COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS. NO. SJC-13236

RYAN J. WELTER, M.D.,
Petitioner-Appellant,
v.
BOARD OF REGISTRATION IN MEDICINE,
Respondent-Appellee.

ON APPEAL FROM A PETITION FOR JUDICIAL REVIEW PURSUANT TO G.L. C. 112, § 64

BRIEF OF THE BOARD OF REGISTRATION IN MEDICINE

MAURA HEALEY
Attorney General

Samuel Furgang, BBO # 559062
Assistant Attorney General
Constitutional and Administrative Law Div.,
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2678
email: Samuel.Furgang@mass.gov

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STATEMENT OF ISSUES

The petitioner, Ryan Welter, M.D., falsely advertised on his website that his hair restoration medical practice had multiple doctors and surgeons, when only Dr. Welter was licensed to practice medicine. The website also claimed that Dr. Welter was "board certified, trained and licensed to perform hair restoration procedures for men and women," when, in fact, he was not board certified to perform hair restoration procedures. Dr. Welter also repeatedly referred to an employee, Clark Tan, as "Dr. Tan," even though Tan was not licensed to practice medicine in Massachusetts.

1. Was the Board of Registration in Medicine required to find that Dr. Welter knew that his website was false or deceptive in holding that he violated 243 Code Mass. Regs. § 2.07(11)(a)(1), which prohibits "[a]dvertising that is false, deceptive, or misleading," where the plain language of the regulation focuses on the content of the website and not on the intent of the publisher?
2. Was the Board required to find that Dr. Welter intended to deceive - and prove that people were materially deceived - in holding that Dr. Welter violated 243 Code Mass. Regs. § 1.03(5)(a)(10), which prohibits "[p]racticing medicine deceitfully, or engaging in conduct which has the

capacity to deceive or defraud," where the plain meaning of "capacity to deceive" is objective?

STATEMENT OF THE CASE

Nature of the Case

This case concerns a final decision of the Board of Registration in Medicine, which indefinitely suspended Dr. Welter's license to practice medicine but stayed the suspension upon his entering into a probation agreement with the Board. On April 4, 2021, Dr. Welter filed an appeal of that decision in the Supreme Judicial Court for Suffolk County pursuant to G.L. c. 112, § 64. The Court (Lowy, J.) then reserved and reported Dr. Welter's appeal of the Board's decision to the full Court on March 3, 2022.

Procedural History

On April 2, 2019, the Board issued an order to Dr. Welter requiring him to produce evidence for the purpose of determining whether the Board needed to summarily suspend Dr. Welter's license to practice medicine (RA IV 20).[1] In response, on May 2, 2019, Dr. Welter voluntarily agreed not to practice medicine (RA IV 22-23). The Board issued a statement of allegations against Dr. Welter on May 30, 2019, based upon the content of his practice's website as well as other

[1] References to the record are designated as "RA" followed by volume and page number.

misconduct in which an assistant, Clark Tan, was represented as a physician practicing with Dr. Welter, even though he was not licensed to practice medicine in the United States. Dr. Welter also represented that he was board certified, trained, and licensed to perform hair restoration procedures. RA I 27-36. The Board's statement of allegations charged Dr. Welter with having violated many rules, including conduct which calls into question a physician's competence to practice medicine; aiding or abetting an unlicensed person to perform activities that require a license; engaging in conduct which has the capacity to deceive or defraud; and engaging in false and deceptive advertising. *Id.* The matter was referred to the Division of Administrative Law Appeals ("DALA") for a full evidentiary hearing, which took place over four days (RA I 39).

The DALA magistrate issued a recommended decision on October 20, 2020. The recommended decision concluded that Dr. Welter engaged in false, misleading, and deceptive advertising on his website for New England Hair from 2015 to 2017, in violation of 243 Code Mass. Regs. § 2.07(11)(a), and that he practiced medicine in a fashion that had the capacity to deceive his patients by creating a false and misleading impression concerning Tan's licensure status from 2015 to 2017, in violation of 243 Code Mass. Regs. § 1.03(5)(a)(10) (RA III 1673). The magistrate, however, also concluded that the Board had not sustained its

burden to prove that Dr. Welter had improperly delegated medical services, maintained improper patient records, or engaged in fraud in renewing his medical license (RA III 168).[2]

On January 28, 2021, the Board issued a partial decision in which it adopted the Findings of Fact and Conclusions of Law of the magistrate's recommended decision (RA IV 256). On March 11, 2021, the Board issued its final decision and order, in which it reviewed the appropriate sanctions, taking into consideration mitigating circumstances, and indefinitely suspended Dr. Welter's license. Under the Board's decision, however, the suspension would be stayed upon Dr. Welter's entry into a probation agreement that involved a Board-approved entity monitoring his credentialing applications, advertising, and media communications (RA IV 329-332). The probation agreement would allow Dr. Welter to petition for termination of the sanction after two years of monitoring (RA IV 331). On April 27, 2021, Dr. Welter executed the probation agreement; accordingly, he is listed as being in active status and accepting new patients on the Board's publicly accessible Physicians Profile (Add. at 159-160).

[2] While the statement of allegations also alleged a violation of 243 Code Mass. Regs. § 1.03(5)(a)(18), which prohibits "misconduct in the practice of medicine," the magistrate did not address this claim in the recommended decision.

Although his suspension has been stayed, Dr. Welter appealed the Board's decision to the Single Justice of the Supreme Judicial Court. On March 3, 2022, the Single Justice (Lowy, J.) reserved and reported the petition to the full Court, stating that the parties should expand upon the arguments presented in their briefs about whether the applicable regulations incorporate the elements of common law fraud (RA V 185-186-2283).

