



FILED IN DISTRICT COURT
OKLAHOMA COUNTY

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

MAR - 3 2015
THE CLERK OF DISTRICT COURT
OKLAHOMA COUNTY
39

STEVEN C. ANAGNOST, M.D.,)

Plaintiff,)

v.)

OKLAHOMA SPINE AND BRAIN)
INSTITUTE, LLP; *et al.*)

Defendants.)

Case No. CJ-2013-6140

Judge Thomas E. Prince

**DEFENDANT GARY L. BROOKS' MOTION TO DISMISS PLAINTIFF'S
AMENDED PETITION AND BRIEF IN SUPPORT**

Gary L. Brooks served as a public member of the Oklahoma Board of Medical Licensure and Supervision (the "Board") from his appointment in 2003 until July of 2011, and the allegations made against him here all relate to that service. *See* Ex. 1, Am. Pet, *passim*.¹ Despite the length, heat, and detail of Plaintiff's Amended Petition, which is far from compliant with the statutory command of a "short and plain statement," the petition fails to allege facts sufficient to state a claim for relief against him. Because the deficiency of the petition against Brooks mirrors in many respects its deficiencies as to the other defendants, this brief will avoid duplication and adopt the arguments made by Brooks' co-defendants.² But Plaintiff's claims also fail for reasons particular to Brooks — the petition simply lacks allegations sufficient to state plausible claims against him. In particular, although the main premise of Plaintiff's claim is that Brooks had a

¹ The cited exhibits are found in the Joint Submission of Exhibits filed by the defendants, State Of Oklahoma, *ex rel.* Oklahoma Board of Medical Licensure and Supervision, Lyle Kelsey, Eric Frische, M.D., Gayla Janke, and Gary L. Brooks.

² Brooks adopts and incorporates herein the arguments set forth in the motions to dismiss filed by the State of Oklahoma, *ex rel.* Oklahoma Board of Medical Licensure and Supervision, Lyle Kelsey, Eric Frische, M.D., Gayla Janke, Daniel B. Graves, Frank J. Tomecek, M.D., Frank J. Tomecek, M.D., P.L.C., David A. Fell, M.D., Tulsa Spine & Specialty Hospital, L.L.C., Oklahoma Spine and Brain Institute, LLP, Clinton Baird, M.D., Chris M. Boxell, LLC, and Christopher M. Boxell, M.D.

conflict of interest that disqualified him from participating in board proceedings related to Plaintiff, there is neither allegation nor evidence that Brooks ever exercised the powers of a board member in connection with Plaintiff.

The petition departs from the usual course of judicial proceedings in multiple ways, particularly as to Brooks. For instance, comments from Governor Mary Fallin and Attorney General Scott Pruitt, before they took office, on the appropriateness of appointing a plaintiffs' lawyer to the Board, while doubtless appropriate as comments on political appointments by an opposing party, say nothing about whether Plaintiff should recover in court. *See* Ex. 1, Am. Pet. ¶ 181. Similarly, comments in a dissenting opinion from the Supreme Court in a case in which Brooks was not a party and involving a lawsuit filed long after he left the Board, are neither fact nor law as to him, and are irrelevant to the claims against him. *See id.* ¶¶ 113-16. As discussed below, as to Brooks, it is irrelevant whether Plaintiff is a good doctor or a bad one or whether the Board's allegations against him were supported or unsupported. And perhaps most egregiously, Plaintiff quotes and relies on what purports to be material from an Oklahoma Bar Association investigative file that the Court has already found to be privileged and confidential. *See, e.g., id.* ¶ 82. Plaintiff's reliance on these extraneous matters speaks volumes about the merits of, and motivations for, this suit.

The real factual allegations against Brooks boil down to three categories, none of which has ever been considered a tort: first, that his status as a plaintiffs' lawyer and his handling of two malpractice suits against Plaintiff constituted a conflict of interest that disqualified him from sitting as a decision maker on the Board's grievance against Plaintiff; second, that his membership on the Board made it improper to communicate factual information related to the treatment of his malpractice clients to the Board's investigator; and third, that his membership on

the Board enabled him to improperly receive information that assisted his handling of the malpractice cases.

