ORDER ON EMERGENT MOTION

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
JOSEPH GLASSMAN, M.D.,	DOCKET NO. AM-000707-18T3
V.	MOTION NO. M-009390-18
GURBIR S. GREWAL, NEW JERSEY	BEFORE PART S
STATE ATTORNEY GENERAL	JUDGES: CARMEN MESSANO ARNOLD L NATALI JR.

MOTION FILED: 08/20/2019 BY: STATE OF NEW JERSEY

ANSWER FILED: 08/23/2019 BY: JOSEPH GLASSMAN

SUBMITTED TO COURT: August 23, 2019

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 27th day of August, 2019, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

MOTION BY APPELLANT FOR LEAVE TO APPEAL	GRANTED
EMERGENT MOTION BY APPELLANT FOR DISSOLUTION OF THE TRIAL COURT'S AUGUST 14, 2019 ORDER	GRANTED

SUPPLEMENTAL:

On leave granted, defendant Gurbir Singh Grewal, Attorney General of the State of New Jersey, appeals from an August 14, 2019 Chancery Division order temporarily enjoining operation of the New Jersey Medical Aid in Dying for the Terminally Ill Act (Act). In light of the significance of the issues raised by the parties, and the need for a prompt and considered resolution, we agreed to consider defendant's motion for leave to appeal on an expedited basis and requested expedited briefing. Having reviewed the record against the applicable law, we conclude the court abused its discretion in awarding preliminary injunctive relief because plaintiff failed to satisfy the standard enunciated in Crowe v. De Gioia.[1] Accordingly, we dissolve the restraints issued pursuant to the August 14, 2019 order.

[1] 90 N.J. 126, 132-34 (1982).

More than four months ago, on April 12, 2019, Governor Philip Murphy signed the Act with an effective date of August 1, 2019. In doing so, New Jersey joined seven other jurisdictions in permitting those defined as "qualified terminally[-]ill patients" to end their lives by self-administering medication under the protocol detailed in the Act.

In passing the Act, the Legislature specifically concluded that it was "in the public interest and . . . necessary for the welfare of the State and its residents." See N.J.S.A. 26:16-2(d). The Act further "[r]ecogniz[es] New Jersey's long-standing commitment to individual dignity, informed consent, and the fundamental right of competent adults to make health care decisions about whether to have life-prolonging medical or surgical means or procedures provided, withheld, or withdrawn." N.J.S.A. 26:16-2(a). The Act also expresses New Jersey's "right of a qualified terminally[-]ill patient, protected by appropriate safeguards, to obtain medication that the patient may choose to self-administer in order to bring about the patient's humane and dignified death." Ibid.

In order to effectuate its purpose, while also protecting the public welfare, the Act provides for a "safeguarded process." See N.J.S.A. 26:16-2(c). That process "guide[s] health care providers and patient advocates who provide support to dying patients"; "assist[s] capable, terminally[-] ill patients who request compassionate medical aid in dying"; "protect[s] vulnerable adults from abuse"; and "ensure[s] that the process is entirely voluntary on the part of all participants, including patients and those health care providers that are providing care to dying patients." Ibid.

The "safeguarded process" includes a detailed protocol to assist health care providers and patients to ensure that a terminally-ill patient's decision is knowing and voluntary. By way of example only, before a patient can receive life-ending medication, he or she must qualify as terminally ill, which is defined in the Act to include only adult, New Jersey residents capable and determined to be terminally ill and who have voluntarily asked to receive life-ending medication. See N.J.S.A. 26:16-3. "Terminally ill" is defined to include only a patient "in the terminal stage of an irreversibly fatal illness, disease, or condition with a prognosis, based upon reasonable medical certainty, of a life expectancy of six months or less." Ibid. Further, a patient will not be deemed a qualified terminally-ill patient based solely on "the person's age or disability or diagnosis of any specific illness, disease, or condition." Ibid.