Statement of Facts

I. Dr. Welter's Practice

Dr. Welter graduated from the University of Oklahoma College of Medicine in 1999 (RA III 120). He was initially licensed to practice medicine in Massachusetts in 2000, and he is certified by the American Board of Family Medicine (RA III 120). Dr. Welter founded and managed several medical corporations, including Tristan Medical Enterprises, P.C., which also does business as New England Center for Hair Restoration ("New England Hair"), and Regeneris Medical. Dr. Welter's practice encompasses primary care as well as hair restoration (RA III 120).

From January 2015 through November 1, 2017, Dr. Welter employed various assistants at New England Hair, including Clark Tan (RA III 121). Clark Tan attended medical school in the Philippines, but he is not licensed to practice

medicine in the United States (RA III 121). Dr. Welter knew that Tan had not done a medical residency in the United States and that Tan was thus not eligible to be licensed to practice medicine in the United States (RA III 125).

II. Website Advertising

Dr. Welter maintained a website for his New England Hair business (RA III 121). An outside consultant initially set up this website based on information that Dr. Welter provided (RA III 121). The website's blog was periodically updated. (RA III 121). Dr. Welter reviewed and approved the content of the website before it was published (RA III 121).

Between January 2015 and November 1, 2017, New England Hair's website contained statements indicating that multiple doctors and surgeons worked at New England Hair (RA III 121). This was not true, however (RA III 122). For example, under the heading "What Sets Us Apart," the website advertised that "our surgeons" had been solving hair loss problems for years, referred to both "Dr. Ryan Welter and Dr. Clark Tan as 'doctors'" and stated that New England Hair's "doctors" could correct other surgeons' work (RA I 105; III 121). Throughout the website, Dr. Welter and Tan were repeatedly referred to in tandem, as in the following statements: "Dr. Ryan Welter and Dr. Clark Tan have gained recognition in the field of hair restoration for their surgical skills ..."; "Dr. Welter and Dr. Tan

believe that all of their patients deserve to look and feel their best ..."; "Dr. Ryan Welter and Dr. Clark Tan have an eye for detail and esthetics that is evident in their outstanding results in many satisfied patients..."; and "Dr. Welter and Dr. Tan have your best interests in mind, so they want you to feel prepared, confident, and assured in every decision you make regarding your hair loss treatment" (RA I 105, 112; RA III 121).

Despite his decision to represent on his website that multiple doctors worked in his practice, Dr. Welter was the only licensed physician who worked at New England Hair during this time (RA III 122). New England Hair did not employ multiple physicians or surgeons (RA III 122). Nevertheless, Tan's biography, which identified him as "Clark Tan, M.D.," was listed on the website under the heading "Our Hair Restoration Consultant" (RA I 416-417; RA III 122). The biography stated: "Dr. Tan received his medical degree from Far Eastern University Institute of Medicine. He is a diplomat in both General Surgery and Aesthetic Cancer Surgery at East Avenue Medical Center with a subspecialty in Aesthetic Plastic Surgery at Makati Medical Center. ... Dr. Tan has been doing hair restoration for more than 14 years in New York and is a staff member of the New England Center for Hair Restoration." (RA 417; RA III 122). The website did not reveal that the East Avenue Medical Center and the Makati Medical Center are not

in the United States, that Tan had not done a residency in the United States and was thus not eligible to be licensed to practice medicine in the United States, or that Tan was not a physician licensed to practice anywhere in the United States (RA III 122).

Dr. Welter's biography also contained misleading information (RA III 122). His biography touted him as "founder and chief surgeon of The New England Center for Hair Restoration" and represented that he was "board certified, trained and licensed to perform hair restoration procedures for men and women." (RA I 416; RA III 122). But Dr. Welter was only board certified in family medicine; he was not board certified in surgery or plastic surgery (RA IV 1866). The website did not disclose that Dr. Welter's board certification was in family medicine (RA III 122).

III. Misrepresentations made in the conduct of New England Hair's practice

The staff in New England Hair's office was aware that Clark Tan was a doctor who had gone to medical school in the Philippines but was not licensed to practice in Massachusetts (RA III 123). Dr. Welter did not direct the staff to tell patients anything about Tan's training or licensure status (RA III 123). Clark Tan introduced himself to staff and patients as "Dr. Tan" and the staff in the office

referred to Tan as "Dr. Tan" (RA III 123). Dr. Welter also referred to Tan as "Dr. Tan" to other patients (RA III 124). Dr. Welter testified that he did so because Tan was a medical school graduate (RA III 124). During Tan's employment, Dr. Welter also allowed Tan to disseminate business cards to patients and prospective patients that read Clark Tan, M.D., without an explanation that Tan was not licensed to practice medicine in the United States (RA III 124).

Patients at New England Hair were also asked to sign authorization forms that were inaccurate. These forms included the following language: "I, _____, do hereby authorize Dr. Ryan Welter, his associate doctors and/or such assistants as may be selected by him to perform [selected procedure] on me." (RA III 124). Again, Dr. Welter had no associate doctors who were licensed to practice medicine on staff at New England Hair (RA III 124).

IV. Patient Complaints

The Board received several complaints from two patients concerning Dr. Welter and Tan (RA III 137-138). Patient A is a licensed physician (RA III 123). She chose New England Hair because the location of the practice was convenient, she liked the patient reviews and the pictures on the website, she wanted to have her procedure done by a physician, and she believed that the physicians at New England Hair were board certified (RA III 123). She assumed from the website,

emails, and the conduct of the practice that Tan was a licensed physician (RA III 123). Patient B is a licensed physician, and he is married to Patient A (RA III 123). He chose New England Hair based on its affiliations, the training of the personnel, and the recommendation of Patient A (RA III 123). Patient B believed that Dr. Welter and Tan were the physicians referred to by New England Hair's website (RA III 123). At his consult with Tan, Patient B picked up Tan's business card and assumed from the card's description that Tan was a licensed physician and one of the surgeons at the practice (RA III 124). The consent form signed by Patient B stated that measurements of hair density "were taken by a doctor" (RA III 124). Patient B assumed from the emails, the business card, and the consent form that Tan was a licensed physician (RA III 125).

