STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Dean Miner,
Plaintiff Below, Petitioner

vs) No. 18-1081 (Ohio County 15-C-222)

The West Virginia Racing Commission, Ralph T. Hrehm, personally and in his capacity as Judge for the West Virginia Racing Commission, Manuel Vidis, personally and in his capacity as Judge for the West Virginia Racing Commission, Holly O'Harra, personally and in her capacity as Judge for the West Virginia Racing Commission, and Lori Bohenko D.V.M, personally and in her capacity as Racing Commission Veterinarian for the West Virginia Racing Commission,
Defendants Below, Respondents

FILED
March 23, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Dean Miner, by counsel Scott E. Brown, appeals the Circuit Court of Ohio County's November 8, 2018, order granting summary judgment to respondents based on quasi-judicial and/or qualified immunity. Respondents the West Virginia Racing Commission ("Commission"), Ralph T. Hrehm, personally and in his capacity as Judge for the West Virginia Racing Commission, Manuel Vidis, personally and in his capacity as Judge for the West Virginia Racing Commission, Holly O'Harra, personally and in her capacity as Judge of the West Virginia Racing Commission, and Lori Bohenko, D.V.M., personally and in her capacity as Racing Commission Veterinarian for the West Virginia Racing Commission, by counsel Christopher C. Ross, submitted a response.

The Court has considered the parties' briefs and record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner Dean Miner is an owner and breeder of greyhound dogs at Wheeling Island Hotel, Casino & Racetrack. On May 9, 2012, twelve dogs petitioner co-owned were brought to the track from another state for entry into the kennel compound. Six of the dogs had no health

certificates, and six had expired health certificates. Respondent Lori Bohenko, D.V.M., reported the lack of certificates to the respondent judges as an infraction of the Rules of Greyhound Racing per 178 C.S.R. § 2-1. On June 19, 2012, the respondent judges held a hearing, which included the presentation of testimony and other evidence. They ultimately issued a ruling ("Ruling #17"), finding that petitioner was in violation of Greyhound Racing Rule § 178-2-52.1, and fined him $500. On August 27, 2012, petitioner filed a timely appeal of that ruling. In August of 2014, an Assistant Attorney General, on behalf of respondents, and then-counsel for petitioner reached a settlement of the appeal, under which the Board of Judges agreed to vacate Ruling #17 and petitioner agreed to deem his appeal moot, requiring no further action on the part of respondents. On September 30, 2014, an order rescinding Ruling #17 was entered by the Racing Commissioner, and petitioner was reimbursed the $500 fine.

On August 14, 2015, petitioner filed a complaint against respondents, personally and in their respective capacities with the Commission, alleging violation of due process, malicious prosecution, interference with business relationships, defamation, and extreme and outrageous conduct, in addition to requesting punitive damages. Respondents filed a motion for summary judgment on March 22, 2017, and the circuit court entered a May 5, 2017, order dismissing petitioner's due process claims. However, it denied respondents' motion on the issue of subject matter jurisdiction as to the remaining counts. It also denied respondents' motion on the issue of petitioner's claims being time-barred by the statute of limitations and deferred respondents' motion on the issues of both quasi-judicial and qualified immunity until the completion of discovery. Petitioner did not appeal from that order.

Following the completion of discovery, respondents filed a renewed motion for summary judgment on October 9, 2018, which was granted by the circuit court by order entered on November 8, 2018.[1] In that order, the circuit court stated that

> the only issue for [it] to determine on quasi-judicial immunity is whether, from the totality of the evidence presented, there are any genuine issues of material fact for a rational trier of fact to determine on whether the [respondent j]udges, in issuing Ruling #17, acted maliciously and 'transcended the limits of their authority' and were not acting within the scope of their duties, authority, and/or employment with the Racing Commission[.] See [sic] Riffe v. Armstrong, 197 W. Va. 626, 641, 477 S.E.2d 535, 550 (1996)[.]

