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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001915-MR

DR. JOHN L. DOYLE III

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 06-CI-005099

KENTUCKY BOARD OF MEDICAL
LICENSURE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER,¹ STUMBO AND THOMPSON, JUDGES.

KELLER, JUDGE: Dr. John L. Doyle III (Doyle) appeals from the trial court's denial of his Kentucky Rules of Civil Procedure (CR) 60.02 motion to set aside the dismissal of his petition for judicial review of an order from the Kentucky Board of

¹ Judge Michelle M. Keller authored this opinion prior to her appointment to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

Medical Licensure (the Board) suspending and indefinitely restricting his license. On appeal, Doyle argues that the trial court abused its discretion when it denied his motion. Having reviewed the record from the proceedings before the Board, the record from the proceedings before the circuit court, and the arguments of the parties, we affirm.

FACTS

In June 2003, Doyle's medical associates advised the Board that they had concerns about Doyle's practice. They alleged that Doyle had been late reporting to work; had occasionally missed work; did not adequately maintain his records; used alcohol during office hours; and experienced "mood swings." Following an investigation, the Board issued a complaint in March 2004 setting forth the above allegations. The Board also alleged that one of its consultants had noted borderline to below standard record keeping; that Doyle had pled guilty to DUI in 2001 and had been arrested and charged with DUI in 2002; that Doyle had undergone several evaluations for substance abuse; and that substance abuse evaluators found evidence of possible alcohol abuse and/or dependence. Based on the preceding, the Board stated that Doyle had violated Kentucky Revised Statutes (KRS) 311.595(7), (8), (10), and (9), and it issued an emergency order of suspension.

In his answer, Doyle admitted that he had voluntarily entered into a substance abuse contract with the Kentucky Physicians Health Foundation; however, he denied a substance abuse problem. Doyle also denied the other

allegations and filed a counterclaim arguing the emergency suspension violated his due process rights and that it was unlawful.

Following a hearing, a hearing officer found that there was substantial evidence that Doyle was a persistent and chronic alcoholic and that his record keeping was less than adequate. However, the hearing officer concluded that Doyle did not pose an immediate danger to the health, safety, or welfare of his patients or the general public. Therefore, the hearing officer recommended that the emergency suspension be modified to an emergency order of restriction, a recommendation the Board apparently adopted. Doyle then filed a motion in the circuit court seeking injunctive relief from the Board's order pending a final hearing. The court granted that relief.

Just prior to the final hearing, the Board and Doyle entered into settlement negotiations. They nearly reached an agreement; however, counsel for the parties could not agree regarding the inclusion of language indicating that no disciplinary action had occurred and that Doyle's license was not being "restricted." Therefore, the parties were unable to resolve the matter through settlement, and they proceeded to participate in a hearing that stretched over eighteen days and several months.

Following the hearing, the hearing officer rendered an eighty-five-page recommended order in which he determined, in pertinent part, that Doyle: was a persistent and chronic alcoholic; had failed to adequately document and maintain patient records; had knowingly made false statements in those records;

and had prescribed medication for his girlfriend. Additionally, the hearing officer found that Doyle's treatment fell below acceptable medical practice. Based on these findings, the hearing officer recommended that Doyle be permitted to continue practicing but with indefinite restrictions on his license.

Doyle and counsel for the Board filed exceptions to the hearing officer's recommended order. Doyle argued in his exceptions that he had been denied due process and that the hearing officer's findings were not supported by the evidence. Counsel for the Board argued in his exceptions that Doyle's license should be revoked. The Board adopted the hearing officer's recommended findings of fact and his recommendation of indefinite restrictions. However, the Board chose to suspend Doyle's license for three months. Additionally, the Board required Doyle to pay the costs of the proceedings, which it stated amounted to \$25,025.

Doyle then filed a petition for judicial review and an action for declaratory judgment in the Jefferson Circuit Court, which was assigned to Division Seven (the suspension petition). In the suspension petition, Doyle continued to argue that the Board's findings were not supported by evidence of substance. Additionally, Doyle argued that various provisions of KRS Chapters 13B and 311 are unconstitutional; that the Board's actions amounted to misconduct; and that he was entitled to conduct discovery regarding the alleged misconduct. In its response, the Board argued that Doyle's action was simply a request for judicial review and that discovery was not appropriate.