Brooks readily agrees that he would have recused from any Board consideration of allegations against Plaintiff during his term of service, but even if liability could legally be predicated on Brooks' actions as a board member, which, as explained below, it cannot, the simple truth is that Plaintiff has not alleged, as he cannot truthfully do, that Brooks ever participated as a board member in any action taken against Plaintiff. There is no allegation that Brooks participated in any way in the June 2010 emergency hearing; there is no allegation that Brooks participated in the formulation or filing of the Board's amended complaint, and there is no allegation that Brooks participated as a board member in the investigation or eventual settlement of that complaint (indeed, the amended complaint was filed a year after Brooks left the Board). While the Amended Petition makes obvious the depth of Plaintiff's animosity toward Brooks, and trial lawyers in general, that animosity is not a sufficient substitute for legally significant factual allegations.

The second category of allegations seeks to stigmatize the act of a board member providing its staff with information in his possession relevant to a Board investigation. Just repeating the idea out loud reveals its impossibility as a tort claim. Brooks not only admits that he provided the Board investigator with information regarding Plaintiff's treatment of his clients and the tragic results of that treatment, he is proud of doing so, and believes it was his duty to do so. There is nothing in the law that makes it tortious for a citizen to provide factual information to regulatory agencies performing their ordained function, much less anything making it tortious for Brooks, as a duly sworn member of the Board, to share what information he had in his

possession. The Amended Petition does not allege the information was false, privileged, or illegally obtained, just that it was provided by Brooks.

The third category is so devoid of substance as to be inadequate. The law does not prohibit a lawyer's use of information to benefit a client's case absent some special circumstance, privilege, trade secret, etc., that renders the information off limits. Here, Plaintiff's allegations do not make it possible to identify what information is involved, what legal prohibition, if any, made it unusable, or how, if at all, Plaintiff claims it was improperly used. Notice is one thing; the lack of any information sufficient to enable Brooks to form a defense to the allegations is another. The Amended Petition is defective from a pleading standpoint and ought to be dismissed as to Brooks. But its deficiencies go far deeper than mere pleading.

BACKGROUND

The Board is vested by statute with the responsibility to license and supervise Oklahoma physicians, and is "given quasi-judicial powers while sitting as a Board for the purpose of revoking, suspending or imposing other disciplinary actions" upon physicians licensed in Oklahoma. *See* 59 Okla. Stat. § 513; *see generally* 59 Okla. Stat. §§ 480 *et seq.* The Board consists of seven licensed physicians and two lay members, all of whom are appointed by the Governor. *See* 59 Okla. Stat. § 481. Brooks served as an uncompensated lay member of the Board from May 2003 until July 2011. *See* Ex. 1, Am. Pet. Ex. 7 ¶ 3.

In March 2010, the Board received complaints relating to the services and quality of care provided by Plaintiff, a Board-licensed physician and spine surgeon. *See* Ex. 1, Am. Pet. ¶¶ 1, 58. Among the information provided to the Board were allegations of sham surgeries; *i.e.* surgeries that Plaintiff falsely claimed to have performed. *Id.* ¶¶ 58-63. In accordance with its mandate, the Board began an investigation and scheduled an emergency hearing to determine

whether Plaintiff's license should be immediately suspended. *Id.* ¶¶ 59, 61, 64; *see also* Okla. Admin. Code § 435:3-3-1 (providing that the Board “*shall* investigate all credible complaints over which [it] reasonably would have jurisdiction”) (emphasis added). At the hearing held June 18, 2010, the Board withdrew its application for emergency suspension and took no action against Plaintiff. *See id.* ¶¶ 61, 74. The Board, however, continued investigating complaints as to Plaintiff's conduct and medical care.

In July 2012, *one year after Brooks left its service*, the Board filed an amended complaint against Plaintiff, alleging incompetent, fraudulent, and/or negligent care in the treatment of nearly two dozen patients. *See* Ex. 1, Am. Pet. ¶¶ 108, 120. Plaintiff, in turn, filed a Petition for Injunctive and Declaratory Relief against the Board in July 2013, setting forth the same contentions he now tries to advance in this lawsuit. *Id.* ¶ 118. The Board's disciplinary proceeding and Plaintiff's lawsuit were both fully and finally resolved on September 12, 2013, at which time Plaintiff entered into a Consent Order and a Settlement Agreement and Release; the latter expressly inuring to the benefit of former Board members such as Brooks. *See* Ex. 1, Am. Pet. ¶¶ 119-22; Ex. 5, Consent Order; Ex. 6, Settlement Agreement & Release.

