RENDERED: FEBRUARY 23, 2018; 10:00 A.M.
TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-001127-MR

BRUCE KINNEY, M.D. APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 09-CI-00239

ANGELA K. MAGGARD, M.D. APPELLEE

OPINION
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Dr. Bruce Kinney challenges an order entered by the Floyd Circuit Court denying his motion to dismiss a complaint filed by Dr. Angela K. Maggard alleging libel and slander; defamation; violation of KRS 311.590[1]

[1] Kentucky Revised Statutes (KRS) 311.590 reads:

> (1) No person shall make any statement or submit any document, paper, or thing to the board, or to its executive director, or to any county clerk, relating in any manner to issuance, registration, suspension, or revocation of any license or permit, knowing same to be false, forged, or fraudulent.

creating a private right of action under KRS 446.070;[2] wrongful use of civil proceedings; and abuse of process. Relying on the judicial statements privilege—often referred to as absolute immunity—Dr. Kinney maintains the complaint should have been dismissed because his challenged statements occurred during judicial proceedings which are afforded absolute immunity from suit. *Smith v. Hodges*, 199 S.W.3d 185, 189 (Ky. App. 2005). Specifically, he claims his words were made:

> "preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding" and that [they] have "some relation to a proceeding that is contemplated in good faith and under serious consideration." *Rogers v. Luttrell*, 144 S.W.3d 841, 843-44 (Ky. App. 2004) (quoting *General Electric Co. v. Sargent & Lundy*, 916 F.2d 1119, 1127 (6th Cir. 1990)). [The judicial statements privilege] applies with equal force to statements in pleadings filed in judicial proceedings. *Massengale v. Lester*, 403 S.W.2d 701-02 (Ky. 1966).

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> (2) No person shall engage in dishonesty, fraud, deceit, collusion, or conspiracy in connection with any examination, hearings, or disciplinary proceedings conducted by the board.

[2] "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

*Halle v. Banner Industries of N.E., Inc*., 453 S.W.3d 179, 184 (Ky. App. 2014).[3] If the judicial statements privilege applies, as Dr. Kinney maintains, his words cannot be used to sustain Dr. Maggard's claims.

This action was initially based solely on Dr. Kinney's appearance as an expert witness during a medical malpractice trial in February 2009. As time wore on, Dr. Maggard added new counts alleging he had also made harmful comments about her to colleagues and patients; had further libeled and slandered her by filing a grievance with the KBML;[4] and had encouraged others[5] to file similar grievances against her.

*Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599 (Ky. 2011), a case of first impression in Kentucky, held statements concerning an attorney disciplinary hearing—whether made in preparation of filing or in the

[3] The majority deems *Halle* factually distinguishable from the disciplinary hearing currently under review. *Halle* pertained to contract issues between competing coal mining entities. This case deals primarily with disciplinary hearings and whether a grievance filed with the Kentucky Board of Medical Licensure (KBML) against a physician should be treated like a complaint filed with the Kentucky Bar Association (KBA) against an attorney. Under the facts presented, extension of the judicial statements privilege to grievances filed with the KBML is appropriate.

[4] Dr. Kinney filed a grievance with the KBML on February 8, 2008. The four-page document, which is in the record, alleged inappropriate charges for services; changing service dates to increase fees; Medicaid fraud; violation of the Stark law (*see generally* 42 U.S.C. § 1395nn); and shoddy work. Dr. Kinney's statement alleged Dr. Maggard suffers from the psychiatric disorder "Megalomania" and is a "pathologic liar." Following an investigation, the KBML closed the matter upon determining the standard of care was met and other claims were unsubstantiated. The grievance named eleven women treated by Dr. Maggard—at least three of whom had never been her patients. Ten of the eleven women were found to have received minimum standards of care for diagnosis, treatment, records and overall opinion. The eleventh patient was deemed to have received less than minimum standards because a particular consult did not occur before a drug was administered. The consultant reviewing Dr. Maggard's cases concluded her work was not substandard, but her documentation needed improvement.

