that she provided to the board. *See id.*

Ristow mentions rule 13.B. in his brief in only a limited way, asserting that the rule does not immunize Cunningham from civil liability because the rule is not "law." Ristow does not develop the argument. We note that rule 13.B. was promulgated by the supreme court. *Order Amending the Rules for Admission to the Bar*, No. C5-84-2139 (Minn. June 12, 2007); *Order Amending the Rules for Admission to the Bar*, No. C5-84-2139 (Minn. Aug. 25, 2004); Amended Order Promulgating Rules for Admission to the Bar, No. C5-84-2139 (Minn. Aug. 26, 1998). The supreme court is vested with exclusive authority to determine who may practice law, to make rules and regulations governing lawyers, and to supervise and discipline lawyers. *See* Minn. Stat. § 480.05 (2020); *In re Daly*, 189 N.W.2d 176, 179 (Minn. 1971); *In re Petition for Integration of Bar of Minn.*, 12 N.W.2d 515, 518 (Minn. 1943); *In re Greathouse*, 248 N.W. 735, 737 (Minn. 1933). The plain language of rule 13.B. makes clear that the supreme court intended to confer civil immunity on persons who provide information to the board concerning applicants for admission to the bar, without any qualifications or preconditions, such as the three requirements of the absolute-privilege doctrine. We are unaware of any reason why rule 13.B. should not be applied in a straightforward manner to the facts and circumstances of this case.

Thus, Cunningham is immune from liability on Ristow's defamation claims that are based on Cunningham's October 2018 statements to the board. Therefore, the district court did not err by granting Cunningham's May 2020 motion for partial summary judgment.

Affirmed.

STATE OF MINNESOTA IN SUPREME COURT

A21-1204

Brent A. Ristow,

Petitioner,

vs.

Amanda Cunningham,

Respondent.

Filed June 21, 2022

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Brent A. Ristow for further review be, and the same is, denied.

Dated: June 21, 2022 BY THE COURT:

/s/

Lorie S. Gildea

Chief Justice

STATE OF MINNESOTA
BOARD OF LAW EXAMINERS

In re Application of

Brent Alan Ristow,
Applicant.

ORDER

This matter came before the undersigned on June 12, 2019, for a third scheduling conference to address remaining prehearing issues and to hear arguments on motions filed by the parties. Applicant filed a Motion to Remove and a Motion to Exclude Affidavit, together with Applicant's Memorandum in Support of Applicant's Motion to Remove and Applicant's Memorandum in Support of Applicant's Motion to Exclude Affidavit. Counsel for the Board filed memoranda in opposition to Applicant's motions. The undersigned issued an Amended Scheduling Order on June 19, 2019, addressing the remaining prehearing issues. Douglas R. Peterson, President of the Minnesota Board of Law Examiners, presided. Natasha Karn, Managing Attorney, and Erin Wacker, Character and Fitness Attorney, also participated. Brent Alan Ristow, Applicant, appeared pro se. Karen McGillic, Assistant Attorney General, appeared as counsel for the Board.

While the two above-described motions were under advisement, Applicant made a request for issuance of a subpoena, which he more formally submitted on June 20, 2019 by way of a written request styled "Subpoena Request, Cunningham." Board counsel submitted a response on June 24, 2019. The ruling that follows as to Applicant's Rule 15F subpoena request rests upon a review of the written submissions of Applicant and Board counsel, as well as the record that has been developed by the parties concerning Ms. Cunningham over the course of three scheduling conferences.

Based upon review of all the files and proceedings herein, the undersigned makes the following:

ORDER

1. Applicant's Motion to Remove is DENIED.

2. Applicant's Motion to Exclude Affidavit, and the related request seeking the initiation of a perjury action, are DENIED.

3. Applicant's Request for issuance of a subpoena to be served upon witness Amanda Cunningham is DENIED, without prejudice to the request being renewed if warranted by the hearing evidence.