In direct contradiction of the Consent Order and the Settlement Agreement, Plaintiff now forges ahead with this lawsuit against the Board, some of its former members, and others who were involved, if only tangentially, in the Board investigation and disciplinary action. Plaintiff's various claims are all grounded on stale allegations that he was the victim of a wrongful disciplinary proceeding triggered by unfounded complaints. Brooks is mentioned in only two of the 126 paragraphs preceding Plaintiff's causes of action, *see* Ex. 1, Am. Pet. ¶¶ 16, 82; the first of those identifies him as a former member of the Board and the second merely sets forth the unsurprising notion that, while serving as a board member, Brooks communicated with Board

investigators regarding the investigation of Plaintiff's medical practices. Despite the meager allegations, Plaintiff seemingly includes Brooks as a defendant in a litany of tort and constitutional claims, including: (1) tortious interference with business relations; (2) abuse of process; (3) intentional infliction of emotional distress; (4) negligence; (5) violations of the Oklahoma Constitution; (6) conspiracy; and (7) fraud/deceit. The Amended Petition, however, is ambiguous enough to create doubt as to which claims include Brooks individually. Regardless, all of the claims are without merit and unsupported by the allegations.

ARGUMENT

A motion to dismiss under 12 Okla. Stat. § 2012(B)(6) “involves consideration of whether a plaintiff's petition is legally sufficient.” *Fanning v. Brown*, 2004 OK 7, ¶ 4, 85 P.3d 841, 844. When considering the sufficiency of a petition, the Court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in the plaintiff's favor. *See Kirby v. Jean's Plumbing Heat & Air*, 2009 OK 65, ¶ 5, 222 P.3d 21, 24. Even under the most liberal pleading standard, however, Plaintiff's claims against Brooks fall far short.

I. All of Plaintiff's Claims Are Barred by the Consent Order and the Settlement Agreement and Release.

Brooks adopts in its entirety the motion to dismiss and supporting brief of the Board. On September 12, 2013, Plaintiff entered into a Consent Order with the Board, ending a disciplinary action regarding the quality of medical care he provided to multiple patients. That same day, Plaintiff executed a Settlement Agreement and Release resolving all claims related to the disciplinary proceeding and a separate lawsuit he filed against the Board. The broad terms of the Consent Order and the Settlement Agreement and Release terminated all claims related to Brooks, whether asserted or unasserted, and whether based on facts known or unknown. *See* Exs. 5 and 6. Plaintiff nonetheless brings this suit against the Board, Brooks, and others in an

ongoing effort to raise contentions that he failed to prevail on prior to entry of those agreements, and that he unquestionably released through their execution.

All of the alleged conduct underlying Plaintiff's claims predates the entry of the Consent Order and the Settlement Agreement and Release, and most, in fact, occurred *after* Brooks ceased serving as a Board member. Indeed, Plaintiff included essentially the identical factual allegations concerning Brooks in the petition he filed against the Board in July 2013. *See* Ex. 4, Am. Petition, ¶¶ 72-73. As set forth in the Board's motion to dismiss, Plaintiff's claims are foreclosed by the express terms of the Consent Order and the Settlement Agreement and Release. Brooks joins in and adopts the Board's arguments.

II. All of Plaintiff's Claims Are Barred by Immunity and the Oklahoma Governmental Tort Claims Act.

Government would be difficult indeed if every administrative action gave rise to a tort action against the state, its boards, and the members of those boards. Instead, Oklahoma courts have long recognized an absolute immunity for those who exercise judicial or quasi-judicial functions on behalf of the state, and in those limited areas where the potential of a tort remedy is retained, the legislature has defined the boundaries of the potential remedy by statute. Brooks adopts and incorporates the arguments of the Board demonstrating that Plaintiff's claims are barred, both by absolute immunity and by the provisions of the Governmental Tort Claims Act, 51 Okla. Stat. §§ 151 *et seq.*, which expressly exempts the State and those authorized to act on its behalf from liability for judicial, quasi-judicial, or prosecutorial functions. *See* 51 Okla. Stat. §§ 152, 155(2). Plaintiff's allegations make clear that the arguments made on behalf of the Board apply with equal force to Brooks.

