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App. No. _____

**In The
Supreme Court of the United States**

Bharani Padmanabhan MD PhD

v.

Massachusetts Board of Registration in Medicine

ON APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION
FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT
(State Supreme Court Docket # FAR-28941)
(State Appeals Court Docket # 2021-P-0401)

PETITIONER'S APPLICATION TO EXTEND TIME TO
FILE A PETITION FOR A WRIT OF CERTIORARI

DECEMBER 2, 2022

Bharanidharan Padmanabhan MD PhD
(pro se)
30 Gardner Road #6A, Brookline MA 02445
617 566 6047, scleroplex@gmail.com

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**PETITIONER'S APPLICATION TO EXTEND TIME TO
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To Circuit Justice John Roberts:

Petitioner Dr. Bharani respectfully requests that the time to file a Petition for a Writ of Certiorari in this matter be extended for sixty days, up to and including February 9, 2023. On September 12, 2022, the Massachusetts Supreme Judicial Court denied a petition for further appellate review without memorandum. The Appeals Court decision is thus enclosed. Absent an extension of time, the Petition would therefore be due on December 11, 2022. This Court has jurisdiction over this Application under 28 U.S.C. 1254 (1) and 1257, Rule 10(b), and has authority to grant the requested relief under the All Writs Act, 28 U.S.C. 1651.

BACKGROUND

Petitioner here, a neurologist with two fellowships in multiple sclerosis (Harvard and UMass) was excluded from the neurology marketplace in July 2017. The exclusion was the result of petitioner blowing the whistle on fake brain MRI reports being issued by his former employer hospital. The Massachusetts medial board held a hearing on the accusations made by the hospital. The magistrate assigned to the case held a hearing over eight days and issued his

tentative decision in August 2015, five months after the close of evidence. The tentative decision declared that no discipline was warranted as no substandard medical care was proved. Under state regulations this tentative decision became final and binding upon the medical board in February 2016 because it did not issue its own decision within 180 days of the tentative decision being issued. In July 2017, eighteen months after the tentative decision became final and binding, the medical board issued its “final decision” and imposed an indefinite suspension of petitioner’s medical license in defiance of a clear binding state law.

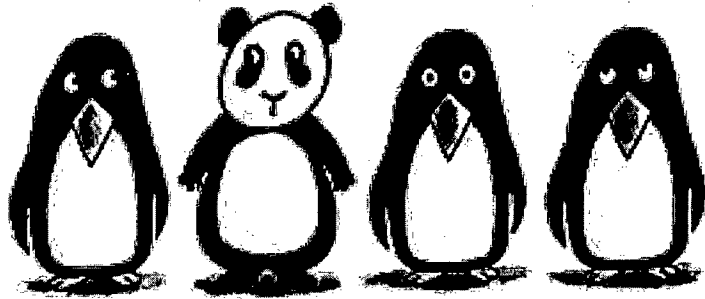
In October 2019, the Massachusetts Appeals Court ruled in a different case and for the first time interpreted the relevant state regulation relied upon by this petitioner to inform the medical board of its errors. Within two weeks, petitioner immediately filed with the medical board a petition for reinstatement of his medical license. The board did nothing, though in every other physician’s case they issued a decision (for or against) within thirty days. In June 2020 petitioner filed suit in state court against the board for violation of his First Amendment rights, based on state law that explicitly declares that the Massachusetts medical board is not an arm of the sovereign state and is not under the Governor’s control. The lower state court ruled that of course the board is an arm of the sovereign, without any analysis of state law. The Appeals Court affirmed that of course the medical board is an arm of the sovereign and of course is under direct control of the Governor. On September 12, 2022, the state Supreme Court affirmed the Appeals Court ruling by declining further appellate review.

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a Petition for a Writ of Certiorari should be extended for sixty days for

these reasons:

This case documents defiance by a state court of an explicit state law which takes pains to ensure that the medical licensing board is not under the control of the Governor and thus fails to meet the factors detailed by this Court to determine whether or not an entity is an arm of the sovereign.



DENTISTRY MEDICINE PHARMACY NURSING

The refusal of the judicial branch to respect the legislative branch's clear choice violates the separation of powers and the rule of law.

