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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

WILLIAM Y. MOORES, Plaintiff and Appellant, v. MEDICAL BOARD OF CALIFORNIA, Defendant and Respondent.	A172919 (San Francisco City & County Super. Ct. No. CPF235181212)

MEMORANDUM OPINION[1]

William Y. Moores filed an appeal—rather than an original writ proceeding in accordance with Business and Professions Code[2] section 2337 (§ 2337) and well-established case authority—challenging the trial court's denial of his administrative mandamus petition challenging the Medical Board of California's (Board) refusal to terminate his probationary status.

[1] We resolve this case by memorandum opinion under California Standards of Judicial Administration section 8.1. We discuss the factual background only briefly as the parties know, or should know, "the facts of the case and its procedural history." (*People v. Garcia* (2002) 97 Cal.App.4th 847, 851.)

[2] All further statutory references are to the Business and Professions Code.

We therefore dismiss Moores's appeal for lack of jurisdiction. (See *Sela v. Medical Bd. of California* (2015) 237 Cal.App.4th 221, 225, 231–232 (*Sela*).)

The pertinent background is as follows: In 2001, the Board filed an accusation against Moores, then practicing as a surgeon, for gross negligence and incompetence. To resolve the disciplinary proceeding, Moores entered into a stipulated settlement. The settlement required, among other things, that he be placed on probation for five years and enroll in the University of California, San Diego School of Medicine's Physician Assessment and Clinical Education Program.

Paragraph 21 of the settlement specifies the probationary period is tolled if Moores leaves California or does not "practice medicine" in California. It states: "Tolling of Probation: In the event [appellant] should leave California to reside or to practice outside the State or for any reason should [appellant] stop practicing medicine in California, [appellant] shall notify the Division or its designee in writing within ten (10) days of the dates of departure and return of the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty days in which [appellant] is not engaging in any activities defined in Sections 2051 and 2052 of the Business and Professions Code. . . . Periods . . . of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary period."

Based on correspondence from Moores to the effect he was no longer performing surgery but was making his living providing nutrition and lifestyle advice, the Board concluded he was not engaged in the "practice of medicine" and therefore his probationary term was tolled.

Moores disputed this, and eventually, in August 2011, filed a petition for penalty relief (§ 2307) with the Board, seeking termination of his

probation. In April 2013, the administrative law judge (ALJ) hearing the petition issued a proposed decision granting it, finding, in part, that "preventative medicine and advice on life-style choices by a physician" are activities that fall within the scope of section 2051. The Board did *not* agree and issued an order of *non*-adoption of the ALJ's proposed decision and a decision denying Moores's petition. Moores did not judicially challenge the Board's decision.

In June 2021, Moores filed a second petition for penalty relief with the Board, claiming, as he had in his first petition, that providing nutrition and lifestyle advice constituted "practicing medicine" and therefore his probationary period had not been tolled and should be terminated. The ALJ hearing this petition disagreed and issued a proposed decision denying it. The Board adopted this proposed decision. Moores filed an administrative mandamus proceeding in the superior court challenging the decision. The court denied the writ petition on January 21, 2025. Moores filed a notice of appeal on March 14, 2025.

"The court in *Landau v. Superior Court* (1998) 81 Cal.App.4th 191 . . . (*Landau*), summarized the judicial review process for Board disciplinary decisions as follows: 'Review of a decision of the [Board] revoking, suspending or restricting a medical license is by writ of administrative mandamus in the superior court. (Code Civ. Proc., § 1094.5.) Traditionally, review of the superior court decision has been by direct appeal from the final judgment or order of the superior court granting or denying the writ petition. Effective January 1, 1996, the Legislature . . . provided that appellate review of the superior court's decision shall be pursuant to a petition for an extraordinary writ. (Bus. & Prof. Code, § 2337.) [¶] This amendment eliminated direct appeal via Code of Civil Procedure section 1094.5 from the superior court

decision granting or denying the petition for writ of mandate and substituted discretionary writ review by the appellate court. . . .' " (*Sela, supra,* 237 Cal.App.4th at p. 228.)

