No. 14-3467

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DR. ALFONOSO RODRIGUEZ,

Appellant,

v.

SECRETARY OF DEPARTMENT OF ENVIRONMENTAL PROTECTION OF PENNSYLVANIA, ET AL,

Appellees.

On appeal from the United States District Court for the Middle District of Pennsylvania, Hon. A. Richard Caputo presiding.

BRIEF OF APPELLEE SECRETARY OF DEPARTMENT OF ENRIVONMENTAL PROTECTION OF PENNSYLVANIA

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I. COUNTERSTATEMENT OF THE ISSUES PRESENTED

(1) Does Dr. Rodriguez have standing to challenge 58 Pa.C.S. § 3222.1(b)(10) or (11) where he has not alleged any injury from these provisions?

SUGGESTED ANSWER: NO

(2) Is Dr. Rodriguez's pre-enforcement declaratory judgment action ripe?

SUGGESTED ANSWER: NO

II. STATEMENT OF RELATED CASES

This case has not previously been before this Court and there are no related cases or proceedings.

III. COUNTERSTATEMENT OF THE CASE

Dr. Rodriguez initiated this matter by filing the Complaint on July 27, 2012. (Dckt. Doc. No. 1). Then-Attorney General Linda L. Kelly moved to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Dckt. Doc. No. 10). Then-Secretary of the Department of Environmental Protection Michael Krancer and Chairman Robert F. Powelson of the Pennsylvania Public Utility Commission moved to dismiss the Complaint on the same grounds. (Dckt. Doc. No. 21.) All parties fully briefed the pending Motions. (Dckt. Doc. Nos. 14, 22, 27, 35 & 36). Before briefing had closed, Dr. Rodriguez entered into a stipulation dismissing all claims against Chairman Powelson with prejudice.

(Dckt. Doc. No. 30.) The District Court approved this stipulation on January 23, 2013. (Dckt. Doc. No. 32.)

The District Court granted the two motions to dismiss under Federal Rule of Civil Procedure 12(b)(1), finding that Dr. Rodriguez lacked standing to assert his claims. J. App. A-3 (Order, Dismissing Complaint); J. App. A-5 (Memoradum, Dismissing Complaint). Dr. Rodriguez then sought leave to alter the order under Fed.R.Civ.P. 59(e). (Dkt. Doc. Nos. 39, 40.) The Court denied the motion to alter but granted Dr. Rodriguez leave to file an amended complaint to "incorporate additional facts and claims which will establish that the Plaintiff has standing[.]" (Dckt. Doc. No. 42 at 2.) In response, Dr. Rodriguez filed an Amended Complaint on January 31, 2014. J. App. A-40 (Amended Complaint). All parties then entered into a second stipulation dismissing with prejudice all claims in the Amended Complaint against Chairman Powelson, which the District Court adopted by Order dated February 7, 2014. (Dckt. Doc. Nos. 44, 45.) Shortly thereafter, the remaining Defendants filed Motions to Dismiss the Amended Complaint and all parties fully briefed the motions. (Dckt. Doc. Nos. 46, 47, 48, 49, 58, 59.) Once again, the District Court granted Defendants' Motions to Dismiss and dismissed the case, finding that Dr. Rodriguez still lacked standing to pursue the claims. J. App. A-4 (Order, Dismissing Amended Complaint); J. App. A-20 (Memorandum,

Dismissing Amended Complaint). On July 30, 2014, Dr. Rodriguez filed a Notice of Appeal. J. App. A-1 (Notice of Appeal).

During the pendency of this suit, Secretary Krancer resigned and was replaced by Secretary E. Christopher Abruzzo. Secretary Abruzzo has since been replaced by Acting Secretary Dana Aunkst. Further, Attorney General Linda L. Kelly's term in office ended and she was replaced by Attorney General Kathleen G. Kane. Under Fed.R.Civ.P. 25(d), Acting Secretary Aunkst and Attorney General Kane were automatically substituted as parties in this matter.

IV. COUNTERSTATEMENT OF FACTS

Dr. Rodriguez is a medical doctor who resides in Dallas, Pennsylvania. Named as Defendants are the Acting Secretary of the Department of Environmental Protection and the Attorney General, each in their official capacities. Dr. Rodriguez challenges two provisions of Title 58 of the Pennsylvania Consolidated Statutes, which governs oil and gas.