Plaintiff alleges that, while serving as a duly-appointed member of the Board, Brooks spoke with and coordinated with Board investigators prior to and shortly after the June 2010

emergency hearing. *See* Ex. 1, Am. Pet. ¶ 82. Even assuming the truth of the allegations, there is nothing improper or actionable in a board member cooperating with investigators. Investigating possible violations of professional conduct rules by licensed physicians is a quintessential Board responsibility. *See* 59 Okla. Stat. §§ 503-509.1, 513. And as set forth in the motion to dismiss filed by the Board, whose arguments Brooks joins in and adopts, it is a governmental duty for which the Board and Brooks are entitled to immunity.

III. Plaintiff's Allegations Do Not Support Any Causes of Action.

As he did in the litigation that preceded entry of the Consent Order and the Settlement Agreement and Release, Plaintiff maintains that, as a medical malpractice attorney, Brooks was plagued by a conflict of interest with respect to the investigation into Plaintiff's medical care. *See* Ex. 1, Am. Pet. ¶¶ 82. But even if true, the mere existence of a conflict of interest does not provide Plaintiff with a private right of action against Brooks. Plaintiff accuses the Board of misrepresenting Brooks' involvement in the investigation, but he does not, and cannot, attribute any dishonesty to Brooks. *Id.* And nowhere in Plaintiff's Amended Petition does he explain how Brooks' purported conflict of interest harmed him in any way. Brooks left the Board's service in July 2011, well before the Board filed the amended complaint that led to entry of the Consent Order, and even before the Board is alleged to have begun "actively soliciting patient complaints against Dr. Anagnost from his competitors and plaintiff's lawyers." *Id.* ¶ 87. Plaintiff's own allegations state that the Board's investigation was spurred by the receipt of complaints pertaining to Plaintiff's medical practices, not by Brooks or any other Board member.

Plaintiff contends that Brooks owed him a "personal duty . . . not to use the information [he] learned about him at the Board for [his] personal gain." Ex. 1, Am. Pet. ¶ 146. He does not, however, allege that Brooks *actually used* information learned at the Board for personal gain.

Moreover, the existence of a duty of a care is a question of law, and the threshold question in any negligence claim. *Smith v. City of Stillwater*, 2014 OK 42, ¶ 22, 328 P.3d 1192, 1200. Here, the alleged “personal duty” is without basis in law or common sense. The Board is entrusted with investigating credible complaints within its jurisdiction. *See* Okla. Admin. Code § 435:3-3-1. The proposition advanced by Plaintiff -- that Brooks owed a duty to restrict his own access to investigatory documents -- is flatly inconsistent with Brooks’ duty as a member of the Board. And insofar as this alleged “personal duty” stems from Brooks’ representation of clients harmed by Plaintiff’s medical care, Brooks’ duty is to his clients, not Plaintiff. The absence of any recognized or conceivable legal duty is fatal to Plaintiff’s negligence claim.

Although Plaintiff appears to include Brooks as a defendant in numerous claims, his thin, conclusory allegations as to Brooks are insufficient to support *any* of the claims. Plaintiff can allege no more than that, while serving as a lay member of the Board and thereafter, Brooks may have assisted in the investigation of Plaintiff for unprofessional medical practices, an investigation that culminated in the entry of a Consent Order. While Plaintiff offers conclusory assertions that Brooks “improperly used” his position at the Board, *see* Ex. 1, Am. Pet. ¶ 132, the Amended Petition is devoid of any factual allegations supporting such assertions. Plaintiff does not, and cannot, allege that Brooks directed or caused the Board to take any action against Plaintiff, either during or after Brooks’ service on the Board. He does not allege that Brooks provided the Board with false information, or that Brooks received information that he was not entitled to receive by virtue of his Board membership. Nor does Plaintiff even attempt to tie Brooks’ actions to any harm allegedly suffered. Plaintiff includes Brooks among the defendants in his “fraud/deceit” claim, but he does not allege that Brooks made *any* representations to him, let alone false ones, and he makes no effort to plead fraud with the requisite particularity. *See* 12

Okla. Stat. § 2009(B); *Gianfillippo v. Northland Cas. Co.*, 1993 OK 125, 861 P.2d 308, 310-11. Brooks' service on the Board prior to July 2011 is Plaintiff's only basis for including Brooks in this matter, but it remains an insufficient one.