Petitioner represented himself *pro se* in the state courts, went unheard, and needs representation by an attorney experienced in preparing briefs in this Court. This case presents an extraordinarily important issue that warrants a carefully prepared Petition. One would be hard-pressed to envisage a worse outcome for jurisprudence than silently allowing state courts to openly defy the will of the legislature, an act that threatens the fundamental structure of this republic, and be derelict in their duty to interpret the law. Review by the Court is thus essential. There is at minimum a substantial prospect that this Court will grant certiorari, and a substantial prospect of reversal given the severe blow to a bedrock principle of American government that the state court's opinion presents.

The Petitioner is working diligently to retain counsel with Supreme Court expertise to

prepare the Petition. The extension sought shall assist greatly in locating appropriate counsel.

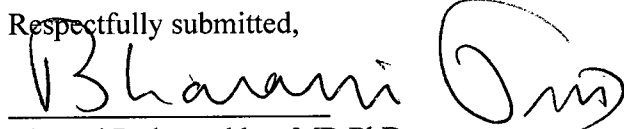
No meaningful prejudice to any party would arise from the extension.

CONCLUSION

Based on the facts and legal arguments presented herein, this Application for extension of time to file a petition for certiorari must be granted and the time to file should be extended sixty days up to and including February 9, 2023, which is what the petitioner respectfully requests.

December 2, 2022

Respectfully submitted,


Bharani Padmanabhan MD PhD

pro se

30 Gardner Road #6A, Brookline MA 02445

617 566 6047, scleroplex@gmail.com

**SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket**

**BHARANIDHARAN PADMANABHAN vs. BOARD OF REGISTRATION IN
MEDICINE
THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID
FAR-28941**

CASE HEADER

Case Status	FAR denied	Status Date	09/12/2022
Nature	Tort: General	Entry Date	07/05/2022
Appeals Ct Number	<u>2021-P-0401</u>	Response Date	07/19/2022
Appellant	Plaintiff	Applicant	
Citation		Case Type	Civil
Full Ct Number		TC Number	2082CV00566
Lower Court	Norfolk Superior Court	Lower Ct Judge	Rosemary Connolly, J.

INVOLVED PARTY

ATTORNEY APPEARANCE

Bharanidharan Padmanabhan
Pro Se Plaintiff/Appellant

Board of Registration in Medicine
Defendant/Appellee

Michael Shiposh, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
07/05/2022		Docket opened.
07/05/2022	#1	FAR APPLICATION filed by BHARANIDHARAN PADMANABHAN.
07/05/2022	#2	Motion to waive filing fee filed by BHARANIDHARAN PADMANABHAN. (ALLOWED as to the entry fee. See 2021-P-0401.)
07/05/2022	#3	Affidavit of Indigency (IMPOUNDED) filed by BHARANIDHARAN PADMANABHAN. (ALLOWED. See 2021-P-0401.)
09/12/2022	#4	DENIAL of FAR application.

As of 09/12/2022 5:20pm

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-401

BHARANIDHARAN PADMANABHAN¹

vs.

BOARD OF REGISTRATION IN MEDICINE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Bharanidharan Padmanabhan, M.D., Ph.D., appeals from a Superior Court judgment dismissing his complaint against the Board of Registration in Medicine (board) for failure to state a claim on which relief can be granted. We affirm.

Background. The complaint, the allegations of which we take as true, Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011), asserted that in 2017, the board indefinitely suspended the plaintiff's license to practice medicine. In 2019, this court decided Bloomstein v. Department of Pub. Safety, 96 Mass. App. Ct. 257 (2019), which held that a State

¹ As is our custom, we spell the plaintiff's name as it appears in the complaint. We note, however, that the plaintiff's appellate submissions spell his first name as "Bharani."

agency had violated certain procedural provisions of G. L. c. 30A, § 11 (7) & (8), in suspending Bloomstein's construction supervisor license. Id. at 258, 261-262. The plaintiff here, believing that the board had committed the same or similar procedural violations in suspending his medical license, petitioned the board to reinstate his license. After some time passed without the board doing so, the plaintiff filed an action seeking damages for violations of his constitutional rights and for "consciously tortious" actions.

