

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0272

RICK MILLER,

Petitioner and Appellant,

v.

MONTANA BOARD OF DENTISTRY and
DEPARTMENT OF LABOR AND INDUSTRY,

Respondent and Appellee.

**DEPARTMENT OF LABOR & INDUSTRY AND MONTANA BOARD OF
DENTISTRY ANSWER BRIEF**

On Appeal from the Montana Eleventh Judicial District Court, Flathead County
The Honorable Heidi J. Ulbricht Presiding

APPEARANCES

Quinlan L. O'Connor
Graden Marcelle
1315 Lockey Avenue
P.O. Box 1728
Helena, MT 59624
Phone: 406-444-1689
E-mail: laborlegal@mt.gov

Rick Miller
924 SE 6th Ave
Aberdeen, SD 57401
Phone: 406-210-7834
E-mail: rickyreline@att.net

Table of Contents

I.	Table of Contents.....	2
II.	Statement of Issues	5
III.	Statement of the Case	5
IV.	Statement of Facts.....	5
V.	Standard of Review.....	6
VI.	Summary of the Argument	7
VII.	Argument	9
	A. Miller does not have a license to practice denturistry and must be enjoined from further violation of the law	9
	B. Miller may no longer challenge denial of his license	10
	1. Miller’s license dispute is not justiciable because he failed to exhaust administrative remedies	10
	2. License denial is not subject to a writ of mandate	11
	C. Miller’s briefing provides no basis to reverse the decision below.....	13
	1. The Unfair Trade Practices Act does not provide a private cause of action	14
	2. Complaints about a lack of contested case are without merit because Miller failed to utilize available remedies	15
VIII.	Conclusion	15
	Certificate of Compliance	16

Table of Authorities

<i>Best v. Police Dep’t of Billings,</i> 2000 MT 97, 299 Mont. 247, 999 P.2d 334.....	13
<i>Boehm v. Park County,</i> 2018 MT 165, 392 Mont. 72, 421 P.3d 789.....	13
<i>Boehm v. Park Cty.,</i> 2018 MT 165, 392 Mont. 72, 421 P.3d 789.....	12
<i>City of Deer Lodge ex rel. City of Deer Lodge Ords. 130 & 136 v. Chilcott,</i> 2012 MT 165, 365 Mont. 497, 285 P.3d 418.....	13
<i>Hilands Golf Club v. Ashmore,</i> 277 Mont. 324, 922 P.2d 469 (1996).....	12
<i>Jefferson Co. v. Dept. of Env’tl. Quality,</i> 2011 MT 265, 362 Mont. 311, 264 P.3d 715.....	8
<i>Mont. Vending, Inc. v. Coca-Cola Bottling Co.,</i> 2003 MT 282, 318 Mont. 1, 78 P.3d 499.....	15
<i>North Start Dev., LLC v. PSC,</i> 2022 MT 103, 408 Mont. 498, 510 P.3d 1232.....	8, 12
<i>Pilgeram v. GreenPoint Mortg. Funding, Inc.,</i> 2013 MT 354, 373 Mont. 1, 313 P.3d 839.....	8
<i>Shoemaker v. Denke,</i> 2004 MT 11, 319 Mont. 238, 84 P.3d 4.....	12
<i>State ex rel. Popham v. Hamilton City Council,</i> 185 Mont. 26, 604 P.2d 312 (1979).....	13
<i>Wiser v. State,</i> 2006 MT 20, 331 Mont. 28, 129 P.3d 133.....	9, 15

Other Authorities

Montana Code Annotated

§ 2-4-702.....	8, 12
§ 27-26-102.....	13
§ 37-1-131.....	8
§ 37-1-137(2).....	11
§ 37-1-317.....	10, 16
§ 37-1-317(2)(a)	10
§ 37-29-102(6).....	11
§ 37-29-301.....	10
§ 37-29-303 (1993).....	14
§ 37-29-303(1).....	13
§ 37-29-411.....	10, 16

Initiative 97

§ 11.....	13
-----------	----

Montana Rule of Civil Procedure

Rule 56.....	7
--------------	---

I. Statement of Issues

1. Whether Miller's unlicensed practice of denturistry must be enjoined.
2. Whether the court may issue a writ of mandate ordering the Board of Dentistry to grant Miller a license, even though he lacks qualifications required by Montana licensing statutes for denturists.

II. Statement of the Case

Montana law requires a license from the Board of Dentistry to practice denturistry. Miller sued the Department of Labor & Industry (DLI) claiming it had improperly withheld licensure from him on behalf of the Board. The Board repeatedly denied Miller's many applications for a license because he lacks qualifications required by statute to receive one.

The Board and DLI moved for summary judgment on all issues. The Court determined Miller's complaint and mandamus action lacked merit and dismissed all claims. Further, the Court granted DLI's counterclaim and enjoined Miller from continuing denturistry practice. (D.C. Doc. 43.) Judgment was entered effectuating this Order. (D.C. Doc. 46.) Miller appealed.

III. Statement of Facts

Miller is not now, and has never been, licensed to practice denturistry in Montana or any other state. Miller has many times in multiple jurisdictions applied for, and been denied, licensure. (D.C. Doc. 47, Ex. B.) By his own

admission, he does not meet any of the minimum statutory requirements for Montana licensure, or states with similar requirements to which he has applied. (D.C. Doc. 47, Ex. B.)

Miller does not meet the educational and training requirements for licensure. (D.C. Doc. 47, Ex. B.) He has taken, and failed, the Board's licensing exam. (D.C. Doc. 47, Ex. B.) He does not hold a license, but nonetheless publicly promoted himself as a denturist, advertised his denturistry services business, and practiced denturistry. (D.C. Doc. 47, Ex. C.)

In 2012, the Board denied Miller's most recent denturistry license application for lack of qualifications. (D.C. Doc. 47, Ex. B.) Miller did not appeal. (D.C. Doc. 47, Ex. B.) He continued to advertise and sell denturistry services. (D.C. Doc. 47, Ex. C.) Unwitting customers of Miller's denture services complained to the Board of injuries and expenses suffered as a result of hiring Miller to construct and fit poorly made and ill-fitting dentures. (D.C. Doc. 47, Ex. C.)

In response to the Board's notice to Miller about consumer complaints and injuries, Miller sued the Department demanding a license. (D.C. Doc. 1.)

IV. Standard of Review

The Supreme Court reviews de novo a district court's grant or denial of summary judgment, applying the same criteria of *Mont. R. Civ. P. 56* as a district court. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9,

373 Mont. 1, 313 P.3d 839 (citation omitted). The Court reviews a district court's conclusions of law to determine whether they are correct and its findings of fact to determine whether they are clearly erroneous. *Pilgeram*, ¶ 9 (citation omitted).

Whether a party failed to exhaust administrative remedies as required by Mont. Code Ann. § 2-4-702 is a mixed question of fact and law reviewed for correctness. *North Start Dev., LLC v. PSC*, 2022 MT 103, ¶ 11, 408 Mont. 498, 510 P.3d 1232. The issuance of a writ of mandamus is a legal conclusion this Court reviews de novo. *Jefferson Co. v. Dept. of Env'tl. Quality*, 2011 MT 265, ¶ 16, 362 Mont. 311, 264 P.3d 715 (citation omitted). The writ is available only when the applicant is entitled to the performance of a clear legal duty by the entity against which the writ is sought, and no speedy and adequate remedy is available in the ordinary course of law. *Jefferson Co.*, ¶ 16 (citation omitted).

V. Summary of the Argument

Montana's professional and occupational licensing boards exist to establish and enforce standards of professional practice which protect Montana consumers of professional services' safety and health. Mont. Code Ann. § 37-1-131.

Licensees, and people who provide regulated professional services, must meet and maintain education, training, and experience qualifications and hold a license.

Healthcare services carry heightened health safety risks for Montana consumers and cause expensive irreversible harms when improperly performed. Regulating

public safety requires health care boards to verify professional license holders meet minimum professional standards for practice by ensuring that people selling professional services to consumers are competent to safely treat patients.

Montana regulates and requires a license to practice dentistry to protect Montana consumers from unsafe and expensive substandard dental services. *Wiser v. State*, 2006 MT 20, ¶ 18, 331 Mont. 28, 129 P.3d 133. Montana law prohibits any person from holding themselves out as a dentist, and selling dentistry services, without first undertaking industry standard education and training to obtain a license.

The Board's statutory mandates require it to investigate and prohibit through injunctive action harmful practice of dentistry by unlicensed people. Mandamus is not a proper legal remedy for denial of a professional license. The Board is authorized to seek and obtain injunctive orders in state district court to prevent risk to consumer citizens physically injured and financially harmed when unqualified people engage in patient care for which they are not trained and do not hold licensure. Miller years ago waived his appeal rights available under the Montana Administrative Procedures Act (MAPA). His failure to exhaust administrative remedies precludes justiciability of his complaint to the District Court.

Without dispute, Miller does not meet the educational and training requirements for licensure. He does not hold a license, but nonetheless publicly

promoted himself as a denturist and practiced denturistry. The District Court's Order enjoining Miller from further violations of the law must be affirmed to protect future patients from harm and expense.

VI. Argument

A. Miller does not have a license to practice denturistry and must be enjoined from further violation of the law

Montana Code Annotated § 37-1-317 requires DLI to investigate persons allegedly practicing a licensed profession without a license. "Unless otherwise provided by statute, a board may file an action to enjoin a person from practicing, without a license, a profession or occupation for which a license is required by this title." Mont. Code Ann. § 37-1-317(2)(a). Specifically regarding denturistry,

[w]hen it appears to the board that any person, firm, or corporation is violating any of the provisions of this chapter, the board may in its own name bring an action in a court of competent jurisdiction for an injunction against such violation, and the court may enjoin the person.
...

Mont. Code Ann. § 37-29-411.

Montana Code Annotated § 37-29-301 requires a person to hold a denturistry license in order to engage or offer to engage in the practice of denturistry. The practice of denturistry means:

(a) the making, fitting, constructing, altering, reproducing, or repairing of a denture and furnishing or supplying of a denture directly to a person or advising the use of a denture; or

(b) the taking or making or the giving of advice, assistance, or facilities respecting the taking or making of any impression, bit, cast, or design preparatory to or for the purpose of making, constructing, fitting, furnishing, supplying, altering, repairing, or reproducing a denture.

Mont. Code Ann. § 37-29-102(6).

Without dispute, Miller is not licensed to practice dentistry. Without dispute, Miller engaged in the practice of dentistry anyway. (D.C. Doc. 47, Exs. B and C.) Because Miller was engaged in unlicensed practice, the Board is entitled to injunctive relief.

Miller has set forth no argument to this Court that the decision below to enjoin him from the practice of dentistry is incorrect. (D.C. Order at 11.) It should be affirmed.

B. Miller may no longer challenge denial of his license

Miller failed to contest denial of his license through the administrative process. (D.C. Doc. 47, Ex. B.) The contest is not justiciable because Miller failed to exhaust the legal remedies afforded under MAPA. For that and due to lack of qualification, a writ of mandate may not issue.

1. Miller's license dispute is not justiciable because he failed to exhaust administrative remedies

A person whose license application is denied may contest the denial in a contested case hearing. Mont. Code Ann. § 37-1-137(2). The contested case hearing is governed by MAPA. Mont. Code Ann. § 37-1-137(2). After a person

has exhausted all administrative remedies within an agency, final agency decisions under MAPA are subject to judicial review by the courts. Mont. Code Ann. § 2-4-702.

Exhaustion of administrative remedies is “a prerequisite to judicial review.” *Hilands Golf Club v. Ashmore*, 277 Mont. 324, 331, 922 P.2d 469 (1996). It is a “well-settled principle” that judicial relief is not available until administrative remedies are exhausted. *Shoemaker v. Denke*, 2004 MT 11, ¶ 18, 319 Mont. 238, 84 P.3d 4. As recently clarified by this Court,

[T]he correct jurisdictional basis for dismissal of a petition for judicial review due to failure to exhaust administrative remedies is lack of procedural justiciability rather than lack of jurisdiction.

North Start Dev., ¶ 23. In short, where a party has failed to avail themselves of administrative remedies, they may not seek redress in the courts.

Miller last applied for a license to practice dentistry in 2012. (D.C. Doc. 47, Ex. B.) He did not proceed to a contested case, though the opportunity was available to him. Denial of his license is no longer justiciable.

2. License denial is not subject to a writ of mandate

A writ of mandamus directing the Board to issue Miller a denturist license would be inappropriate legally and due to Miller’s lack of qualification. *See Boehm v. Park Cty.*, 2018 MT 165, ¶ 11, 392 Mont. 72, 421 P.3d 789 (quoting *State ex rel. Popham v. Hamilton City Council*, 185 Mont. 26, 29, 604 P.2d 312,

314 (1979)). “A writ of mandamus ‘is an extraordinary remedy’ to be granted only in ‘rare cases.’” *City of Deer Lodge ex rel. City of Deer Lodge Ords. 130 & 136 v. Chilcott*, 2012 MT 165, ¶ 14, 365 Mont. 497, 285 P.3d 418 (internal citations omitted). A court may only issue the writ “where the applicant demonstrates “(1) [he] is entitled to performance of a clear legal duty by the party against whom the writ is sought and (2) there is no speedy and adequate remedy in the ordinary course of law.” *Boehm v. Park County*, 2018 MT 165, ¶ 9, 392 Mont. 72, 421 P.3d 789 (quoting *Best v. Police Dep’t of Billings*, 2000 MT 97, ¶ 14, 299 Mont. 247, 999 P.2d 334); Mont. Code Ann. § 27-26-102. A writ of mandamus “is not available ‘to cause the respondent to undo action already taken, or to correct or revise such action, however erroneous it may have been.’” *Boehm*, ¶ 11 (quoting *State ex rel. Popham v. Hamilton City Council*, 185 Mont. 26, 29, 604 P.2d 312, 314 (1979)).

A person applying for a denturist license in Montana is required to “score[] a passing grade on the examination for licensure” and “complete[] formal training of not less than 2 years at an educational institution accredited by a national or regional accrediting agency recognized by the Montana state board of regents. . . .” Mont. Code Ann. § 37-29-303(1). Until 1995, an applicant could obtain a Montana license if the applicant was licensed in a state or territory with which the Board had a reciprocal licensing relationship. Initiative 97, § 11; *see also* Mont.

Code Ann. § 37-29-303 (1993). In 1995, the Montana Legislature removed the reciprocal licensing provision.

As to the first step of the test, clear legal duty to issue a license, Miller does not meet these licensing requirements. He has not documented completion of educational requirements. (D.C. Doc. 47, Ex. B). He failed his written exam. (D.C. Doc. 47, Ex. B). The Board is barred from issuing a license to someone who does not meet statutory requirements for licensure. Certainly, then, the Board has no “clear legal duty” to issue Miller a license.

As to the second step of the test, lack of speedy and adequate remedy, Miller also fails. As set forth above, Miller was provided an opportunity to contest the denial of licensure. He failed to do so from the date of initial denial in the 1980s to the present.

Writ of mandate is inappropriate in the circumstance of available alternative remedies and a statutory bar due to lack of qualification for licensure.

C. Miller’s briefing provides no basis to reverse the decision below

The issues above are sufficient to sustain the Order below. Miller’s briefing sets forth no basis to justify reversal. Nonetheless, in an effort to clarify the principal issues he appears to present, DLI notes that the Unfair Trade Practices Act provides no remedy to Miller, and Miller may not complain about lack of remedies he chose not to avail himself of.

1. *The Unfair Trade Practices Act does not provide a private cause of action*

Miller reasserts his claim under the Montana Unfair Trade Practices Act (MUTPA). As succinctly set forth below, MUTPA “does not set forth any actionable legal claims that could entitle him to the relief sought. . . .” (D.C. Order at 8.)

“[T]he plain and ordinary interpretation of this language is that MUTPA was created to apply to businesses, not government.” *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 34, 318 Mont. 1, 78 P.3d 499 (emphasis in original). In *Montana Vending*, this Court found MUTPA could not apply to school districts because they were not “persons” under the Act; to hold otherwise would be “a strained interpretation of the Act. . . .” *Mont. Vending, Inc.*, ¶ 37. That holding was expressly extended to the Board of Dentistry in *Wiser*. The Court held:

Furthermore, as a matter of common sense, it is clear that the Legislature, in designing the regulatory structure for denturists and dentists, did not envision the BOD’s regulatory function could somehow constitute the unlawful restraint of trade. Thus, we hold that the BOD, like school districts, is not subject to MUTPA.

Wiser v. State, 2006 MT 20, ¶ 33, 331 Mont. 28, 129 P.3d 133.

Miller sets forth no basis for the Court to reconsider its prior holdings. At best, he makes conclusory, self-serving, spurious factual accusations against the Board. None trigger reevaluation of law.

Because MUTPA does not apply to the Board of Dentistry, the claim was properly dismissed as a matter of law.

2. *Complaints about a lack of contested case are without merit because Miller failed to utilize available remedies*

Miller sets forth a series of citations in an apparent attempt to argue that the district court could not enjoin his unlicensed practice of dentistry without a contested case hearing. (Appellant's Br. at 3-7.) As set forth above, the statutes applicable to unlicensed practice expressly provide authority to proceed to the district court. *See* Mont. Code Ann. §§ 37-1-317, 37-29-411. Provisions for contested case proceedings, including those cited by Miller, apply to disciplinary proceedings against a licensee of a board and applicants for licensure. Because Miller has never been licensed, they are inapplicable; because Miller failed to request a contested case proceeding as to his license denial, they are further inapplicable.

VII. Conclusion

Miller has failed to set forth any basis for this Court to reverse the judgment below. Miller practiced dentistry without a license. Though Miller long ago applied for licensure, he does not meet minimum qualifications for licensure, and failed to contest license denial. The judgment below should be affirmed: Miller

should continue to be enjoined from the practice of denturistry without a license and this suit should be found an improper means to challenge license denial.

Respectfully submitted this 19th day of August, 2022.

/s/ Quinlan L. O'Connor
Quinlan L. O'Connor

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(3)(e) of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,584 words, excluding the certificate of compliance.

/s/ Quinlan L. O'Connor
Quinlan L. O'Connor

CERTIFICATE OF SERVICE

I, Quinlan L. O'Connor, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-19-2022:

Graden Marcelle (Govt Attorney)
1315 Lockey Avenue
PO Box 1728
Helena MT 59624-1728
Representing: Labor and Industry, Montana Department of
Service Method: eService

Rick Miller (Appellant)
924 6th Avenue SE
Aberdeen SD 57401
Service Method: Conventional

Electronically signed by John Klein on behalf of Quinlan L. O'Connor
Dated: 09-19-2022