In February 2007, while Doyle's suspension petition was pending, the Board issued a complaint alleging that Doyle had not paid any of the \$25,025 he had been ordered to pay. Following a hearing, during which Doyle conceded that he had not made any payments, a hearing officer concluded that Doyle lacked the funds to do so. However, the hearing officer did not excuse Doyle's failure to pay, noting that Doyle made no attempt to advise the Board of his inability to make payments or to make alternative payment arrangements. The Board adopted the hearing officer's findings and, based on those findings, revoked Doyle's license. Doyle filed a petition for judicial review of that revocation order, which was assigned to Division One of the Jefferson Circuit Court (the revocation petition).

While the petitions were pending in circuit court, Doyle moved to the Solomon Islands, where he practiced medicine and met his current wife. In late 2007 or early 2008, Doyle returned to Kentucky with his wife and her children. Doyle's wife and stepchildren, who were not United States citizens, were in the country as lawful permanent residents. In order for them to maintain that status, Doyle was required to provide an affidavit stating that he could support them.

After returning to Kentucky, Doyle began exploring ways to reinstate his license to practice medicine. To that end, Doyle sought assistance from Dr. Glenn Womack (Dr. Womack). In May 2008, Dr. Womack sent a letter to Doyle's counsel, J. Fox DeMoisey (DeMoisey). In his correspondence, Dr. Womack indicated that he was willing to assist Doyle in getting his license reinstated. DeMoisey forwarded that letter to counsel for the Board, C. Lloyd Vest II (Vest).

With Dr. Womack's assistance, Doyle completed a number of assessments/courses/seminars during 2008 and early 2009. In March 2009, the Board and Doyle entered into an agreed order amending the revocation and suspension orders in order to permit Doyle to practice as a physician's assistant. Doyle believed that, if he fulfilled all of the training and assessment requirements and had no problems practicing as a physician's assistant, the Board would fully reinstate his license at the earliest date possible, November 2009.

While Doyle was working with the Board and Dr. Womack to get his license fully reinstated, the Division Seven circuit court ruled that he had made a *prima facie* case that the Board had engaged in misconduct with regard to the suspension proceedings. Specifically, the court stated that there was sufficient evidence of misconduct to permit Doyle to conduct discovery regarding the Board's finding of alcoholism and the way it conducted settlement negotiations. Approximately seven months after the court entered that order, Doyle filed a motion to reconsider, asking the court to permit additional discovery, and a motion to consolidate the suspension and revocation petition actions. Thereafter, the Board filed a motion to reconsider, asking the court to set aside its order permitting discovery. On July 1, 2008, the court denied Doyle's motion to consolidate and granted the Board's motion to set aside the order permitting discovery.² In doing so, the court noted that Doyle was attempting to litigate issues regarding alleged misconduct within a petition for judicial review. The court could not find any

² We note that, sometime during this litigation, the judge who issued the order permitting discovery retired. The order setting aside the discovery order was issued by his replacement.

authority, and Doyle had cited to no authority, that would permit Doyle to do so. Because the court did not believe the issue of misconduct was properly before it, the court saw no need to permit discovery.

In October 2009, Vest advised Doyle that the Board would likely be amenable to entering into an agreed order fully reinstating his license at the November 2009 meeting. However, before the Board would agree to do so, Doyle would have to dismiss the suspension and revocation petitions that were still pending in circuit court. Doyle consulted with DeMoisey and, although DeMoisey advised him not to do so, Doyle agreed to dismiss those petitions. DeMoisey then withdrew as counsel and Doyle, *pro se*, dismissed the petitions. The Board then fully reinstated Doyle's license, and he has practiced medicine since then.

One year after Doyle dismissed the petitions for review, he filed a CR 60.02 motion to set aside the dismissal of the suspension petition.³ In his motion, Doyle argued that the dismissal had been obtained through fraud and duress. Doyle also argued that he should be permitted to conduct discovery regarding the issues raised in his motion.