On the board's motion to dismiss, a judge ruled that the plaintiff's Federal constitutional claims, asserted under 42 U.S.C. § 1983, and his State constitutional claims, asserted under the Massachusetts Civil Rights Act (MCRA), G. L. c. 12, §§ 11H, 11I, failed because the board is not a "person" within the meaning of either of those statutes and thus retained sovereign immunity to liability thereunder. The judge further ruled that because the board was a public employer under the Massachusetts Tort Claims Act (MTCA), G. L. c. 258, it retained sovereign immunity from intentional tort claims. This appeal followed.

Discussion. We review the sufficiency of the complaint de novo. Curtis, 458 Mass. at 676. On appeal, the plaintiff argues that the board is not the type of State entity that is

immune from liability under § 1983 or the MCRA, or immune from intentional tort liability under the MTCA. We are unpersuaded.

1. Constitutional claims. It is settled that "[a]n agency of the Commonwealth is not a 'person' subject to suit for monetary damages under § 1983." Laubinger v. Department of Revenue, 41 Mass. App. Ct. 598, 601 (1996), citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 70-71 (1989).² Likewise, as to the MCRA, "the Commonwealth, including its agencies, is not a 'person' subject to suit pursuant to G. L. c. 12, § 11H." Williams v. O'Brien, 78 Mass. App. Ct. 169, 173 (2010). See Commonwealth v. ELM Med. Lab., Inc., 33 Mass. App. Ct. 71, 75-80 & n.9 (1992) (MCRA did not waive sovereign immunity of State agencies).

Here, the board is a State agency exercising delegated legislative authority. See Levy v. Board of Registration & Discipline in Med., 378 Mass. 519, 522-526 (1979) (evaluating board's action based on principles generally applicable to public administrative agencies).³ "The [b]oard . . . is a state

² In Will, the United States Supreme Court interpreted the word "person" in § 1983 in light of, among other things, Congress's intention to preserve State sovereign immunity. 491 U.S. at 67.

³ We reject the plaintiff's claim that because at the time Levy was decided, the name of the board included the phrase "and [d]iscipline," but no longer does, Levy is inapplicable. Contrary to the plaintiff's claim, the statute that removed that phrase from the board's name made no changes in the board's

agency," and thus is entitled to the Commonwealth's immunity under the Eleventh Amendment to the United States Constitution against suit in Federal court.⁴ Bettencourt v. Board of Registration in Med. of the Commonwealth of Massachusetts, 721 F. Supp. 382, 384 (D. Mass. 1989), aff'd, 904 F.2d 772 (1st Cir. 1990). "[T]he doctrine of sovereign immunity bars the recovery of damages from the [b]oard, and the [b]oard members and their staff in their official capacities." Bettencourt v. Board of Registration in Med. of the Commonwealth of Massachusetts, 904 F.2d 772, 781 (1st Cir. 1990).⁵

Numerous statutory provisions show that the board is a State agency. Under G. L. c. 13, § 10, the board's members are appointed by the Governor, who may remove them "for neglect of duty, misconduct, malfeasance or misfeasance in office."⁶ Under

powers, duties, or status as a state agency. See St. 1979, c. 58.

⁴ The Eleventh Amendment affirms "the fundamental principle of sovereign immunity." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984).

⁵ In Padmanabhan v. Cambridge, 99 Mass. App. Ct. 332, 340-341 (2021), relying on reasoning in Bettencourt, our court concluded that the board's members and certain staff are entitled to quasi-judicial absolute immunity -- an immunity not commonly extended to non-state actors.

⁶ We are at a loss to understand the plaintiff's argument based on the language of G. L. c. 13, § 10, to the effect that the board "consist[s] of" seven persons appointed by the Governor. The plaintiff fails to explain how this language renders the board any less a State entity than other boards that have

G. L. c. 13, § 9 (a), the board serves in the Department of Public Health. Under G. L. c. 13, § 10A, the board's proposed regulations may be reviewed and approved or disapproved by the Commissioner of Public Health (commissioner). A variety of other statutes control the board's activities. See G. L. c. 13, § 9B; G. L. c. 112, §§ 2, 3-9B.

The plaintiff nevertheless asserts that G. L. c. 112, § 1, provides the defendant board with "statutory independence from the State," because that statute provides that the commissioner "supervises" the work of various other boards of registration, but merely "consults with" the chair of the defendant board. In view of the other statutes cited above, the words of G. L. c. 112, § 1, create no such independence.