[5] Within thirty days of Dr. Kinney's grievance being filed, two other women—both of whom were now Dr. Kinney's patients—filed grievances against Dr. Maggard with the KBML.

complaint itself, and whether made before or during a disciplinary proceeding—are privileged under the judicial statements privilege, so long as the statements are material, pertinent and relevant to the proceeding. This case explores another matter of first impression in Kentucky—whether a physician who files a grievance with the KBML against a doctor may successfully assert the same absolute immunity afforded an individual filing a KBA complaint against an attorney. We answer the question in the affirmative.

FACTS

Dr. Kinney and Dr. Maggard are OB/GYNs. In 2005, both treated patients at Highlands Regional Medical Center (HRMC) in Prestonsburg, Kentucky.[6] Dr. Maggard was employed by Big Sandy Health Care, Inc.—a federally qualified health care center—and chaired HRMC's OB/GYN Department. An employee of HRMC, Dr. Kinney was critical of Dr. Maggard, blaming her for his lack of patient referrals and for departure of several health care professionals from the area.

On January 10, 2005, Dr. Maggard performed a hysterectomy on Kathy Harless. Dissatisfied with her post-surgery care, and following another procedure by a urologist, Harless became a patient of Dr. Kinney, ultimately filing a medical malpractice suit[7] against Dr. Maggard's employer in 2007 under the Federal Tort Claims Act. Dr. Kinney testified as the sole expert witness for

[6] Dr. Kinney left HRMC in August 2009 and no longer practices medicine in Kentucky.

[7] *Harless v. United States of America*, Civil No. 07-141-GFVT (E.D. Ky. March 24, 2009).

Harless, stating Dr. Maggard's treatment fell below accepted standards of care. Two experts called by the government expressed a different opinion. Finding Dr. Kinney lacked objectivity and credibility, the federal case was dismissed with prejudice on March 24, 2009.

On March 4, 2009, Dr. Maggard had filed a complaint in Floyd Circuit Court alleging Dr. Kinney's testimony—both in deposition and at trial—constituted libel and slander.[8] Dr. Kinney moved to dismiss the complaint for failure to state a claim upon which relief could be granted, or alternatively, sought additional time to review the file and respond in full. On April 3, 2009, the motion to dismiss was denied and additional time was given for the filing of a response. The order was not appealed. In answering the single-count complaint, Dr. Kinney asserted absolute privilege because his comments occurred during a judicial proceeding; claimed he did not defame Dr. Maggard by stating his "opinion;" and, averred the complaint did not state a claim upon which relief could be given.

Other than an occasional request for a status conference, the case idled until 2012 when Dr. Maggard served interrogatories on Dr. Kinney and gave notice of her intent to depose him. Dr. Kinney was ordered to respond to the interrogatories. He still has not been deposed in this litigation. Practically no discovery has occurred leaving us with generalities and few facts.

[8] On June 20, 2014, Dr. Maggard conceded this particular count is barred by privilege and offered to enter an agreed order dismissing the allegation. No such order appears in the record.

In December 2013, Dr. Maggard sought leave to file her first amended complaint to add four new counts. The amended complaint was ordered filed and ten days later, Dr. Kinney moved to dismiss the suit asserting absolute immunity for statements made during a judicial proceeding "and privileges associated with individuals holding professional licenses."

On April 7, 2014, Dr. Kinney supplemented his motion to dismiss the first amended complaint arguing all his deposition/trial testimony in *Harless* was privileged; relying on *Botts,* filing a complaint with the KBML is the same as filing a bar complaint against an attorney to which absolute immunity applies; had he not reported Dr. Maggard to the KBML he would have opened himself to liability for a misdemeanor;[9] KRS 446.080 does not create a private cause of action for his statements; and, having conceded a KBML hearing is a "judicial proceeding," Dr. Maggard cannot allege wrongful use of civil proceedings and abuse of process.

