

Circuit Court for Baltimore City
Case No.: 24-C-23-000018

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 502

September Term, 2023

RANDOLPH WHIPPS, M.D., ET AL.

v.

CHRISTINE FARELLY, ET AL.

Reed,
Tang,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: March 22, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal arises from an investigation commenced by the Maryland State Board of Physicians (“the Board”), appellee, of Randolph Whipps, M.D., appellant. After the Board served upon Dr. Whipps an administrative subpoena seeking records for a patient he treated, he filed a motion to quash the subpoena in the Circuit Court for Baltimore City. Along with that motion, Dr. Whipps filed a complaint against Christine Farelly, the Board’s executive director, and Maureen Sammons, the Board’s intake manager, also appellees (collectively “the Board”), which he later amended to add the Board as a defendant, seeking an order quashing the subpoena and declaring that the subpoena was invalid. The Board opposed the motion to quash and moved to dismiss the complaint.

The circuit court denied the motion to quash for failure to comply with the good faith certificate requirement of Rule 2-431. It subsequently dismissed Dr. Whipps’s amended complaint, determining that one count was duplicative of the amended motion to quash and that the other count had been brought in the improper venue. Dr. Whipps appeals from both orders presenting two questions,¹ which we have combined and rephrased as:

¹ The questions as posed by Dr. Whipps are:

1. Whether the Circuit Court Baltimore County [sic], Vidalia [sic] Brown J., committed reversible error in issuing the Order of March 6, 2023 E. 436, refusing to hear Appellant’s motion for relief pursuant to MD Rule pursuant to MD Rule 2-510 (quashing subpoena) and a protective Order pursuant to M.D. Rule 2-403 E. 93-128 E 160-161 for failure to file a good faith affidavit pursuant to MD Rule 2-431, and whether treating the motion and the underlying matter as a simple civil discovery dispute amounted to reversible error.

2. Whether the Baltimore City Circuit Court committed reversible error in dismissing the Verified Complaint based upon MD Government

(continued...)

I. Did the circuit court err or abuse its discretion by denying the amended motion to quash the administrative subpoena and dismissing the amended complaint?

For the following reasons, we answer that question in the affirmative, vacate the orders denying the motion to quash and dismissing the complaint, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On December 7, 2022, the Board received an anonymous email with a link to a newspaper article published in the Washington Post titled, “Dying to Compete – When risking lives is part of the show.” The article reported upon a 37-year-old bodybuilder who died due to cardiac arrest and who was identified as a patient of Dr. Whipps (“Patient 1”).

The article stated:

[Patient 1] had prescriptions for metformin, spironolactone and a thyroid medication from Randolph Whipps, the founding physician of LifeMed Institute in Maryland, which bills itself as the largest concierge wellness facility on the East Coast.

But [Patient 1] did not have any apparent medical conditions that required the use of those prescription drugs, according to Leon Kelly, the El Paso County coroner whose office reviewed her medical records and interviewed family members.

A week later, the Board notified Dr. Whipps that a complaint had been filed against him and that the Board had opened a preliminary investigation. The letter specified that a

Code Sec. 10-125(a)(2) E. 449 and erroneously interpreted the applicable statutory scheme of Maryland Courts and Judicial Proceedings Code Secs. 6-201 through 6-203 and MD Government Code Sec. 10-125(a)(2) to reach an absurd result, and whether venue under MD Government Code Sec. 10-125(a)(2) is jurisdictional.

copy of the complaint was enclosed and attached a copy of the newspaper article. The Board requested a written response to the allegations of the complaint within 10 business days. The Board simultaneously served on Dr. Whipps a subpoena duces tecum seeking the complete medical records for Patient 1.

On December 26, 2022, counsel for Dr. Whipps responded. He requested an extension of time until January 10, 2023 due to the holidays; requested “an explanation of what the complaint against Dr. Whipps is, where the complaint with [sic] and what are the facts and nature of the allegations of the misconduct being investigated.” Counsel expressed concern that there was “no complaint” vesting the Board with authority to investigate Dr. Whipps and subpoena confidential medical records. He argued that a “written complaint with allegations of misconduct” was a prerequisite to a Board investigation and that the newspaper article did not qualify because it contained “hearsay upon hearsay statements[.]”

On January 3, 2023, Dr. Whipps filed in the circuit court a “Verified Complaint for Pre-Compliance Judicial Review of Administrative Subpoena . . . and for Declaratory Judgment” and a motion to quash the subpoena. On January 26, 2023, he filed an amended complaint and amended motion to quash.²

The amended complaint recited the above stated facts and alleged that the Board’s authority to issue subpoenas arises only upon receipt of a formal complaint, which Dr.

² In the interim, on January 11, 2023, Dr. Whipps provided the Board with “partial, redacted medical records for Patient 1.”

