UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-15742

KEVIN BUCKWALTER, M.D.,
Plaintiff-Appellant

v.

STATE OF NEVADA BOARD OF MEDICAL EXAMINERS; SOHAIL U. ANJUM; JAVAID ANWAR; S. DANIEL MCBRIDE; VAN HEFFNER; EDWARD COUSINEAU,
Defendants-Appellees.

Appeal from the United States District Court,
District of Nevada

Case No. 2:10-cv-02034-KJD-GWF

Initial Brief for Plaintiff-Appellant,
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CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. Kevin Buckwalter, M.D., Plaintiff-Appellant, is not a corporate entity and has no parent corporation, subsidiaries or affiliates that have issued shares to the public.

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JURISDICTIONAL STATEMENT

The United States District Court, District of Nevada, had jurisdiction to entertain this matter because all claims brought herein relate to alleged violations of the United States Constitution and various federal statutes, including without limitation, violation of the Fourteenth Amendment of the United States Constitution. The constitutional claims were brought pursuant to 42 U.S.C. § 1983.

The United States Court of Appeals for the Ninth Circuit has jurisdiction to entertain this appeal as the District Court dismissed the case in its entirety as a result of a finding of absolute immunity on the part to the Appellees; whether Dr. Buckwalter's claims are barred by absolute immunity "turns on an issue of law," and, therefore, it "is an appealable 'final decision' within the meaning of 28 U.S.C. §1291." Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). The Order granting Defendants-Appellees' Motion to Dismiss was rendered on March 25, 2011 and was a final order or judgment that disposes of all parties' claims. Doc. 45 (BUCKv1:002-006). Dr. Buckwalter filed a timely Notice of Appeal on March 28, 2011. Doc. 47 (BUCK v2:007-009).

STANDARD OF REVIEW

A district court's order granting a motion to dismiss based on absolute

immunity is reviewed *de novo*. Mitchell v. Forsyth, 472 U.S. at 530. Because the United States District Court, District of Nevada granted a Rule 12(b)(6) motion to dismiss, this review should be confined to the allegations set forth in the complaint, and this Court should accept all well-pleaded allegations in the complaint as true, and draw all reasonable inferences in Dr. Buckwalter's favor. Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Appellees are entitled to absolute immunity for **all** actions or omissions committed in their official capacities as members of the Nevada State Board of Medical Examiners ("NSBME");

2. Whether a summary suspension of a physician's medical license through an un-noticed, *ex parte* telephone call is a judicial or quasi-judicial act;

3. Whether a physician who has had his professional license summarily suspended is entitled to protection under the U. S. Constitution and a prompt post-deprivation hearing to address the justification for the summary nature of the suspension, (i.e., that he is an immediate danger to self or others);

4. Even if absolute immunity applies, whether such bars suit for injunctive and declaratory relief under 42 U.S.C. § 1983; and

5. Whether the Younger abstention doctrine precludes a physician from seeking relief for an initial due process violation when he was never given a

prompt post-deprivation hearing after a summary suspension of his license despite on-going administrative proceedings related to the underlying merits of a suspension.

STATEMENT OF THE CASE

This is an action brought as a result of a violation of Dr. Kevin Buckwalter's Due Process rights under the Fourteenth Amendment of the United States Constitution. Without any notice or opportunity to be heard, Appellees summarily suspended part of Dr. Buckwalter's medical license at an un-noticed *ex parte* telephone call on November 12, 2008. At the time, Dr. Buckwalter was a family and primary care physician who, due to an overly aggressive regulatory environment, was one of the few physicians in Nevada willing to treat patients with chronic and severe pain. However, due to the summary suspension of Dr. Buckwalter's license, he immediately became a leper within the medical community. In addition, he was crucified in the press and blacklisted from all payor panels. Although the suspension was labeled "partial," it has been a complete suspension of his medical license, as volunteer organizations will not even let him volunteer his time and services as a physician.

In their zeal to discipline Dr. Buckwalter, the Appellees made crucial mistakes in violating his procedural due process rights by: 1) suspending his ability to prescribe, administer, or dispense controlled substances; 2) claiming that there

was an emergent need for his suspension and 3) failing to schedule a post-deprivation hearing within a reasonable time. To date, however, after over two-and-a-half years, the administrative complaint has not been amended, and no additional counts have been added, despite numerous veiled threats to do so. Most importantly, no hearing has been afforded for either the summary suspension or the emergent nature of Dr. Buckwalter's action that necessitate a summary suspension. As no hearing appeared to be forthcoming, Dr. Buckwalter filed a complaint in the United States District Court, District of Nevada, alleging two counts of violations under 42 U.S.C. § 1983. The district court dismissed the case in its entirety, citing the absolute immunity of the Appellees.

On April 13, 2011, this Court granted Dr. Buckwalter's motion requesting that this case receive priority under 28 U.S.C. § 1657 and Circuit Rules 27-12 and 34-3, setting forth an expedited briefing schedule. DktEntry 7.

STATEMENT OF FACTS

On or about December 8, 1997, Kevin Buckwalter, M.D. was granted a license to practice medicine in the State of Nevada. Doc. 1 (BUCK v2:018-030).

On November 12, 2008, Appellee Cousineau filed a Complaint and Request for Summary Suspension of Respondent's Ability to Prescribe, Administer, or Dispense Controlled Substances with the NSBME (hereinafter "Administrative Complaint"). Doc. 2-1 at 2-10 (BUCK v2:031-039). The Administrative

Complaint contained twenty-three paragraphs and was based upon a review of "numerous" records from Dr. Buckwalter's practice. Id. These records were provided by Dr. Buckwalter through his cooperation in the NSBME's investigation, many months before November 2008. Out of the "numerous records" reviewed, only the records of four patients were relied upon as the basis for the allegations made in the Administrative Complaint. Id.

The records of the four cases in question covered treatments over a five year span, from May 13, 2004 until April 9, 2008. Id. The NSBME received a review of the records, performed by their expert, on November 4, 2008. Id. The Administrative Complaint contained three counts of alleged wrongdoing on the part of Dr. Buckwalter. Id. The Administrative Complaint alleged, in part, that, based upon the care rendered to **only** four patients over a five year period of time, Dr. Buckwalter "poses a threat to the health and safety of patients he sees and treats, or may see and treat, as well as the public in general." Id. At the time these allegations were made, however, the information supporting them was at least seven months old. Id.

In addition to the dated information, the Administrative Complaint was supported solely by an affidavit of a doctor who was board certified to practice medicine in a field different from Dr. Buckwalter's practice. Doc. 2-1 at 9-10 (BUCK v2:038-039). The affidavit merely stated that "the lack of documentation

makes it nearly impossible to assess and analyze Dr. Buckwalter's medical decision-making regarding the controlled substance prescriptions he wrote for patients." Id. In fact, NSBME's expert's affidavit did not cite even one example of any case where Dr. Buckwalter actually provided care below medical standards. Id. Rather, their expert concluded his opinion by stating that he "believe[s] that the vague, haphazard, and illegible documentation of Dr. Buckwalter's medical decision-making is both inconsistent with the expectations enunciated in the Model Guidelines for the Use of Controlled Substances for the Treatment of Pain and with the expected medical standard of care as it relates to prescribing controlled substances." Id. Accordingly, it appears that the basis for NSBME's expert's concern was really poor medical record keeping – something that does not qualify as an emergency.

On November 12, 2008, Appellees took part in an emergency *ex parte* telephone call to address the Administrative Complaint. Doc. 2-1 at 12-14 (BUCK v2:040-042). Appellees neither provided any notice that Dr. Buckwalter's Administrative Complaint would be addressed, nor provided any notice to Dr. Buckwalter of the occurrence of the ex parte telephone call. Id.

As a result of the November 12, 2008 *ex parte* telephone call, it was ordered that the ability of Dr. Buckwalter "to prescribe, administer, or dispense controlled substances in the state of Nevada is hereby suspended pending proceedings for

disciplinary action pursuant to the Complaint filed herein and issuance of a final order, or until further order of this Board." Id. The Appellees issued this order "pursuant to NEV. REV. STAT. § 233B.127(3)." Id. The November 12, 2008 Order was silent as to any due process rights Dr. Buckwalter may have had as a result of the suspension, or that NEV. REV. STAT. § 233B.127(3)[1] allows for one to challenge such a suspension. Id.