The plaintiff next suggests that the board is not subject to sufficient State control to entitle the board to State-action antitrust immunity, as is required under North Carolina State Bd. of Dental Examiners v. Federal Trade Comm'n, 574 U.S. 494, 503-504 (2015) (Dental Examiners). The plaintiff fails to explain, however, why a board's entitlement to antitrust

similar language in their enabling statutes. See, e.g., G. L. c. 13, § 16 (board of registration in optometry); G. L. c. 13, § 64 (board of registration of chiropractors).

immunity is necessarily coextensive with or determinative of that board's entitlement to sovereign immunity.⁷

The plaintiff also argues that, under G. L. c. 10, § 35M, the board is ensured "financial independence," and that this weighs against treating the board as a State agency entitled to sovereign immunity. See, e.g., Walter E. Fernald Corp. v. Governor, 471 Mass. 520, 524 (2015) (sovereign immunity serves, in part, to protect public treasury). The cited statute, however, does not by its terms give the board such independence; it allows the board to keep and expend specified portions of various revenue streams, but it does not allow the board to retain all of its revenues. Nor does it require the board to operate without annual appropriations from the State treasury; to the contrary, the board receives such appropriations. See, e.g., St. 2021, c. 24, § 2, item 4510-0723 (appropriating money from State's general fund for certain operations of board for fiscal year 2022).

In sum, the board retains State sovereign immunity. As an arm of the State, it is not a "person" and thus cannot be liable

⁷ We need not and do not imply any view on whether the board here is entitled to antitrust immunity.

under § 1983 or the MCRA. The plaintiff's claims for damages for constitutional violations were correctly dismissed.⁸

2. Intentional tort claims. The plaintiff's claims against the board for intentional torts also fail. The board falls within the MTCA's definition of "[p]ublic employer," which includes, as relevant here, "the commonwealth . . . and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof" (emphasis added).⁹ G. L. c. 258, § 1. The provisions of G. L. c. 258, §§ 1-8, waive a public employer's sovereign immunity to claims based on the negligence of that employer's public

⁸ To whatever extent the plaintiff sought to assert his State constitutional claims directly under the State Constitution rather than under the MCRA, dismissal of the claims was also proper. See Doe, Sex Offender Registry Bd. No. 474362 v. Sex Offender Registry Bd., 94 Mass. App. Ct. 52, 64-65 (2018).

⁹ We reject the plaintiff's argument, based on FBT Everett Realty, LLC vs. Massachusetts Gaming Comm'n, 489 Mass. 702, 719-720 (2022) (FBT), that the board enjoys the same level of financial and political independence as the Massachusetts Port Authority (MassPort) and therefore is an "independent body politic and corporate" that is excluded from the definition of "public employer" in G. L. c. 258, § 1. MassPort's organic statute expressly establishes it as a "body politic and corporate," St. 1956, c. 465, § 2, with the power to sue and be sued in its own name, to issue revenue bonds, to represent itself in litigation, and to acquire real property in its own name. See FBT, supra at 720-722. None of these things is true of the board. The plaintiff also asks us to take judicial notice of the principles of statutory interpretation set forth in Markham v. Pittsfield Cellular Tel. Co., 101 Mass. App. Ct. 82 (2022). We have considered those principles in reaching our decision.

employees,¹⁰ but do not waive immunity to intentional tort claims. See G. L. c. 258, § 10 (c). See also Shapiro v. Worcester, 464 Mass. 261, 270 (2013) (MTCA is not a blanket waiver; "[i]t specifically exempts certain categories of conduct that continue to enjoy the protection of sovereign immunity"). The intentional tort claims against the board were therefore properly dismissed.

We have not overlooked the plaintiff's remaining arguments, including that § 1983 claims do not require the exhaustion of administrative remedies, and that Bloomstein, 96 Mass. App. Ct. 257, rendered the board's indefinite suspension decision void. Rather, "[w]e find nothing in [those arguments] that requires discussion," given the separate grounds on which we have concluded above that the plaintiff's complaint was

¹⁰ Notably, under G. L. c. 13, § 9C, "[t]he members of the boards of registration shall be public employees for the purposes of chapter 258 for all acts or omissions within the scope of their duties as board members."

defective. Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

Judgment affirmed.

By the Court (Blake, Sacks &
D'Angelo, JJ.¹¹),

Joseph F. Stanton

Clerk

Entered: June 13, 2022.

¹¹ The panelists are listed in order of seniority.