Two days later, Dr. Maggard sought leave to file her second amended complaint to allege defamation based on comments Dr. Kinney had made to the KBML, HRMC administrators, Dr. Maggard's colleagues and co-workers, and her current and former patients. Dr. Kinney opposed the amendment saying it merely alleged the same claims using different names. In a single order entered on May 15, 2014, the second amended complaint was ordered filed and Dr. Kinney's

[9] KRS 311.606(2); KRS 311.990(22).

motions to dismiss, stay all discovery, and enter a protective order were denied. This order was not appealed.[10]

On May 29, 2014, Dr. Kinney moved to dismiss the second amended complaint with supporting memorandum. This pleading repeated much of the motion to dismiss denied just two weeks earlier and reasserted absolute immunity.

After taking the motion to dismiss under submission, on June 25, 2014, the trial court entered a written order overruling the motion to dismiss without offering any explanation and held in abeyance Dr. Kinney's motion to stay all proceedings and strike objectionable terms contained in the second amended complaint. It is from this order that Dr. Kinney appeals.

ANALYSIS

While denial of a motion to dismiss is generally interlocutory and unappealable, Dr. Kinney's assertion of absolute immunity for testimony he gave in a judicial proceeding triggers immediate *de novo* appellate review upon request. *Druen v. Miller*, 357 S.W.3d 547, 549 (Ky. App. 2011). Were we to deny consideration until after he bears the expense and burden of trial, Dr. Kinney would be denied "meaningful review." *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 884 (Ky. 2009). Thus, we have jurisdiction to consider those aspects of the appeal directly related to the claim of judicial statements privilege.

[10] Dr. Maggard argues *this* order—as well as one entered on April 3, 2009—should have been appealed and failure to do so constituted waiver. While the interlocutory order entered on May 15, 2014, *could* have been appealed, we are unwilling to require its appeal. We realize allowing an appeal to go forward at this point technically gives Dr. Kinney a second bite at the apple and allowed the trial court case to churn another month, but the position of the parties is the same.

*Mattingly v. Mitchell*, 425 S.W.3d 85, 91 (Ky. App. 2013). Our review, however, will be limited to questions directly related to the claim of absolute immunity. Other alleged errors can be corrected by filing an appeal after entry of final judgment. This approach is consistent with an order entered by a motion panel of this Court on October 17, 2014, granting in part Dr. Kinney's motion for intermediate relief.

Dr. Kinney moved the trial court to dismiss the second amended complaint for failure to state a claim upon which relief may be granted. Such a motion:

> admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. . . . Accordingly, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. This exacting standard of review eliminates any need by the trial court to make findings of fact; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

*Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (citations and quotations omitted).

Count I alleges a single count of libel and slander based solely on testimony Dr. Kinney gave in a deposition and at a subsequent federal trial at

which Dr. Maggard's employer prevailed. The judicial statements privilege which Dr. Kinney seeks to invoke is summarized as:

> "[P]ertinent matter in pleadings, motions, affidavits, and other papers in any judicial proceeding, is absolutely privileged, though false and malicious, but that matter which is clearly impertinent and irrelevant and also false and malicious, is actionable." The same rule applies to the privilege accorded witnesses in judicial proceedings.

*Schmitt v. Mann*, 291 Ky. 80, 163 S.W.2d 281, 283 (1942) (quoting COOLEY ON TORTS, 4th Edition, section 156). While Dr. Kinney's opinion was disputed by two other expert witnesses, and deemed unconvincing by the trial court, there is no indication his testimony about the applicable standard of care was not pertinent and relevant to the federal tort case which turned on whether the standard of care was met. Having determined his testimony was both pertinent and relevant, we question neither its truthfulness nor accuracy. *Id.* Because Count I is based wholly on statements made in preparation for and during a judicial proceeding—a fact recently conceded by Dr. Maggard when she offered an agreed order dismissing the claim—Dr. Kinney's statements cannot be used to sustain the allegation. The trial court erred in not dismissing this count—a ruling which must be rectified on remand.

