IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

H. MERCEDES CLEMENS	*	
Plaintiff	*	
v.	*	**Case No. 296766-V**
MARYLAND BOARD OF CHIROPRACTIC EXAMINERS	*	**Boynton, J.**
Defendant	*	

PLAINTIFF'S RESPONSE TO DEFENDANT'S THIRD MOTION TO DISMISS

The Chiropractic Board's Third Motion to Dismiss should be denied. As explained more fully below, Ms. Clemens's case against the Chiropractic Board remains live in spite of the Board's voluntary rescission of its cease-and-desist order because this case falls squarely within two well-established exceptions to mootness: the voluntary-cessation doctrine and the collateral-consequences doctrine. Moreover, of the handful of cases the Chiropractic Board cites in support of its Third Motion to Dismiss, only one actually dismissed the underlying challenge on mootness grounds, and that single case is easily distinguishable from Ms. Clemens's case.

I. Ms. Clemens's Case Remains Live Under the Voluntary-Cessation Doctrine.

Maryland courts have adopted the practice of the federal courts and recognized the doctrine of "voluntary cessation," under which an action for declaratory judgment will not be rendered moot if a defendant voluntarily stops engaging in the challenged

activity that gave rise to the lawsuit. *See Carroll County Ethics Comm'n v. Lennon*, 119 Md. App. 49, 61, 703 A.2d 1338, 1344 (Md. Ct. Spec. App. 1998) (noting that voluntary cessation of a challenged activity will not moot an action for declaratory judgment); *see also Stevenson v. Lanham*, 127 Md. App. 597, 621, 736 A.2d 363, 376 (Md. Ct. Spec. App. 1999) ("*Lennon* stands for the proposition that the voluntary cessation of allegedly illegal or wrongful conduct will not render a declaratory judgment action to determine the illegality or impropriety of the conduct moot."). The purpose of this exception to mootness is to ensure that a defendant cannot escape a judicial determination of the legality of his challenged actions by strategically mooting a case while remaining "free to return to his old ways." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Accordingly, under this doctrine the "[v]oluntary cessation of challenged conduct moots a case . . . only if it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors v. Slater*, 528 U.S. 216, 222 (2000) (emphasis added). Further, "the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*," *id.* (internal quotation marks omitted), in this case, the Chiropractic Board.

Ms. Clemens's case falls squarely within the voluntary cessation exception to mootness. The Chiropractic Board maintained an *ultra vires* cease-and-desist order against Ms. Clemens from February 14, 2008, until June 4, 2009, the day after Ms. Clemens filed a motion for summary judgment, when the Board voluntarily rescinded that order. To defeat the presumption that this case remains live in spite of the Board's

voluntary cessation of its challenged activity, the Chiropractic Board must produce evidence making it "absolutely clear" that it is unlikely to interfere with Ms. Clemens's practice of animal massage in the future. *Adarand Constructors*, 528 U.S. at 222. The Chiropractic Board, however, offers no evidence—beyond the order voluntarily rescinding its previous cease-and-desist order—in support of its motion to dismiss. Having failed to produce any evidence on a point for which the Chiropractic Board bears the burden of proof, the Board's latest motion should be denied as a matter of law.

Moreover, even if the Board had produced evidence suggesting that it would leave Ms. Clemens alone in the future, that evidence would have to be weighed against the numerous contrary statements the Chiropractic Board and its agents have made over the course of this litigation and as recently as last month. For example, in a letter to Ms. Clemens's attorney, Chiropractic Board Executive Director James Vallone stated, "[t]he Board has consistently held that certified and registered massage therapists are not permitted to practice their profession on animals." Aff. of Paul Sherman in Supp. of Pl.'s Mot. Summ. J., Ex. D (letter from James J. Vallone, Executive Dir., Md. Bd. of Chiropractic Exam'rs, to Kathleen J.P. Tabor (Mar. 4, 2008)). Mr. Vallone is also reported in newspaper accounts of this case to have stated, "[t]he law in Maryland under the Massage Practice Act states that a licensee may not practice on anyone other than a human," and "[y]ou can't work on animals, period." Anath Hartmann, *Equine Masseuse Sues Md. Agencies Over Massage Ban*, Capital News Service, Oct. 17, 2008 (http://www.journalism.umd.edu/cns/wire/2008-editions/10-October-editions/081017-