Whipps asserted meant a form document that appears on the Board’s website.³ Though a regulation governing Board investigations defined a “Complaint” to include a “Media publication[,]” Dr. Whipps maintained that the Board exceeded its statutory authority when it promulgated that regulation and, consequently, that the subpoena was “constitutionally defective” and failed to satisfy the reasonableness standard under the Fourth Amendment to the federal constitution. (Citing COMAR 10.32.02.02B(12)(b)(viii).) In Count 1, Dr. Whipps asked the court to quash the subpoena and grant him a protective order because the subpoena “fails to meet the minimum requirements of the Fourth Amendment.” In Count 2, Dr. Whipps sought a declaration that 1) the subpoena was invalid and violative of the Fourth Amendment to the federal constitution; 2) declaring that the Board’s request for Dr. Whipps to respond in writing to the allegations in the newspaper article was illegal and outside of the scope of the Board’s powers; and 3) declaring COMAR 10.32.02.02B(12)(b)(viii) and COMAR 10.32.02.02B(12)(b)(x)⁴ “facially unconstitutional” because the regulations authorized the Board to exceed the powers granted to it by the legislature.

The amended motion to quash made the same arguments concerning the validity of the subpoena under the Fourth Amendment and sought the same relief as in Count 1 of the amended complaint.

³ That form appears at <https://www.mbp.state.md.us/forms/complaint.pdf>.

⁴ These regulations define a “Complaint” to include “Media publications” and “Other information, from whatever source, which warrants investigation.” COMAR 10.32.03.02B(12)(b)(viii), (x).

The Board opposed the amended motion to quash and motion for protective order and moved to dismiss the amended complaint. In its opposition to the amended motion, the Board argued that the subpoena was valid because it was authorized by statute, the information sought by it was relevant to the investigation into Dr. Whipps’s treatment of Patient 1, and it was neither overbroad nor indefinite. (Citing *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946).) It maintained that because a complaint was defined by regulation to include a media publication, the Board was authorized to investigate Dr. Whipps based upon the newspaper article, triggering its subpoena powers. Consequently, the Board asked the court to deny the motion to quash and for a protective order.

In its motion to dismiss, the Board argued that Dr. Whipps failed to state a claim upon which relief could be granted because Count 1 of his amended complaint was duplicative of the motion to quash, which was the appropriate vehicle for relief, and that his request for declaratory relief in Count 2 was an improper method to challenge an administrative subpoena. It further argued that the complaint included improper legal argument in violation of Rule 2-303(b) and that Dr. Whipps failed to effect proper service on the Board or the individual defendants.

By order entered March 7, 2023, the circuit court denied the motion to quash on ground that Dr. Whipps’s attorney “failed to file a certificate of good faith pursuant to Maryland Rule 2-431[,]” which states that a circuit court need not address the merits of a discovery dispute in a civil action unless the attorney seeking action by the court “has filed a certificate describing the good faith attempts to discuss with the opposing attorney the

resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues.” Md. Rule 2-431.

Within 10 days, Dr. Whipps moved to alter or amend the order. His motion was denied by order entered April 11, 2023. Dr. Whipps noted an immediate appeal.

On May 22, 2023, the circuit court held a hearing on the motion to dismiss the amended complaint. The Board argued that the complaint never should have been filed because this was not a civil action, but a proceeding to quash an administrative subpoena. The only mechanism to do so was a motion to quash and because that motion had been denied, there was no controversy remaining before the Court. With respect to the declaratory judgment count, relying for the first time upon Md. Code, State Gov’t § 10-125, the Board argued that because Dr. Whipps challenged the constitutionality of COMAR regulations and sought a declaration that the regulations were facially invalid, he was obligated to file his action in the county where he maintains his principal place of business, which was Baltimore County.

Dr. Whipps, through counsel, responded that his challenge to the regulation went “hand in hand with the motion to quash.” The declaratory judgment action did “not exist in a vacuum” because the subpoena he moved to quash was issued under the authority of the regulations he challenged as unconstitutional.

The circuit court ruled from the bench and dismissed the complaint. It ruled that Count 1 was duplicative of the motion to quash and Count 2 was a declaratory judgment action challenging the constitutionality of a regulation which, under State Gov’t § 10-125,

only could be filed in the Circuit Court for Baltimore County. The court signed an order to that effect the same day, which was entered two days later.

This timely appeal followed. We shall include additional facts in our discussion of the issues.

DISCUSSION

The Board of Physicians is a state regulatory agency charged with carrying out the provisions of the Medical Practice Act. *See* Md. Code, Health Occ. § 14-401.1. The Board is empowered to issue subpoenas “in connection with any investigation under this title and any hearings or proceedings before it.” Health Occ. § 14-206(a); *see also Solomon v. Bd. of Physician Quality Assurance*, 132 Md. App. 447, 454 (2000) (“[T]here [is no] dispute that the Board has the authority to issue subpoenas in furtherance of an investigation.”). If the Board subpoenas medical records in relation to its investigation into a complaint against a health care provider and the health care provider believes that there are grounds for not producing the records, the patient or the health care provider must file a motion to quash the subpoena or a motion for a protective order under Rules 2-403 or 2-510. *Md. State Bd. of Physicians v. Eist*, 417 Md. 545, 565 (2011).

a.