Doyle's fraud argument before the circuit court contained four parts. First, Doyle argued that the Board failed to consider the entire record before adopting the hearing officer's recommended findings. According to Doyle, that rendered the Board's suspension and revocation orders void *ab initio*. Second, Doyle argued that the Board, after revoking or suspending a license, only has the

³ We note that Doyle also filed a CR 60.02 motion to set aside the dismissal of the revocation petition. The circuit court has not ruled on that motion.

authority to issue a new license. It does not have the authority to amend a final order of revocation or suspension so as to reinstate a license. Therefore, according to Doyle, the Board's reinstatement of his license with restrictions in March 2009 and its full reinstatement of his license in November 2009 were fraudulent. Third, Doyle argued that the Board fraudulently led him to believe that dismissal of his suspension and revocation petitions was a statutory requirement for reinstatement of his license. Finally, Doyle argued that, because there is no statutory or regulatory authority for the Board to make dismissal of those petitions a precondition for reinstatement, the linking of the two was unlawful.

As to duress, Doyle argues that his wife and stepchildren had been issued "green cards" which permitted them to remain in this country even though they are not citizens. According to Doyle, their immigration status was to be reviewed in early 2010. In order to ensure that they could remain in this country, Doyle had to verify that he had sufficient employment to support them. Doyle feared that, if he lost his ability to work as a physician's assistant, as the Board threatened, his wife and stepchildren would be deported. According to Doyle, absent that fear, he would not have agreed to dismiss his suspension and revocation petitions.

Finally, as to the discovery issue, Doyle argued that he needed to develop additional evidence for the record. Doyle listed several topics/areas that he wanted to explore, including what the members considered when reaching their decisions to suspend and ultimately revoke his license.

Following extensive briefing and oral arguments by the parties, the court denied Doyle's motion. In doing so, the court first found that there was no evidence of fraud. According to the court, although Doyle could have refused to dismiss his suspension petition and litigated the issues raised therein, he knowingly and voluntarily chose not to do so. Furthermore, the court found that, by dismissing the petition, Doyle "surrendered the opportunity to argue" underlying issues about the validity of the Board's suspension and revocation orders. Thus, the court determined that issues regarding the sufficiency of the evidence to support the suspension and revocation of Doyle's license and whether the Board failed to consider the record were moot. Based on that finding, the court determined that the requested discovery was not necessary. Finally, the court found that "[e]xtraneous factors, including possible revocation of [Doyle's] limited medical license and his wife's immigration status, [did] not foster an aura of fraud."

Doyle filed a CR 59.05 motion to alter, amend, or vacate, which the court denied. In doing so, the court reiterated its finding that, although Doyle continued to object to the Board's finding that he is a persistent and chronic alcoholic, he waived his right to contest that finding by dismissing his suspension petition. Furthermore, the court reiterated its finding that Doyle "had the option of entering into the negotiated settlement or contesting it. He chose the former, and in so doing accepted the benefits along with the negative elements of the agreement." It is from the court's orders denying his CR 60.02 and 59.05 motions that Doyle now appeals.

STANDARD OF REVIEW

We review a trial court's ruling on a CR 60.02 motion for abuse of discretion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Absent a "flagrant miscarriage of justice," we will affirm the trial court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

ANALYSIS

Doyle makes a two-fold argument that the court abused its discretion when it denied his CR 60.02 motion. First, Doyle argues that the court erroneously determined that the Board had not committed fraud in order to obtain the dismissal of the suspension petition. Second, Doyle argues that the court erroneously determined that he waived his right to raise/litigate issues related to the Board's pre-suspension actions when he dismissed the suspension petition. We address each argument in turn below.

1. Fraud/Misrepresentation

As we understand it, Doyle is arguing that the Board committed fraud because: (1) it unlawfully reinstated his license with restrictions in March 2009; (2) it "illegally" conditioned the full reinstatement of his license on dismissal of the

suspension and revocation petitions; (3) it advised him that the Board would revoke his limited license if he did not dismiss the petitions; (4) it negotiated with him without including DeMoisey in the negotiations; and (5) it used knowledge of his family's immigration status to coerce the dismissal. According to Doyle, these actions by the Board amounted to "tricks and contrivances perpetrated against" him in order to prevent him from fully and appropriately presenting his case. We disagree and address each argument separately below.