Friday/HorseMassage_CNS-UMCP.html); John Kelly, *Hands Off the Horses, Massage Therapist Is Told*, Washington Post, Sept. 25, 2008, at B3 (http://www.washingtonpost .com/wp-dyn/content/story/2008/09/24/ST2008092404156.html). In its second motion to dismiss, the Chiropractic Board stated that the "only function" of the Board's practice act is to "limit . . . licensees . . . to the treatment of humans with massage therapy." Def.'s 2d Mot. to Dismiss (Dec. 22, 2008) at 6. At oral argument on the Chiropractic Board's second motion to dismiss, opposing counsel stated, "the statute clearly limits you to treating humans." Tr. of Hr'g on Def.'s 2d Mot. to Dismiss (May 5, 2009) at 10:24-25. Indeed, the Board's insistence on its power to regulate animal massage is the very point that led to the breakdown of settlement negotiations in this case. *See* E-mail from Grant Gerber to Paul Sherman (May 29, 2009) (stating that the Chiropractic Board "will not agree to your statement about the Board's lack of regulatory authority over animal massage. This statement is not accurate or necessary. The Board's licensees may not practice their profession on animals.") (attached as Ex. A).[1] In light of these repeated statements to Ms. Clemens, her counsel, the media, and this Court, there clearly exists an ongoing dispute between the parties regarding the Board's authority to discipline its

[1] Plaintiff notes that the Court may consider this statement because it is not offered to establish "the validity, invalidity, or amount of a civil claim in dispute." Md. Rule 5-408. Instead, this statement is admissible because it is offered in response to the Chiropractic Board's claim that this Court lacks jurisdiction over the subject matter of the controversy. *See*, *e.g.*, *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1382-83 (Fed. Cir. 2007) (using settlement discussions in evaluation of subject-matter jurisdiction); *Surefoot L.C. v. Sure Foot Corp.*, No. 2:07-67, 2007 U.S. Dist. LEXIS 34525, at *5-6 (D. Utah May 10, 2007) (citing *SanDisk* and holding that "the paragraphs referred to by Plaintiff . . . are admissible, not for the purpose of proving liability for or invalidity of any of Plaintiff's claims, but rather, to address the question of whether Plaintiff's claims are justiciable.").

licensees for practicing animal massage, and that dispute can be remedied by declaratory judgment. Accordingly, Ms. Clemens's case falls within the exception to mootness for voluntary cessation and remains live.

II. Ms. Clemens's Case Remains Live Under the Collateral-Consequences Doctrine

Even after a plaintiff's primary injury has been resolved, a plaintiff's case is not moot if the plaintiff will continue to suffer a secondary or collateral injury. *See In re Kaela C.*, 394 Md. 432, 453, 906 A.2d 915, 927 (Md. 2006); *Toler v. Motor Vehicle Admin.*, 373 Md. 214, 219-20, 817 A.2d 229, 232-33 (Md. 2003). One such collateral injury is the risk that the plaintiff will be treated less favorably in a future legal proceeding as a result of the original, unadjudicated injury. *See Toler*, 373 Md. at 219-20, 817 A.2d at 232-33 (holding that appeal of drivers-license suspension was not moot even though suspension had ended, because driver would be subject to more-severe punishment if his license were suspended again in the future); *see also In re Kaela C.*, 394 Md. at 452-53, 906 A.2d at 927 (collecting cases). In such cases it is not necessary for the party challenging mootness to establish conclusively that they *will* be subject to a future legal proceeding; it is enough to establish that they *may* be subject to more-severe treatment should future legal proceedings occur. *See Toler*, 373 Md. at 219-20, 817 A.2d at 232-33 (applying collateral-consequences doctrine even though it was not certain that driver would have his license revoked in the future). Ms. Clemens's case easily satisfies these standards.

Without a declaratory ruling in this case, Ms. Clemens may suffer adverse collateral consequences in the future. Under the Massage Therapy Practice Act, the

Chiropractic Board has the power to suspend or revoke the license of any individual who *knowingly* exceeds the scope of their practice or performs any act that the Board believes violates its regulations. Md. Health Occ. Code § 3-5A-11(a)(6), (21). If Ms. Clemens were to resume her practice, the Chiropractic Board could easily argue that its previous cease-and-desist order and its repeated public statements that licensed massage therapists may not practice on animals have placed Ms. Clemens on notice that her practice violates the Board's regulations, and either suspend or revoke her license on those grounds. A declaratory judgment that the Board does not have authority to regulate animal massage will prevent this collateral harm, however, because it will make clear that the Board had no authority for sending Ms. Clemens its original cease-and-desist order and has no authority for taking future action against Ms. Clemens for practicing massage on animals. Accordingly, because Ms. Clemens may be subject to collateral harm that would be remedied by a declaratory judgment, the instant case remains live.

