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New York Supreme Court

APPELLATE DIVISION — FOURTH DEPARTMENT

Docket No. CA 21-01301

In the Matter of the Application of

JUN WANG, M.D.,

Petitioner-Appellant,

For a Judgment Pursuant to CPLR Article 78
and CPLR Section 3001

against

LETITIA JAMES, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

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QUESTION PRESENTED

1. Did the trial court err in confirming New York State's ("the State") determination that Petitioner Jun Wang, M.D. was not entitled to the State's representation and indemnification pursuant to Correction Law § 24-a?

   Yes. The trial court erred in confirming the State's determination that Petitioner Jun Wang, M.D. was not entitled to its representation and indemnification pursuant to Correction Law § 24-a.

PRELIMINARY STATEMENT

Plaintiff Omar Alvarez, an incarcerated individual[1] under the custody of the New York State Department of Corrections and Community Supervision ("DOCCS") at the time of the events in question, commenced a medical malpractice action in New York County Supreme Court against Defendants Pang Kooi, M.D., R. Wayne Cotie, M.D., and Cortland Regional Medical Center ("Cortland Regional") on or about March 2, 2015 (R. at 27-38). Plaintiffs Omar Alvarez and his wife Diana Grecequet-Alvarez generally allege that Mr. Alvarez was not timely diagnosed with Hodgkin's lymphoma (*see id.*). During the course of litigation of that action, Cortland Regional commenced a third-party action against Petitioner Jun Wang, M.D., a pathologist who interpreted the specimen at issue that was biopsied by general surgeon R. Wayne Cotie, M.D. on September 10, 2012 at Cortland Regional (R. at 511-528).

On March 4, 2021, Dr. Wang, through his attorneys, timely served upon the State, vis-à-vis New York State Attorney General's Office, a tender of defense letter (dated March 3, 2021) requesting defense and indemnification pursuant to New York Public Officers Law (POL) § 17 and New York Correction Law § 24-a

[1]The term "incarcerated individual" is used throughout the brief based on the current language of Correction Law § 24-a that was amended in August 2021 to refer to imprisoned individuals as "incarcerated individuals" as opposed to "inmates." The change in terms does not affect the central issue on appeal, which is whether the protections under Correction Law § 24-a are afforded to Dr. Wang.

(R. at 633-635). The State denied the request by letter dated March 4, 2021 (R. at 636). In a letter dated March 16, 2021, Dr. Wang asked the State to reconsider its determination (R. at 637-638). On or about March 23, 2021, the State reiterated its previous decision declining Dr. Wang's request for defense and indemnification (R. at 639-640).

On May 28, 2021, Dr. Wang commenced a CPLR Article 78 proceeding in Onondaga County Supreme Court seeking to annul the State's determination that denied defense and indemnification of Dr. Wang pursuant to POL § 17 and Correction Law § 24-a (R. at 14-642 [including exhibits]). On July 27, 2021, the State filed and served its Answer and Return (R. at 643-884 [including exhibits]). By Decision and Order dated and entered August 11, 2021, the trial court (Donald A. Greenwood, J.S.C.) determined that there was no possible factual or legal basis on which the State eventually might be obligated to indemnify Dr. Wang and that the State's determination is entitled to deference (R. at 5-13). Accordingly, the trial court denied the relief sought in Dr. Wang's petition (R. at 13).

Dr. Wang filed his notice of appeal on September 13, 2021 (R. at 2). On September 15, 2021, a Notice of Entry of said Decision and Order was filed and an amended Notice of Appeal was filed on the same day (R. at 3-4).

STATEMENT OF FACTS

At the relevant time, Mr. Alvarez was an incarcerated individual in the custody of DOCCS housed in the Auburn Correctional Facility (hereinafter "Auburn") (*see generally* R. at 40-45). From May 2012 to on or around August 3, 2012, Mr. Alvarez was noted to have developed a mass in the area of his right axilla (i.e., armpit area) and received treatment for it (R. at 42-43, 45). A general surgeon, R. Wayne Cotie, M.D., was consulted (R. at 45). Dr. Cotie, who was affiliated with DOCCS, provided general surgery services to incarcerated individuals at Auburn (R. at 63, 71-75). During a consultation at Auburn on August 3, 2012, Dr. Cotie recommended an excisional biopsy of the right axillary mass (R. at 45).

Pang L. Kooi, M.D., the Facility Health Services Director at Auburn in 2012, had authority to approve Dr. Cotie's recommendation for a biopsy to rule out a malignancy (R. at 209, 224; *see* R. at 44-45). Ultimately, DOCCS thereafter approved the biopsy at some point and it was performed on September 10, 2012 at Cortland Regional (*see* R. at 44-45, 74, 82-83, 109, 408-409). Moreover, Cortland Regional billed DOCCS for the procedure including the pathology services, and DOCCS paid the invoice (R. at 505-510).

Dr. Cotie's surgical plan was to excise the mass if it was a non-lymph node mass, such as a lipoma (R. at 113-114; *see* R. at 480-481). However, during

surgery on September 10, 2012, Dr. Cotie noted that the mass was comprised of lymph nodes and therefore, he removed only a portion of the mass for pathology to review (R. at 113-114, 480-481). Dr. Cotie's differential diagnosis ranged from a non-cancerous to a cancerous tumor, i.e., "…a benign lipoma to lymphadenopathics (*sic).* The size of this mass would raise the question of lymphoma." (R. at 114).

Dr. Cotie sent the excised specimen to the pathology department at Cortland Regional for examination and anticipated a preliminary report within a week (R. at 114-116). Dr. Cotie performed the biopsy to obtain a specimen which could be examined for the presence or absence of a malignancy (R. at 188). Dr. Cotie relied on the pathologist to examine the specimen and identify the histological and hepatological findings, including whether there was any malignancy (R. at 189).

Dr. Wang, who was part of Cortland Pathology, P.C., which had a contract to provided pathology services at Cortland Regional, interpreted the specimen and submitted the specimen to SUNY Upstate for a flow cytometry study (R. at 485-486, 871-884). Based on his examination of the specimen and the results from SUNY Upstate, Dr. Wang concluded that the specimen was "lymph node with reactive lymphoid hyperplasia," i.e., a non-malignant condition (*id.*; *see* R. at 120). Approximately one year later, Mr. Alvarez was diagnosed with Hodgkin's lymphoma (*see* R. at 41).

ARGUMENT

I. THE TRIAL COURT'S DECISION AND ORDER DENYING DR. WANG'S PETITION IN ITS ENTIRETY IS A FINAL JUDGMENT THAT IS APPEALABLE AS OF RIGHT.

As an initial matter, although denominated a decision and order by the trial court, the decision and order is appealable as of right because it constitutes a final judgment under CPLR 7806.

It is well-settled that "[a]n appeal may be taken to the appellate division as of right in an action, originating in the [S]upreme [C]ourt or a [C]ounty [C]ourt . . . from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action" (CPLR 5701 [a] [1]). However, generally, "no appeal lies as of right from a nonfinal order in a CPLR article 78 proceeding" (*Carcone v City of Utica*, 185 AD3d 1476, 1477 [4th Dept 2020] [citations and internal quotation marks omitted]; *see also* CPLR 5701 [b] [1]). "A nonfinal order is one . . . in which a court decides one or more but not all causes of action in the [petition] . . . but leaves other causes of action between the same parties for resolution in further judicial proceedings" (*Carcone*, 185 AD3d at 1477 [citations and internal quotation marks omitted]).

Here, although denominated a "Decision and Order," the trial court's determination in this case is properly a judgment because it disposed of the entire relief sought in Dr. Wang's petition—annulment of the State's determination

denying defense and indemnification to Dr. Wang—and does not indicate that the denial was without prejudice (*see* R. at 13; *see also* CPLR 7806 [noting that "(i)f the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent"]; *Roesch v State*, 187 AD3d 1651, 1651 [4th Dept 2020] [noting that a trial court's sua sponte dismissal of the CPLR article 78 petition is properly a judgment that is appealable as of right]; *see e.g. Harrington v City of Oswego*, 188 AD3d 1683, 1683-1684 [4th Dept 2020] [affirming a judgment (denominated decision and order) in a CPLR article 78 proceeding]; *Fludd v Kirkpatrick*, 93 AD3d 1204, 1204 [4th Dept 2012] [affirming a judgment (denominated decision and order) in a CPLR article 78 proceeding], *lv denied* 19 NY3d 807 [2012]).[2] Indeed, the trial court's denial of the relief sought in Dr. Wang's petition left no issues for resolution with further judicial proceedings. Therefore, the trial court's determination is appealable as of right in this case and the Court should consider the appeal on the merits.

Alternatively, to the extent this Court concludes that the trial court's decision and order is non-final and is not appealable as of right, this Court has the discretion to treat the notice of appeal as an application for permission to appeal

[2]Of note, after the trial court issued the Decision and Order, the trial court declined Dr. Wang's request to reclassify the Decision and Order as a Judgment.

and to grant such permission to appeal (*see e.g. Carcone*, 185 AD3d at 1477; *Custom Topsoil Inc. v City of Buffalo*, 63 AD3d 1511, 1511 [4th Dept 2009]; *Ball v City of Syracuse*, 60 AD3d 1312, 1313 [4th Dept 2009], *rearg denied* 63 AD3d 1671 [4th Dept 2009], *lv dismissed* 13 NY3d 823 [2009]; *cf. Cor Van Rensselaer Street Co. III, Inc. v New York State Urban Dev. Corp.*, 197 AD3d 976, 977 [4th Dept 2021] [the Court declined to exercise its discretion to consider the notice of appeal to be an application for permission to appeal from the trial court's order, which dismissed certain parts of the article 78 petition without prejudice and directed the respondent to submit the petitioner's application to the board of directors for a determination]; *Matter of Green v Monroe County Child Support Enforcement Unit*, 111 AD3d 1446, 1447 [4th Dept 2013] [declining to treat the notices of appeal as applications for permission to appeal under the circumstances of the case]).

Here, the trial court's decision and order denied Dr. Wang's petition in its entirety, did not indicate that the denial was without prejudice, and did not direct Dr. Wang's application for defense and indemnification to be submitted to any other government board or agency for a determination. Moreover, the decision and order concerns an issue of first impression as to whether Correction Law § 24-a applies to licensed physicians whose services are a necessary part of the medical services provided to incarcerated individuals by a physician either employed by, or

who has a contract or is affiliated with, DOCCS. Therefore, if necessary, Dr. Wang respectfully requests that this Court consider his notice of appeal to be an application for permission to appeal and grant such permission to appeal.

II. DR. WANG IS ENTITLED TO DEFENSE AND INDEMNIFICATION BY THE STATE UNDER CORRECTION LAW § 24-a BECAUSE A CONTRACTUAL RELATIONSHIP IS NOT A PREREQUISITE TO OBTAIN SUCH PROTECTIONS BASED ON THE PLAIN LANGUAGE OF THE STATUTE.

For Dr. Wang to obtain defense and indemnification from the State under the provisions of Correction Law § 24-a, he does not need to have a contract with DOCCS. Rather, the only requirement is that Dr. Wang must have provided health care and medical treatment to an incarcerated individual at the request of DOCCS (or one of its facilities). Dr. Wang met that requirement here in providing pathology services for a DOCCS-approved biopsy of Mr. Alvarez performed by R. Wayne Cotie, M.D. on September 10, 2012. Therefore, Dr. Wang is entitled to the protections of Correction Law § 24-a.

Generally, "[j]udicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis" (*Matter of Walker v State Univ. of N.Y.*, 19 AD3d 1058, 1059 [4th Dept 2005] [citations and internal quotation marks omitted], *lv denied* 5 NY3d 713 [2005]; *see generally* CPLR 7803 [3]). Thus, in a CPLR Article 78 special proceeding, a court may annul a government body's determination—including a

New York State Attorney General's determination—if it finds such determination to be arbitrary and capricious or there was an error of law (*see generally CRP/Extell Parcel I, L.P. v Cuomo*, 101 AD3d 473, 473 [1st Dept 2012]; *Madison Park Owner LLC v Schneiderman*, 93 AD3d 555, 556 [1st Dept 2012]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043 [2013] [citations and internal quotation marks omitted]). More specifically, if the agency's determination "has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*id.*; *see also Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

Moreover, when statutory language is clear and unambiguous, the statute must be given literal effect (*see Anonymous v Molik*, 32 NY3d 30, 37 [2018], *citing Patrolmen's Benevolent Assn. of City of NY v City of New York*, 41 NY2d 205, 208 [1976]). As applicable to this proceeding, Public Officers Law ("POL") § 17 (2) (a) requires the State, in pertinent part, to provide a defense of an "employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties. . ." POL § 17 (3) (a) further indicates that the State shall indemnify the employee or pay any judgment or settlement related to an act or omission arising out of the

employee's public employment or duties (except for intentional wrongdoing). Correction Law § 24-a extends the statutory benefits of POL § 17 "to *any person*" licensed to practice medicine (*see* Article 131 of the New York State Education Law) who provides health care and treatment or professional consultation to incarcerated individuals of state correctional facilities "*at the request of the department* [of Corrections and Community Supervision] or *a facility of the department* [of Corrections and Community Supervision]" (emphasis added).

As an initial matter, Dr. Wang does not claim that he was a State employee at the time he provided pathology services for Mr. Alvarez in September 2012 or that he qualifies under POL § 17 itself for defense and indemnification. Additionally, Dr. Wang does not claim that he had a contract with DOCCS at the time of the events at issue. Rather, Dr. Wang's claim is simply that he is entitled to defense and indemnification from the State under Correction Law § 24-a because he provided pathology services to interpret a DOCCS-approved biopsy taken by surgeon R. Wayne Cotie, M.D. who treated incarcerated indivdiuals at Auburn.

A. The plain language of Correction Law § 24-a demonstrates that Dr. Wang is entitled to defense and indemnification from the State.

Unlike POL § 17, which requires an employment relationship with the State for an individual to be afforded a defense and indemnification by the State, the

plain language of Correction Law § 24-a does not require a pre-arranged employment, or even contractual, relationship between DOCCS and the physician seeking defense and indemnification from the State. As relevant to the facts of this case, there is no limiting language in Correction Law § 24-a, other than the requirement that the person be licensed to practice medicine (among other professions), that the beneficiary of the professional care be an incarcerated individual, and that the professional services were rendered at the request of DOCCS itself or a DOCCS facility.

Moreover, contrary to the conclusions of the trial court, the plain language of Correction Law § 24-a does not limit or define the nature of the relationship between DOCCS and the licensed professional. Indeed, if the Legislature wanted Correction Law § 24-a to apply only to employees or independent contractors of the State (or more specifically, DOCCS), it could have stated as much, similar to the express limits imposed by POL § 17 (1) (a) in defining who constitutes an employee of the State. Additionally, Correction Law § 24-a does not require prior knowledge by the licensed professional regarding the patient's status as an inmate.

Thus, the State's interpretation that Correction Law § 24-a "requires some employment arrangement or other advance contractual or formal understanding between the provider and DOCCS" (R. at 639), lacks a sound basis in reason and is without regard to the facts. Indeed, if a physician had a contract with an

indemnification and defense clause, which is at least not unheard of with the State based on the summary of Dr. Cotie's contract with DOCCS provided by the State (*see* R. at 658-660), there would be no need for Correction Law § 24-a because indemnification would be provided pursuant to the contract itself outside of any statutory obligation to provide a defense. As such, the State's argument that a contractual relationship between the licensed physician and the State is necessary for the benefits of Correction Law § 24-a to apply, is arbitrary and capricious and the State's determination must be annulled.

Considering the facts of the instant matter and based on the foregoing discussion of the plain language of Correction Law § 24-a, Dr. Wang is entitled to defense and indemnification from the State. It is undisputed that Dr. Cotie's differential diagnosis, prior to surgery, included a malignant tumor and it is undisputed that he anticipated that the tissue specimen he removed would be examined by a pathologist to determine if it was malignant or non-malignant (*see* R. at 114-116, 188). It is undisputed that Dr. Cotie recommended the biopsy and that the request for the biopsy was submitted to DOCCS for approval (*see* R. at 45, 74, 82-83, 109). It is undisputed that DOCCS approved the recommendation at some point and Dr. Cotie performed the biopsy on September 10, 2012 at Cortland Regional (*see* R. at 44, 109, 222-224, 480-481). It is undisputed that Dr. Wang examined the surgical specimen removed by Dr. Cotie and rendered a medical

opinion regarding the pathology of the specimen in order to complete the excisional biopsy performed at the request, and based on the approval, of DOCCS (R. at 485-486). Finally, it is undisputed that DOCCS paid Cortland Regional for the pathology services performed on September 10, 2012 (R. at 506-507).

Furthermore, an excisional biopsy necessarily involves two separate steps: (1) excision of a specimen of a questionable lesion by a surgeon; and (2) examination of the specimen by a pathologist to determine the pathologic nature of the specimen (e.g., malignant versus non-malignant) (*see* R. at 188-189). DOCCS approved the surgical biopsy recommended by Dr. Cotie, who planned on obtaining tissue for examination under a microscope by a pathologist. Indeed, regardless of any inability of a surgeon or DOCCS to select a specific pathologist to review a specimen, it cannot seriously be disputed that the surgeon and the pathologist are inextricably intertwined. The work of the surgeon cannot be completed, i.e., the surgeon's work is worthless, without the pathological interpretation. Thus, the excision and the pathology review cannot be severed into distinct parts but are indivisible. As such, the fact that DOCCS approved the biopsy must be read as an approval of the pathology review which necessarily followed.

Therefore, based on the foregoing, Dr. Wang has met the requirements of Correction Law § 24-a, i.e., that he is a licensed physician who provided medical

services and treatment to an inmate at the request and approval of DOCCS. Any other interpretation is logically flawed and arbitrary and capricious.

B. The State's determination denying a defense and indemnification for Dr. Wang is not entitled to deference.

The State's determination denying Dr. Wang a defense and indemnification is not entitled to deference because this involves a matter of interpreting the plain language of Correction Law § 24-a and because the 1980 Attorney General's Opinion finding that the protections of Correction Law § 24-a extend to medical providers who are under contract with DOCCS is not dispositive of whether Dr. Wang qualifies for such protections.

Courts generally do not defer to administrative agencies in matters of "pure statutory interpretation" unless the question is one involving "specific application of a broad statutory term" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [citations and internal quotation marks omitted]). Put differently, where the interpretation of a statute does not require the expertise of the relevant government body or agency, the government body's or agency's interpretation is not entitled to deference (*see Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 18 NY3d 289, 296 [2011]; *Matter of Batti v Town of Austerlitz*, 71 AD3d 1260, 1262 [3d Dept 2010]). Moreover, an attorney general's opinion is "an element to be considered but is not binding on the courts" (*American Tel. & Tel. Co. v State Tax Com'n*, 61 NY2d 393, 404 [1984]).

This is a matter of pure statutory interpretation and is not about the specific application of a broad statutory term, such as what constitutes an employee or independent contractor, as in the *O'Brien* case (*see* 7 NY3d at 242-243; *cf. Kaufman v Spitzer*, 2007 NY Slip Op 31095[U] [Sup Ct, Suffolk County 2007] [noting that it was for the Attorney General in the first instance to determine whether the petitioner was acting within the scope of his employment and therefore was entitled to the State's representation]). Thus, the Court does not need to look to the State for its guidance and expertise in interpreting Correction Law § 24-a and the State's determination in this matter is not entitled to deference (*see generally O'Brien*, 7 NY3d at 242). As indicated in Point II.A above, the plain language could not be clearer—Correction Law § 24-a does not require an employment or independent contractor relationship with the State and the biopsy at issue in this case was performed by Dr. Cotie at the request and/or approval of DOCCS.

Furthermore, even considering the Attorney General's 1980 Opinion, including the scant legislative history of Correction Law § 24-a cited therein (a letter from the New York State Department of Health to the Governor's Counsel) noting that the benefits of POL § 17 are extended to "non-employee health professionals of both the Department of Correction and Department of Mental Hygiene who render professional care at the request of those agencies," the opinion

is nevertheless confined to the specific nature of the question presented to the Attorney General, i.e., “whether health care providers who render professional services to the Department of Correctional Services *under contract* are entitled to representation and indemnification . . .” (1980 NY Op Atty Gen 40 [emphasis added] [citations and internal quotation marks omitted]).

Because the inquiry was limited to the professionals under contract with DOCCS, the response was tailored to that inquiry—that the protections of Correction Law § 24-a (i.e., defense and indemnification) are applicable to independent contractors of DOCCS (*see id.*). The Attorney General’s opinion and the aforementioned legislative history do not state unequivocally one way or the other whether the protections of Correction Law § 24-a are limited *only* to independent contractors of DOCCS or whether such protections may also be afforded to private licensed physicians who are not employees of the State or independent contractors of DOCCS, but provide medical services necessary for a DOCCS-employed or affiliated physician to diagnose and treat incarcerated individuals (e.g., pathology and radiology).

Thus, even if the Court were to consider the Attorney General’s 1980 Opinion, it is evident that the purpose of Correction Law § 24-a is to protect physicians (among other licensed professionals) who are not employees of the State but are nonetheless rendering health care and treatment to incarcerated

individuals and have concerns about possible liability arising out of the services performed with respect to those individuals (*see id.*). Accordingly, Dr. Wang should be afforded a defense pursuant to Correction Law § 24-a and the State's determination to the contrary is arbitrary and capricious.

Finally, the State's argument to the trial court that this application of Correction Law § 24-a would open the floodgates for the State's defense and indemnification to be provided to any medical provider who treated an incarcerated individual in any capacity, is misplaced. That would not be the case. Rather, Dr. Wang's position regarding the application of Correction Law § 24-a is limited to those medical providers whose medical services are necessary for the DOCCS-employed, contracted, or affiliated physician to complete his or her diagnosis and/or treatment of an incarcerated individual, such as pathology and radiology.

Therefore, Correction Law § 24-a applies to Dr. Wang and mandates that the State defend and indemnify Dr. Wang pursuant to Correction Law § 24-a in the Supreme Court action arising out of the care Mr. Alvarez received at Cortland Regional on or around September 10, 2012. The State's decision to the contrary was therefore arbitrary and capricious and without regard to the particular facts of this case.

CONCLUSION

In light of the foregoing, this Court should reverse the trial court's decision denying Dr. Wang's petition, annul the New York State Attorney General's determination, and find that Dr. Wang is entitled to defense and indemnification from New York State in the Supreme Court medical malpractice action.

Dated: November 12, 2021
Syracuse, New York

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR 1250.8(j), the Brief of Petitioner-Appellant Jun Wang, M.D. was prepared on a computer using Microsoft Word.

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Dated: November 12, 2021

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