Count II alleges libel and slander stemming from Dr. Kinney's filing of a grievance with the KBML. Dr. Kinney argues this count must be dismissed under *Botts*, 348 S.W.3d at 605, which holds:

> any communication or statement made to the KBA during the course of a disciplinary hearing or

> investigation, including the contents of the bar complaint initiating such proceedings, are absolutely privileged. This privilege extends to any claim relating to the act of filing the bar complaint, such as abuse of process, wrongful use of civil proceedings, or malicious prosecution.

In *Botts*, a majority of the Supreme Court of Kentucky concluded the public's need for a vibrant attorney disciplinary process is so great complainants must be free of all civil liability for reporting misconduct—even if false—to ensure complaints are filed. Otherwise, self-regulation will fail.

*Botts* dealt exclusively with bar complaints and attorneys. Applying a two-step inquiry, the Court first considered whether the allegedly defamatory statements—a disciplinary complaint filed against an attorney resulting in referral to the Inquiry Commission, the filing of charges, an evidentiary hearing at which the Trial Commissioner determined Botts committed none of the acts or omissions charged, and finally, dismissal of the charges—were made during a judicial proceeding. The Court concluded a hearing on a bar complaint constituted a judicial proceeding. The Court then considered whether the objectionable statements were material, pertinent and relevant to that judicial proceeding. Again, the Court concluded they were. Answering both parts of the inquiry in the affirmative, the Court concluded any statement made at any point during an attorney disciplinary hearing—including the complaint and investigation—is absolutely privileged so long as it is material, pertinent and relevant to the

proceeding. *Id.* at 605-06. No Kentucky case extends *Botts* beyond a bar complaint.

Dissenting in *Botts*, Justice Noble acknowledged other professionals —"physicians, counselors, social workers"—are also licensed, governed by licensure boards and often the target of damaging complaints. None of those professions was mentioned by the majority. Justice Noble questioned why bar complaints should be treated differently than grievances filed against other professionals. *Id.* at 610. In other words, why should a lawyer be prevented from suing an accuser for malicious prosecution who falsely files a bar complaint against him—as *Botts* holds—but a doctor be allowed to file suit against a physician who files a KBML grievance naming her?

Dr. Maggard correctly notes Justice Noble's dissent in *Botts*—on which Dr. Kinney relies—did not carry the day. Nor did a separate dissent filed by Justice Scott arguing only qualified—not absolute—immunity should apply to those filing bar complaints, *Id.* at 612, thereby allowing the target of a grievance to file civil suit for false statements made to the KBA.

We see no good reason to isolate bar complaints from grievances filed against physicians. *Botts* recognizes KBA disciplinary hearings are "judicial proceedings," explaining:

> "Judicial proceedings include all proceedings in which an officer or tribunal exercises judicial functions." Restatement (Second) of Torts § 587 (1977). The disciplinary process has been likened to a criminal trial. *KBA v. Harris*, 269 S.W.3d 414, 417–18 (Ky. 2008).