On November 12, 2008, Appellee Cousineau filed a Notice of Pre-Hearing Conference and Hearing ("Notice") with the NSBME. Doc. 2-1 at 16-18 (BUCK v2:043-045). The Notice requested that the NSBME schedule of a hearing to address the underlying allegations of malpractice in the Administrative Complaint, as a whole. Id. On November 19, 2008, the NSBME filed an Order for Prehearing Conference and Exchange of Required Information and Documents. Doc. 2-1 at 20-23 (BUCK v2:046-049). The November 19, 2008 Order set a hearing for March 18, 2009 to address the underlying malpractice allegations in the Administrative Complaint ("Malpractice Hearing"). The November 19, 2008 Order was the first confirmation that Dr. Buckwalter had that the hearing requested in the Notice of Hearing would be provided to Dr. Buckwalter by the NSBME. Id.

[1] The power granted to the NSBME under NRS §233B.127(3) is specific and definitive. NRS §233B.127(3) allows for the suspension of a medical license. Nowhere in NRS §233B.127(3) is the Board allowed to suspend part of a license. NRS §233B.127(3) further provides that "proceedings relating to the order of summary suspension "must be promptly instituted and determined."

Dr. Buckwalter, however, was not afforded any opportunity to address the specific allegation that he "poses a threat to the health and safety of patients he sees and treats, or may see and treat, as well as the public in general," the basis for the summary suspension, as the hearing only referenced the underlying malpractice allegations. Id.

On February 13, 2009, Appellee Cousineau filed a Pre-Hearing Conference State of Investigative Committee which set forth the NSBME's witnesses and the evidence it would rely upon for justifying the allegations made in the Administrative Complaint. Doc. 2-1 at 25-27 (BUCK v2:050-052). The Malpractice Hearing never occurred. The hearing was delayed because Appellee Cousineau made representations to Dr. Buckwalter that there were additional complaints against Dr. Buckwalter being received by the NSBME and under investigation. Doc. 22-1 at 2-5 (BUCK v2:053-056). The hearing was stalled to allow the NSBME to investigate the additional complaints. Id. During that time, the parties worked together to try to settle the matter without the need for a hearing. Id. In November, 2009, the NSBME rejected the settlement agreement negotiated and agreed upon between Dr. Buckwalter and Appellee Cousineau. Id.

In December 2009, Dr. Buckwalter hired the Law Offices of Jacob Hafter & Associates to take over the representation of this matter. On January 15, 2010, Dr. Buckwalter filed an answer to the Administrative Complaint. Doc. 2-1 at 29-39

(BUCK v2:057-067). Shortly upon entering this case, counsel spoke with Appellee Cousineau to understand where the matter stood. Appellee Cousineau stated that there were new allegations of violations of the medical practice act which had not been included in the Administrative Complaint, but were pending against Dr. Buckwalter. Dr. Buckwalter requested that he receive notice of the new cases on which the allegations were being made. His request was renewed in letters to Appellee Cousineau in June and November 2010. To date, Dr. Buckwalter still has not received notice of all of the allegations that the NSBME is considering in this matter.

More importantly, more than two years after the date of the initial summary suspension have passed and Dr. Buckwalter has still not received the hearing which he is entitled to pursuant to NEV. REV. STAT. §233B.127(3). As no final order has been issued, Dr. Buckwalter does not have access to the state court system. As of the date of this Opening Brief, there is no hearing scheduled.

SUMMARY OF ARGUMENT

The district court dismissed this case as a result of its application of a blanket absolute immunity to all acts performed by Appellees sued in their individual capacity for acts or omissions performed as members of the NSBME. In doing so, the district court committed clear error of law in a number of ways. First, Appellees are only entitled to absolute immunity for judicial or quasi-judicial

acts. Second, a summary suspension of a physician's medical license through an un-noticed, *ex parte* telephone call is not a judicial or quasi-judicial act for which absolute immunity would attach. Even if a summary suspension is a judicial or quasi-judicial act, the complaint in this case not only alleges harms from the summary suspension, but also from the Appellees' failure to provide Dr. Buckwalter with any post-deprivation due process as required under the U.S. Constitution and Nevada law. Hence, the failure to provide Dr. Buckwalter due process is not a judicial or quasi-judicial act suitable to allow absolute immunity. However, even if, *assuming arguendo*, absolute immunity applies to any or all of Dr. Buckwalter's claims, it would not prevent declaratory and injunctive relief under 42 U.S.C. § 1983.

Additionally, the district court erred in its finding that the Younger abstention doctrine precluded the federal courts from acting in this case. This was erroneous as there were no pending judicial proceedings of identical substance or on the merits which were being raised in this case, the state interest in the matter has been waived, and Dr. Buckwalter did not have the opportunity to raise all federal questions from this case in any state proceedings.

For these reasons, Dr. Buckwalter respectfully requests that this Court reverse the district court's dismissal of this case, and, in doing so, find that the Appellees are not entitled to immunity for their actions in this case.

ARGUMENT

I. APPELLEES ARE NOT ENTITLED TO ABSOLUTE IMMUNITY FOR ALL ACTS PERFORMED WHILE FUNCTIONING IN THEIR OFFICIAL CAPACITIES AS THE NEVADA STATE BOARD OF MEDICAL EXAMINERS

The primary error of the district court was the blanket application of absolute immunity to the Appellees as the foundation for its complete dismissal of this case. The district court erroneously stated that the Appellees "are entitled to absolute immunity while functioning in their official capacities as members of the Nevada State Board of Medical Examiners." Doc. 45 at 3:18-19 (BUCK v1:004). The court further stated that "[t]he Ninth Circuit Court of Appeals has previously determined that actions performed by the Board in the course of its duties are entitled to absolute immunity." Id at 4:6-8, citing Mischler [sic] v. Clift, 191 F.3d 998 (9th Cir. 1999).

While this Court did, in Mishler, grant **certain** Appellees absolute immunity, it clearly did so based on the specific acts conducted, not as blanket immunity for **all** acts completed in the Appellees' official capacities. In doing so, this Court **limited** such immunity only to those acts which are judicial or quasi-judicial in character. This Court stated "[e]ven if the Board Members generally function in capacities comparable to those of judges and prosecutors, the protections of absolute immunity reach only those actions that are judicial or closely associated with the judicial process." Mishler at 1007, citing Buckley v. Fitzsimmons, 509

U.S. 259, 273 (1993) and Forrester v. White, 484 U.S. 219, 229 (1988).

This Court placed such qualification on the application of absolute immunity because of the origins from which the immunity derives. As this Court correctly stated in the beginning of its analysis in Mishler:

> A functional approach is used to determine whether an official is entitled to absolute immunity. See [Buckley v. Fitzsimmons, 509 U.S.] at 269. Essentially, the court examines the function performed by the official and determines whether it is similar to a function that would have been entitled to absolute immunity when Congress enacted § 1983. See id. at 268-69. It is the "nature of the function performed, not the identity of the actor who performed it," that is critical to this inquiry. See id. at 269.

Mishler at 1002-1003. The fact, however, that that judicial officers and some executive branch officers are entitled to absolute immunity, does not conclude the analysis of whether immunity applies to an act in question; one must then engage in a "functional comparable" test to determine whether the actions in question in Mishler were judicial in nature.

The "functional comparable" test was first set forth by the Supreme Court in Butz v. Economou, 438 U.S. 478, 512-13 (1978), in order to identify the characteristics of the judicial process, and, in doing so, aid in the determination of whether absolute immunity should be granted to administrative agencies and officials in 42 U.S.C. § 1983 cases. The "functional comparable" test looks at

some of the following characteristics of a questioned action:

(a) the need to assure that the individual can perform his functions without harassment or intimidation;

(b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;

(c) insulation from political influence;

(d) the importance of precedent;

(e) the adversary nature of the process; and

(f) the correctability of error on appeal.

Mishler at 1003, citing Cleavinger v. Saxner, 474 U.S. 193, 202 (1985).

When this Court applied this "functional comparable" test to the NSBME in Mishler, it held that the actions of the NSBME in conducting "disciplinary hearing processes fall within the scope of absolute immunity." Mishler at 1007. Specifically, this Court relied on the fact that the NSBME "performs its duties and functions under a comprehensive umbrella of statutes and the Nevada Administrative Procedure Act." Id. at 1005. This was a critical fact, as the Administrative Procedure Act generally contains elaborate procedural safeguards. Id. at FN6. The procedures cited by this Court, however, were not those related to a summary suspension; rather, they were for a routine disciplinary hearing which

allowed the physician to be represented by counsel, provided the physician with notice of the charges, and provided the physician with the opportunity to proffer evidence to support his defense and allowing the physician an opportunity to cross-examine and impeach witnesses. Id. As a result, this Court found that when the NSBME engages in "holding hearings, taking evidence, and adjudicating" matters, such are functions that "are inherently judicial in nature." Id. at 1008.