Patient A underwent a treatment procedure known as Platelet Rich Plasma (RA III 128). Tan performed the procedure on Patient A with a physician's assistant (RA III 128). Patient A was satisfied with her procedure and recommended Dr. Welter's practice to her husband, Patient B (RA III 131).

Patient B was interested in undergoing Follicular Unit Extraction surgery for treatment of his sparse beard (RA III 131). Tan, Dr. Welter, and assistant Zach Brock performed Patient B's procedure (RA III 133). Several months after the procedure, Patient B became concerned that he had not seen any results (RA III

134). As a result of his misgivings, Patient B attempted to look up Tan's license on the Board's website but was unable to find a listing for Tan (RA III 135).

On September 12, 2016, Patient B contacted Tan to ask about his licensure status (RA III 135). On September 13, 2016, Dr. Welter responded to Patient B's inquiry about Tan's license and explained that Tan was not a licensed physician, but was a surgeon trained in the Philippines (RA III 135). Dr. Welter stated that Tan was authorized in Massachusetts to work as a technician and consultant under Dr. Welter's direct supervision (RA III 135). Patient B replied that he believed it was improper that Tan had participated in his care and demanded a refund of the full amount that both he and Patient A had paid for their procedures (RA III 135).

Believing that he had been duped by Dr. Welter, Patient B filed complaints with the Better Business Bureau and the Board shortly after the September 13, 2016, email exchange (RA III 136). In his Board complaint, Patient B told the Board that he wanted to get the money back that he and his wife (Patient A) had paid for their procedures (RA III 136).

On November 2, 2016, Dr. Welter received notification that Patient A had filed a complaint against him with the Board's Consumer Protection Unit (AR I 133). In the complaint, Patient A stated that she never would have consented to

have her procedure done by an unlicensed physician had she known the truth about his licensure status (RA III 137).

After Patient A and Patient B complained to the Better Business Bureau and the Board, Patient B and Dr. Welter engaged in discussions about settling the outstanding complaints (RA III 137). Dr. Welter stated that he was willing to refund the money that Patient A and Patient B had paid in exchange for their withdrawing their complaints (RA III 137). Dr. Welter, through his medical malpractice insurer, learned that the Board had concerns about his website, and in particular the reference to "doctors" in the plural and the description of Tan (RA III 138). In the fall of 2017, Dr. Welter responded to the Board's concerns by eliminating from New England Hair's website all references to Tan and by changing Tan's job so that Tan no longer had contact with patients (RA III 138-139). Dr. Welter's description of his own qualifications on the website remained unchanged (RA III 139).

Based on these complaints, the Board ordered Dr. Welter to produce evidence, and then commenced proceedings against him by issuing a statement of allegations on May 30, 2019 (RA I 27-36).

V. Findings of the Board

After the four-day hearing before DALA and the issuance of the DALA magistrate's recommended decision, the Board issued a partial decision that adopted the findings and conclusions of the magistrate. *See supra*, at 9-10. First, the Board found that Dr. Welter's website was misleading and deceptive by repeatedly used the plural terms "doctors" and "surgeons," when New England Hair had only one licensed doctor or surgeon on staff (RA III 151-152). The Board concluded that this repeated use of the plural - which would lead the reader to believe that there were multiple licensed physicians at New England Hair when there was only one – was misleading (RA III 151-152). Before DALA, Dr. Welter had attempted to justify his decision to use the plural by testifying that it had always been his intent to hire additional doctors, and his website language merely reflected his future intent (RA III 152). The magistrate and the Board did not credit this testimony (RA III 152).

The Board also concluded that the inappropriateness of using the plural was compounded by the presence of Clark Tan's name and biography on the website (RA III 152). As the magistrate stated: "It is possible that a website might not be misleading if it referred to doctors and surgeons in the plural but listed only one individual who could possibly fill that role. That was not the case here." (RA III

152). Thus, on the website, Tan was repeatedly referred to as "Dr. Tan," and he and Dr. Welter were paired together as the "doctors" whom New England Hair employed. *Id.* The Board found that the website falsely and deceptively placed "Dr. Tan" on the same level as Dr. Welter and implied that he was a licensed physician (RA III 152).

The Board found that the website obscured the fact that Tan was trained only in the Philippines (RA III 152). As the magistrate pointed out: "Although the description of Tan's qualifications may have been technically accurate, even a careful reader might conclude that the East Avenue Medical Center, with its generic English name, is in the United States." *Id*. The Board went on to find that, in concealing or obfuscating the fact that Tan lacked U.S. training, the website prevented readers from understanding that the reference to "doctors" and "surgeons" could not include Tan (RA IV III 152-153). "The failure to make this disclosure, coupled with the repeated references to Tan as a doctor in tandem with Dr. Welter, was deceptive and misleading." (RA III 153).

The Board concluded that the website's misdirection was not limited to the number of physicians and the status of Clark Tan (RA III 153). Rather, the website "also falsely implied that Dr. Welter was board-certified in surgery or plastic surgery" by stating that Dr. Welter was, as New England Hair's founder and chief

surgeon, "board certified, trained and licensed to perform hair restoration procedures." (RA III 153). While Dr. Welter is board certified, that certification is only in family medicine, and the website did not disclose this fact (RA III 153).