III. None of the Cases Cited by the Chiropractic Board Support a Finding of Mootness in This Case.

In support of its motion to dismiss, the Chiropractic Board relies on three cases, none of which establish the mootness of this case. Indeed, two of the cases simply state the basic standard for mootness and then go on to hold that the underlying challenge was *not* moot. *See In re Kaela C.*, 394 Md. at 464-65, 906 A.2d at 933-34 ("We shall hold that the issues presented in Mrs. C.'s petition for a writ of certiorari are not moot because Mrs. C. continues to suffer collateral consequences from the circuit court's order . . . ."); *Post v. Bregman*, 349 Md. 142, 159, 707 A.2d 806, 814 (1998) ([W]hen an action for declaratory judgment does clearly lie, as it did in this case, it is ordinarily not permissible

for a court to avoid declaring the rights of the parties . . . ."). None of the cases discuss the doctrine of voluntary cessation, and the one case that discusses the doctrine of collateral consequences found that the doctrine applied and that the case was not moot. *See In re Kaela C.*, 394 Md. at 435-36, 464-65, 906 A.2d at 917, 933-34. The only cited case in which a challenge was actually moot is *Hamilton v. McAuliffe*, 277 Md. 336, 353 A.2d 634 (1976), an unusual challenge to a court-ordered blood transfusion that is easily distinguishable from the instant case.

Hamilton dealt with a Jehovah's Witness, Hubert Hamilton, who, upon a judge's order, was given a blood transfusion against his will. *Hamilton*, 277 Md. at 337, 353 A.2d at 635. Eleven months later, Hamilton brought a declaratory judgment action against the judge who had ordered him to undergo the transfusion. *Hamilton*, 277 Md. at 338, 353 A.2d at 636. The Court dismissed the action as moot because the chances that Hamilton would find again himself gravely injured and that the same judge—or any judge—would again order him to undergo a blood transfusion against his will were simply too remote and hypothetical to pose a live controversy. *Hamilton*, 277 Md. at 341, 353 A.2d at 637-38.

In contrast to the plaintiff in *Hamilton*, Ms. Clemens faced an ongoing injury at the hands of the Chiropractic Board. Due to its cease-and-desist order, she has been out of the animal-massage business for more than 16 months. Further, unlike the infinitesimal odds that Hamilton would again find himself subject to a court-ordered blood transfusion, there are numerous reasons to believe that Ms. Clemens may again be subject to discipline by the Chiropractic Board for massaging animals: Ms. Clemens

remains a licensee of the Board and subject to its disciplinary sanctions; the Chiropractic Board maintained its cease-and-desist order against Ms. Clemens for nearly 11 months past the time the Veterinary Board publicly retracted its previous statements that only veterinarians may massage animals; and the Chiropractic Board has made repeated statements, discussed above, that licensed massage therapists may not practice on animals. Moreover, *Hamilton* did not raise or discuss either the voluntary-cessation or collateral-consequences exceptions to mootness. Accordingly, while it is true that the "declaratory judgment process is not available to decide . . . questions which have become moot," Chiro. Bd.'s 3d Mot. to Dismiss at 2-3 (quoting *Hamilton*, 277 Md. at 340, 353 A.2d at 637), neither the facts nor the reasoning of *Hamilton* undermine Ms. Clemens's case against the Chiropractic Board, which remains live.

Conclusion

The Chiropractic Board insists that Ms. Clemens's case is moot, but it has utterly refused to disclaim the authority to subject Ms. Clemens to an identical cease-and-desist order in the future, and it has provided no evidence to meet is burden under the doctrine of voluntary cessation. As long as the Chiropractic Board continues to claim *any* authority over the practice of animal massage by licensed massage therapists like her, Ms. Clemens cannot resume her practice without the fear of future disruptions from the Board. Accordingly, Ms. Clemens case remains live and the Chiropractic Board's Third Motion to Dismiss should be denied.

Request for Hearing

In accordance with Maryland Rule 2-311(f), Plaintiff respectfully requests a hearing on this motion.

Dated: June 26, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 26, 2009, a copy of Plaintiff's Motion for Summary Judgment was mailed, first class, postage prepaid to:

- Grant Gerber, Assistant Attorney General, Department of Health and Mental Hygiene, 300 W. Preston St., Baltimore, MD 21201, Counsel for Defendant Maryland Board of Chiropractic and Massage Therapy Examiners

By: ______________________________
Joseph M. Creed