This Court, however, ***did not find***, as the district court in this instant case suggested, that ***all*** actions of the NSBME members are entitled to absolute immunity. In fact, in Mishler this Court, relying on the Supreme Court from Tower v. Glover, 467 U.S. 914, 920 (1984), said the opposite, stating that "[e]ven when [the court] can identify a common-law tradition of absolute immunity for a given function, [the court should] consider [ ] 'whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.'" Id. at 1002-03. Hence, as the district court in this case did not rely on any outside authority beyond Mishler to support such an expanded application of absolute immunity, the district court clearly erred when it expanded Appellees' immunity to **all** actions performed by the members of the NSBME in the course of their duties.

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II. A SUMMARY SUSPENSION OF A PHYSICIAN'S MEDICAL LICENSE THROUGH AN UN-NOTICED, *EX PARTE* TELEPHONE CALL IS NOT A JUDICIAL OR QUASI-JUDICIAL ACT.

In bringing this action, Dr. Buckwalter listed two counts in his Complaint. Doc. 1 (BUCK v2:018-030). The first count relates to the legitimacy of the summary suspension. The district court dismissed this action, claiming that when the NSBME undertook the summary suspension it was a judicial or quasi-judicial act. The summary suspension in this case, however, cannot qualify as a judicial or quasi-judicial act, because suspension in this case does not satisfy the "functional comparison" test set forth by the United States Supreme Court.

In this case, Appellees, without notice or opportunity to be heard and through an *ex parte* telephone call, immediately suspended part of Dr. Buckwalter's medical license.[2] The sad fact is that his suspension has remained in place up until today. Not once has Dr. Buckwalter been given the opportunity to defend the allegation that he was an immediate danger to the people of the State of Nevada, the foundation of the Appellees' *ex parte* summary action.

[2] Technically, the NSBME suspended Dr. Buckwalter's ability to prescribe, dispense or administer controlled substances. However, the implications of this suspension were widespread. Dr. Buckwalter ultimately lost his ability to participate in any payor panel and was removed from any medical staffs in which he was a member. In fact, Dr. Buckwalter could not even volunteer his services as a physician, as no group or organization would allow him to work with them. Doc. 2-2 at 3.

A. Understanding Summary Suspensions

Ultimately, the true opportunity for this Court is to fill the void which exists in the case law regarding a comprehensive analysis of summary actions by a state actors. See, e.g., Jablonsky v. Sierra Kings Health Care Dist., No. CV F 06-1299, slip op. at 16, 22 (E.D. Cal. Sept. 24, 2009) ("Authority appears sparse in this circuit for the proposition that post-deprivation proceedings are sufficient to satisfy Fourteenth Amendment Due Process requirements in the context of summary suspension of medical staff privileges."). Creating an issue of first impression, Dr. Buckwalter hopes that this Court will seize the opportunity to address this issue, and, in doing so, provide clarity through the adoption of a proposed judicial test for what due process is required in summary actions.

The global concern in cases of summary suspension, from a civil liberties perspective, is that it may be all too easy for a state actor to claim, in good faith, that an emergency exists which requires immediate *ex parte* action, when, in fact, such emergency is merely perceived, but does not exist. Coupled with the extreme deference that an agency is given as a result of a legislative mandate for protecting the public, as is the case with any state board of medical examiners or hospital, and the burden which a court may place on a person to demonstrate abuse of such discretion may be insurmountable, even in cases where an emergency never really exists. The result is that, without a bright line test for what due process is required

and when, one may have no recourse when an improper summary action is taken where there is no true emergency. In order to avoid such degradation of one's civil liberties, an analysis of the unique characteristics of a summary action is warranted.

1. When Due Process is due

Although the existence of a constitutionally-protected property right is a question of state law, federal law controls the level of process due prior to adequately depriving a physician of his license. Laudermill v. Cleveland Bd. of Educ., 470 U.S. 532, 541 (1985). In Nevada, the right to practice medicine has already been deemed a property right protected by the due process clauses of the constitutions of the United States and Nevada, and a license to practice medicine may not be arbitrarily abridged or revoked. See Molnar v. State, Bd. of Med. Examiners, 773 P.2d 726, 727 (Nev. 1989); Potter v. State, Bd. of Med. Exam'rs, 705 P.2d 132 (Nev. 1985). Accordingly, state law has determined that, in Nevada, a physician's license is a constitutionally-protected property right; any attempt to interfere with that right will trigger the application of the Due Process Clause.

"Once it is determined that the Due Process Clause applies, 'the question remains what process is due.'" Laudermill, 470 U.S. at 541, quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Such requirement to provide due process, however, is not a fixed obligation. The Supreme Court has stated that "due

process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). When the court considers what process is due in a particular context, the starting point is the general rule that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Although the constitution favors due process before one is deprived of a constitutionally-protected property interest, in a few limited circumstances, generally when there is a legitimate imminent danger to safety, a deprivation may occur before due process is provided. Gilbert v. Homar, 520 U.S. 924, 930 (1997) ("where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."); see, also, United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993); Zinermon v. Burch, 494 U.S. 113, 128 (1990) (collecting cases); Barry v. Barchi, 443 U.S. 55, 64-65 (1979); Dixon v. Love, 431 U.S. 105, 115 (1977); N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 319-20 (1908); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 595-96

(1950); Fahey v. Mallonee, 332 U.S. 245, 250-51 n. 1 (1947).

Indeed, in Parratt v. Taylor, 451 U.S. 527 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986), the Supreme Court specifically rejected the notion that that due process always requires the State to provide a hearing prior to the initial deprivation of property. 451 U.S., at 540; see also, FDIC v. Mallen, 486 U.S. 230, 240 (1988) ("important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.") When there is an imminent danger or other emergency circumstance, a deprivation may occur without due process. Id. In Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 299-300 (1981), the Supreme Court defined "imminent danger" as a condition or practice that could reasonably "be expected to cause substantial physical harm to persons ... before such condition, practice, or violation can be abated."

However, the imminent danger, or emergency, cannot be fabricated. "[T]here is a constitutional right ***not*** to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity." Zahrey v. Coffey, 221 F.3d 342, 344 (2d Cir. 2000) (***emphasis added***). "When a summary procedure is based on a fabricated emergency, the procedure is

inherently defective." Jones v. State, Dept. of Health, 242 P.3d 825 (Wash. 2010). An emergency is impermissibly fabricated when an official knows an emergency does not exist but persists with declaring an emergency. Armendariz v. Penman, 31 F.3d 860 (9th Cir. 1994), vacated in part on other grounds, 75 F.3d 1311 (9th Cir. 1996). As the First Circuit has observed, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals." Limone v. Condon, 372 F.3d 39, 44-45 (1st Cir. 2004).

When a deprivation occurs without pre-deprivation due process, a prompt post-deprivation hearing must occur. Barry, 443 U.S. at 64-65; Dixon, 431 U.S. at 115; N. Am. Cold Storage Co., 211 U.S. at 319-20. "In determining how long a delay is justified in affording a post-suspension hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." FDIC, 486 U.S. at 242. A delay, however, in conducting a post-deprivation hearing can become a constitutional violation. Loudermill, 470 U.S. at 547.

Defining the specific process and the time in which such must be afforded is a matter of constitutional rights as opposed to state law. The Court in Loudermill

was clear to set forth that while state law may confer a property interest, the protections afforded once such interest attaches is a matter of constitutional right. Id.

2. Unique Situations Raised by Summary Suspensions

Because due process is a flexible creature which applies under the circumstances of a particular situation, it is imperative to understand the nature of a summary suspension and why it would prevent pre-deprivation due process in order to understand what type of post-deprivation due process is required.