> The Office of Bar Counsel is empowered to assess complaints, investigate and prosecute disciplinary cases, and impose alternative discipline when appropriate. SCR 3.160(3)(A). The Inquiry Commission has authority to subpoena witnesses and take testimony. SCR 3.180(3). The Trial Commissioner enters findings of fact and conclusions of law. SCR 3.360(1). Clearly, the KBA exercises a judicial function in the handling of disciplinary matters and, therefore, disciplinary hearings are judicial proceedings. *See* 77 A.L.R.2d 493 (collecting authorities). *See also Baggott v. Hughes*, 34 Ohio Misc. 63, 72, 296 N.E.2d 696, 701 (1973) ("Investigations and proceedings on complaints as to an attorney's professional conduct is a judicial function in Ohio."). *Accord McCurdy v. Hughes*, 63 N.D. 435, 248 N.W. 512 (1933); *Ashton-Blair v. Merrill*, 187 Ariz. 315, 928 P.2d 1244 (Ariz. Ct. App. 1996); *Doe v. Rosenberry*, 255 F.2d 118 (2nd Cir. 1958).
>
> Thus, any statement made preliminary to, in the institution of, or during the course of an attorney disciplinary proceeding will be privileged so long as it is material, pertinent, and relevant to such proceeding. This would include statements contained in the ethics complaint. The complaint triggers the investigative and disciplinary functions of the KBA and, therefore, is always material, pertinent, and relevant to attorney discipline proceedings. See *Katz v. Rosen*, 48 Cal.App.3d 1032, 1036, 121 Cal.Rptr. 853 (Cal. Ct. App. 1975) ("Informal complaints received by a bar association which is empowered by law to initiate disciplinary procedures are as privileged as statements made during the course of formal disciplinary proceedings.").

*Botts*, at 602.

In *Sangster v. Kentucky Board of Medical Licensure*, 454 S.W.3d 854, 856-59 (Ky. App. 2014) we recognized the KBML is a state agency whose members:

> exercise the requisite adjudicatory functioning for quasi-judicial immunity. The Board exercises authority over medical practitioners in Kentucky and has authority to issue subpoenas, conduct various levels of inquiries, make findings and issue different orders. *See* KRS § 311.591.

The function of the KBML appears to be on par with that of the KBA—it simply polices a different group of licensees. By investigating consumer grievances, it serves as

> an important and direct source of information about the competency of health care professionals and the quality of care they provide. Grievances also show KBML officials that consumers are watching the actions the KBML takes on behalf of the public.

CONSUMER'S GUIDE TO THE KBML.

Despite numerous similarities in the handling of KBA complaints and KBML grievances, there are key differences—primarily confidentiality. Once formal charges are issued against a medical/osteopathic physician, surgical assistant, acupuncturist, athletic trainer, or physician assistant, any administrative hearing requested by the licensee is "held before a Hearing Officer appointed by the State Attorney General's Office and is generally open to the public." *Id.* That hearing is "similar to a civil trial" wherein "evidence and witnesses are presented and both sides give questions and answers." *Id.* The KBML grievance form warns: "The Kentucky Board of Medical Licensure is a public agency and your completed grievance form may become an open record pursuant to KRS 61.870, Subsection (2)." Finally, the "Frequently Asked Questions Regarding Filing a

Grievance" portion of the KBML website[11] warns: "There is no Kentucky law to provide confidentiality to grievants or other witnesses." In contrast, Kentucky's attorney "disciplinary process has been likened to a criminal trial." *Botts*, at 602 (citing *KBA v. Harris,* 269 S.W.3d 414, 417–18 (Ky. 2008)). Finally, "[i]n Kentucky, the bar complaint, the investigation by the Inquiry Commission, and the disciplinary proceedings are entirely confidential." *Botts*, at 605 (citing Supreme Court Rule (SCR) 3.150(1)).

Just as *Botts* recognized it is crucial for the public to be protected from unscrupulous lawyers, it is equally important to protect the public from incompetent doctors—perhaps even more so because a doctor's skill may be the difference in life and death. Applying the logic of *Botts* to a complaint filed with the KBML*,* a claim of libel and slander cannot be based solely on statements Dr. Kinney made during the KBML grievance process. On remand, such a claim must be dismissed.

Our holding on the allegation of libel and slander based on the grievance Dr. Kinney filed with the KBML extends the reasoning of *Botts* to licensed physicians in recognition of the rigorous education doctors complete, the life and death decisions they make, and the similarities between the KBA and the KBML. Extending immunity to any other professional would be advisory only and entirely beyond the scope of this limited Opinion. We decline to speak on an issue not before us.