IV. Plaintiff's Claims Against Brooks Are Barred by the Statute of Limitations.

It is clear from the face of the Amended Petition that Plaintiff's claims against Brooks are time-barred. Plaintiff concedes, as he must, that Brooks' tenure as a member of the Board ended in July 2011. *See* Ex. 1, Am. Pet. Ex. 7 ¶ 3. All of the causes of action directed at Brooks by virtue of his status as a member of the Board would be subject to a two-year or shorter limitations period. *See* 12 Okla. Stat. § 95(A). Even if the discovery rule were applicable, Plaintiff was well aware of Brooks' membership on the Board prior to July 2011, and certainly aware of whatever actions were taken against him by the Board during that time period. At the latest, the limitations period for any claims predicated on Brooks' activities on the Board expired in July 2013 — two years after Brooks left its service. In his affidavit accompanying the Amended Petition, Plaintiff sets forth various dates on which Brooks allegedly provided or received information regarding Plaintiff, but the latest date provided is February 29, 2012 (and even that is a reference to a *prior* conversation). *See* Ex. 1, Am. Pet. Ex. 6 ¶ 16. Insofar as Plaintiff's claims are based on these alleged communications, the limitations period expired no later than February 2014. Since no causes of action were asserted against Brooks until the filing of the Amended Petition on December 12, 2014, all of Plaintiff's claims against Brooks should be dismissed as time-barred.

V. Plaintiff's Claims Are Further Barred by the Oklahoma Citizens Participation Act.

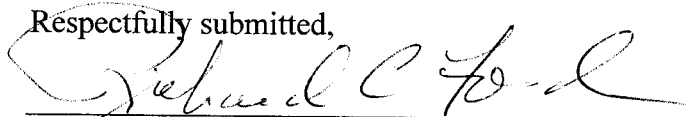
To the extent that Plaintiff's claims against Brooks may be premised on something other than his service on the Board, which is not apparent from a plain reading of the Amended

Petition, the claims are barred by the Oklahoma Citizens Participation Act, 12 Okla. Stat. §§ 1240 *et seq.* Brooks adopts and incorporates the arguments made by defendant Daniel Graves in his motion to dismiss filed February 6, 2015 (*see* pages 15-17).

CONCLUSION

Plaintiff's claims against Brooks are fatally flawed on several grounds. As set forth in the Board's motion to dismiss, Plaintiff's claims are foreclosed by the Consent Order and the Settlement Agreement and Release entered into in September 2013. Even if not foreclosed, all of Plaintiff's claims against Brooks stem from his membership on the Board and actions taken in conformity with the Board's statutory mandate. Brooks is thus entitled to immunity and the protection afforded by the Governmental Tort Claims Act. Plaintiff's Amended Petition further fails to set forth any allegations against Brooks sufficient to support his claims for relief. The sparse allegations involving Brooks all pertain to actions taken during Brooks' tenure on the Board or shortly thereafter, and thus the claims fall outside the limitations period. And insofar as Plaintiff's claims against Brooks are predicated on actions removed from Brooks' membership on the Board, the claims run afoul of the Oklahoma Citizens Participation Act. For all of these reasons, and those adopted and incorporated herein, Brooks is entitled to dismissal of Plaintiff's claims against him.