A summary action is not intended to discipline a person, but rather to protect the public from an imminent harm. Jablonsky v. Sierra Kings Health Care Dist., No. CV F 06-1299, slip op. at 16, 22 (E.D. Cal. Sept. 24, 2009), citing Bollengier v. Doctors Medical Center, 272 Cal.Rptr. 273 (Cal. App. 5th Dist. 1990). The emphasis on the protection of the public illustrates how the alleged emergency, historically, was part in parcel with the perceived harm. For example, in the case of the practice of medicine, the original intention of a summary action was to provide a hospital or regulatory agency with the power to immediately intervene when a physician is perceived to be impaired to such a degree that he is incapable of delivering competent care. Simplistically, the physician's impairment, historically, was the emergency. Such impairments were traditionally found to have their origins in a chemical (i.e., drug or alcohol related), or biological (i.e.,

mental or physical illness) sources. See, e.g., Cohlmia v. Ardent Health Services, LLC, 448 F.Supp.2d 1253 (N.D. Okla. 2006) (summary suspension upheld where physician appeared to be under the influence of drugs or alcohol); Knatt v. Hospital Service Dist. No. 1 of East Baton Rouge, 327 Fed.Appx. 472 (5th Cir. 2009) (summary suspension upheld in case involving a surgeon who appeared impaired during surgery).

Recently, however, and as seen in the instant action, as a result of a broadened regulatory efforts, prospective concerns regarding possible future malpractice acts or other administrative impediments to the practice of medicine have been used by hospitals and regulatory agencies to justify summary suspensions. See, e.g., Kobrin v. Board of Registration in Medicine, 444 Mass. 837, 842 (Mass. 2005) (whether indictments for Medicaid fraud were valid justification for summary suspension).

Understanding the origins of a summary suspensions and its evolution begins to form a bright line test for due process requirements in summary action cases. First, in the case of a true emergency, where the emergency is the same as the underlying allegations (i.e., chemical dependency or mental illness), the post-deprivation due process which must be afforded is simply related to the inquiry of whether one is truly competent to engage in a given act. For example, in the case of physician impairment (or the impairment of any professional) as a result of a

chemical dependency, the physician should be afforded the opportunity to be heard on whether a chemical dependency exists. Ultimately, the immediate inquiry required is whether an impairment exists which removes or unduly interferes with one's ability to control one's action.

This is a clear-cut inquiry which can be quickly performed and objectively determined. This due process standard has been better enunciated in other areas of the law than in medicine. For example, in some states such as Illinois, statutes allow for the summary suspension of a drivers license. People v. Aultman, 604 N.E.2d 416, 419 (Ill. App. 4th Dist. 1992) ("The statutory summary suspension procedures were enacted primarily to protect highway travelers and to evaluate whether motor vehicle drivers are intoxicated."); see also, State v. Strong, 605 A.2d 510, 513 (Vt. 1992) ("The summary suspension scheme serves the rational remedial purpose of protecting public safety by quickly removing potentially dangerous drivers from the roads.") However, in such cases, the courts have noted that the purpose of the summary suspension procedure is twofold: to quickly remove impaired drivers from our highways, People v. Ehley, 887 N.E.2d 772 (Ill. App. 4th Dist. 2008), and to balance the due process rights of a driver to a prompt hearing, People v. Mizaur, 877 N.E.2d 1185 (Ill. App. 2nd Dist. 2007). To that end, in Illinois, hearings related to a driver's state of impairment are to occur within 30 days. Id.

The problem, however, occurs when a summary action is allowed involving one who is not impaired; rather, it is that person's technical proficiency or deliberate acts which are used to justify the emergency. In these cases, the distinction from the previous situation is that the underlying allegations can be adjudicated separate and apart from the basis supporting the alleged emergency. For example, as is the case in the instant action, the alleged emergency is the ***fear*** of prospective harm that ***may*** occur because of an alleged pattern of malpractice (suggesting an overall incompetence to practice medicine). In this case, there are really two components of the summary suspension, each of which requires separate due process opportunities. The first being whether there is an actual imminent danger to the people of the state of Nevada as a result of the fear of prospective harm; while, the second component is the underlying allegations of past malpractice acts. Ultimately, addressing these two issues may require different analyses, relying on different burdens of proof and different fact finding approaches.

The need for the bifurcated due process in these cases becomes obvious in the instant case. This is not a case involving impairment, rather, this is a case where the underlying allegations are related to Dr. Buckwalter's overall competency to practice medicine. Unlike the case where a physician has a chemical or biological impairment, the allegation of malpractice does not, in and of

itself, create an emergency. In fact, the NSBME routinely engages in administrative actions which are founded in malpractice which are not summary actions. However, whether such malpractice creates an imminent prospective danger, the statutory requirement for a summary suspension, is a separate question of fact from whether one engaged in past acts of malpractice.

In the case of Dr. Buckwalter, the Appellees relied on the opinion of a physician who is board certified in a different area than Dr. Buckwalter and related to four patient charts where care was rendered over a five year period, with the last incident of care being in April, to suddenly suggest that in November an emergency existed. Doc. 2-1 at 2-10 (BUCK v2:031-039). Whether this creates a true imminent danger, however, becomes a question of fact. That question of fact, however, is far different than whether Dr. Buckwalter may have committed past malpractice acts in the four alleged cases.

B. Summary Suspensions lack the characteristics of a judicial or quasi-judicial act

Both the Nevada Supreme Court and the United States Supreme Court have provided tests for determining whether acts committed by administrative agencies or actors are judicial or quasi-judicial in nature. Applying these tests to the summary suspension in this case results in a finding that such act was not judicial or quasi-judicial in nature.

1. A summary suspension fails to be a judicial or quasi-judicial act under Nevada law.

The law on whether an administrative agency in Nevada acts in a judicial or quasi-judicial manner is clear. This issue has been recently discussed by the Nevada Supreme Court in Stockmeier v. Nevada Dept. of Corrections Psychological Review Panel, 135 P.3d 220 (Nev. 2006), reversed on other grounds by Buzz Stew, LLC v. City of North Las Vegas, 181 P.3d 670 (Nev. 2008).

In Stockmeier, the Nevada Supreme Court addressed the question of whether prisoners have standing to file suit regarding violations of the open meeting law, NEV. REV. STAT. Chapter 241, that occur before and during Psychological Review Panel hearings under NEV. REV. STAT. § 213.1214. Stockmeier, 135 P.3d at 220. The matter came before the Nevada Supreme Court when the district court did not reach the merits of these allegations, finding that Mr. Stockmeier did not have standing to assert open meeting law rights. Id. Relevant to this case, however, the district court stated that even if Mr. Stockmeier had standing to assert such claims, the Psych Panel hearing was a judicial proceeding that was exempt from the open meeting law. Id.

In addressing this caveat set forth by the district court, the Nevada Supreme Court began its analysis of judicial proceedings by recognizing that an administrative body acts in a quasi-judicial manner when it refers to a proceeding as a trial, takes evidence, weighs evidence, and makes findings of fact and

conclusions of law. Stockmeier, 135 P.3d at 223 , citing Van Heukelom v. State Board, 224 P.2d 313, 316 (Nev. 1950); see also, Knox v. Dick, 665 P.2d 267, 270 (Nev. 1983) ("the taking of evidence only upon oath or affirmation, the calling and examining of witnesses on any relevant matter, impeachment of any witness, and the opportunity to rebut evidence presented against the employee is consistent with quasi-judicial administrative proceedings."). After further analysis, the Nevada Supreme Court stated that an administrative tribunal acts in a quasi-judicial capacity when it provides the "parties substantially the same rights as those available in a court of law, such as the opportunity to present evidence, to assert legal claims and defenses, and to appeal from an adverse decision." Stockmeier, 135 P.3d at 224, citing Town of Richmond v. Wawaloam Reservation, 850 A.2d 924, 933 (R.I. 2004).

The Nevada Supreme Court in Stockmeier noted that similar determinations of judicial function have occurred by other states, citing Arizona P. C., Inc. v. Arizona Bd. of Tax App., Div. 1, 558 P.2d 697, 699 (Ariz. 1976), superseded by statute as recognized by Rosenberg v. Arizona Bd. of Regents, 578 P.2d 168, 173 (Ariz. 1978), as well as by other circuits, Reed v. AMAX Coal Co., 971 F.2d 1295, 1300 (7th Cir. 1992) (a quasi-judicial proceeding is one that provides the following safeguards: (1) representation by counsel, (2) pretrial discovery, (3) the opportunity to present memoranda of law, (4) examinations and cross-

examinations at the hearing, (5) the opportunity to introduce exhibits, (6) the chance to object to evidence at the hearing, and (7) final findings of fact and conclusions of law). The Nevada Supreme Court concluded its analysis by stating that "[a] t a minimum, a quasi-judicial proceeding must afford each party (1) the ability to present and object to evidence, (2) the ability to cross-examine witnesses, (3) a written decision from the public body, and (4) an opportunity to appeal to a higher authority." Stockmeier, 135 P.3d at 224-25.