DATED: June 26, 2019 IS IT SO ORDERED

_____/s/_____
Douglas R. Peterson,
President

MEMORANDUM

Motion to Exclude Affidavit

Applicant moves to exclude an affidavit submitted by Amanda Cunningham from his file, and claims her affidavit includes "baseless, malicious, and intentionally false and misleading statements, " which raise "serious questions as to the integrity of Ms. Cunningham ." Applicant argued that he was not provided a copy of Ms. Cunningham's affidavit until after the Board issued its adverse determination letter. One of the 14 issues cited in the Board's adverse determination letter was that Applicant had not shown rehabilitation from "aggressive, intimidating, bullying, uncooperative [and] disrespectful conduct." Applicant was provided notice in that adverse determination letter that his conduct and rehabilitation, or lack thereof, would be at issue if he requested a hearing before the Board pursuant to Rule 15B. Applicant disagrees with the contents of Ms. Cunningham's affidavit and submitted voluminous text messages exchanged between him and Ms. Cunningham that he alleges support his argument that her affidavit should be excluded from his current file and any future file.

Ms. McGillic, counsel for the Board, argued that the Board office had no obligation to provide Applicant with the affidavit prior to issuing the adverse determination, or give him an opportunity to rebut the allegations therein, because the adverse determination was not a final order, but merely a preliminary decision made as part of the Board's fact finding investigation . See Humenasky v. Minn. Bd. Of Med. Exam'rs, 525 N.W.2d 559, 566 (Minn. Ct. App. 1994) (full due process requirements do not attach to a general fact finding investigation conducted by an agency).

Additionally, Rule 5 sets forth the Essential Eligibility Requirements, which are considered when determining whether an individual has the requisite character and fitness to practice law. Rule 5B(3) includes the following relevant conduct for the Board to review in its investigations:

1. Acts involving dishonesty, fraud, deceit, or misrepresentation;
2. Acts which demonstrate disregard for the rights or welfare of others;
3. Abuse of legal process;
4. Neglect of financial responsibilities;
5. Neglect of professional obligations;
6. Conduct that evidences current mental or emotional instability;
7. Conduct that evidences current drug or alcohol dependence or abuse; and
8. The making of false statements, including omissions, on bar applications.

Ms. Cunningham's affidavit addresses various Essential Eligibility Requirements, and is thus relevant to Applicant's character and fitness to practice law. *See In re Gahan*, 279 N.W.2d 826, 830 (Minn. 1979).

After Applicant requested a hearing, Board staff provided both parties with the complete file, including Ms. Cunningham's affidavit. Applicant will have the opportunity to challenge Ms. Cunningham's credibility at the July 16, 2019, hearing with his own testimony, additional evidence, and cross-examination of Ms. Cunningham. A motion to exclude Ms. Cunningham's affidavit is not the proper vehicle by which to argue that her affidavit contains inaccuracies. Applicant may present his arguments to the full Board during the evidentiary hearing. The Board may give Ms. Cunningham's affidavit and testimony the weight it deems appropriate, but there is no legal basis by which to strike the affidavit from Applicant's file at this time.

As part of his challenge to Ms. Cunningham's sworn affidavit, Applicant requests that the Board "initiate an action in perjury against Ms. Cunningham." Such action is out of bounds, certainly prior to the Board hearing from Applicant and witnesses about the matters at issue. Ms. Cunningham is voluntarily appearing over a public question of whether Applicant has carried *his* burden to establish *his* character and fitness to benefit from the privilege of holding a law license in the state of Minnesota. Applicant is reminded that he has a duty to cooperate with the Board and refrain from "discourage[ing] a person from providing information to the Board or retaliate[ing] against a person for providing information to the Board." Rule 4H(2). Applicant should focus his efforts on establishing that he can meet the Essential Eligibility requirements of Rule 5. Applicant's request to initiate a perjury action against Ms. Cunningham before the scheduled hearing is unsupported by legal precedent and is denied.