Respectfully submitted,



Richard C. Ford, OBA #3028
CROWE & DUNLEVY, P.C.
324 N. Robinson Ave., Suite 100
Oklahoma City, Oklahoma 73102
(405) 235-7749
(405) 272-5270 (Facsimile)
richard.ford@crowedunlevy.com

-AND-

Henry A. Meyer, OBA #6163
MEYER & LEONARD, PLLC
116 E. Sheridan, Suite 207
Oklahoma City, Oklahoma 73104
(405) 702-9900
(405) 605-8381 (Facsimile)
hameyer@meyerleonard.com

**ATTORNEYS FOR DEFENDANT GARY
L. BROOKS**

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March, 2015, I caused a true and correct copy of the above and foregoing document to be placed in the U.S. mail, postage prepaid to:

Patrick M. Ryan, OBA #7864
Phillip G. Whaley, OBA #13371
Jason A. Ryan, OBA #18824
RYAN WHALEY COLDIRON SHANDY PLLC
900 Robinson Renaissance
119 North Robinson
Oklahoma City, OK 73102

Joe E. White, Jr., OBA #12930
Charles C. Weddle III, OBA #18869
WHITE & WEDDLE, P.C.
630 N.E. 63rd Street
Oklahoma City, OK 73105

**ATTORNEYS FOR PLAINTIFF,
STEVEN C. ANAGNOST, M.D.**

Drew Neville
Kurt M. Rupert
HARTZOG CONGER CASON & NEVILLE
1600 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, Oklahoma 73102
dneville@hartzoglaw.com
krupert@hartzoglaw.com

**ATTORNEYS FOR DEFENDANT,
STATE OF OKLAHOMA, EX REL.**

**OKLAHOMA BOARD OF MEDICAL
LICENSURE AND SUPERVISION**

Robert A. Nance
RIGGS ABNEY
528 N.W. 12th Street
Oklahoma City, Oklahoma 73103-2407

**ATTORNEY FOR DEFENDANT,
LYLE KELSEY**

Tom W. Gruber
Gregory T. Metcalfe
Lewis T. LeNaire
GABLE GOTWALS
One Leadership Square, 15th Floor
Oklahoma City, Oklahoma 73102-7101

**ATTORNEYS FOR DEFENDANTS,
ERIC FRISCHE, M.D. and GAYLA JANKE**

James K. Secrest, II
Edward J. Main
SECRET, HILL, BUTLER & SECREST
7134 S. Yale, Ste. 900
Tulsa, Oklahoma 74136
jsecrest@secresthill.com

**ATTORNEY FOR DEFENDANT TULSA SPINE &
SPECIALITY HOSPITAL, L.L.C.**

Mike Atkinson
Jennifer R. Annis
Rachel A. Hubner
ATKINSON, HASKINS, NELLIS, BRITTINGHAM,
GLADD & FIASCO
525 S. Main, Ste. 1500
Tulsa, Oklahoma 74103-4524

ATTORNEYS FOR DAVID A. FELL, M.D.

Hinton H. Walters
R. Gene Stanley
RIFE WALTERS STANLEY & NATARAJAN, LLP
1017 N.W. 6th Ave.
Oklahoma City, Oklahoma 73106

**ATTORNEY FOR OKLAHOMA SPINE AND
BRAIN INSTITUTE, L.L.P.; CLINTON BAIRD, M.D.;
CHRIS M. BOXELL, LLC; AND CHRISTOPHER M.
BOXELL, M.D.**

Walter D. Haskins
Rachel Hughes
Meredith D. Lindaman
ATKINSON, HASKINS, NELLIS, BRITTINGHAM,
GLADD & FIASCO
525 S. Main, Ste. 1500
Tulsa, Oklahoma 74103-4524

**ATTORNEYS FOR FRANK J. TOMECEK, M.D. AND
FRANK J. TOMECEK, M.D., P.L.C.**

George S. Corbyn, Jr.
Amy J. Pierce
CORBYN HAMPTON, PLLC
One Leadership Square
211 N. Robinson, Suite 1910
Oklahoma City, Oklahoma 73102
georbyn@corbynhampton.com
apierce@corbynhampton.com

**ATTORNEYS FOR DEFENDANT
DANIEL B. GRAVES**

Charles Alden, III
210 Park Ave., suite 2550
Oklahoma City, Oklahoma 73102

**ATTORNEYS FOR DEFENDANT
S. RANDALL SULLIVAN**

Office of the Attorney General of the State of Oklahoma
313 N.E. 21st St.
Oklahoma City, Oklahoma 73105

A handwritten signature in black ink, appearing to read "Daniel B. Graves", is written over a horizontal line.