The Board rejected Dr. Welter's attempt to avoid liability by decontextualizing a term on the website (RA III 153). Thus, while Dr. Welter argued that the use of a comma after the words "board certified" disconnected them from the remaining sentence, the Board found that, together, the adjectives describing Dr. Welter convey the message that Dr. Welter is board-certified in hair restoration techniques, either as a surgeon or as a plastic surgeon (RA III 153). As a result, the Board found that this was "false, misleading, and deceptive." *Id.*

Based on these findings, the Board concluded that "Dr. Welter violated 243 Code Mass. Regs. § 2.07(11)(a) by publishing on New England Hair's website references to multiple doctors and surgeons, by misrepresenting the role and qualifications of Clark Tan, and by misrepresenting Dr. Welter's own qualifications to imply that he was board-certified in an area that he was not." *Id.*

The Board also found that Dr. Welter engaged in conduct which has the capacity to deceive, in violation of 243 Code Mass. Regs. § 1.03(5)(a)(10) (RA III 154). He facilitated the false impression that Tan was a licensed physician; deceived patients by permitting Tan to disseminate business cards displaying the

words “Clark Tan, M.D.”; and used consent forms that referred to “associate doctors,” when there were no associate doctors, and that contained the statement that hair density measurements were taken by a doctor. *Id.* The Board found that Dr. Welter further contributed to the misperception by publicly calling Tan “Dr. Tan” and allowing his staff to do so as well. *Id.* As the Board concluded: “Taken together, the practice of calling Tan ‘Dr. Tan,’ the language in the consent forms, and Tan’s business cards all created the false impression that Tan was a licensed physician” (RA III 154-155).

The Board rejected as “facile” Dr. Welter’s claim that there was no deception because Tan was actually a doctor (RA III 155). Indeed, based on the information on the website and the way in which he was presented to them at the practice, Patients A and B both believed that Tan was a licensed physician. *Id.* Thus, the Board concluded that because of Tan’s business cards, the consent forms, and the conduct of the office staff, Dr. Welter created a “false and misleading impression” of Tan’s licensure status, thereby practicing medicine in a fashion that had the capacity to deceive, in violation of 243 Code Mass. Regs. § 1.03(5)(a)(10). *Id.*

SUMMARY OF THE ARGUMENT

Review of the Board's decision is narrow and deferential, and the appealing party bears a heavy burden to demonstrate its invalidity (pp. 25-26).

The Board correctly concluded that Dr. Welter violated 243 Code Mass. Regs. §§ 1.03(5)(a)(10) and 2.07(11)(a)(1) by engaging in conduct that has the capacity to deceive and by advertising in a manner that is false, deceptive, or misleading. The plain language of these provisions does not incorporate the common law torts of fraud and deceit. Instead, the provisions use language that describes conduct that is analyzed objectively. This Court has held that analogous provisions—ones that prohibit false or deceptive advertising or conduct that has the capacity to deceive—regulate based on the appearance of the advertisement itself, rather than on the intent of the advertiser or reliance by a specific consumer. The context in which the Board regulations appears also shows that they do not import the common law elements of fraud or deceit, since other provisions in the same regulation explicitly refer to intentional misconduct (pp. 26-31).

The Board's objective interpretation of 243 Code Mass. Regs. §§ 1.03(5)(a)(10) and 2.07(11)(a)(1) also furthers the purpose of the Board. The Board is charged with sanctioning physicians for conduct which undermines public confidence in the integrity of the medical profession. *Raymond v. Board of*

Registration in Medicine, 387 Mass. 708, 713 (1982). The Board's broad authority to "protect the image of the medical profession" is not limited to disciplining conduct involving direct patient care, criminal activity, or deceit. Misleading or deceptive advertising can likewise have grave consequences for public health even if the advertising is not intentionally misleading (pp. 31-34).

Quite apart from the unambiguous meaning of the provisions, the Board's interpretation is entitled to great deference because the agency's interpretation is reasonable; the interpretation is the agency's official position; the interpretation draws on the agency's technical and substantive expertise; and the agency's interpretation is based on fair and considered judgment. *See DeCosmo v. Blue Tarp Redevelopment, LLC*, 487 Mass. 690, 699 (2021) (pp. 34-37).

The Board's interpretation of 243 Code Mass. Regs. §§ 1.03(5)(a)(10) and 2.07(11)(a)(1), and the resultant sanction on Dr. Welter, easily pass constitutional muster. The application here of regulations prohibiting false, misleading, or deceptive conduct or advertising is aimed at preserving the public's trust in the medical profession and, by extension, promoting public health (pp. 37-38).

The Board's sanction - an indefinite suspension that would be stayed upon Dr. Welter's agreement to submit to probationary supervision – was well within its discretion. Moreover, Dr. Welter could petition for termination of supervision

after successful completion of two years of monitoring the marketing practices at issue. The sanction was comparable to sanctions imposed by the Board in recent cases involving similar misconduct, and the Board considered mitigating circumstances (pp. 38-42).

The Board's decision was based upon substantial evidence. Dr. Welter does not dispute the overwhelming documentary evidence of his misconduct. Instead, he disagrees with the conclusions of the Board. Yet, based upon the objective analysis described above, the evidence speaks for itself (pp. 42-43).