The circuit court also found that in his response to respondents' original motion for summary judgment petitioner agreed that the respondent judges were acting within their official judicial capacity at the time they issued Ruling #17. It further found that while petitioner may not like the result or the process which led to the result, the respondent judges were acting within the bounds of their roles as enunciated in the West Virginia Code of State Rules.

In that order, the circuit court determined that the respondent judges are employed by the Commission to oversee all races. The circuit court then set forth some of the judges' duties

[1]The motion was noticed for hearing, but three days prior to the scheduled hearing the circuit court issued its order without hearing oral argument.

pursuant to 178 C.S.R. § 2-9. The circuit court also found that respondent Dr. Bohenko, as the Commission veterinarian, is required to determine that greyhounds are in condition to race and, if she finds they are not, she shall immediately notify the judges.

The circuit court order provides that petitioner argues that respondents were malicious and selectively prosecuted him because

> the Rules and Regulations of Greyhound Racing do not specify who is responsible for providing the health certificates; greyhound farmer Rod Boatright took full responsibility for the error in the health certifies [sic] of the dogs; no owner had ever been held responsible for providing health certificates; the [respondent j]udges did not conduct an investigation to [petitioner's] satisfaction; the [respondent j]udges had made up their minds prior to the hearing; [respondent] Bohenko participated in the proceedings as an official and as a witness; and that [respondents] were unfair to [petitioner].

The circuit court, however, found that all of those complaints fall squarely within the realm of the judicial discretion of the respondent judges as provided under the laws and regulations of West Virginia cited in the circuit court's order.

Further, the circuit court found that petitioner had failed to produce sufficient evidence that the respondent judges exceeded their official authority. In support of that finding, the circuit court quoted petitioner's liability expert on the greyhound racing industry, Michael J. Fynmore, who testified that he was not "aware of anything improper or beyond the duties of the track vet that Dr. Bohenko did in this matter[.]" He gave the same response regarding anything improper or beyond the judges' roles. Agreeing with respondents, the circuit court noted that "being treated unfairly isn't enough[, petitioner] must show that [respondents] acted in such a way as to transcend the limits and bounds of their authority, and such factual support does not exist in [this] case."

Finally, the circuit court found that respondents are entitled to qualified immunity. The circuit court determined that, according to the facts before it, petitioner had not produced genuine issues of material fact that could lead a jury to conclude that respondents did not act in compliance with the authority granted to them by the Greyhound Racing Rules and the complaint does not allege that the rules violated any clearly established statutory or constitutional rights or laws of which a reasonable person would have known. "Accordingly, had th[e circuit court] not granted [respondents'] Renewed Motion on grounds of quasi-judicial immunity, it would have granted the same on grounds of qualified immunity."

Upon concluding that respondents are entitled to quasi-judicial and/or qualified immunity from all of petitioner's claims, the circuit court granted respondents' renewed motion for summary judgment and dismissed petitioner's complaint with prejudice. The court also determined that it need not address respondents' remaining arguments, such as whether petitioner's claims are barred by a prior settlement agreement, as the same is moot in light of the court's ruling. Petitioner appeals

from that November 8, 2018, summary judgment order.[2]

This Court has long held that "'[a] circuit court's entry of summary judgment is reviewed *de novo*.' Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)." *City of Morgantown v. Nuzum Trucking Co.*, 237 W. Va. 226, 230, 786 S.E.2d 486, 490 (2016). Further, we have found as follows:

> "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syllabus point 3, *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 459 S.E.2d 329 (1995).

Syl. Pt. 2, *Andrews v. Antero Res.*, 241 W. Va. 796, 828 S.E.2d 858 (2019). We have additionally stated that

> "the party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Painter v. Peavy*, 192 W. Va. at 192-93, 451 S.E.2d at 758-59 (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986)).

Andrews at 811, 828 S.E.2d at 873.