Applying this Stockmeier test to this case, it is clear that the summary suspension was not a judicial or, even, a quasi-judicial proceeding. The only part of the Stockmeier test which was satisfied by the Appellees in this case was that they provided a written decision of their summary suspension. Doc. 2-1 at 12-14 (BUCK v2:040-042). However, the Stockmeier test fails in the other three areas.

First, Dr. Buckwalter had no prior knowledge of the *ex parte* telephone call at which the summary suspension occurred; hence, it was impossible for him to present and object to evidence or cross-examine witnesses. Second, Dr. Buckwalter did not have standing to appeal the summary suspension order. In the administrative setting, the Nevada Administrative Procedures Act, NEV. REV. STAT. § 233B, et. seq. ("NAPA"), governs the appellate rights of a party who was subject to administrative action. Under NAPA, "any party who is (a) Identified as a party of record by an agency in an administrative proceeding; and (b) Aggrieved

by a final decision in a contested case, is entitled to judicial review of the decision." NEV. REV. STAT. § 233B.130. In addition to the NAPA, the Nevada Medical Practice Act, NEV. REV. STAT. § 630, et. seq., specifically, NEV. REV. STAT. § 630.356, also provides for judicial review of all final orders of the NSBME. However, in this case, there was no final order by the NSBME, in fact, Appellees admit to this Court that there "has been no 'final decision'" by the Board in this case. Doc. 18 at 12:13-14 (BUCK v2:068). Accordingly, the judicial review provisions of NAPA and the Nevada Medical Practice Act were unavailable to Dr. Buckwalter with respect to the summary suspension. As such, under Nevada law, the summary suspension fails to meet the test of a judicial or quasi-judicial action.

2. A summary suspension fails to be a judicial or quasi-judicial act under the federal "functional comparison" test.

Similarly, by applying the "functional comparison" test from Butz, the same test relied upon by this Court in Mishler, to the facts in this instant case, the summary suspension which occurred in the instant action fails to rise to that of a judicial or quasi-judicial act. The specific factors which this Court considered in Mishler were (a) the absence of procedural safeguards, (b) lack of adversarial proceedings, (c) political influence, and (d) inability to correct a decision on appeal.

i. Absence of Procedural Safeguards

When it comes to a summary suspension, there is a complete absence of any pre-deprivation safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct. There is also a void of any specific post-deprivation safeguards.

Appellees relied upon NEV. REV. STAT. § 233B.127(3) to summarily suspend Dr. Buckwalter's license.[3] In relevant part, NEV. REV. STAT. § 233B.127(3) states:

> If the agency finds that public health, safety or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Such proceedings must be promptly instituted and determined**.**

In this case, the summary suspension in question occurred over two years ago and Dr. Buckwalter has still not been able to challenge the alleged "emergency" which required immediate action to prevent "imminent harm" to the

[3] In 2009, just a few months after the suspension of Dr. Buckwalter's license, the Nevada Legislature enacted NEV. REV. STAT. § 630.326(1) which specifically addressed the NSBME's authority to summarily suspend the license of a physician. In doing so, the Legislature instituted a 45 day period in which the physician shall be provided a post-deprivation due process hearing. This, however, was not in effect at the time of this case. Accordingly, the fact that the district court in this case stated that "[w]hat is required thereafter [a summary suspension occurs] is that a hearing be scheduled not later than 45 days following the date on which the Board issues an order of summary suspension unless the Board and Licensee mutually agree to a longer period," Doc. 45 at 3:23-25 (BUCKv1:004), is another error by the district court.

people of the State of Nevada. As discussed above, the law which was in effect governing summary suspensions, NEV. REV. STAT. § 233B.127(3) only required that a post-deprivation hearing "be promptly instituted and determined." It does not give Dr. Buckwalter rights to demand a hearing or otherwise force such.

ii. Lack of Adversarial Proceeding

The second manner in which the Butz test fails is that there were no adversarial proceedings when the Appellees took action against Dr. Buckwalter. As discussed above, Dr. Buckwalter had no prior notice or opportunity to participate in this telephone call. The decision to summarily suspend Dr. Buckwalter's medical license occurred during an *ex parte* telephone call.

iii. Political Influence

This Court stated in Mishler that "[d]espite these differences, however, the structure of the Nevada Board and the procedural requirements of their decision-making process show that the Board Members are sufficiently insulated from political influence." Mishler at 1007. In a vacuum, this may have been a workable legal analysis; in the real world of Nevada politics, however, this is far from the truth.

Appellees cannot demonstrate that they were or are shielded from political influence. All of the NSBME members are political appointees. The NSBME is

charged with upholding the legislative mandate set forth in NEV. REV. STAT. § 630.003. At the time which the summary suspension occurred, Appellees were under intense public and political scrutiny to discipline and regulate the medical profession as part of the Endoscopy Center crisis in mid-2008.[4] As a result, Appellees acted swiftly and harshly to suspend Dr. Buckwalter's license, despite a scant of evidence.

The political influence of the time during which this occurred is further obvious when comparing the instant case with how the NSBME acted in a similar case which was resolved two years later, well after the heat from the Endoscopy Crisis died. Carlos Inocencio, M.D., was accused of similar behavior as Dr. Buckwalter in a complaint filed December 23, 2009, Doc. 2-1 at 42:41-45; however, in his case, the actions were alleged to be worse, as Dr. Inocencio was found to "unquestionably contributed" to the death of a patient. Doc. 2-1 at 42:25. Nonetheless, a settlement agreement was adopted by the NSBME on September 13, 2010, was settled through a public reprimand, a requirement to obtain ten continuing medical education hours and a $1500 fine; his license was never

[4] The Endoscopy Crisis occurred when it was discovered that an outpatient endoscopy center was reusing syringes and tubing. Allen, M. "Board chief: We did all we could. Medical board leader refuses Gibbons' demand to resign" Las Vegas Sun, http://www.lasvegassun.com/news/2008/mar/20/board-chief-we-did-all-we-could/ (3/20/2008). As a result, it is believed that many people were placed at risk for infection with Hepatitis. http://en.wikipedia.org/wiki/Endoscopy_Center_of_Southern_Nevada (visited 4/18/2011). Over 60,000 people were tested for Hepatitis as a result of this crisis.

suspended before or after Dr. Inocencio was provided due process. The difference in the way that Dr. Inocencio and Dr. Buckwalter were treated, at the least, certainly suggests arbitrary and capricious acts on the part of the NSBME; however, in light of a changing political pressures from when Dr. Buckwalter was summarily suspended and the formal complaint was filed against Dr. Inocencio certainly may help explain such disparities.

Nonetheless, in this case, the Appellees acted swiftly, without notice, and yet worked diligently to let the entire state of Nevada know about this case. The amount of news articles and press coverage related to this action was unprecedented. To suggest that the Appellees did not have political motives for what they did in this case is suspect, at best.

iv. Inability to Correct on Appeal

As discussed above, based upon the framework of the NAPA, Dr. Buckwalter has had no opportunity to appeal the summary suspension.

Further, Dr. Buckwalter is unable to obtain any injunctive relief from the courts, as the Nevada Legislature has expressly limited the power of the courts in NEV. REV. STAT. § 630.356(2). NEV. REV. STAT. § 630.356(2) states, as it relates to a judicial review, a "court shall not stay the order of the Board pending a final

determination by the court."[5] Accordingly, until the court can issue a final determination of a final order from the Board, the court would lack the authority to provide even injunctive relief to Dr. Buckwalter.

3. Other Circuits have held that summary suspensions are not judicial or quasi-judicial acts.

Other Courts have found that summary suspensions are not judicial or quasi-judicial acts. In DiBlasio v. Novello, the Second Circuit found that absolute immunity did not extend to summary suspension actions. 344 F.3d 292 (2nd. Cir. 2003). The DiBlasio case, like the instant action, was initiated as a result of a summary suspension of Dr. DiBlasio's medical license. Id. On May 25, 2000, Antonia Novello, on behalf of the State of New York Department of Health,

[5] Dr. Buckwalter raised in the district court his concerns that NEV. REV. STAT. § 630.356(2) may be unconstitutional under a separation of powers argument. This argument was ignored by the court. The Nevada Constitution vests the state's judicial power in a Judiciary comprised of a Supreme Court, district courts, and justices of the peace. NEV. CONST. art. 6, § 1. Specifically, with respect to the instant action, the "district courts … have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts." NEV. CONST. art. 6, § 6. Further, the "district courts and the Judges thereof have power to issue writs of Mandamus, Prohibition, ***Injunction***, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction." Id (***emphasis added***). Such powers are separate and independent of the legislature. Without proceeding through the process of amending the Nevada Constitution, the legislature, through NEV. REV. STAT. § 630.356(2), has stripped the courts of their power to issue injunctions as provided for under Article 6, Section 6 of the Nevada Constitution. Specifically, under this statute, the legislature has limited courts from staying an order of the Board while the court is conducting a judicial review of the Board's action.

summarily suspended Dr. DiBlasio's medical license pursuant to New York Public Health Law § 230(12)(a) and, through the medical board, issued a Statement of Charges, specifying four instances of alleged professional misconduct all related to billing allegations. Id. The defendants in DiBlasio claimed absolute immunity from suit, relying in part on the Mishler decision.