ARGUMENT

I. STANDARD OF REVIEW

Under G.L. c. 112, § 64, a person whose license to practice medicine has been suspended, revoked, or cancelled by the Board may petition the Supreme Judicial Court to "enter a decree revising or reversing the decision ... in accordance with the standards for review provided in G.L. c. 30A, § 14(7)." *Fisch v. Bd. of Reg. in Med*., 437 Mass. 128, 131 (2002). "Judicial review under G.L. c. 30A of an agency decision is narrow and deferential to the agency." *Buchanan v. Contributory Retirement Appeal Bd*., 65 Mass. App. Ct. 244, 246 (2005). The party appealing an administrative decision bears a "heavy burden" to demonstrate the decision's invalidity. *Mass. Ass'n of Law Enforcement Officers v. Abban*, 434

Mass. 256, 263-64 (2001). The Court may set aside an agency's decision only if it "concludes that 'the substantial rights of any party may have been prejudiced' by a decision that is based on an error of law, unsupported by substantial evidence, or otherwise not in accordance with the law." *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 689 (2012) (quoting from G.L. c. 30A, § 14(7)). Contrary to Dr. Welter's assertion (Pet. Br. at 17), this is not an action for reinstatement, and thus, this matter is not subject to review under the standard for actions in the nature of certiorari. The petition itself seeks judicial review of the Board's decision to indefinitely suspend Dr. Welter's license. *See* Petition, citing G.L. c. 112, § 64 (RA V 5, 10).

II. THE PLAIN LANGUAGE OF THE REGULATIONS VIOLATED BY DR. WELTER AND THE CONTEXT IN WHICH THEY APPEAR DO NOT INCORPORATE THE COMMON LAW REQUIREMENTS OF FRAUD.

The Board correctly held that Dr. Welter violated 243 Code Mass. Regs. § 2.07(11)(a)(1), which prohibits "advertising that is false, misleading, or deceptive," and that he practiced medicine in a fashion that had the "capacity to deceive" his patients by, among other things, creating a false and misleading impression concerning Tan's licensure status and Dr. Welter's own qualifications, in violation

of 243 Code Mass. Regs. § 1.03(5)(a)(10) (RA III 168).[3] Neither of these regulations incorporates the common law tort of fraud and, in the absence of unambiguous language to that effect, the Board correctly declined to import the elements of that tort, including knowledge, intent, materiality, and reliance.

In interpreting a regulation, this Court applies the clear meaning of the regulation's words unless doing so would lead to an illogical result. *See Massachusetts Fine Wine & Spirits, LLC v. Alcoholic Beverages Control Comm'n*, 482 Mass. 683, 687 (2019). Under this standard, the terms "advertising that is false, misleading, or deceptive," and engaging in "conduct that has the capacity to deceive," describe conduct that is analyzed objectively. Whether an advertisement is false, misleading, or deceptive, and whether conduct has the capacity to deceive, are matters that do not require an inquiry into the state of mind of the actor engaging in the errant conduct, or into the mind of the target of that conduct. *See Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 394 (2004). Instead, the focus is upon the act itself: an advertisement is forbidden if it is objectively false, misleading, or deceptive. *See Langlitz v. Bd. of Reg. of Chiropractors*, 396 Mass. 374, 381-82 (1985). In other words, the regulations prohibit conduct by a

[3] The Board did not find that Dr. Welter's conduct had the capacity to defraud. *See* 243 Code Mass. Regs. § 1.03(5)(a)(10).

physician that may, at very least, have the capacity to mislead an objective observer.

In closely analogous circumstances, this Court has refused to incorporate any additional state of mind requirement where such a requirement is not expressly contained within the regulatory text. For example, this Court held that a regulation promulgated by the Board of Registration of Chiropractors that prohibits "deceptive, confusing, misleading, or unfair" advertising does not depend upon the advertisement's effect on a member of the public. *See Langlitz*, 396 Mass. at 381-82 (1985) (construing 233 Code Mass. Regs. § 4.11). In that case, a chiropractor's advertisement created the false impression that weight control, therapeutic nutrition, cardiovascular analysis, and acupuncture could be received as independent treatments, without accompanying chiropractic adjustments. *Id.* at 380. In affirming the Board's decision, the Court did not refer to any findings on the intent of the chiropractor. *Id.* at 381-382. The Court also held that the Board did not require evidence that members of the public had actually been deceived. Instead, it affirmed a violation of the regulation based upon "the appearance and content of the advertisement itself." *Id.* (upholding the Board's "determination that the advertisement was misleading" as a "matter of common experience and common sense"). Here too, the Board correctly focused upon the content of Dr.

Welter's website to determine that it was false, deceptive, or misleading. *See also In re Angwafo*, 453 Mass. 28, 37 (2009) (although evidence did not support a finding that attorney knowingly made a false statement of material fact, the hearing officer properly could conclude that the respondent's conduct was deceitful and adversely reflected on her fitness to practice law in violation of Rule 8.4 (c), (d), and (h) of the Mass. R. Prof. Conduct, which *inter alia*, proscribe conduct involving dishonesty, fraud, deceit, or misrepresentation); *Com. v. AmCan Enterprises, Inc.*, 47 Mass. App. Ct. 330, 334 (1999) (applying objective test to 940 Code Mass. Regs. § 3.05(1), which prohibits a representation that "has the capacity or tendency or effect of deceiving buyers").

Similarly, this Court has rejected the argument that Chapter 93A—which like the Board's regulations here, prohibits deceptive conduct, including deceptive advertising, *see* G.L. c. 93A, § 2(a)—requires intentional deception or reliance by a third party. *See Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 394 (2004). "Whether conduct is deceptive is initially a question of fact, to be answered on an objective basis and not by … subjective measure[s]," the Court explained. *Id.* (a deceptive advertising claim under chapter 93A does not rely upon intention to deceive plaintiff, or that plaintiff relied upon representation, or knowledge by defendant that representation was false). Indeed, the Court observed that "conduct

is deceptive if it possesses a tendency to deceive … In determining whether an act or practice is deceptive, regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which [the act or practice] might reasonably be expected to have upon the general public." *Id.* (quotations and citations omitted). The same principles of construction apply to 243 Code Mass. Regs. §§ 1.03(5)(a)(10) and 2.07(11)(a)(1) which, as described in more detail below, advance similar public protection goals as chapter 93A. Indeed, reflecting the responsibility of the Board to protect patients against false or deceptive communications from trusted medical professionals, for a time the Board was under the supervision of the Executive Office of Consumer Affairs. *See* St. 1979, c. 0799, Item 9230-0150. For these reasons, neither chapter 93A nor the Board's regulations require an intent to deceive or proof of actual deception.