Motion to Remove

Applicant seeks to prevent the Board from presiding over Applicant's evidentiary hearing and asks that "an independent and unbiased third party" hear the matter. Applicant argues that his due process rights will be violated because the Board made the "prior adverse decision" and the Board is thus acting as "both prosecutor and judge, and then appellate judge." Applicant cites *Schware v. Board of Bar Examiners of NM*, 353 U.S. 232, 238 (1957) to support his argument that a state cannot exclude an individual from the practice of law in contravention of the Due Process clause. While this Board recognizes its duty to honor Applicant's due process rights, those rights have not been violated in this matter.

Applicant's due process claims rest on his belief that the Board's adverse determination is a "final" determination. Applicant expresses a fundamental misunderstanding of the Rules for Admission to the Bar and Board's role and process.

When the Board makes an adverse determination, an applicant has two options. The applicant may choose not to request a hearing before the Board, at which point the adverse determination becomes the "final decision of the Board." Rule 158. An applicant may also request a hearing before the Board. In that case, the adverse determination is not final, and does not become final. Instead, the Board schedules a hearing, provides ample notice, extends Applicant an opportunity to be heard, be represented by counsel, and cross-examine witnesses. Through this hearing process, the applicant is provided another opportunity to present additional evidence to the Board. The Board then issues a final decision in the form of written "findings of fact, conclusions of law and final decision." Rule 15H. An Applicant may then challenge the Board's "final decision" by filing a timely Petition for Review with the Minnesota Supreme Court. The Minnesota Supreme Court independently reviews the record as "the ultimate determination of admission to the Bar is reserved to [the Supreme Court] alone." In re Zbiegien, 433 N.W.2d 871, 874 (Minn. 1988). The Supreme Court will then give "such directions, hold such hearings, and make such orders as it may in its discretion deem appropriate" concerning the applicant's bar application. Rule 178. Here, the adverse determination is not the "final order" because Applicant made a timely request for a hearing before the Board under Rule 158.

The Minnesota Supreme Court has already rejected similar due process claims, *In Minn. Bd. Of Med. Exam'rs v. Schmidt*, 292 N.W. 255 (Minn. 1940), the Court stated:

> The argument that the action of the board was either in process or result a denial of due process or equal protection of the law is without merit. We appreciate that appellant's attack in not on the law as such. It is rather and only on the action of the board in this case. The charge is the frequent one made against administrative boards, that they act both as prosecutors and judges. Enough answer for this case is that appellant was given ample notice of the nature of the charges against him, with the opportunity for hearing. He was heard at length in his own defense. Finally, the whole proceedings before the Board is and has been subject to court review.

Id. at 257.

With respect to Applicant's request that an independent third party oversee the hearing process, there is no rule requiring the Board to do so, and the Board has not previously done so. Even if the Board president appointed a hearing examiner, the Board still must make the ultimate determination with regard to an applicant's character and fitness, as charged by the Supreme Court. There is no reason, on this record in this case, for the Board to delegate its ultimate decision-making authority to an independent party not appointed by the Supreme Court.

Significantly , Applicant has made no allegation that the Board members are biased against him due to personal interest in the outcome of his application. See In re Khan, 804 N.W.2d 132, 137 (Minn. Ct. App. 2010). Indeed, there is no basis in the record for any such claim. What remains lays bare the fact that Applicant's due process challenge is a fundamental attack upon the Rules for Admission to the Bar.