In the instant case, Dr. Whipps filed a motion to quash the subpoena and/or for a protective order *and* a complaint. Both the motion and the complaint alleged that the Board lacked authority to investigate a physician based upon a newspaper article and, to the extent that the Board relied on regulations it promulgated that permitted it to do so, that those

regulations were invalid because they exceeded the powers conferred on the Board by the legislature.

The Board argued before the circuit court and in this Court that the complaint “should never have been filed.” To the extent that the complaint was unnecessary and duplicative of Dr. Whipps’s motion to quash, its filing did not alter the nature of the action before the circuit court, which sought review of the validity and enforceability of the subpoena. Thus, for purposes of this appeal, we will consider the motion and the complaint as one action.

b.

We begin with the denial of the motion to quash. We review a circuit court’s order denying a motion to quash under an abuse of discretion standard. *Morrill v. Md. Bd. of Physicians*, 243 Md. App. 640, 648 (2019). As the Board concedes, because Dr. Whipps’s motion did not arise from a discovery dispute, but rather in the context of a pre-compliance challenge to an administrative subpoena, Rule 2-431 was inapplicable. Consequently, the circuit court abused its discretion by denying the motion to quash on this basis. *See Bass v. State*, 206 Md. App. 1, 11 (2012) (reasoning that a court abuses its discretion when it exercises it based upon an error of law).

The Board, citing *Yaffe v. Scarlett Place Residential Condo., Inc.*, 205 Md. App. 429, 440 (2012), argues that we should address the merits of the motion to quash for the

first time on appeal.⁵ We decline to do so. In ruling on a motion to quash an administrative subpoena, a circuit court has a “wide range of discretion.” *Morrill*, 243 Md. App. at 648; *see also Equitable Tr. Co. v. State Comm’n on Hum. Rels.*, 287 Md. 80, 97 (1980) (“Because [trial judges] are on the scene and intimately acquainted with the details at the time, they are in a better position than are appellate judges to evaluate such an issue as oppressiveness or burdensomeness and to contrive means of lessening the burden and yet at the same time permitting investigations to go forward.”). The trial court must exercise its discretion on the merits of the motion to quash in the first instance before this Court may engage in our deferential review of that determination.

c.

We now turn to the issue of venue. The Board argued for the first time at the hearing on its motion to dismiss the amended complaint that because Count 2 challenged the validity of a regulation, it was subject to the venue provision of State Gov’t § 10-125. That statute, which appears in the Administrative Procedure Act, provides that “[a] person may file a petition for a declaratory judgment on the validity of any regulation, whether or not the person has asked the unit to consider the validity of the regulation.” State Gov’t § 10-125(a)(1). Such an action “shall be filed with the circuit court for the county where the

⁵ Our decision in *Yaffe* is inapposite. There, the circuit court granted defense motions for judgment at the conclusion of the plaintiffs’ case in a bench trial. 205 Md. App. at 435. On appeal, we affirmed the grant of judgment on one count on a different ground than relied upon by the trial court, reasoning that this Court may “affirm when the trial court’s decision was right for the wrong reasons.” *Id.* at 440. We did so based on our interpretation of unambiguous language in a condominium declaration, which we could determine as a matter of law. *Id.* at 456.

petitioner resides or has a principal place of business.” *Id.* at (a)(2). Because Dr. Whipps maintains his office in Baltimore County, the Board asserted that Count 2 only could be filed in the Circuit Court for Baltimore County. The circuit court agreed and dismissed Count 2 on this basis.

We disagree that venue was improper. In his amended complaint, Dr. Whipps challenged the validity of the regulation as applied to him. Specifically, he asserted that the Board cannot issue subpoenas in furtherance of an investigation of a physician commenced based on a media publication or “other information” that did not originate with a complainant. Because Dr. Whipps’s challenge to the regulation was made within the context of a proceeding challenging a subpoena, not as a facial challenge to the regulation, we are satisfied that the complaint, as interpreted, was subject to the general venue statute.⁶ Venue was proper in the Circuit Court for Baltimore City with respect to the motion to quash because the Board’s offices are in Baltimore City. *See* Md. Code, Cts. & Jud. Proc.

⁶ The Board conceded during oral argument that if Dr. Whipps’s amended complaint were so limited, that venue was proper in Baltimore City. To the extent that Dr. Whipps seeks to mount a direct challenge to the constitutionality of the regulation, he may do so consistent with State Gov’t § 10-125, but not within this action to quash the subpoena.

§ 6-201(a) (“[A] civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation.”).

For all these reasons, we vacate the orders denying the motion to quash and dismissing the complaint and remand for further proceedings.

**ORDERS OF THE CIRCUIT COURT FOR
BALTIMORE CITY DENYING AMENDED
MOTION TO QUASH AND DISMISSING
AMENDED COMPLAINT VACATED.
CASE REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID BY
APPELLEE.**