The plain meaning of the provisions at issue is also illustrated by the context in which they appear. A statute or regulation "must be interpreted 'as a whole'; it is improper to confine interpretation to the single section to be construed." *Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 784 (2014), quoting *Commonwealth v. Keefner*, 461 Mass. 507, 511 (2012). And here, the context in which 243 Code Mass. Regs. §§ 1.03(5)(a)(10) and 2.07(11)(a)(1) appear makes plain that they differ from neighboring regulations that do explicitly reference

"fraud" or that require intentional conduct. *See, e.g.*, 243 Code Mass. Regs. § 1.03(5)(a)(1) ("*Fraudulent procurement* of his or her certificate of registration or its renewal"); *id.* § 1.03(5)(a)(3) ("Conduct which places into question the physician's competence to practice medicine, including but not limited to gross misconduct in the practice of medicine, or *practicing medicine fraudulently*, or beyond its authorized scope, or with gross incompetence, or with gross negligence on a particular occasion or negligence on repeated occasions"); *id.* § 1.03(5)(a)(6) ("*Knowingly permitting, aiding or abetting* an unlicensed person to perform activities requiring a license") (emphases added). The regulations that Dr. Welter violated, in contrast, do not require the Board to find any degree of intentional action and do not reference common law fraud.

III. THE OBJECTIVE STANDARD FOR THE VIOLATIONS AT ISSUE FURTHERS THE PUBLIC SAFETY ROLE OF THE BOARD.

Focusing upon the objective perception of a physician's conduct in committing the violations at issue here is consistent with the Board's role in disciplining physicians for conduct that undermines public confidence in the integrity of the profession. "The role of the board in the over-all statutory scheme is to take primary responsibility in the regulation of the practice of medicine in the Commonwealth 'in order to promote the public health, welfare, and safety.'" *Levy v. Board of Registration & Discipline in Medicine*, 378 Mass. 519, 524 (1979),

quoting St. 1975, c. 362, § 3. Part of that responsibility includes sanctioning physicians for conduct that undermines public confidence in the integrity of the medical profession. *Raymond v. Board of Registration in Medicine*, 387 Mass. 708, 713 (1982). The Board has broad authority to "protect the image of the medical profession," and its authority is not limited to disciplining conduct involving direct patient care, criminal activity, or intentional misconduct. *Sugarman v. Bd. of Registration in Med*., 422 Mass. 338, 342-43 (1996).

The Board's broad, public-facing charge accords with an interpretation of the advertising provision focused upon the public perception of the advertisement, not on the physician's intent in publishing it. Section 2.07(11)(a), read as a whole, authorizes advertising that is "in the public interest," and then defines what type of advertising is "not in the public interest," including:

> 1. Advertising that is false, deceptive, or misleading;
> 2. Advertising that has the effect of intimidating or exerting undue pressure;
> 3. Advertising that guarantees a cure; or
> 4. Advertising that makes claims of professional superiority which a licensee cannot substantiate.

243 Code Mass. Regs. § 2.07(11)(a). By focusing on the "means" by which a physician may advertise, this provision sets out a violation based upon the content of the advertisement itself. Thus, a physician may be found to have violated the

provision by using advertising that includes content that is contrary to the public interest, without the need to prove wrongful intent.

Misconduct such as advertising that is false, misleading, or deceptive, and conduct that has the capacity to deceive, has an impact upon the image of the medical profession, regardless of whether the conduct was intentional or relied upon. For that reason, the regulatory provisions at issue, unlike in the cases cited by Dr. Welter, do not invoke common law causes of action that require intent or reliance. Pet. Br. at 24, citing *Reisman v. KPMG Peat Marwick LLP*, 57 Mass. App. Ct. 100, 108 (2003) (claim of fraud or deceit); *von Schonau-Riedweg v. Rothschild Bank AG*, 95 Mass. App. Ct. 471, 497 (2019) (claim of negligent misrepresentation). While the purpose of a tort action is "to redress a legal wrong in damages," that is not the purpose of the regulations at issue, and the Board's regulations must be interpreted by a standard commensurate with their goals. *See Heacock v. Heacock*, 402 Mass. 21, 24 (1988).

Where a Board regulation does invoke the language of fraud, as in 243 Code Mass. Regs. § 1.03(5)(a)(3) ("practicing medicine fraudulently"), this Court has acknowledged that such a violation involves a knowing false statement. *See Fisch v. Bd. of Registration in Med*., 437 Mass. 128, 139 (2002) (violation of practicing medicine fraudulently may be shown by proof that a party knowingly made a false

statement and that the subject of that statement was susceptible of actual knowledge; no further proof of actual intent to deceive is required), citing *Snyder v. Sperry & Hutchinson Co*., 368 Mass. 433, 444 (1975). But unlike in these cases, the sanctions imposed upon Dr. Welter pursuant to 243 Code Mass. Regs. §§ 1.03(5)(a)(3) and 2.07(11)(a)(1) are not based upon charges of fraud or deceit or of negligent misrepresentation. Such conduct may be subject to discipline by the Board, but they were not the claims for which Dr. Welter was disciplined.