In 1891, the legislature authorized the Minnesota Supreme Court to establish the Board of Law Examiners ("Board"), and to create rules governing admission to the practice of law. See 1891 Minn. Laws Ch. 36, §§ 1, 7; Mason's Minn. Stat. §§ 133, 5685 (1927) (currently codified in Minn. Stat. § 481.01). Subsequently, the Supreme Court not only promulgated rules governing admission , but it also adopted character and fitness standards for admission that had been instituted by the Board. See generally Petition of Frickey, 515 N.W.2d 741 (Minn . 1994) (recognizing that the Supreme Court adopted the Board's character and fitness standards in 1988). These rules were collectively known as the "Rules of the Supreme Court and State Board of Law Examiners for Admission to the Bar" until 1998, when the Supreme Court consolidated, edited and reorganized the rules into a single set of "Rules for Admission to the Bar." Order Promulgating Rules for Admission to the Bar, CS-84-2139 (Minn. Aug. 18, 1998); Amended Order Promulgating Rules for Admission to the Bar, CS-84-2139 (Minn. Aug. 26, 1998). Pursuant to Rule 3B, the Board is authorized to administer the Rules and adopt policies and procedures consistent with the Rules, and is authorized to delegate to its president and director authority to make necessary determinations to implement the Board's policies and procedures and the Rules themselves. The Board must petition the Supreme Court to change a rule, however, and the Court will then issue an order promulgating the change if it deems it just and provident to do so.

Finally, Applicant argued that the Board is subject to the Administrative Procedure Act ("APA"). The Board was created by the Minnesota Supreme Court and is not subject to the APA; thus, his arguments that the Board is somehow in violation of the APA are without merit.

In the end, the Board was created to ensure that those who are admitted to the bar have the necessary competence and character to justify the trust of the public. The Board will proceed to carry out its responsibilities at the July 16, 2019, hearing, as contemplated by the series of scheduling orders previously issued in this matter.

Subpoena Request

Applicant's subpoena request is the latest in a series of efforts directed toward witness Amanda Cunningham. Applicant initially advocated for a pre-hearing deposition, then filed his motion to exclude Ms. Cunningham's affidavit and requested that this Board initiate a perjury action against her, and now seeks the use of subpoena power to order production of all cellular phones she as owned since 2016 and require production of all:

> Electronic communications including but not limited to text messages, facebook messages, snapchat messages, email messages, and the like, wherein the subject matter is reasonably related to Brent Ristow. Itemized phone bills in pdf format showing incoming and outgoing timestamps for messages.

As established by Applicant's prior submissions, and Board counsel's affidavit, extensive text communications between Applicant and Ms. Cunningham are available to the parties to the upcoming hearing. Indeed, Applicant represents that he possesses a "complete record" of those messages from March 18, 2017 to the present. Applicant's formal request speaks to his interest in exploring whether Ms. Cunningham possesses additional text messages beyond those she already produced.

Applicant's undefined quest is an unwarranted fishing expedition, at best. By his own admission, Applicant possesses a "complete record" of the communications at the heart of the evidentiary issue framed by his motion. As for additional communications with third parties, such an intrusive inquiry of private cellular records is unjustified here. While not mentioned in his formal Rule 15F request, Applicant's only specific interest, mentioned in an email exchange with Board counsel, is in reference to a collateral conversation between the witness and her "best friend." See McGillic Aff. at G & K. Any relevance is tangential to this matter and far outweighed by the likely harm of the overbroad search Applicant wishes to undertake. Applicant can, within proper bounds, make tailored inquires of Ms. Cunningham via cross-examination. The undersigned does not foresee a circumstance where the subpoena sought by Applicant will be a justified means to try to locate extrinsic evidence to impeach a witness voluntarily appearing before the Board. Nevertheless, the companion order is without prejudice to Applicant reviving his request and seeking to keep the hearing record open for that purpose. That extends Applicant an opportunity to prove the materiality of the undefined information he thinks might exist - a burden of proof Applicant fails to meet thus far. The undersigned, however, reminds Applicant of his Rule 4H(2) obligation to refrain from "discourage[ing] a person from providing information to the Board or retaliate[ing] against a person for providing information to the Board." Rule 4H(2).

ERIN WACKER EMAILS

What follows is a true and correct transcription of emails exchanged between Ms. Erin Wacker, character and fitness investigator at the Minnesota Board of Law Examiners, and Ms. Amanda Cunningham, Respondent, from October 4, 2018 at 3:02 pm to October 12, 2018 at 10:44 am.