On appeal, petitioner sets forth two assignments of error. First, he contends that the circuit court erred by concluding that respondents were entitled to quasi-judicial immunity and granting respondents' motion for summary judgment based upon that allegedly erroneous conclusion. Acknowledging the applicability of *Riffe*, which was cited by the circuit court in its order, petitioner argues that the defense of quasi-judicial immunity or privilege is generally available to one participating in the involuntary commitment process "in good faith." Syl. Pt. 10, in relevant part, *Riffe v. Armstrong*, 197 W. Va. 626, 477 S.E.2d 535 (1996). Without citing specific discovery,

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[2] Petitioner's recitation of the facts includes allegations that in 2007 his license was summarily suspended on the wrongful and fictitious premise that two of his greyhound dogs had

> bogus health certificates. The suspension was undone in just a few days but [petitioner] sued [the former Commission Chairman] and . . . Commission for harassing [petitioner] and maliciously suspending his license. . . . The litigation of that case dragged on and [petitioner's] business took a hit with a steady loss in his earnings . . . .

However, petitioner fails to cite to the record for those contentions, in addition to a number of other unsupported factual assertions.

petitioner contends that he demonstrated in discovery that the respondent judges not only failed to act in good faith but acted maliciously toward petitioner. As a result, he argues that they have lost their quasi-judicial immunity.

Petitioner accuses the respondent judges of holding "a kangaroo court style hearing" in June of 2012 and is critical of the failure to present the six allegedly expired health/vaccination records during that hearing, accusing the judges of denying him the right to examine those documents. However, in violation of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure, [3] he fails to cite to any place in the record where he requested to examine those records or such request was denied. Petitioner also sets forth limited portions of the testimony of the three respondent judges, wherein they essentially agreed that the health certificates at issue constituted evidence in the case against petitioner but that they did not recall seeing them during the hearing. While petitioner does not point to a request for a continuance below, he is critical of the respondent judges' failure to order a continuance so that the health certificates could be produced at the hearing. Petitioner argues that these facts show that the respondent judges acted with malice toward him.

Petitioner next points to his testimony that he contends shows that the respondent judges were maliciously targeting him for prosecution. However, that testimony simply established that he was charged but that his ex-wife, who was a co-owner of the dogs, was not charged. While respondents argued that petitioner's discovery responses supported their position that the respondent judges' actions did not transcend the bounds of their authority, petitioner asserts that those responses clearly demonstrate that the respondent judges had pre-judged the matter before the hearing and knew they were going to rule against petitioner. Petitioner points out that dog owners are often hundreds or thousands of miles away from the kennel compound when the dogs arrive so they cannot be held responsible for paperwork issues. He argues that "[t]he only logical conclusion to be reached is that the respondent judges, in cohoots with Dr. Bohenko, selectively and maliciously and unjustifiably targeted [petitioner]."

In response, respondents correctly point out that petitioner spends the majority of his argument on due process issues that are not properly before this Court because they were dismissed in 2017 and were not timely appealed to this Court.[4]

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[3] The brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error. The argument must *contain appropriate and specific citations to the record on appeal*, *including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal*. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure. (Emphasis added).

[4] In its May 5, 2017, order, the circuit court found that "while allegations of constitutional due process violations generally fall within [that c]ourt's jurisdiction . . . in this case, subject matter (continued . . .)

With regard to quasi-judicial immunity, this Court has explained that it is

> "[a]n exemption similar to that of judges from personal liability for their judicial acts [that] is extended to officers in the other departments of government whenever they are entrusted with the exercise of discretionary power and their determinations or decisions are, by their nature judicial. . . . This immunity exists only where the officer has jurisdiction of the particular case and is authorized to determine it; if the officer transcends the limits of authority the officer ceases, in the particular case, to act as a judge, and is responsible for all the consequences. . . ." 32 Am.Jur.2d *False Imprisonment* § 109 (1995) (footnotes omitted).

Riffe at 641, 477 S.E.2d at 550.

As the circuit court found in its order granting summary judgment to respondents, in his response to respondents' original motion for summary judgment, petitioner

> agreed that the [respondent j]udges were acting within their official judicial capacity at the time of the issuing of Ruling #17: [T]here is absolutely no question that the [respondent] judges were acting within the scope of their employment with the West Virginia Racing Commission. This fact can be clearly seen in the [respondents'] duties as described in this memorandum.