IV. THE BOARD'S INTERPRETATION IS REASONABLE AND ENTITLED TO DEFERENCE.

While the plain language of the provisions demonstrates that the regulations do not incorporate any mens rea requirement or other element of common law fraud, this conclusion is buttressed by the substantial deference owed to the Board in interpreting its own regulations. The Court will ordinarily defer to the Board's interpretation of its rules when it meets the multi-factor analysis of this Court, which considers "whether (1) the regulatory language is plain or ambiguous; (2) the agency's interpretation is reasonable; (3) the interpretation is the agency's official or authoritative position; (4) the interpretation draws on the agency's technical and substantive expertise; and (5) the agency's interpretation is based on fair and considered judgment." *DeCosmo v. Blue Tarp Redevelopment, LLC*, 487 Mass. 690, 699 (2021) (citations omitted).

As set out above, the regulatory language is plain and consistent with the Board's interpretation. Moreover, based upon the plain language of the provisions, the context in which they appear, and the interpretation of analogous provisions, the Board's interpretation is eminently reasonable. As described above, the Board's interpretation furthers the purpose of the regulations in fostering public confidence in the integrity of the profession, and in protecting the public. Thus, the petitioner has failed to overcome the "formidable burden" of showing that the Board's interpretation is not reasonable. *Ten Local Citizen Group v. New England Wind, LLC*, 457 Mass. 222, 228 (2010). The interpretation is also the Board's official position, as exemplified by its adoption of the findings of the magistrate in this case.

The Board's interpretation also draws upon its technical and substantive expertise. Examples of advertising by physicians, and the ethical obligation of physicians not to mislead their patients, are matters that are necessarily a part of the Board's oversight responsibilities. Moreover, the determination whether particular advertisements or other statements are misleading may require specialized knowledge about the subject-matter of the representations. *See Langlitz*, 396 Mass. at 381 (Board properly relied upon its general expertise and knowledge of the scope of chiropractic care and the nature of supportive

procedures to determine that petitioner engaged in "deceptive, confusing, misleading, or unfair" advertising).

Finally, the Board's interpretation of these provisions reflects a fair and considered judgment that is long-standing, rather than one that was created as a result of this litigation. *DeCosmo*, 487 Mass. at 702, and cases cited. For example, the Board has applied an objective standard for the advertising violations of 243 Code Mass. Regs. § 2.07(11)(a), for at least twenty-five years. *In the Matter of Donald Pugatch, M.D.* (Adjudicatory Case No. 97-34-XX, Dec. 17, 1997) (advertising was false, deceptive, and misleading where the respondent placed an ad for a one-year period in the Yellow Pages stating that he was board certified in psychiatry while his license was suspended). Add. at. 146. Similarly, the Board has also long applied an objective standard to the capacity to deceive violations of 243 Code Mass. Regs. § 1.03(5)(a)(10). *See In the Matter of Barry Lobovitz, M.D.* (Adjudicatory Case No. RM-00-796, Apr. 25, 2002) (petitioner's use of computer template that gave erroneous impression that petitioner had performed full physical examination, though not intended to deceive, was conduct that had the capacity to deceive or defraud within the meaning of 243 CMR 1.03(5)(a)(10)). Add. at. 119.

Simply put, the Board's interpretation of the regulations at issue amply satisfies the multi-factor test set out in *DeCosmo*, and the substantial deference owed to the Board's interpretation merit the affirmance of the Board's decision.

V. THE BOARD'S IMPOSITION OF A SANCTION THAT WAS STAYED WAS WELL WITHIN CONSTITUTIONAL LIMITS

For the same reasons, Dr. Welter's constitutional challenge to the Board's sanction is baseless. Dr. Welter concedes that the Board's interpretation of the regulations survives constitutional scrutiny if there exists a rational basis for the regulations' interference with any property interest in the right to practice medicine. Pet. Br. at 19. And Dr. Welter further acknowledges that such a rational basis exists when the regulations have a tendency to promote "'the safety, health, morals, and general welfare of the public.'" Pet. Br. at 19-20, quoting *Milligan v. Bd. of Reg. in Pharmacy*, 348 Mass. 491, 498-99 (1965). As described above, the sanctioning of false, misleading, or deceptive conduct or advertising is aimed at preserving the public's trust in the medical profession and, by extension, promoting public health and welfare.

In any event, Dr. Welter cites no case limiting the Board's ability to impose a suspension based on deceit, malpractice, or gross misconduct. The case law is, indeed, to the contrary. In *Sugarman v. Bd. of Reg. in Med*., 422 Mass. 338, 342-43 (1996), for example, the Court affirmed a suspension based upon the release of

confidential information of child abuse to the press. *Id.* at 338-340. The petitioner argued that she was acting to protect the child, and that the Board lacked authority to impose an indefinite suspension because she did not engage in wrongdoing. *Id.* at 342. In upholding the Board's decision that the physician engaged in conduct that undermines public confidence in the integrity of the medical profession, the Court held that "[t]he board has broad authority to 'protect the image of the medical profession' and is not limited to disciplining conduct involving direct patient care, criminal activity, or deceit." *Id.*, citing *Raymond v. Bd. of Reg. in Med.*, 387 Mass. 708, 713 (1982). The authority of the Board to protect the integrity of the profession also underlies its authority for sanctioning the violations committed by Dr. Welter.

VI. THE BOARD'S IMPOSITION OF AN INDEFINITE SUSPENSION THAT WAS STAYED WAS WELL WITHIN ITS DISCRETION

Dr. Welter's next argument, that the sanction imposed by the Board was too harsh and, hence, arbitrary and capricious, likewise finds no support in this Court's precedent or in analogous decisions of the Board.

As an initial matter, Dr. Welter overstates the severity of the sanction imposed by the Board by describing it as an indefinite suspension. In fact, the Board's indefinite suspension was stayed upon Dr. Welter's agreement to submit to probationary supervision (Add. at 155). Moreover, Dr. Welter could petition for

termination of supervision after successful completion of two years of monitoring the marketing practices at issue (RA IV 331; Add. at 158). In other words, unlike an indefinite suspension, Dr. Welter could, and did, resume the practice of medicine immediately upon execution of the probation agreement. *See Kvitka v. Bd. of Registration in Med.*, 407 Mass. 140, 143 (1990) (authorizing imposition of temporary suspension pending completion of course of education).