Specifically, Dr. Rodriguez alleges that Sections 3222.1(b)(10) and (11) violate his First Amendment rights. Dr. Rodriguez refers to these provisions derogatorily as the "Medical Gag Act" ("the Act"). Those provisions provide a means for the medical community to receive from participants in the oil and gas industry certain proprietary information. The challenged provisions read as follows:

> (10) A vendor, service company or operator shall identify the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests the information in writing if the health professional executes a confidentiality agreement and provides a written statement of need for the information indicating all of the following:
>
> (i) The information is needed for the purpose of diagnosis or treatment of an individual.
>
> (ii) The individual being diagnosed or treated may have been exposed to a hazardous chemical.
>
> (iii) Knowledge of information will assist in the diagnosis or treatment of an individual.
>
> (11) If a health professional determines that a medical emergency exists and the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information are necessary for emergency treatment, the vendor, service provider or operator shall immediately disclose the information to the health professional upon a verbal acknowledgment by the health professional that the information may not be used for purposes other than the health needs asserted and that the health professional shall maintain the information as confidential. The vendor, service provider or operator may request, and the health professional shall provide upon request, a written statement of need and a confidentiality agreement from the health professional as soon as circumstances permit, in conformance with regulations promulgated under this chapter.

58 Pa.C.S. § 3222.1(b)(10)-(11).

Dr. Rodriguez repackages in this Court the same arguments that were rejected twice by the District Court, alleging that the above provisions violate his

First Amendment rights because he desires to "widely share relevant medical information with, not only his patient, but with the wider medical community and the public." App. Br. at 12. Notably, nowhere in the Amended Complaint does Dr. Rodriguez allege that he has sought information and been denied it or that he has been subject to a confidentiality agreement; i.e., that these provisions have ever applied to him or ever will.

V. STANDARD OF REVIEW

As stated, on June 30, 2014, the District Court granted Defendants' Motions to Dismiss and dismissed Dr. Rodriguez's Amended Complaint based on a finding that Dr. Rodriguez lacked standing to pursue the claims. This Court exercises plenary review over a district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). *See, e.g., In re Schering-Plough Corp. Intron/Temodar Consumer Class Action,* 678 F.3d 235, 243 (3d Cir. 2012).

VI. SUMMARY OF THE ARGUMENT

First, Dr. Rodriguez does not have standing under Article III to challenge Sections 3222.1(b)(10) or (11) of the Act. Dr. Rodriguez has not alleged an injury-in-fact that is traceable to the Appellees' conduct, nor is the requested relief likely to redress any alleged injury.

Second, Dr. Rodriguez cannot establish that his pre-enforcement action is ripe. There is no adversity of interest between the parties because Dr. Rodriguez is

not at risk of incurring penalties if he maintains the status quo. Since Dr. Rodriguez's facts are entirely hypothetical, a finding in his favor will also not conclude the controversy. Finally, a declaratory judgment would have no utility for Dr. Rodriguez because a declaration that Sections 3222.1(b) is unconstitutional would not materially affect his rights.

VII. ARGUMENT

A. Dr. Rodriguez lacks standing.

The District Court has twice ruled that Dr. Rodriguez lacks standing to challenge Section 3222.1(b)(10) or (11) of the Act because his alleged injury "is too conjectural to satisfy the injury-in-fact requirement of Article III standing" and "he cannot show that his injury would likely be redressed by a favorable decision." J. App. A-14 (Memorandum, Dismissing Complaint); J. App. A-30 (Memorandum, Dismissing Amended Complaint). This finding was proper and should be affirmed by this Court.

Article III of the United States Constitution restricts the federal judicial power to the resolution of "cases" and "controversies," and this case-or-controversy requirement is satisfied only where a plaintiff has standing. *See Sprint Commc'ns. Co. v. AP-CC Servs., Inc.*, 554 U.S. 269, 273 (2008). To establish standing, a plaintiff must show (1) an injury-in-fact; (2) the injury is traceable to the defendant's conduct; and (3) the requested relief is likely to redress the injury.

Planned Parenthood of Cent. New Jersey v. Farmer, 220 F.3d 127, 146 (3d Cir. 2000). To satisfy the injury-in-fact requirement of Article III standing, a plaintiff's injury "must be concrete in both a qualitative and temporal sense." *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Allegations of "possible future injury" are not sufficient to satisfy Article III. *Whitmore*, 495 U.S. at 158.