In addition, before a patient can receive and self-administer medication, the patient must make two separate oral requests, at least fifteen days apart, and a written request. N.J.S.A. 26:16-10(a). Further, the patient's attending physician is obligated to ensure that a patient's records memorialize the voluntary nature of the patient's decision to terminate his or her life, as well as the patient's capacity, diagnosis, and prognosis. See N.J.S.A. 26:16-10(d)(3). The attending

physician's records must also include similar information from a consulting physician. See N.J.S.A. 26:16-10(d)(4).

A health care provider's participation under the Act is entirely voluntary. N.J.S.A. 26:16-17(c). "If a health care professional is unable or unwilling to carry out a patient's request . . . and the patient transfers the patient's care to a new health care professional or health care facility, the prior health care professional shall transfer, upon request, a copy of the patient's relevant records to the new health care professional or health care facility." Ibid.

Eight days after the effective date of the Act, on August 9, 2019, plaintiff, Yosef Glassman, a medical doctor, filed an Order to Show Cause, supported by an eleven-count verified complaint, which alleged that the Act, violated: "the fundamental right to defend life" (count one); the equal protection clauses of the state and federal constitutions, and the Fifth Amendment's right to due process (count two); plaintiff's and other religious physicians' as well as religious pharmacists' First Amendment rights under the United States Constitution (count three); the "canon of common law" which prohibits killing oneself and aiding and abetting another's death (count four); state and federal law (count five); a physician's right to practice medicine, and a pharmacist's right to practice pharmacy by involving unwilling participants "to be involved in the machinery of death" (count six); the duty to warn (count seven); the Administrative Procedure Act by failing to promulgate rulemaking, "thereby rendering its entire process of death wholly and dangerously unregulated, leaving ambiguities and contradiction in statutory language" (count eight); Article Ten of the United States Constitution (count nine); and a physician's obligation not to falsify records (count ten). Finally, in count eleven, plaintiff sought declaratory relief deeming the Act unconstitutional and invalid.[2]

After hearing oral argument, the court entered the August 14, 2019 order enjoining defendant from enforcing the Act. The court concluded that plaintiff lacked standing to assert claims on behalf of other physicians or third parties. The court further found that nearly "all of the causes of action which are premised upon Constitutional violations or alleged Constitutional violations don't really affect" plaintiff. The court did, however, find merit in plaintiff's eighth cause of action. The court determined that the failure to promulgate regulations would cause plaintiff "immediate and irreparable injury" based on the significant change in the law when "dealing with individuals who are terminally ill."

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[2] During the pendency of this appeal, plaintiff filed an amended verified complaint to add plaintiff Maish Pujara, R.Ph., "in his professional capacity as a New Jersey practicing registered pharmacist and on behalf of all affected patients and pharmacists throughout the State . . . ." Although Pujara has not requested to participate in the appeal, we have nevertheless reviewed the amended verified complaint and conclude nothing in that pleading affects our decision.

Finally, the court determined that the harm to plaintiff "outweigh[ed] any risk of harm to the State."

On appeal, the State maintains the court abused its discretion in enjoining operation of the Act as a proper balancing of the Crowe factors required denial of plaintiff's application. We agree.

Before granting interim injunctive relief, a court must consider: (1) whether the injunction is "necessary to prevent irreparable harm;" (2) whether "the legal right underlying the claim is unsettled;" (3) whether the applicant has made "a preliminary showing of a reasonable probability of ultimate success on the merits;" and (4) "the relative hardship to the parties in granting or denying [injunctive] relief." Crowe, 90 N.J. at 132-34. "[A] party who seeks mandatory preliminary injunctive relief must satisfy a 'particularly heavy' burden." Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011) (alteration in original) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006)).