As for the purported comparative severity of the sanction, the Board acted well within its broad discretion. "It is well-settled that in reviewing such a penalty, the reviewing court can neither substitute its own discretion as to the matter nor interfere with the imposition of the penalty because in the court's own evaluation of the circumstances the penalty is too harsh." *Sugarman*, 422 Mass. at 347-48 (quotation omitted). As long as the Board's discretion regarding penalties was reasonably exercised, this Court must affirm the Board's decision. *See Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 347, 355 (1987) (a court will only interfere with an agency's discretion in the imposition of a penalty "in the most extraordinary of circumstances").

While the Petitioner relies upon selective cases in which the Board imposed a lesser sanction for different misconduct, the Board itself cited to comparable instances in which physicians misrepresented their qualifications and received

similar sanctions (RA IV 330-331). Thus, in a case cited by the petitioner, the Board imposed an indefinite suspension, with the suspension stayed upon the physician's entry into a probationary agreement supervising his marketing activities due to similar violations to those in the instant case. *In the Matter of Boris Bergus, MD.*, (Adjudicatory Case No. 2017-004, June 27, 2019) (Add. at 151). In *Bergus*, the physician misrepresented the circumstances surrounding the end of his residency, incorrectly informed a health maintenance organization that he was board-certified, and inaccurately claimed in an advertisement that he had received fellowship training board in areas where he had not (RA IV 2002-2003). It is also noteworthy that, other than the *Bergus* case, the most recent example cited by the petitioner was from 2006, while the *Bergus* case itself, which was issued in 2019, imposed a similar sanction as in this case. Thus, the Board's sanction was consistent with recent practice, and not arbitrary or capricious.

In an attempt to minimize the severity of his misconduct, Dr. Welter claims that the Board imposed a suspension based upon "actions which the Board found were not undertaken with the intent to defraud or deceive …" Pet. Br. at 22 (emphasis in original). Yet the Board made no such finding. While the Board did find that Dr. Welter's misrepresentations *in his license renewal application* were not made with the intent to deceive the Board, it did not find that Dr. Welter's

misrepresentations *to his patients and the public* were unintentional. To the contrary, the Board rejected Dr. Welter's explanation for the use of the plural in describing himself and Tan, and further found that Dr. Welter's description of Tan's qualifications amounted to "[c]oncealing or obfuscating the fact that Tan lacked U.S. training …" (RA IV 152-153). Thus, while the Board was not required to find that Dr. Welter intended to mislead, it did not find his conduct to be guileless.

Nor did the Board ignore the mitigating circumstances cited by the magistrate. Instead, the Board explicitly acknowledged the remedial measures taken by Dr. Welter to remediate his website and conduct, as well as his execution of a voluntary agreement not to practice (RA IV 331). However, the Board was also entitled to consider that, while Dr. Welter took remedial measures after learning that he was under investigation by the Board, such as removing all references to Tan on the website, he did not change his own biography, which itself contained misrepresentations about his board certification (RA III 153). Furthermore, at the hearing, Dr. Welter continued to maintain that there was no deception because Tan was a doctor. In so arguing, he persisted in his approach that statements should be analyzed without context (RA III 155). In short, the

Board properly took mitigating circumstances into account when the sanction was imposed, and the sanction was not arbitrary or capricious.

VII. THE BOARD'S DECISION WAS BASED UPON SUBSTANTIAL EVIDENCE.

While Dr. Welter disagrees with the Board's evaluation of his conduct, there is no dispute about the nature of the conduct itself. Almost the entire record of Dr. Welter's misrepresentations is documented in the website, the business cards, and the consent forms. And the Board's conclusion that Dr. Welter's conduct was misleading was supported by Dr. Welter's patients, who testified that they were misled by his representations into believing that Tan was licensed to practice medicine in the United States (RA III 155).

Dr. Welter only disputes the Board's conclusion that this undisputed evidence constituted advertising that is false, misleading, or deceptive, and conduct that has the capacity to mislead. Yet the Board went to great lengths to point out that the issue is not whether any particular statement, when viewed in isolation, was truthful, but rather the effect that those statements have on a reasonable person when viewed in context (RA III 152-155). That is the essence of the analysis of this type of violation. "The criticized advertising may consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading

impression through failure to disclose material information." *Aspinall*, 442 Mass. at 395 (2004) (citations omitted).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that its final decision be affirmed.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL

/s/Samuel Furgang
Samuel Furgang, BBO NO. 559062
Assistant Attorney General
Office of the Attorney General
Constitutional and Admin. Law Div.
Government Bureau
One Ashburton Place
Boston, MA 02108
(617) 963-2678
Samuel.Furgang@mass.gov

Date: July 21, 2022

CERTIFICATE OF COMPLIANCE

I, Samuel Furgang, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 8131 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word (version: Word 2016).

/s/ Samuel Furgang

Samuel Furgang
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2022, I filed with the Supreme Judicial Court and served the attached Brief of the Board of Registration in Medicine in Ryan J. Welter v. Board of Registration in Medicine, No SJC-13236, through the electronic means provided by the clerk on the following registered users and through e-mail on the following:

Paul Cirel, Esq.
Alycia M. Kennedy, Esq.
Todd & Weld, LLP
One Federal Street
Boston, MA 02110
(617)720-2626
pcirel@toddweld.com
akennedy@toddweld.com

/s/ Samuel Furgang
Samuel Furgang
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2678

ADDENDUM