Dr. Rodriguez's continued failure to allege a concrete, non-speculative injury is fatal to his standing. Dr. Rodriguez claims that knowledge of the various chemicals used in fracturing fluid is necessary for the treatment of his patients but does not allege that he has ever sought or been denied such information. Dr. Rodriguez also does not allege that he has ever been subject to a confidentiality agreement under Sections 3222.1(b)(1) or (11). Instead, Dr. Rodriguez's broad assertion that the Act infringes on his First and Fourteenth Amendment rights by abridging his freedom to communicate with his patients and the public regarding the chemicals obtained under the Act is purely hypothetical. Since he has neither sought nor been denied information under the Act, he has also not been prohibited from communicating such information. To the extent that Dr. Rodriguez asserts an injury based on the inability to exercise his First Amendment rights, he has not yet been prevented from engaging in any type of communication.

Dr. Rodriguez's attempt to show a well-founded or reasonable fear of prosecution under the Act also fails. Dr. Rodriguez claims that he will be subject to a civil lawsuit were he to sign and ignore a confidentiality agreement under the Act. However, any potential penalties would be contingent on multiple factors not adduced in his Amended Complaint. Although Dr. Rodriguez has alleged that he has treated patients exposed to fracturing fluid, he has not alleged that he has requested information under the Act or been subject to any confidentiality agreements. If he maintains the status quo, he will not risk any such penalties.

Further, a declaration that Section 3222.1(b) is unconstitutional would not provide Dr. Rodriguez with meaningful relief, since it would simply eliminate one of the avenues for obtaining the information he seeks to publicize. Under the current statute, Dr. Rodriguez is entitled to this information subject to confidentiality restrictions. As such, Sections 3222.1(b)(10) and (11) adopt an approach used by the federal and state government for over 25 years to ensure continued trade secret protection while still protecting public health and appropriate speech in the form of confidentiality agreements. *Compare* 58 Pa.C.S. § 3222.1(b)(10)-(11), *with* Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11043(b)-(c)[1], *and* Worker and Community Right-To-Know Act,

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[1] 42 U.S.C. § 11043(b) states:

35 P.S. § 7311(b)-(c), *and* 29 C.F.R. § 1910.1200(i)(2)-(3) (OSHA regulations). Hence, a confidentiality agreement is a well-established mechanism for affording protection while also allowing necessary speech. *See* 42 U.S.C. § 11043(d); 35 P.S. § 7311(b)-(c), *see also Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 119 (3d Cir. 2010) ("As noted by the District Court, there is a generalized public interest in 'upholding the inviolability of trade secrets and enforceability of

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Medical emergency. An owner or operator of a facility which is subject to the requirements of section 311, 312, or 313 [42 U.S.C. § 11021, 11022, or 11023] shall provide a copy of a material safety data sheet, an inventory form, or a toxic chemical release form, including the specific chemical identity, if known, of a hazardous chemical, extremely hazardous substance, or a toxic chemical, to any treating physician or nurse who requests such information if such physician or nurse determines that –

(1) a medical emergency exists,

(2) the specific chemical identity of the chemical concerned is necessary for or will assist in emergency or first-aid diagnosis or treatment, and

(3) the individual or individuals being diagnosed or treated have been exposed to the chemical concerned.

Immediately following such a request, the owner or operator to whom such request is made shall provide the requested information to the physician or nurse. The authority to withhold the specific chemical identity of a chemical from a material safety data sheet, an inventory form, or a toxic chemical release form under section 322 [42 U.S.C. § 11042] when such information is a trade secret shall not apply to information required to be provided to a treating physician or nurse under this subsection. No written confidentiality agreement or statement of need shall be required as a precondition of such disclosure, but the owner or operator disclosing such information may require a written confidentiality agreement in accordance with subsection (d) and a statement setting forth the items listed in paragraphs (1) through (3) as soon as circumstances permit.

confidentiality agreements."). Without Section 3222.1(b), Dr. Rodriguez and other doctors would have one less avenue to obtain valuable information for medical purposes. A declaration that Section 3222.1(b) is unconstitutional would leave Dr. Rodriguez less able to obtain the information he desires while also still unable to speak about it.

1. The *Robinson* decision is inapplicable.

Dr. Rodriguez attempts to rely on the non-binding decision of the Pennsylvania Supreme Court in *Robinson Twp. v. Com.*, __ A.3d __, 2013 Pa. LEXIS 3068 (Pa. 2013), to argue that he does have standing. Not only is the *Robinson* decision not binding on this Court, but standing in federal court is a different analysis from a state-court standing analysis. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). Federal standing requires an allegation of a present or immediate injury-in-fact, which Dr. Rodriguez does not provide. *See id.* This is primarily because standing in federal court is a jurisdictional question with roots in the U.S. Constitution. Therefore, the *Robinson* decision, which relies on state standing doctrines, does not apply here.

B. Dr. Rodriguez's pre-enforcement declaratory judgment action is not ripe.

Next, Dr. Rodriguez attempts to argue that his pre-enforcement declaratory action is proper because it satisfies the test for ripeness. Pre-enforcement declaratory relief from the Act requires a showing of ripeness, which turns on its

fitness for a judicial decision and the hardship to the parties of withholding court consideration. *See Abbott Lab v. Gardner*, 387 U.S.136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). For declaratory judgments, this test has been refined to consideration of three factors: (1) the adversity of the parties' interests; (2) the conclusiveness of the judgment; and (3) the utility of the judgment. *See, e.g.*, *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990). All three of these factors are absent in the situation at hand.

1. Adversity of interest does not exist between the parties.

First, adversity does not exist between Dr. Rodriguez and Appellees. "For there to be an actual controversy the defendant must be so situated that the parties have adverse legal interests." *Step-Saver Data Sys., Inc.*, 912 F.2d at 648. Because the Act does not require an immediate or significant change in Dr. Rodriguez's conduct of his affairs or subject him to serious penalties for non-compliance, his interests are not adverse to Appellees' interests. Any potential penalties or enforcement actions that Dr. Rodriguez may be subject to as a consequence of the Act would be contingent on multiple conditions that have not and may never occur. If Dr. Rodriguez maintains the status quo, then he is not at risk of incurring civil penalties. Therefore, the parties' interests are not adverse.

2. Judgment in Dr. Rodriguez's favor will not establish conclusiveness.

Next, judgment in Dr. Rodriguez's favor will not establish conclusiveness. Conclusiveness requires a "real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts." *Step-Saver*, 912 F.2d at 647. As stated above, Dr. Rodriguez's Amended Complaint relies entirely on hypothetical facts. Dr. Rodriguez has not asked for chemical information or been asked to sign, or actually signed, any confidentiality agreement in connection with an inquiry.

3. There is no utility to a declaratory judgment ruling.

Finally, Dr. Rodriguez has failed to establish the utility of a declaratory judgment ruling. Utility considers "whether the parties' plans of action are likely to be affected by a declaratory judgment." *Step-Saver*, 912 F.2d at n.9. As stated above, a declaratory judgment in this case would not materially affect Dr. Rodriguez's rights. Were the Sections of the Act declared unconstitutional, Dr. Rodriguez would be left with one less avenue to obtain information with or without a confidentiality agreement. If Dr. Rodriguez maintains the status quo, his rights will continue intact since he has neither requested nor obtained information under the Act. Therefore, a declaratory judgment would not affect Dr. Rodriguez's rights.

VIII. CONCLUSION

For the reasons set forth above, Appellee Acting Secretary of the Pennsylvania Department of Environmental Protection respectfully requests that this Court uphold the ruling of the District Court and find that Dr. Rodriguez lacks standing to pursue this case.

Respectfully submitted,

CONRAD O'BRIEN PC

Dated: December 10, 2014

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COMBINED CERTIFICATIONS

I, Matthew H. Haverstick, hereby certify that:

Bar membership. I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Compliance with FRAP 32. 1. This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains 2,791 words, excluding the parts of the brief excluded by FRAP 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

Virus Check. The electronic copy of this brief was scanned for electronic viruses on December 10, 2014 before transmission to this Court using System Center Endpoint Protection.

Identity Between Electronic Copy and Paper Copies. The electronic copy and paper copies of the foregoing brief are identical.

Service. I have on this date served Appellee's Brief by causing the Brief to be served on Paul A. Rossi, Esquire, Counsel for Plaintiff, by electronic mail.

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