The moving party has the burden to prove each of the Crowe factors by clear and convincing evidence. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012). And, "[a]lthough it is generally understood that all these factors must weigh in favor of injunctive relief," McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007), a more flexible approach may be applied when the preliminary injunction seeks merely to maintain the status quo. Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008) (citing Gen. Elec. Co. v. Gem Vacuum Stores, Inc., 36 N.J. Super. 234, 236-37 (App. Div. 1955)). "When a case presents an issue of 'significant public importance,' a court must [also] consider the public interest in addition to the traditional Crowe factors." Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013) (quoting McNeil v. Legis. Apportionment Comm'n, 176 N.J. 484 (2003)).

"An appellate court applies an abuse of discretion standard in reviewing a trial court's decision to grant or deny a preliminary injunction." Rinaldo, 387 N.J. Super. at 395-96. We are bound by a court's factual findings if they are "supported by substantial, credible evidence" in the record. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292, 315 (App. Div. 2010).

Here, plaintiff failed to establish that injunctive relief was necessary to prevent irreparable harm and preserve the status quo. Irreparable harm in this context has been described as "injury to be suffered in the absence of injunctive relief [that] is substantial and imminent[.]" Waste Mgmt., 399 N.J. Super. at 520. The only harm identified by the court was the Executive Branch's failure to adopt enabling regulations. Neither the court nor plaintiff, however, identified how the absence of such regulations harmed him, irreparably or otherwise. It was undisputed that no party has sought medical advice or assistance from plaintiff to implement any provision of the Act. Other than stating the Act created a material change in the law regarding the treatment of terminally-ill patients, the court did not identify a single

provision of the Act that lacked the clarity necessary for a patient or any affected individual or entity to effectuate the Act's clearly stated purpose.

Further, as the Act makes clear, participation by physicians like plaintiff is entirely voluntary. The only requirement the Act imposes on health care providers who, based upon religious or other moral bases, voluntarily decide not to treat a fully-informed, terminally-ill patient interested in ending their lives, is to transfer any medical records to the new provider selected by the patient. See N.J.S.A. 26:16-17(c). We fail to discern how the administrative function of transferring those documents constitutes a matter of constitutional import, or an act contrary to a physician's professional obligations. In this regard, we note that a physician has long been required to transfer a patient's records on request, see N.J.A.C. 13:35-6.5, and does so without personal assent to any subsequent medical procedures.

The second and third Crowe factors also involve a fact-sensitive analysis that "requires a determination of whether the material facts are in dispute, and whether the applicable law is settled[.]" Waste Mgmt., 399 N.J. Super. at 528 (citation omitted). However, when considering this factor in the context of a preliminary injunction:

> doubt about a suit's merits does not entirely preclude the entry of an interlocutory injunction designed to preserve the status quo. So long as there is some merit to the claim, a court may consider the extent to which the movant would be irreparably injured in the absence of pendente lite relief, and compare that potential harm to the relative hardship to be suffered by the opponent if an injunction preserving the status quo were to be entered. If these factors strongly favor injunctive relief, the status quo may be preserved through injunctive relief even though the claim on the merits is uncertain or attended with difficulties.
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> [Id. at 535.]

Even if the facts are relatively undisputed, plaintiff failed to demonstrate by clear and convincing evidence that the legal rights asserted in his verified complaint were well-settled in his favor. As noted, the judge concluded injunctive relief was necessary because the Executive Branch failed to implement enabling regulations prior to the Act's enactment. Such a reading of the statute is contrary to its clear, plain and unambiguous language. It is well-settled that when interpreting a statute, the "paramount goal" is to discern the Legislature's intent. DiProspero v. Penn, 183 N.J. 477, 492 (2005). That process begins with the statute's plain language, giving the words used their ordinary meaning unless they clearly have a technical or special meaning. Safeway Trails, Inc. v. Furman, 41 N.J. 467, 478 (1964). "We construe the words of a

statute 'in context with related provisions so as to give sense to the legislation as a whole.'" Spade v. Select Comfort Corp., 232 N.J. 504, 515 (2018) (quoting N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 570 (2017)); see N.J.S.A. 1:1-1. "We do not add terms which may have been intentionally omitted by the Legislature . . . ." State v. Perry, 439 N.J. Super. 514, 523 (App. Div. 2015).