The Second Circuit found that "even if the summary process itself shared more characteristics with a judicial proceeding, neither [of Defendants' roles] in the summary suspension [were] sufficiently analogous to that of a judge or prosecutor, respectively, to warrant absolute immunity from suit." DiBlasio, 344 F.3d at 299-300. Specifically, the Second Circuit, in denying the State of New York's arguments of absolute immunity stated that "New York State's procedures governing summary suspensions lack the hallmarks and safeguards of a judicial proceeding that would render absolute immunity for those officials involved appropriate." The Second Circuit inserted a footnote to this statement which expressly distinguished the facts in Mishler from the summary suspension that occurred in DiBlasio. Id at FN2.

The State of Florida has also addressed the same exact issue raised in this case. In Ampuero v. Department of Professional Regulation, Bd. of Medical Examiners, 410 So.2d 213 (Fla. App. 3 Dist. 1982), a physician sought review in

state court[6] of an emergency order of the Department of Professional Regulation, Board of Medical Examiners, prohibiting him from prescribing controlled substances. In Ampuero, it was alleged in an administrative order dated September 8, 1981 that between December 16, 1980 and May 26, 1981, the physician prescribed Methaqualone and Ativan, both controlled substances, in excessive amounts, without "good faith" and outside "the course of his professional duties." Id. Almost six months elapsed before Dr. Ampuero was afforded any post-deprivation hearings. Id.

In that case, the Florida appeals court held that the physician was denied due process of law when he had not been granted a hearing on the summary suspension for almost six months. In supporting this finding, the court stated that "[w]e find the circumstances of this delay more egregious than was the case in Aurora Enterprises v. State, Department of Professional Regulation, 395 So.2d 604 (Fla. 3d Dist. Ct. App. 1981), wherein we held that a fifty-day delay between the date of temporary suspension of a license and hearing on a complaint for revocation was a denial of due process." Ampuero, 410 So.2d at 214. The court further stated that "[w]hen the state undertook to temporarily restrict the petitioner's privilege to

[6] This action was brought in state court, rather than under §1983, as in Florida, their state statutes allow judicial review for all final actions, as well as for orders that are "preliminary, procedural, or intermediate" in nature "if the review of the final agency decision would not provide an adequate remedy." FLA. STAT. § 120.68(1) (1979).

practice medicine it had an affirmative duty to grant a post-suspension hearing and one that would be concluded without appreciable delay." Id. citing Barry v. Barchi, 443 U.S. 55 (1979).

III. APPELLEES WERE OBLIGATED TO PROVIDE PROMPT POST-DEPRIVATION PROCEEDINGS AND THE FAILURE TO DO SO WAS NOT A JUDICIAL OR QUASI-JUDICIAL ACT.

The second count of the Complaint in this matter alleged that the failure to provide prompt post-deprivation hearing was also a violation of Dr. Buckwalter's due process rights. Doc. 1 at 11-12 (BUCK v2:028-029). The district court, when dismissing this action, seemed to ignore this count. Doc. 45 (BUCK v1:02-006). Lumping both counts into one issue, the district court relied upon the alleged judicial nature of the Appellees' actions to apply a blanket absolute immunity. In light of the failure to provide any due process, such application of absolute immunity to the second claim was clearly erroneous.

A. Dr. Buckwalter was entitled to prompt post-deprivation proceedings under the United States Constitution.

As discussed above, Due Process may be satisfied through post-deprivation hearings. Gilbert, 520 U.S. at 930. However, again, the requirements of due process, which flow from "constitutional guarantee" rather than "legislative grace," are fluid and depend on the circumstances of a particular deprivation.

Loudermill, 470 U.S. at 541. In a case involving the summary suspension of a horse trainer, the United States Supreme Court stated that "[o]nce suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount." Barry, 443 U.S. at 62. A "lack of assurance of a prompt postsuspension hearing" will create an unconstitutional violation of a licensee's due process rights. Id.[7]

In addressing the scope and nature of the due process which is required in the post-deprivation setting, the Supreme Court has found that requirements of due process are derived from the consideration of three factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure requirement would entail." Mathews, 424 U.S. at 334-335. In the case of a summary suspension, applying the Mathews tests balances the competing interests of a private interest in retaining employment, livelihood and professional reputation with the governmental interest in the protection of public safety, with the risk of an erroneous deprivation in light of an

[7] Query, however, if all summary suspensions are judicial or quasi-judicial in nature, and thus afforded absolute immunity, what is the value of such constitutional violation?

ex parte action.

While limited to retaining employment, the Supreme Court placed extreme weight on such a private interest of retaining employment in its analysis in Loudermill. It stated:

> the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. See Fusari v. Steinberg, 419 U.S. 379, 389 (1975); Bell v. Burson, 402 U.S. 535, 542 (1971); Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969). While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. See Lefkowitz v. Turley, 414 U.S. 70, 83-84 (1973).

Laudermill, 470 U.S. at 54. Extrapolating this standard to the instant case, if the interest in retaining employment is significant, it must be that much more when it involves a physician's license to practice medicine. The investment of time, money and effort required to obtain such a license is far and above the routine prerequisites to employment.

However, the governmental interest is also higher in the case of a summary suspension. By statutory definition, the trigger for such action is an event where "public health, safety or welfare imperatively require emergency action." NEV. REV. STAT. § 233B.127(3). Such situations occur rarely, but, when they arise, may

require immediate action where prolonged analysis or investigation may not be available. Notwithstanding, due to the potential harm which is being sought to be avoided, deference should be given to the state actor.

Under such weight from each side, the only way to balance these interests is to require immediate due process which addresses the allegations arising to the emergency at hand. As discussed above, where the emergency is part and parcel with the underlying etiology (i.e., chemical or biological impairment), the due process required must focus on the physician's ability to address the validity of the underlying etiology. Where, however, the emergency may be a function of, but not the same as the underlying allegations (i.e., overall allegations of competence as a result of a pattern of negligence or other unlawful acts), the due process should be a tiered process where the initial hearing is meant to inquire as to whether there is a legitimate concern for potential harm, followed by further proceedings, in a similar manner as a pre-deprivation hearing, which address the underlying allegations.

B. Dr. Buckwalter was entitled to prompt post-deprivation proceedings under Nevada law.

While the requirement for due process is not set forth through legislative grace, the legislature has the ability to provide for the process required under certain circumstances. At the time the Appellees suspended Dr. Buckwalter's license, they did so pursuant to the authority set forth in NEV. REV. STAT. §

233B.127(3). As discussed above, this statutory language requires that a post-deprivation hearing "be promptly instituted and determined." Accordingly, Dr. Buckwalter also had a right to a ***prompt*** post-deprivation hearing under Nevada law.

C. Dr. Buckwalter received *no* post-deprivation proceedings, yet alone prompt proceedings.

It is undisputed that as of the date the instant case was filed, Dr. Buckwalter has received absolutely no post-deprivation due process. Accordingly, as Dr. Buckwalter had a right to such under both the US Constitution and state law, the failure to provide such due process proceedings is, in and of itself, a violation of both his constitutional and statutory rights.

Whether the Appellees would be entitled to obtain absolute immunity for their failure to provide Dr. Buckwalter with a post-deprivation hearing would depend on whether the failure to act is deemed a judicial or quasi-judicial act. Applying the functional comparable test, as discussed above, it would be impossible to find that a failure to provide a post-deprivation hearing would be a judicial or quasi-judicial act.