[11] https://kbml.ky.gov/grievances/Documents/Consumer Guide and Grievance Form.pdf

Similarly, Count IV, alleging a violation of KRS 311.590 by filing false or fraudulent information with the KBML, is based exclusively on the grievance filed by Dr. Kinney. The judicial statements privilege applies. On remand, the allegation must be dismissed.

Count III (making false statements to Dr. Maggard's co-workers, colleagues, current and former patients, HRMC administrators and the KBML) and Count V (wrongful use of civil proceedings by initiating and participating in "civil and administrative proceedings" by filing false complaints with the KBML and recruiting others to do same) allege damages both from Dr. Kinney's filing of the KBML grievance against Dr. Maggard, and his recruitment of others to file similar grievances. As previously explained, statements made to the KBML throughout the disciplinary process—from complaint through completion—are absolutely privileged. Therefore, those portions of Counts III and V based solely on Dr. Kinney's KBML grievance must be dismissed. However, disparaging statements he may have made about Dr. Maggard to others—outside the KBML disciplinary process—are not insulated from civil liability by the judicial statements privilege. On remand, the trial court must determine whether the alleged making of "false and defamatory statements," as stated in the complaint, "satisfies the requirements of notice pleading so as to defeat a motion to dismiss." *Botts*, at 606. In *Botts*, the Supreme Court doubted sufficiency of a complaint alleging only a "bare allegation of 'accusations.'" *Id.*

Finally, Count VI alleges Dr. Kinney committed abuse of process by reporting—and "caus[ing] others to report"—Dr. Maggard to the KBML for a purpose unintended by the disciplinary process. It is further alleged he took the additional step of recruiting a former patient to file a civil suit. Dr. Kinney asserts the *Noerr-Pennington* doctrine[12] as a defense, but we question its applicability. In the wake of Congress enacting the Sherman Act, the United States Supreme Court created that doctrine as "an exemption from antitrust liability for joint efforts to influence governmental action." David L. Meyer, *A Standard for Tailoring Noerr-Pennington Immunity More Closely to the First Amendment Mandate*, 95 Yale L.J. 832, 832-33 (1986). While a novel argument, that is not the scenario before us and we need not stretch that far to resolve this issue.

*Botts* extends the absolute privilege associated with a KBA disciplinary hearing or investigation "to any claim relating to the act of filing the bar complaint, such as abuse of process, wrongful use of civil proceedings, or malicious prosecution." *Botts*, 348 S.W.3d at 605. Because we have concluded *Botts* applies equally to KBML grievances, it follows that the judicial statements privilege also applies to an abuse of process claim flowing from the KBML disciplinary process. We recognize this is a departure from *Halle*, 453 S.W.3d at 187, wherein a different panel of this Court concluded "the judicial statement privilege has no application to abuse of process claims." As noted previously, we

[12] *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411, 414 (Ky. App. 2004); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 659, 85 S. Ct. 1585, 1588, 14 L. Ed. 2d 626 (1965).

deem *Halle,* wherein one coal company alleged tortious conduct by another coal company, to be factually distinguishable. While we equate bar complaints with grievances filed against doctors with the KBML, we draw a wide distinction between physician and lawyer complaints and other professions. For reasons previously explained in detail, we extend the same immunity to physicians filing grievances with the KBML as enjoyed by attorneys reporting questionable conduct to the KBA. Thus, on remand, that portion of Count VI centering on the grievance Dr. Kinney personally filed with the KBML must be dismissed. However, an abuse of process claim may proceed as to whether Dr. Kinney recruited the filing of complaints against Dr. Maggard by others.