On October 12, 2018, at 10:44 am Ms. Wacker forwarded to Ms. Carol Martens, judicial paralegal at the Board, the same who then inserted the same into Petitioner's application file at the Board.

Scans of the originals have been filed as Exhibit E in the 2405 action.

October 4, 2018, 3:02 pm, Ms. Wacker to Ms. Cunningham:

> Hi Amanda,
>
> Thank you so much for taking the time to talk to me today. If you could please send me an affidavit outlining any information that we discussed today and that you believe would be helpful in our character and fitness investigation, I would appreciate it. Additionally, if you have any screenshots that you could attach, that would be great. Please let me know if you have any questions or concerns.
>
> Thank you,
> Erin Wacker

October 9, 2018, 9:06 am, Ms. Cunningham to Ms. Wacker:

> Hi Erin,
>
> Wanted to confirm I received your email. I will work on an affidavit and collecting what relevant correspondences I have and get that to you either this afternoon or tomorrow.
>
> If you are looking into Brent's character, if you haven't already I would strongly suggest contacting his father, Dennis Ristow, [phone number redacted].
>
> Have a great day!
>
> Amanda Cunningham

October 9, 2018, 9:08 am, Ms. Wacker to Ms. Cunningham:

> Thanks, Amanda. I appreciate it.
>
> Erin c. Wacker, Attorney for Character and Fitness

October 10, 2018, 10:45 am, Ms. Cunningham to Ms. Wacker:

> Hi Erin,
>
> My affidavit is attached. Please let me know if there are any follow- up questions.
>
> As for texts and emails. I have several of our correspondences saved, some I got rid of thinking this was all over. I need to go through them and I will forward on what is applicable.
>
> I have also attached a copy of the claim I tried to serve him last year, that was tossed out since I could not find his address to properly serve him. However, when I do find his address I will resubmit this claim.
>
> I would appreciate being kept in the loop on this process if possible. I saw first hand how incredibly angry he was when his appeal for getting his license reinstated early was denied. I am very nervous how he will react if denied again.
>
> Amanda Cunningham

October 10, 2018, 10:55 am, Ms. Wacker to Ms. Cunningham:

> Thank you very much, Amanda. Would it be possible to get your affidavit notarized? Any other screenshots of texts from him would be helpful as well. If he ends up having access to your affidavit, we will make sure to give you notice in case he reaches out to you. Thanks again and please let me know if you have any questions.
>
> Thanks,
> Erin

October 10, 2018, 11:17 am, Ms. Cunningham to Ms. Wacker:

> Hi Erin,
> Sure, I can get it notarized tomorrow.
>
> Amanda Cunningham

October 11, 2018, 11:07 am, Ms. Wacker to Ms. Cunningham:

> Thank you.
>
> Erin C. Wacker

October 11, 2018, 11:42 am, Ms. Cunningham to Ms. Wacker:

> Hey Erin,
>
> I found all of Berent's texts on my old phone from when he contacted me February 24th - once he found out I was trying to file the small claims against him. There is A LOT from that discussion. How would you like me to proceed? I can do screen shots of the threats?
>
> Amanda Cunningham

October 12, 2018, 10:38 am, Ms. Cunningham to Ms. Wacker:

> Hi Erin,
>
> Attached is the notarized copy of my affidavit and screen shots of text with Brent Ristow.
>
> Also, if Brent has an updated residential address on file with you that I could get, I would appreciate it.
>
> Thank you for following up.
>
> Amanda Cunningham

And,

I, Brent Alan Ristow, of 1027 Ottawa Avenue, West Saint Paul, Minnesota, 651-260-0970, brentristow@brightonashford.com declare, under the penalty of perjury, that the foregoing is true and correct.

Respectfully, Executed on:

In the County of:

Brent A. Ristow In the State of: