

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-053962

05/20/2011

HONORABLE MICHAEL R. MCVEY

CLERK OF THE COURT
R. Tomlinson
Deputy

ARTIFFANY GRAHAM-PAYNE, et al.

LISA C GERVASE

v.

ARIZONA STATE BOARD OF NURSING, et al. REBECCA J HERBST

TERESSA M SANZIO

MINUTE ENTRY

The Court has reviewed the Motion to Dismiss filed by the State of Arizona, by the Arizona State Board of Nursing (“the Board”), the Response of Plaintiffs, and the Board’s Reply. The Court has further considered oral argument of counsel for the parties.

Plaintiffs’ claims must be dismissed for three reasons: 1) with the exception of three Plaintiffs, all of the claims asserted in the Complaint were made more than one year after the causes of action accrued; 2) the Plaintiff, David Wermuth, did not file a notice of claim within 180 days of the date that his cause of action accrued; and 3) as to all Plaintiffs, their claims are barred pursuant to A.R.S. § 12-820.01(A).

I. Statue of Limitations

A.R.S. § 12-821 provides that all “actions” against any public entity “must be made within one year after the cause of action accrues and not afterward.” See A.R.S. § 12-821. With the exception of three Plaintiffs, Greg Tidrick, David Wermuth, and Barbara Woodward, all of the Interim Orders for which the Plaintiffs have filed suit were issued more than one year before

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the date the Complaint was filed, August 27, 2010. Thus, any claim which accrued before August 27, 2009, is time barred.

Plaintiffs claim that their causes of action did not accrue until April 19, 2010, the date the Board admitted that it had no legal authority to issue the Interim Orders, is not availing.

The discovery rule tolls the statute of limitations if a plaintiff did not know and could not have exercised reasonable diligence to discover the underlying *facts* of his claim. *Gust, Rosenfeld & Henderson v. Prudential Insurance Ins. Co.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995). A plaintiff must diligently investigate potential claims; if he allows them to become stale, the statute does not toll. *Doe v. Roe*, 191 Ariz. 313, 324, 955 P.2d 951, 962 (1998). Furthermore, the plaintiff need not know all the facts for a claim to accrue. *Doe* 191 Ariz. at 323, 955 P.2d at 961.

The cause of action for all these Plaintiffs accrued on the date that they were notified by the Board that they were required to pay for their own evaluations. Therefore, the claims of all Plaintiffs, other than Plaintiffs Tidrick, Wermuth, and Woodward, are outside the one year statute of limitations provided for in A.R.S. § 12-821.

Plaintiff Wermuth's cause of action accrued on September 10, 2009. However, he did not file his Notice of Claim until May 12, 2010.

A.R.S. § 12-821.01 provides that any person wishing to assert a claim against an Arizona public entity, must file a Notice of Claim within 180 days of the date the cause of action accrued. Because Mr. Wermuth's cause of action accrued more than 180 days before his Notice of Claim was filed, his claim is barred by A.R.S. § 12-821.01.

II. Judicial Immunity

A.R.S. § 12-820.01(A) provides that a public entity is not liable for the exercise of a judicial function.

Judicial immunity exists so that "judges will exercise their functions with independence and without fear of consequences." *Acevedo v. Pima County Adult Probation Dep't*, 142 Ariz. 319, 321, 690 P.2d 38, 40 (1984). The immunity doctrine does not only apply to judges. *Burk v. State*, 215 Ariz. 6, 9, 156 P.3d 423, 426 (App. 2007). "The immunity is granted to those who perform functions intimately related to or which amount to an integral part of the judicial process." *Acevedo*, 142 Ariz. at 321, 690 P.2d at 40. Thus, courts look at the "nature of the activities performed and the relationship of those activities to the judicial function" to determine whether immunity applies. The Arizona State Board of Nursing is given the power and duty to

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“conduct investigations, hearings, and proceedings concerning violations” of the nursing statutes or Board rules. A.R.S. § 32-1606(A)(9).

“For reasonable cause,” the Board may issue Interim Orders requiring “a licensee or certificate holder to undergo any combination of mental, physical or psychological examinations or skill evaluations necessary to determine the person’s competence and conduct.” These examinations may include bodily fluid testing. A.R.S. § 32-1664(F).

Plaintiffs’ assertions that the Board exceeded its authority to order the licensees to pay for those evaluations and acted willfully and wantonly, does not defeat the absolute immunity defense provided for in A.R.S. § 12-820.01(A). The Arizona Supreme Court has stated that judicial immunity protects one from civil liability “even when such acts are in excess of their jurisdiction or are alleged to have been done maliciously or corruptly.” *Acevedo*, 142 Ariz. at 321, 690 P.2d at 40. Even if the Board exceeded its authority by requiring the licensees to pay for the evaluations or acted wantonly in issuing those orders without explicit authority, it is absolutely immune from liability for monetary damages under Arizona law.

Based upon the foregoing,

IT IS ORDERED granting the Arizona Board of Nursing’s Motion to Dismiss the claims of all Plaintiffs for monetary damages.

III. Defendant’s Motion to Dismiss Plaintiffs’ Claims for Declaratory Judgment and for Special Action Relief.

Defendant urges the Court to dismiss Plaintiffs’ claims for a Declaratory Judgment and for Special Action relief. Defendant argues that both claims are moot now that the Board has acknowledged that it has no legal authority to order nurses to pay for their own evaluations.

At oral argument the Board conceded that while it has rescinded its policy requiring nurses to pay for their own evaluations, there is no current legal impediment precluding them from re-implementing that policy. Voluntary cessation of questioned practices does not automatically moot a party’s claim. This is particularly true when the Defendant is free to re-implement the allegedly wrongful behavior. *State ex rel Babbitt v. Goodyear Tire and Rubber Co.*, 128 Ariz. 483, 486, 626 P.2d 1115, 1118 (App. 1981). Therefore,

IT IS FURTHER ORDERED denying Defendant’s Motion to Dismiss Plaintiffs’ Claims for Declaratory Judgment and for Special Action Relief.

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ALERT: eFiling through AZTurboCourt.gov is mandatory in civil cases for attorney-filed documents effective May 1, 2011. See Arizona Supreme Court Administrative Orders 2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.