"The court in *Landau* . . . explained that '[t]he legislative history of section 2337 makes clear that the statute was a response to one aspect of a perceived crisis in physician discipline procedures—that of lengthy delays in the final imposition of discipline. The provision for writ review in the Court of Appeal was intended *to expedite the completion of judicial review of physician discipline decisions and to shorten the overall time for these cases irrespective of which party prevailed at the superior court level.* [¶] . . . In cases where the Board has imposed discipline suspending or revoking a license, and the superior court has refused to issue a writ overturning that decision, appellate review by writ of mandate enables the appellate court to dispose of a petition that has no apparent merit relatively quickly. Similarly, where the superior court has issued a writ overturning the Board's imposition of discipline, appellate writ review pursuant to section 2337 would benefit the physician by shortening the time to final decision.' (*Landau, supra,* 81 Cal.App.4th at pp. 205–206, italics added.)" (*Sela, supra,* 237 Cal.App.4th at pp. 228–229.)

The *Sela* majority held the rationale explicated in *Landau* applies equally to a physician's purported appeal from a decision by the superior court denying a petition challenging a Medical Board denial of a petition for penalty relief. (*Sela, supra,* 237 Cal.App.4th at pp. 225–226, 229–231.)

Moores argues in his closing brief[3] that the Legislature's purpose in requiring that appellate review of Board disciplinary decisions be by way of

[3] Moores made no mention of section 2337 in his opening brief.

original writ proceeding, rather than by way of appeal, is inapplicable to a Board decision denying a petition for penalty relief.

The physician in *Sela* made this same argument and the majority rejected it. "Plaintiff's argument that the purpose of section 2337—to remove promptly unqualified physicians from the practice of medicine—would not be served by applying it to the judgment in issue is unavailing. Although timely removal of unqualified physicians is a purpose of the enactment, it is not the sole purpose. As the court in *Landau, supra,* 81 Cal.App.4th at page 205 observed, the writ review provision of section 2337 was intended 'to expedite the completion of the judicial review of physician discipline decisions' and to shorten the overall time for such cases, 'irrespective of which party prevailed at the superior court level.' Thus, section 2337 is not limited to disciplinary proceedings in which the physician does not prevail before the Board or in the trial court and which result in the termination or limitation of his or her right to practice. On its face, section 2337 applies to trial court review of any disciplinary decision by the Board that affects the status of the physician's license to practice. To hold otherwise would limit unreasonably the application of section 2337 and thereby impede the overall purpose of expediting judicial review of Board disciplinary decisions that affect a physician's license, such as the decision here to continue in place the probationary restrictions on plaintiff's license. . . . [W]rit review in this case would have served that statutory purpose by enabling this court to dispose of plaintiff's request for penalty relief quickly and expeditiously, regardless of whether the Board or plaintiff prevailed in the trial court. Just as the Board has an interest in promptly removing unqualified physicians from practice, a physician entitled to relief has an interest in a prompt appellate review that

might restore his or her right to practice." (*Sela, supra,* 237 Cal.App.4th at p. 230.)

Moores urges us to reject the reasoning of the *Sela* majority and, instead, adopt the view of the dissent—that the Administrative Procedure Act (Gov. Code, § 11340 et seq.) generally controls the review of licensing decisions and allows for appeals in judicial proceedings (*Sela, supra,* 237 Cal.App.4th at pp. 232–234 (dis. opn. of Goodman, J.)), the language of section 2337 does not explicitly refer to Board decisions denying petitions for penalty relief (*Sela*, at pp. 237–238 (dis. opn. of Goodman, J.)), and such decisions simply maintain the status quo and therefore do not implicate the policy reasons for expedited review of the underlying disciplinary decision (*id.* at pp. 236–238 (dis. opn. of Goodman, J.)).

We decline to part company from the *Sela* majority opinion. It has long been the unquestioned law on the non-appealability of Board decisions on petitions for penalty relief, and we are confident the Legislature would have amended the statute had the majority been in error as to the purpose and proper application of the statute. (See *Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 196 ["When a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it."].)

Alternatively, Moores asks us to deem his improper appeal an original writ proceeding, citing *Zabetian v. Medical Board* (2000) 80 Cal.App.4th 462 (*Zabetian*). *Zabetian* recited the basic principle that an appellate court "may treat an improper appeal as a petition for an extraordinary writ in unusual circumstances." (*Id.* at p. 466.) "[U]nusual circumstances are present where the matter presents an issue of first impression, the issue has been

thoroughly briefed and [the court's] determination is purely one of law." (*Ibid.*) In *Zabetian,* the Board, itself, urged the Court of Appeal to treat the physician's improper appeal as a writ proceeding "because [the case] concern[ed] an issue of first impression, which ha[d] been briefed by the parties." (*Ibid.*) The Court of Appeal agreed the case presented unusual circumstances. (*Ibid.*) The court did not, contrary to what Moores suggests, conclude there were unusual circumstances solely because writ review is the sole means of appellate review. If that, alone, sufficed, the jurisdictional mandate of section 2337 would be meaningless.

Sela makes that clear. The physician in *Sela* also urged the Court of Appeal to treat his improper appeal as an original writ proceeding. (*Sela, supra,* 237 Cal.App.4th at p. 231.) The court declined to do so. (*Id.* at p. 232.) The physician "failed to explain why he proceeded by way of direct appeal instead of seeking expedited appellate review in an extraordinary writ proceeding as required by section 2337." (*Id.* at p. 231.) He "also did not provide a sufficient justification for the unreasonable delay in the disposition of this matter caused by his failure to follow section 2337 and seek expedited review pursuant to a petition for an extraordinary writ. . . . There is no advantage to plaintiff or the public in having a longer period of review by way of an appeal. Given the plain language of section 2337, [his] conduct in proceeding with this appeal contrary to the requirements of that section requires a more convincing explanation of his justification for proceeding as he did." (*Id.* pp. 231–232.) The court therefore "decline[d] to exercise [its] discretion to treat the unauthorized appeal as a petition for an extraordinary writ." (*Id.* at p. 232.)

For the same reasons, we decline to exercise such discretion here. Although couched in much verbiage, Moores's reason for why he should be

excused from the mandate of section 2337 boils down to a claim that he has raised an important legal question. He maintains the "primary focus" of his challenge to the Board's denial of his petition for penalty relief is its asserted failure to carry "its own burden to establish non-practice and a probation violation" and by requiring Moores "to demonstrate compliance." These claimed legal errors, according to Moores, trampled his "due process" rights. To begin with, Moores cites no legal authority whatsoever in support of this argument. Nor is this surprising since it has long been the law that in seeking penalty relief, the burden of proof is, indeed, on the disciplined physician to demonstrate entitlement to relief and to do so in accordance with the heightened clear and convincing standard. (See *Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.) As *Flanzer* explains, " '[i]t is important to bear in mind that in a proceeding for the restoration of a revoked license, the burden at all times rests on the petitioner to prove that he has rehabilitated himself and is entitled to have his license restored, and not on the board to prove to the contrary.' As an applicant for reinstatement, [the physician] is not in the position of an untried newcomer, but a fallen licentiate." (*Ibid.,* quoting *Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308, 315.)

In sum, Moores made no mention of section 2337 in his opening brief, let alone provided a justification for his failure to comply with the statute. In his closing brief, he asks us to deem his improper appeal an original writ proceeding because he purportedly has raised an important question of law—which, in fact, is a question that has long been decided and decided adversely to the position Moores now advocates. Finally, unlike in *Zabetian*, the Board does not join Moores in urging this Court to deem his improper appeal an original writ proceeding; to the contrary, it strenuously argues against it. We

therefore decline to deem Moores's unauthorized appeal an original writ proceeding.

DISPOSITION

The appeal is dismissed. Respondent to recover costs on appeal.

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Banke, Acting P. J.

We concur:

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Langhorne Wilson, J.

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Smiley, J.

A172919, Moores v. Medical Board of California