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D. The district court erred in finding that Dr. Buckwalter voluntarily waived his rights to a prompt post-deprivation hearing,

The district court stated that Dr. Buckwalter "argues that summary suspension requires notice and a hearing, ignoring the fact that Nevada Revised Statutes require the matter be set for a hearing following summary suspension and that he voluntarily agreed to vacate that hearing." Doc. 45 at 4:9-11 (BUCK v1:005). This is illustrative of another error[8] made by the district court and is a flawed argument for three reasons.

First, the hearing that was scheduled was intended to address the underlying merits of the malpractice claims made against Dr. Buckwalter, not the allegations that Dr. Buckwalter was an imminent danger to the people of the State of Nevada. Doc. 22-1 at 2-5 (BUCK v2:053-056). The Notice setting forth the subsequent hearing only mentioned the underlying allegations and was silent as to any due process rights Dr. Buckwalter may have had related to the summary suspension. Doc. 2-1 at 16-18 (BUCK v2:043-045). It was also silent as to whether the hearing would address the alleged emergency which supported the *ex parte* summary suspension. Id. Dr. Buckwalter has never been offered an opportunity to address

[8] For sake of efficiency, not every error made by the district court has been raised in this brief. Another example of an error (if not bias) is the district court's statement that "[n]o sensible person would argue that the Board would have to wait until after a hearing to suspend the privileges of a physician who was killing or even poisoning patients." Document 45 at 4:13-15 (BUCK v1:005). However, nowhere in the filings in this case or in the underlying supporting documentation was such a reference or insinuation made! In fact, in reviewing the entire record, the words "killing" and/or "poisoning" were never used!

such allegations.

Second, the Malpractice Hearing was scheduled unilaterally set March 18, 2009, over four months or 120 days after the deprivation occurred. Id. It is Dr. Buckwalter's position that a delay of 120 days was not "prompt" as required under NEV. REV. STAT. § 233B.127(3). Although the statute is vague as to what is "promptly," surely what has now amounted to over two-and-a-half years is not prompt. As discussed above, in Florida, a 55 day delay was too long. Ampuero, 410 So.2d at 214. More relevant, however, is that now, in Nevada, a hearing after a summary suspension must occur within 45 days. NEV. REV. STAT. § 630.326(1).

Finally, Dr. Buckwalter agreed to postpone the Malpractice Hearing only because he had legitimate concerns that he could not adequately defend his constitutionally-protected property interest in light of shifting allegations and the veiled threat of further mysterious charges. Doc. 22-1 at 2-5 (BUCK v2:053-056). Once the Malpractice Hearing was cancelled, however, Dr. Buckwalter's opportunity to be heard disappeared. During the time after the Malpractice Hearing was cancelled, the parties worked together to try to settle the matter without the need for a hearing. Id. Dr. Buckwalter's counsel, however, could only push for action to a limited extent, however, as the Appellees were the prosecutor, jury and executioner. Accordingly, to avoid angering them and risking draconian penalties, Dr. Buckwalter and his various counsel, bent over backwards in a

conciliatory manner to try to settle this case. Only when it became apparent that the Appellees had no intent to move this matter forward, on the eve of the end of the statute of limitations for a §1983 action, the instant case was filed as a last ditch effort to preserve Dr. Buckwalter's due process claims.

Notwithstanding, despite a most recent request on April 4, 2011 for a hearing on the limited on the issue of whether there was, indeed, a preponderance of the evidence to support a finding that "unforeseen circumstances have arisen and exist that pose a risk of impairment of the health and safety of the public that require immediate Board action," still no hearing or other procedure was provided to Dr. Buckwalter.[9]

IV. BECAUSE OF THE UNIQUE CHARACTERISTICS OF A SUMMARY SUSPENSION, IMMUNITY SHOULD BE QUALIFED RATHER THAN ABSOLUTE.

Recently, the Supreme Court of Washington addressed the same issues as are before this Court. In Jones v. State, Dept. of Health, 242 P.3d 825 (Wash. 2010), a pharmacist's license was summarily suspended. As discussed above, although a summary suspension may legally occur without a pre-deprivation hearing, it cannot be supported upon false or misleading allegations related to the

[9] In March, 2011, the NSBME arbitrarily set a hearing on the underlying allegations of malpractice which were made in the original complaint. Based upon a motion to dismiss made by Dr. Buckwalter on the grounds that he cannot be reasonably expected to defend in 2011, allegations from a case which stems from care rendered in 2004, the hearing has been stayed pending the outcome of that motion.

emergency underlying the summary suspension. The only way to ensure that the summary deprivation was reasonably warranted is to allow for a prompt post-deprivation hearing to look at the allegations of imminent harm, separate and apart from any other inquiries of administrative harms. For this reason, the Washington Supreme Court has made the immunity which a state actor may enjoy a qualified immunity. Id.

In essence, such is the same analysis which Dr. Buckwalter has suggested should be applied in this case. Rather than absolute immunity, the test which the district court should have applied is that of qualified immunity. Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In deciding whether a government official is entitled to qualified immunity against a 42 U.S.C. § 1983 claim, a court considers two issues. First, a court must decide whether the facts that a plaintiff has alleged or has proven make out a violation of a constitutional right. If they do not, then the defendant is entitled to qualified immunity. Pearson v. Callahan, 555 U.S 223 (2009); Saucier v. Katz, 533 U.S. 194 (2001). In this case, as detailed in great length above, Dr. Buckwalter

clearly had a due process right with respect to any deprivation of his medical license. As he has never been afforded a meaningful opportunity to be heard on the ex parte deprivation of his license, his due process rights have clearly been violated.

Second, the court must decide whether the right at issue was clearly established at the time of the government official's alleged misconduct. Id. If it was not, then the defendant is entitled to qualified immunity. The state has the ability to define the existence of a constitutionally protected property right. Laudermill, 470 U.S. at 541. In Nevada, the Supreme Court confirmed that a medical license is a protected property right in the 1980's. See Molnar, supra, 773 P.2d 726, 727 ; Potter, supra, 705 P.2d 132, 134 . Once a property right exists, the due process that is to be afforded "is conferred … by constitutional guarantee." Loudermill, 470 U.S. at 541, quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974). Hence, the property right at question in this case clearly existed at the time Dr. Buckwalter's license was summarily suspended.

Furthermore, to defeat a claim of qualified immunity, plaintiffs must show that defendants "knew or reasonably should have known" that their actions were unconstitutional. Harlow, 457 U.S. at 816. To suggest that a medical board did not know or should not have known that Dr. Buckwalter was entitled to due process as a result of the deprivation of his property interest through the summary

suspension of his medical license is unfounded in logic or reason. This is not Appellees' first trip to this Court, or any court, on issues of due process. Their obligations are well known and clearly defined. For these reasons, in this case, Appellees would not even be entitled to qualified immunity under the facts of this case.

Had Appellees provided Dr. Buckwalter with some semblance of due process, then, perhaps they would qualify for immunity. However, Appellees cannot be allowed to trample on the rights of Dr. Buckwalter (and all physicians, for that matter), by either fabricating the existence of an emergency, or refusing to provide a prompt post-deprivation hearing, and receive complete immunity. The only way to ensure that one receives the rights to which one is entitled under the Due Process Clause of the U.S. Constitution in a summary suspension case is to make the immunity one of a qualified immunity.

V. EVEN IF ABSOLUTE IMMUNITY APPLIES, SUCH WOULD NOT PREVENT RELIEF UNDER 42 U.S.C. § 1983 FOR DECLARATORY AND INJUNCTIVE RELIEF.

As discussed above, absolute immunity for judicial or quasi-judicial acts is a bar to damages. Absolute immunity, however, does not bar claims for prospective injunctive relief, in certain limited circumstances. See Supreme Ct. of Virginia v. Consumers Union of U.S., Inc., 446 U.S. 719, 736-37 (1980) (citing Gerstein v.

Pugh, 420 U.S. 103 (1975)); see also, Pulliam v. Allen, 466 U.S. 522, 541-42 (1984).

To understand these limited circumstances, it is instructive to look at the express language of 42 U.S.C. § 1983. It states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

42 U.S.C. § 1983.

Notably, 42 U.S.C. § 1983 was amended in 1996 to state that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, § 309(c), Pub.L.No. 104-317, 110 Stat. 3847, 3853 (1996). Accordingly, while Congress further limited the relief available under 42 U.S.C. § 1983 against judicial officers, it allowed for a person to be able to obtain injunctive or declaratory relief under 42 U.S.C. § 1983, even when such relief is against a judicial officer. "[E]ntitlement to absolute immunity from a claim for damages ... does not bar the granting of injunctive relief or of other equitable relief." Adibi v.

California State Bd. of Pharmacy, 393 F.Supp.2d 999 (N.D.Cal. 2005) citing Shmueli v. City of New York, 424 F.3d 231, 239 (2d Cir. 2005), Valley v. Rapides Parish Sch. Bd., 118 F.3d 1047, 1051 n. 1 (5th Cir. 1997) ("It is well established law in this Circuit that the defenses of qualified and absolute immunity do not extend to suits for injunctive relief under 42 U.S.C. § 1983."), and Roe v. City & County of San Francisco, 109 F.3d 578, 586 (9th Cir. 1997) ("The individual prosecutors' absolute immunity protects them only from damages claims, not from suits for prospective injunctive relief.").

In this case, declaratory relief has not been available to Dr. Buckwalter. As discussed above, as a summary suspension is not a final order by the NSBME, the judicial review provisions of NAPA, NEV. REV. STAT. § 233B, et. seq., and the Nevada Medical Practice Act, NEV. REV. STAT. Chapter 630, et. seq., are unavailable to Dr. Buckwalter with respect to the summary suspension. Further, Dr. Buckwalter is unable to obtain any injunctive relief from the courts, as the Nevada Legislature has expressly limited the power of the equitable powers of the courts. See NEV. REV. STAT. § 630.356(2), supra FN5. Accordingly, Dr. Buckwalter has no other recourse for the violation of his due process rights but to turn to the federal courts. As he is not entitled to declaratory relief, absolute immunity will not preclude his injunctive and declaratory claims in this case.

VI. YOUNGER ABSTENTION DOCTRINE DOES NOT PRECLUDE ONE FROM PURSUING A 42 U.S.C. § 1983 ACTION RELATED TO AN INCURABLE DUE PROCESS VIOLATION THAT HAS ALREADY OCCURRED.

Dr. Buckwalter disagrees that the rule from Younger v. Harris, 401 U.S. 37 (1971), is applicable in the present matter. Abstention under Younger "is a jurisprudential doctrine rooted in overlapping principles of equity, comity, and federalism." San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose, 546 F.3d 1087, 1091 (9th Cir. 2008). Moreover, the Supreme Court has rejected Younger as a question of subject matter jurisdiction. See New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 358 (1989) ("NIOPSI") and Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 626 (1986).

The United States Supreme Court has stated that abstention of the federal courts is the exception, rather than the rule. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976). Under very limited circumstances, the federal courts should abstain from interfering with ongoing state court proceedings. Id. The Supreme Court in Middlesex County Ethics Comm. V. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982), sets forth a three part test for determining the applicability of Younger: 1) there are ongoing state proceedings that are judicial in nature; 2) the state proceedings implicate important state interests; and 3) the state proceedings afford an adequate opportunity to raise

federal claims. In this case, the district court erred by applying the Younger abstention doctrine, as these three criteria are not met.

A. There are no pending judicial proceedings of identical substance or on the merits

Younger directs federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings. Martinez v. Newport Beach City, 125 F.3d 777, 781 (9th Cir. 1997), overruled on other grounds, Green v. City of Tucson, 255 F.3d 1086 (9th Cir. 2001), overruled in part on other grounds by Gilbertson v. Albright, 381 F.3d 965 (9th Cir. 2004)(*en banc*). In order to apply Younger, as such, there has to be a pending state judicial proceeding which could be interfered with by this Court.

This action has been filed seeking relief from two alleged wrongs: Violation of Due Process by Falsely Creating an Emergency Necessitating a Summary Suspension of Part of Dr. Buckwalter's Medical License (Count I), and Violation of Due Process by Failing to Promptly "Institute and Determine" Due Process Proceedings (Count II). Doc. 1 (BUCK v2:018-030). Both of these claims hinge on past acts which are not being currently addressed by the on-going administrative process. The only issue pending before the NSBME is the validity of the underlying allegations, the malpractice allegations.

B. The State Interest in the matter has been waived

Appellees are quick to waive the banner of protecting the safety of the public and ensuring the integrity of the medical profession. Doc. 14 at 11:13-18 (BUCK v2:069). Dr. Buckwalter recognizes that these are important state interests; however, when looking at the facts of this case, there are legitimate questions of the appropriateness of the summary suspension. As discussed above, supra Statement of Facts, Appellees relied on an affidavit from a physician who practiced in a different field as Dr. Buckwalter and made opinions related to Dr. Buckwalter's medical documentation, the last record of which was from April, 2008, to declare in November, 2008, that Dr. Buckwalter was an imminent danger to the people of the State of Nevada. The truth is that the Appellees rushed to discipline Dr. Buckwalter as a result of the hepatitis C crisis and the allegations that the Appellees were soft on disciplining doctors. In their zeal to discipline Dr. Buckwalter, however, they made a crucial mistake – they violated his due process rights by falsely claiming that there was an emergent need to suspend Dr. Buckwalter's license; this was patently false.

In reality, Appellees took Dr. Buckwalter out of the game without any notice or due process and are now claiming that they protected the public by doing so. While protecting the public is an important state interest, it has to be a legitimate interest that is sought to be furthered by federal abstention. There is nothing that

abstention will do to further the state interest in this case.

C. Dr. Buckwalter will not have the opportunity to raise all federal questions in any state proceedings.

The third part of the Middlesex test is where the test clearly fails in this case. With respect to the third part of the test, in Middlesex, the Court stated that "[i]t would trivialize the principles of comity and federalism if federal courts failed to take into account that an adequate state forum for all relevant issues has clearly been demonstrated to be available prior to any proceedings on the merits in federal court." Middlesex at 437, citing Hicks v. Miranda, 422 U.S. 332, 350 (1975). Abstention under Younger is ordinarily required where "[a]ny adjudication by this Court, or by the district court, ... would necessarily determine the same questions ... as are at issue" in the pending state proceedings. Sable Communications of California, Inc. v. Pacific Telephone and Telegraph Co., 890 F.2d 184, 190 (9th Cir. 1989), citing Feaster v. Miksch, 846 F.2d 21, 22 (6th Cir. 1988).

The issues brought before the court in the instant case are NOT issues related to professional discipline; rather, this case is one of a violation of Dr. Buckwalter's due process rights, as actionable by 42 U.S.C. § 1983. The question before the Appellees in the administrative action which is still pending is whether Dr. Buckwalter engaged in conduct which would be violative of the Nevada Medical Practice Act; the question in this case is whether the Appellees violated

Dr. Buckwalter's due process rights when they summarily suspended his medical license, did such under the false pretense of an emergency, and continued such suspension without any notice or opportunity to be heard on such for the past two-and-a-half years. This is a critical distinction which this Court must recognize. Hence, the underlying proceeding is not intended to address the same questions which are at issue in this instant action.

In other words, the instant case brings forth federal tort claims, through 42 U.S.C. § 1983, which are brought as a matter of law. It is well established that 42 U.S.C. § 1983 claims are claims sound in tort. See Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 727 (1999). As these claims are based in tort, they can only be brought in court; the administrative process is not set up or provided with the authority to address such claims.

Since Dr. Buckwalter would be unable to raise all relevant federal issues, Dr. Buckwalter respectfully requests that this Court find that Younger abstention doctrine should not apply to this case.

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CONCLUSION

In light of the foregoing, this Court is requested to reverse the district court's November Order terminating this matter and remand this matter for further proceedings consistent with such reversal.

Respectfully Submitted,

LAW OFFICE OF JACOB HAFTER & ASSOCIATES

By: /s/ Jacob L. Hafter, Esq.
JACOB L. HAFTER, ESQ.
MICHAEL NAETHE, ESQ.

Dated: April 21, 2011

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NINTH CIRCUIT LOCAL RULE 28-2.6 STATEMENT

To the best of Dr. Buckwalter's knowledge, there are no pending related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C), I certify that this brief is proportionately spaced with one inch margins on all four corners with a total of 12,898 words (not including the Cover Page, Tables of Contents or Authorities, Rule 28-2.6 Statement, this Certificate of Compliance or the Certificate of Service).

Respectfully Submitted,
LAW OFFICE OF JACOB HAFTER & ASSOCIATES

By: /s/ Jacob L. Hafter, Esq.
JACOB L. HAFTER, ESQ.
MICHAEL NAETHE, ESQ.

Dated: April 21, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

LAW OFFICE OF JACOB HAFTER & ASSOCIATES

By: /s/ Jacob L. Hafter, Esq.
JACOB L. HAFTER, ESQ.
MICHAEL NAETHE, ESQ.

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