Similar to *Botts*, the record in this case contains very little proof—one grievance Dr. Kinney filed with the KBML naming Dr. Maggard, one grievance filed by Harless naming Dr. Maggard, and a few pages of testimony from Dr. Ric Ascani—another OB/GYN and Dr. Kinney's former medical partner—stating Dr. Kinney had referred to Dr. Maggard as being "black-hearted and evil" during a meeting at HRMC. Otherwise, Dr. Maggard's claims are void of detail and lack a clear statement of factual basis. Just as in *Botts*, missing from the complaint is "the content of the statements, at whom they were directed, in what forum they were made, or specifically when they were made." 348 S.W.3d at 606. More fact-finding will be required to determine whether the complaint is sufficient to "defeat a motion to dismiss." *Id.*

In summary, the judicial statements privilege applies to statements Dr. Kinney made in the deposition preceding the *Harless* trial and to his testimony as an expert witness during the trial itself. Absolute immunity applies equally to the entirety of the KBML proceedings—from filing of the grievance through closure of the matter by the KBML. Therefore, on remand, any count based exclusively on statements made by Dr. Kinney in connection with a judicial or disciplinary hearing must be dismissed. This includes the entirety of Counts I, II and IV. Those portions of Counts III, V and VI based on Dr. Kinney's role in filing a KBML grievance must also be dismissed. Through additional fact-finding, the trial court must determine whether the remaining portions of Counts III, V and VI withstand a motion to dismiss.

WHEREFORE, we REVERSE and REMAND for further proceedings consistent with this Opinion.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent from that portion of the majority's opinion that holds an action for abuse of process cannot be maintained based on the act of filing a complaint with the Kentucky Board of Medical Licensure (KBML). To hold otherwise is contrary to this Court's opinion in *Halle v. Banner Industries of N.E., Inc*., 453 S.W.3d 179 (Ky.App. 2014).

As noted by the majority, *Morgan & Pottinger*, *Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599 (Ky. 2011), involved an abuse of process claim filed by an attorney after the defendant filed a complaint against the attorney with the Kentucky Bar Association (KBA). Although the Court held that statements made preliminary to, or in the institution of, or during the course of a KBA proceeding are privileged, whether to apply the judicial statements privilege to an abuse of process claim posed a "larger question" because the tort is based on the act of filing the complaint for an improper purpose. *Id*. at 603. Ultimately, the Court concluded the privilege applies to KBA complaints. *Id*. at 605.

Despite that it held the privilege applied to the filing of a KBA complaint, the Supreme Court did not suggest that its holding went beyond that limited circumstance. In fact, Justice Noble, in her dissenting opinion, observed that the majority had not intended for its holding to apply to any complaint filed with a licensure board other than the KBA and pointed out that "[p]hysicians, counselors, social workers, and other professions that are governed by licensure boards may bring a wrongful institution of civil proceedings or an outrageous conduct claim against the client who has wrongly accused them." *Morgan & Pottinger*, 348 S.W.3d at 610 (Justice Noble, dissenting).

After *Morgan & Pottinger*, this Court rendered *Halle*. In that case, the trial court broadly applied the judicial statements privilege and dismissed the plaintiff's various tort claims, including abuse of process. On appeal, we noted the lack of authority for expanding the privilege beyond its traditional scope of

defamation actions. *Halle*, 453 S.W.3d at 185. That lack of authority necessitated an in-depth discussion of the Supreme Court's decision in *Morgan & Pottinger*.