The Legislature made clear that the Act's effective date was August 1, 2019, not some undetermined future date. Indeed, the Act provides:

> This [A]ct shall take effect on the first day of the fourth month following the date of enactment, but the Director of the Division of Consumer Affairs in the Department of Law and Public Safety, the Commissioner of Health, the State Board of Medical Examiners, the New Jersey State Board of Pharmacy, the State Board of Social Work Examiners, and the State Board of Psychological Examiners may take such anticipatory administrative action in advance thereof as shall be necessary for the implementation of this [A]ct.
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> [L. 2019, c. 59, § 29.]

Likewise, the Act directs the aforementioned Boards, the Division of Consumer Affairs, and the Commissioner of Health to adopt "rules and regulations as are necessary to implement the provisions of sections 1 through 20" of the Act. Id. at §§ 21 to 25. Had the Legislature intended the Act to remain in a period of perpetual quiescence, thereby keeping all interested parties in limbo until a half-dozen administrative bodies decided to engage in their rulemaking functions, it could have clearly said so. In using permissive, as opposed to mandatory language, it is clear that the Legislature did not intend that implementation of the Act await rulemaking.

Further, there is no indication that any of the administrative agencies and organizations identified in the Act determined that rule-making was necessary prior to August 1, 2019. "Agencies are accorded 'wide latitude in improvising appropriate procedures to effectuate their regulatory jurisdiction.'" Coal. for Quality Health Care v. N.J. Dep't of Banking & Ins., 348 N.J. Super. 272, 294 (2002) (quoting Metromedia, Inc. v. Dir. Div. of Taxation, 97 N.J. 313, 333 (1984)). "This flexibility includes the ability to select those procedures most appropriate to enable the agency to implement legislative policy." Ibid. (quoting In re Public Serv. Elec. & Gas Co. Rate Unbundling, 167 N.J. 377, 385 (2001)). "In that regard, '[a]n agency has discretion to choose between rule-making, adjudication, or an informal disposition in discharging its statutory duty . . . .'" Ibid. (alteration in original) (quoting Northwest Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 137 (2001)). The absence of agency action here may imply the opposite conclusion, as defendant argues, that regulations were not necessary to implement the Act.

In any event, the Administrative Procedure Act specifically permits "[a]n interested person" to "petition an agency to adopt a new rule," and provides for a deliberate process for consideration of such a request. N.J.S.A. 52:14B-4(f). In the months since passage of the Act, plaintiff never sought this relief.

Plaintiff also failed to establish that he had a "reasonable probability of ultimate success on the merits." First, we note, as did the trial court, that plaintiff does not have standing to assert claims on behalf of other physicians, patients or interested family members. And, his claim that participation in the transfer of records makes him somehow complicit in a qualified terminally-ill patient's informed decision to end his or her life, ignores the voluntary nature of his participation under the Act, and his already existing obligation under relevant regulations to provide a patient with his or her medical records. Further, as noted, we find no support in the language of the Act that the Legislature intended the implementation of the Act to await formal rulemaking.

Finally, in considering the "relative hardship to the parties in granting or denying [injunctive] relief," we conclude the court failed to consider adequately the interests of qualified terminally-ill patients, who the Legislature determined have clearly prescribed rights to end their lives consistent with the Act. In reaching this conclusion on the fourth Crowe factor, we have also considered the public interest, and readily acknowledge and respect plaintiff's decision not to participate in the diagnosis or treatment of such patients, on either professional, personal, religious or moral grounds. His right to so abstain, however, does not outweigh those of qualified terminally-ill patients who the Legislature has concluded may end their lives as permitted under the Act.

Accordingly, we reverse and vacate that portion of the August 14, 2019 order temporarily restraining the Act and remand the matter to the trial court for further proceedings on plaintiff's amended verified complaint. We do not retain jurisdiction.

FOR THE COURT:

Arnold L. Natali, Jr.

ARNOLD L. NATALI, JR., J.A.D. t/a