However, before addressing the individual instances of alleged fraud, we address fraud generally. In support of his argument that the Board acted fraudulently, Doyle cites to two "definitions" of fraud. The first proffered definition, from *Commonwealth v. Smith*, 242 Ky. 365, 46 S.W.2d 474, 478 (1923), is as follows:

Fraud vitiates whatever it touches. "It is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling and unfair ways by which another is cheated."

(Citation omitted).

We note that Doyle did not cite the full paragraph in *Smith*, omitting the following language:

"Actual fraud" may be discovered as follows, "when the party intentionally, or by design, misrepresents a material fact, or produces a false impression in order to mislead

another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is positive fraud, in the truest sense of the terms." "The principal difference between 'actual' and 'constructive' fraud is that in the first case there is an intent to induce another to part with property or surrender some legal right, while in the other, although the act may accomplish that purpose, there is no such intent on the part of the actor." The presence or absence of such intent distinguishes "actual" from "constructive" or "legal" fraud. Fraud is synonymous with bad faith, dishonesty, or overreaching, and is distinguishable from mistake or negligence.

Id. (Citations omitted).

Furthermore, Doyle failed to recite the facts in *Smith*. In *Smith*, an attorney who was attempting to obtain parole for his client, misrepresented to the trial court the extent of the client's underlying sentence. The trial court, relying on those misrepresentations, freed Smith from prison. The former Court of Appeals determined that the attorney's misrepresentation amounted to fraud and reversed the trial court.

The second proffered definition, from *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 818-19 (Ky. 2002), is as follows:

As a general proposition [fraud affecting the proceedings] relates to what is denominated 'extrinsic' fraud. This covers fraudulent conduct outside of the trial which is practiced upon the court, or upon the defeated party, in such a manner that he is prevented from appearing or presenting fully and fairly his side of the case.

.....

Thus, it appears that fraud perpetrated in the courtroom or through testimony under oath is subject to a one-year

limitation while fraud occurring outside the courtroom that interferes with presentation of the losing party's evidence to the extent that he or she is "prevented from appearing or presenting fully and fairly his side of the case" is not subject to that limitation. 7 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 60.02, cmt. 6 (5th Ed. 1995). Philipps goes on to say: "It may be said the language specifying [fraud upon the proceeding] is quite broad and allows for flexibility in the determination of what constitutes 'fraud affecting the proceedings' where the net effect would cause an unjust judgment to stand." *Id.* While finality of judgment is a laudable goal, it cannot take precedence over the fair and equitable resolution of disputes.

As with *Smith*, Doyle failed to recite the facts from *Terwilliger*.

In *Terwilliger*, a husband and wife owned a corporation that was subject to division as marital property. During their divorce proceedings, the husband represented to the wife that the corporation was on the verge of bankruptcy. Furthermore, he represented to her that, if she did not immediately accept the property settlement agreement he had prepared, she would lose her house to creditors. The wife, relying on her husband's representations, signed the agreement and, two months after the divorce was finalized, the husband sold the corporation for approximately 1.6 million dollars. The Supreme Court of Kentucky determined that the husband's actions were fraudulent and it remanded the matter to the trial court for additional proceedings.

Thus, in both cases cited by Doyle, there was an element of misrepresentation. This is consistent with the general definition of fraud which necessitates the making of a false representation of a material fact. *See United*

Parcel Service Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999). It is with the understanding that fraud requires some misrepresentation of a material fact that we analyze the specific instances of fraud alleged by Doyle.

a. Reinstatement of Doyle's License With Restrictions in March 2009

Doyle argues that, under KRS 311.607, the Board had no authority to reinstate his license with restrictions in March 2009. Furthermore, Doyle argues that, by inducing him to enter into an agreed order reinstating his license with restrictions, the Board committed fraud.

KRS 311.607 provides that, once revoked, the Board does not reinstate a license, it issues a new one. Therefore, Doyle is correct that, in March 2009, the Board misrepresented to him its ability to reinstate his license with restrictions. However, based on the record, Doyle approached the Board, both personally and through Dr. Womack, and asked what he should do in order to work for Dr. Womack as a physician's assistant. The Board devised the agreed order that reinstated Doyle's license with restrictions limiting his practice to that of a physician's assistant. Doyle agreed to this arrangement and was a participant in any fraud that took place. Therefore, Doyle's argument that he was somehow entrapped by his own plan is not persuasive.

Furthermore, Doyle has not shown how he was harmed by the agreement to reinstate his license with restrictions. In fact, Doyle benefitted from the agreement because he: was able to earn more money than he could otherwise earn; was able to complete training that he otherwise would not have been able to

complete;⁴ and was able to prove to the Board that he could successfully practice medicine, albeit in a limited role. Therefore, we discern no error in the court's finding that this did not constitute fraud sufficient to set aside Doyle's dismissal of the suspension agreement.

b. Conditioning Full Reinstatement of Doyle's License on
Dismissal of the Petitions for Review

Doyle argues that conditioning full reinstatement of his license on the dismissal of the petitions for review was illegal and therefore fraudulent. As noted above, KRS 311.607 provides that, once revoked, the Board does not reinstate a license, it issues a new one. Doyle is correct that the only condition contained in KRS 311.607(2) for the issuance of a new license is proof to the Board's satisfaction that the applicant is "of good moral character and qualified both physically and mentally to resume the practice of medicine without undue risk or danger to his patients or the public." However, what Doyle ignores is that KRS 311.607(2) also states that the Board "shall not be required to issue a new license," and KRS 311.607(3) provides that a physician receiving such a license is under probation for no less than two and no more than five years. Thus, the statute contemplates supervision of licensees for an extended period of time.

⁴ The March 2009 agreed order states that Doyle was required to complete the CPEP program by both the suspension and revocation orders. He could not do so or fully engage in a CPEP Educational Intervention Plan unless he could, in some capacity, evaluate and treat patients and document his activities. The Board indicated that "[i]t would be very helpful" for Doyle to have completed those programs before it evaluated his petition for reinstatement.

Furthermore, nothing in KRS 311.607 prohibits the Board from placing conditions on the granting of a new license. Therefore, we are not convinced that the Board's requirement that Doyle dismiss his petitions for review was "illegal."

As to whether this amounted to fraud, Doyle has pointed to no misrepresentations by the Board regarding the agreed order that fully reinstated his license. The Board made it clear to Doyle in October 2009 that full reinstatement of his license in November 2009 was conditioned on his dismissing his petitions for review. Doyle consulted with DeMoisey before entering into the agreement and, when DeMoisey withdrew, Doyle took steps *pro se* to dismiss the petitions. Simply stated, Doyle was faced with a choice. He could obtain full reinstatement of his license in November 2009, or he could continue to litigate the correctness of the suspension and revocation of that license. He chose full reinstatement, knowing the conditions and the ramification of accepting those conditions. We discern no fraud and can find no abuse of discretion in the trial court's failure to find fraud.

c. The Board's Statement that It Would Revoke His Restricted License

Doyle argues that the Board's threat to revoke his restricted license if he did not dismiss his petitions for review amounted to fraud. Because Doyle had, by all accounts, been functioning well under his restricted license, we are concerned by the Board's threat. However, as noted above, the Board reinstated Doyle's license on a restricted basis at Doyle's request. Furthermore, the March 2009 agreed order reinstating his license specifically indicates that it could be

terminated "at the sole discretion of the" Board at its November 2009 meeting.

Doyle knew, or should have known, that termination was a possibility, therefore, we discern no misrepresentation on the part of the Board.

d. Failure to Include DeMoisey in Negotiations

On May 9, 2008, Dr. Womack wrote to DeMoisey setting forth a detailed plan to return Doyle to the practice of medicine. At the end of that letter, Dr. Womack stated that he had "communicated in the past with the Executive Director of the Kentucky Medical Licensure Board regarding Dr. Doyle" DeMoisey forwarded Dr. Womack's letter to Vest. It does not appear from the record that DeMoisey told Doyle, Dr. Womack, or Vest to keep him apprised of negotiations. Furthermore, it does not appear from the record that DeMoisey asked Dr. Womack what his previous communication with the executive director of the Board had been.

Additionally, in his cover letter enclosing Dr. Womack's letter, DeMoisey indicated that he and Doyle intended to require the Board to "re-license" Doyle under the terms and conditions set forth in Dr. Womack's letter. Furthermore, DeMoisey indicated that, if the Board would not agree, Doyle would seek relief from the court. DeMoisey closed his letter by stating that he would be available if any further assistance was needed. Again, DeMoisey did not ask Vest to keep him apprised of negotiations. Thereafter, both Dr. Womack and Doyle

corresponded directly with Vest and at least one other Board employee. These communications were not shared with DeMoisey.

Finally, in his affidavit, Doyle states that:

To the best of Affiant's knowledge, [DeMoisey] filed a Motion for Scheduling Order to be heard on June 22, 2009;

It is the Affiant's understanding that [Vest] was not able to schedule the conference with the Court and, subsequently, advised [DeMoisey] that these matters should be put "on hold" while the Affiant sought to regain his medical licensure through KRS 311.670.

When Affiant discussed this matter with [DeMoisey], Affiant instructed [DeMoisey] to put the Petition matters "on hold" until after November 2009.

Based on the preceding, it appears that Doyle chose to negotiate with the Board either directly or through Dr. Womack. If he had chosen otherwise, he would have apprised DeMoisey of the negotiations; he would have copied DeMoisey with his correspondence to the Board; and he would have copied DeMoisey with Dr. Womack's correspondence to the Board. Furthermore, DeMoisey was aware that Doyle and/or Dr. Womack began negotiating directly with Vest as early as May 2008 and that those negotiations were expected to continue through November 2009. In light of the preceding, we cannot fault Vest for failing to keep DeMoisey "in the loop" when Doyle did not do so. Thus, we discern no error in the trial court's refusal to grant Doyle's CR 60.02 motion on this issue.

e. The Immigration Status of Doyle's Family Members

In his affidavit, Doyle states that:

[H]e did not want to dismiss the pending suits inasmuch as the findings of the KBML were not accurate or truthful; however, Affiant recognized that he had been recently married to a Phillippino [sic] National and that, as Board counsel well knew, a review of her "green card" status was rapidly approaching, which was very employment dependent and sensitive.

According to Doyle, the Board fraudulently used this information to coerce him into dismissing his petitions. We disagree.

As we previously noted, Doyle was free to reject the Board's offer and to litigate the merits of his petitions in court. Certainly, doing so may have had collateral consequences that Doyle did not want. However, parties in law suits often compromise their claims in less than ideal ways to avoid collateral consequences. Taking Doyle's argument to its logical conclusion, every settlement where one party had some advantage over the other would be subject to attack as having been obtained through fraud. That is why fraud requires something more - evidence of misrepresentation or concealment of facts, evidence that is missing herein.

2. Waiver of Right to Raise Issues Regarding
the Board's Pre-Petition Actions

In his suspension petition, Doyle raised, in part, issues regarding the sufficiency of the proof before the Board, the legitimacy of the Board's decision to

suspend his license, and the legitimacy of the Board's settlement negotiation tactics prior to the hearing. In his brief, he argues that if the dismissal of the suspension petition was "procured by misconduct and/or definable fraud . . . then it stands as vitiated." We believe Doyle is arguing that, if we were to find that the trial court erred in denying his CR 60.02 motion, we should reinstate his suspension petition so that he could take proof on the issues raised therein. However, because Doyle knowingly and voluntarily dismissed his suspension petition; the trial court denied his CR 60.02 motion to set aside that dismissal; and we are affirming the trial court, this issue is moot.

CONCLUSION

For the foregoing reasons, we discern no abuse of discretion by the trial court and affirm.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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