In *Halle*, this Court emphasized that "at the core of abuse of process is the improper use of judicial proceedings and the defendant's motive for using the *process* rather than the *statements* made during the course of a judicial proceeding." *Halle*, 453 S.W.3d at 187 (emphasis added). In determining whether to extend a privilege historically reserved for defamation actions and applicable to statements made during judicial proceedings, we quoted the Supreme Court's words that a layperson is not expected to "understand the subtle legal difference between an allegation of defamation versus a claim of abuse of process." *Halle*, 453 S.W.3d at 186 (quoting *Morgan & Pottinger*, 348 S.W.3d at 605). We also emphasized that our Supreme Court's decision to apply the privilege was based on the policy that people are encouraged to participate in KBA investigations and the Court's conclusion that it would not unduly burden attorneys or abrogate any right to seek redress. *Id.* Finally, we noted that the decision to afford absolute immunity to KBA complainants for the act of filing the complaint was premised on the notion that "one who elects to enjoy the status and benefits as a member of the legal profession must give up certain rights as causes of action . . . ." *Id.* (quoting *Morgan & Pottinger*, 348 S.W.3d at 605). We concluded that given the Supreme Court's recognition of the unique aspects of KBA membership and its oversight of that association's members, its opinion should be read as limited to KBA

complaints and not a broad extension of the judicial statements privilege to other acts. *Id*.

The majority concludes that there is no reason to distinguish bar complaints from grievances filed against physicians. However, our Supreme Court went to great lengths to explain why KBA complainants are protected by the judicial statements privilege while complainants in other professional associations are not afforded the same protection.

> When the complainant is not an attorney, there is an inequitable balance of power which creates a very real opportunity for attorney intimidation. Attorneys can threaten and pursue retaliatory litigation at very little expense and through their own means. Conversely, the cost of litigation coupled with the risk of liability in defending against such an action could be enough to discourage an individual from bringing a meritorious complaint. Laypersons, in deciding whether to file a bar complaint, cannot be expected to understand the subtle legal difference between an allegation of defamation versus a claim of abuse of process. And it is insufficient that an "honest" complainant would eventually be exonerated of any abuse of process claim. It is the threat and potential for retaliatory litigation—of any kind—that serves as a disincentive to filing a bar complaint.
>
> We must encourage persons with complaints against attorneys to submit such information to the KBA for proper investigation and examination. This includes persons who might lack knowledge of the law and, therefore, have some doubt as to the propriety of the attorney's conduct or the validity of the complaint. If ethics investigations are to be conducted effectively, it is imperative that complainants be free from the threat of themselves being sued.

*Morgan & Pottinger*, 348 S.W.3d at 604-05 (internal quotation marks and citation omitted).

No one can argue the accuracy of the majority's observation that physicians serve a vital role in our society. However, why should this deprive them of their right to maintain an abuse of process action? Unlike the imbalance between a lawyer and a client, there is no imbalance in the power between a physician and a patient that creates an opportunity for a physician to intimidate a patient with legal resources.

In *Halle*, this Court noted the danger in applying the judicial statements privilege broadly to abuse of process claims is it could eliminate the tort entirely. *Halle*, 453 S.W.3d at 187. Our unwillingness to abolish the tort of abuse of process by application of the privilege led this Court to hold that outside the context of KBA complaints, "the judicial statement privilege has no application to abuse of process claims." *Id*.

The majority has taken a forward step in emasculating the abuse of process tort. By including the KBML within the ambit of the exception to the judicial statements privilege recognized in *Morgan & Pottinger* and failing to make any significant distinction between the regulation of attorneys and of physicians. Although the majority purports to limit the privilege to KBA and KBML complaints, I can foresee reasonable arguments that it should apply to a wide range of complaints filed with a professional or occupational licensure board, including but not limited to, pharmacists, counselors, social workers, real estate

agents, plumbers, massage therapists and cosmetologists. This list is far from exhaustive but demonstrates the potential for eliminating judicial redress through an action for abuse of process by a broad application of the judicial statements privilege.

Whatever the majority's view of the *Halle* decision and its limitation on the judicial statements privilege, as a prior published decision of this Court and recently rendered, we are bound by its holding unless there has been some other directive by our Supreme Court or it is overturned by this Court *en banc*. I do not believe the majority can simply ignore it as precedent.

| BRIEFS FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Tamela J. White<br>Huntington, West Virginia | Ray S. Jones, II<br>Pikeville, Kentucky |