The circuit court went on to find that the respondent judges were acting within the bounds of their roles as set forth in the West Virginia Code of State Rules, particularly the relevant portions of 178 C.S.R. § 2-9. Pursuant to 178 C.S.R. § 2-9.7, the "judges shall have general supervision over all occupational permit holders, other racing officials, and greyhounds on association grounds." Additional pertinent parts of those rules, which the circuit court considered, provide as follows:

> 9.11 The judges shall have the authority to resolve all conflicts involving entries and racing.
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> 9.12 Persons entering greyhounds to run at licensed association tracks in this jurisdiction agree in so doing to accept the decision of the judges on any questions relating to a race or racing.
>
> 9.13 The judges shall have the authority to sanction any person for violation of the rules or statutes, including but not limited to, suspension or revocation of an occupational permit and/or fine. . . .

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jurisdiction was specifically placed with the Racing Commission . . . . In this case, the time period within which [petitioner] had to appeal due process violations to [the circuit c]ourt has lapsed. ACCORDINGLY, [respondents'] Motion for Summary Judgment on the issue of subject matter jurisdiction, as it applies to [the due process portion of petitioner's] Complaint is hereby GRANTED." Thereafter, the circuit court dismissed those claims.

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> 9.16 The judges shall take appropriate action on alleged violations of this rule with or without complaint thereof.

The circuit court next addressed the claims against Dr. Bohenko, determining that if she finds that greyhounds are not in condition to race, she "shall immediately notify the judges" pursuant to 178 C.S.R. § 2-17.2.

In considering petitioner's arguments that respondents acted maliciously and selectively prosecuted him, the circuit court agreed with respondents, holding that "all of these complaints fall squarely within the realm of the judicial discretion of the [respondent j]udges as provided under the laws and regulations of West Virginia . . . ." The circuit court also foreclosed petitioner's attempt to attack the merits of the respondent judges' decision or the process that led to that decision due to statute of limitations issues as set forth in the circuit court's May 5, 2017, order. Finally, it concluded that petitioner failed to produce sufficient evidence that the respondent judges "transcended the limits and acts outside of the bounds of their official authority." In reaching that conclusion, the circuit court pointed to petitioner's expert's admission that he was not aware of anything improper or beyond their respective duties that Dr. Bohenko or the respondent judges did in this matter. We agree with the circuit court.

This Court has previously held that

> "[a]dministrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syllabus point 3, *Mountaineer Disposal Service, Inc. v. Dyer,* 156 W.Va. 766, 197 S.E.2d 111 (1973).

Syl. Pt. 5, *PNGI Charles Town Gaming, LLC v. West Virginia Racing Comm'n*, 234 W. Va. 352, 765 S.E.2d 241 (2013). Further, "'administrative agencies also possess "such powers as are reasonably and necessarily implied in the exercise of their duties in accomplishing the purposes of the act." *McDaniel v. West Virginia Div. of Labor,* 214 W.Va. 719, 727, 591 S.E.2d 277, 285 (2003)[.]'" *PNGI* at 364, 765 S.E.2d at 253 (citation omitted). It is clear from the evidence before the circuit court and this Court that petitioner failed to present sufficient evidence to show that the respondent judges and veterinarian "transcended the limits and acts outside of the bounds of their official authority." Therefore, petitioner's first assignment of error is without merit.

Petitioner next argues that the circuit court erred by concluding that respondents are entitled to qualified immunity from all of petitioner's claims. The circuit court found that while it need not address the application of qualified immunity in light of its ruling on quasi-judicial immunity, had it not granted respondents' renewed motion for summary judgment on grounds of quasi-judicial immunity, it would have granted that motion on grounds of qualified immunity. Likewise, based on this Court's affirmation of the circuit court's finding as to quasi-judicial immunity, we find that

we need not address petitioner's argument regarding qualified immunity. For the reasons set forth above, we hereby affirm the circuit court's grant of respondents' renewed motion for summary judgment.

Affirmed.

ISSUED: March 23, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison