United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 554

§ 554. Adjudications

Currentness

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of--

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for--

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply--

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 384; Pub.L. 95-251, § 2(a)(1), Mar. 27, 1978, 92 Stat. 183.)

Notes of Decisions (164)

Footnotes

1 So in original.

5 U.S.C.A. § 554, 5 USCA § 554
Current through P.L. 115-223. Title 26 current through 115-227.

150 So.3d 1085
Court of Civil Appeals of Alabama.

ALABAMA BOARD OF **EXAMINERS** IN **PSYCHOLOGY**

v.

C. Fletcher **HAMILTON**, PhD.

2120032.
|
Sept. 27, 2013.
|
Certiorari Quashed March 7, 2014
Alabama Supreme Court 1130014.

Synopsis

Background: Psychologist sought review of decision of the Board of **Examiners** in **Psychology**, sanctioning psychologist for entering into a sexual relationship with a patient. The Circuit Court, Montgomery County, No. CV–11–1183, William A. Shashy, J., reversed and remanded. Board appealed.

Holdings: The Court of Civil Appeals, Donaldson, J., held that:

[1] psychologist preserved claim of laches by raising it in administrative proceedings;

[2] psychologist failed to show prejudice necessary to establish claim of laches;

[3] issue of patient's credibility was for the administrative law judge (ALJ); and

[4] agency's rejection of the applicability of the common-law rule of repose did not support reversal.

Reversed and judgment rendered.

Pittman, J., concurred in part and concurred in the result, with writing, which Thomas, J., joined.

Moore, J., concurred in the result.

[1] **Administrative Law and Procedure**
Scope of Review in General

Judicial review of an agency's administrative decision is limited to determining whether the decision is supported by substantial evidence, whether the agency's actions were reasonable, and whether its actions were within its statutory and constitutional powers.

1 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Presumptions

Judicial review of an agency's administrative decision is limited by the presumption of correctness which attaches to a decision by an administrative agency.

Cases that cite this headnote

[3] **Health**
Review

Psychologist challenging sanction for entering into a sexual relationship with a patient adequately raised claim of laches in the administrative proceedings and thus was permitted to assert the defense in the trial court upon judicial review; although psychologist did not mention either the doctrine of laches or the rule of repose, the Board was apprised of psychologist's essential reliance upon laches as a defense before the administrative hearing was conducted, at no time did psychologist abandon that defense, and Board's response to psychologist's motion for a summary judgment filed in the administrative proceeding briefed the issue of laches extensively. Code 1975, § 41–22–20(k)(1–7).

Cases that cite this headnote

West Headnotes (23)

[4] **Equity**
Application of doctrine in general

The party asserting laches bears the burden of proving that the delay was unreasonable and that prejudice resulted from the delay.

Cases that cite this headnote

[5] **Equity**
Prejudice from Delay in General
Equity
Loss of evidence

Classic elements of undue prejudice, for purposes of determining the applicability of the doctrine of laches, include the unavailability of witnesses, changed personnel, and the loss of pertinent records.

1 Cases that cite this headnote

[6] **Equity**
Prejudice from Delay in General

For the equitable doctrine of laches to bar an action, the evidence must show that a delay has caused such prejudice or disadvantage to a party that permitting the proceedings to continue would be fundamentally unfair.

1 Cases that cite this headnote

[7] **Health**
Disciplinary Proceedings

Psychologist failed to establish that he was prejudiced by delay in patient's reporting of allegations against him, and thus failed to establish that laches barred the Board of **Examiners** in **Psychology** from pursuing sanctions against him for entering into a sexual relationship with a patient 30 years earlier, notwithstanding claim that psychologist's treatment records from the relevant time period had been destroyed in the regular course of business; voluminous documentation memorialized the interaction between psychologist and patient during the period in question. Code 1975, §§ 34–26–3, 34–26–46.

Cases that cite this headnote

[8] **Equity**
Application of doctrine in general

A showing that records have been destroyed, alone, is not sufficient to support application of laches to bar an action; the party asserting laches must also prove to the trier of fact that the lack of the pertinent records renders the administration of justice difficult, if not impossible.

Cases that cite this headnote

[9] **Health**
Evidence

Issue of patient's credibility was for the administrative law judge (ALJ) in proceedings brought by the Board of **Examiners** in **Psychology** to sanction psychologist for entering into a sexual relationship with a patient 30 years earlier. Code 1975, §§ 34–26–3, 34–26–46.

Cases that cite this headnote

[10] **Limitation of Actions**
Operation as to rights or remedies in general

The common-law "rule of repose," which is an affirmative defense, bars actions that have not

been commenced within 20 years from the time they could have been commenced.

Cases that cite this headnote

[11] **Limitation of Actions**
Disabilities in General
Limitation of Actions
Operation as to rights or remedies in general

The rule of repose is not affected by the circumstances of the situation, by personal disabilities, or by whether prejudice has resulted or evidence has been obscured.

Cases that cite this headnote

[12] **Limitation of Actions**
In general; what constitutes discovery

Lack of notice is not sufficient to avert the application of the rule of repose.

Cases that cite this headnote

[13] **Limitation of Actions**
Operation as to rights or remedies in general

The only element of the rule of repose is time.

Cases that cite this headnote

[14] **Constitutional Law**
Time for proceedings; limitation or suspension of remedy
Limitation of Actions
Operation as to rights or remedies in general

The applicability of the rule of repose does not hinge on the denial of any substantive or procedural due-process rights; rather the rule serves as an absolute bar against stale claims, and the only element necessary for its application is the passage of time. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[15] **Equity**
Prejudice from Delay in General
Limitation of Actions
Operation as to rights or remedies in general

Unlike the doctrine of laches, which requires an analysis of prejudice or disadvantage based on the circumstances of the case, the rule of repose serves as an absolute bar to any proceedings.

Cases that cite this headnote

[16] **Administrative Law and Procedure**
Time for hearing; continuance
Constitutional Law
Administrative Agencies and Proceedings in General

Agency's rejection of the applicability of the common-law rule of repose in administrative proceedings does not implicate any constitutional due-process rights, is not a violation of any statute, and does not amount to an "error of law" supporting reversal on judicial review. (Per Donaldson, J., with one Judge concurring and three Judges concurring in the result.) Code 1975, § 41–22–20(k)(1, 5).

Cases that cite this headnote

[17] **Health**
Disciplinary Proceedings

Common-law rule of repose did not bar Board of **Examiners** in **Psychology** from pursuing sanctions against psychologist for entering into a

sexual relationship with a patient 30 years earlier. (Per Donaldson, J., with one Judge concurring and three Judges concurring in the result.) Code 1975, §§ 34–26–3, 34–26–46.

Cases that cite this headnote

[18] **Limitation of Actions**
Nature of statutory limitation

The rule of repose is a creature of common law and not a statute.

Cases that cite this headnote

[19] **Administrative Law and Procedure**
Limitation of scope of review in general

Judicial review of administrative-agency decisions is extremely limited, and a court may reverse an agency decision based only on specifically listed grounds.

Cases that cite this headnote

[20] **Statutes**
Intent

The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute.

Cases that cite this headnote

[21] **Statutes**
Natural, obvious, or accepted meaning

Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning.

Cases that cite this headnote

[22] **Statutes**
Plain Language; Plain, Ordinary, or Common Meaning

Where plain language is used, a court is bound to interpret that language to mean exactly what it says.

Cases that cite this headnote

[23] **Statutes**
Purpose and intent; unambiguously expressed intent

If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.

Cases that cite this headnote

Attorneys and Law Firms

***1088** Luther Strange, atty. gen., and Matthew Y. Beam of Beam Law Firm, LLC, Birmingham, for appellant.

Glen David King, Auburn, for appellee.

Alice M. Henley, deputy atty. gen. and gen. counsel, and Patrick Samuelson, asst. atty. gen. and asst. gen. counsel, Alabama Board of Nursing; Ellen Leonard, asst. atty. gen., Alabama Board of Social Work **Examiners**; and Susan Franklin Wilhelm, deputy atty. gen., Board of Dental **Examiners** of Alabama; for amici curiae Alabama Board of Nursing, Alabama Board of Social Work **Examiners**, and Board of Dental **Examiners** of Alabama, in support of the appellant.

Opinion

DONALDSON, Judge.

The Alabama Board of **Examiners** in **Psychology** ("the Board") appeals a judgment of the Montgomery Circuit Court ("the circuit court") dated September 6, 2012, in which the circuit court reversed a decision of the Board to sanction Dr. C. Fletcher **Hamilton**, a licensed psychologist in Jefferson County, for entering into a sexual relationship with a patient in 1982, in violation of §§ 34–26–3 and 34–26–46, Ala.Code 1975. The circuit court "reversed and set aside" the Board's decision, citing the rule of repose and the doctrine of laches as grounds, and remanded the action to the Board. For the reasons stated herein, we reverse the circuit court's judgment, and we render judgment in favor of the Board.

Factual Background and Procedural History

In October 2010, L.M.[1] filed a complaint with the Board alleging that between 1982 and 1994 **Hamilton** had engaged in an inappropriate romantic relationship with her while simultaneously providing her therapeutic **psychological** treatment. On January 26, 2011, the Board filed a formal administrative complaint against **Hamilton** alleging that he had violated §§ 34–26–3 and 34–26–46, Ala.Code 1975, by engaging in sexual contact with L.M., a patient. As a part of his defense in the administrative proceeding conducted before an administrative law judge ("ALJ") pursuant to the Alabama Administrative Procedure Act ("AAPA"), § 41–22–1 et seq., Ala.Code 1975, **Hamilton** asserted the doctrine of laches in his answer to the Board's complaint and the rule of repose in a motion for a summary judgment. Both defenses were rejected by the ALJ prior to the commencement of the administrative hearing.

At the administrative hearing held on May 25 and 26, 2011, the ALJ received testimony from various witnesses, including L.M. and **Hamilton**. The record reveals that L.M. sought **psychological** treatment from **Hamilton** in April 1982 for myriad issues and that physical contact between **Hamilton** and L.M. commenced during the first few sessions. L.M. and **Hamilton** exchanged cards, letters, and pictures at various times between 1982 and 1994. L.M. also kept a calendar in 1982 of all of her activities, in which she detailed her professional and personal interactions with **Hamilton**. The correspondence ***1089** and the calendar were admitted into evidence at the hearing.

Testimony indicates that most of **Hamilton's** professional records concerning his treatment of L.M. between April and June 1982 had been destroyed in the regular course of business in February 2010. However, the record reveals that **Hamilton's** office retained the "face sheets," or patient-intake forms, completed during that period. On the bottom of the intake form L.M. completed in April 1982, which was admitted into evidence at the administrative hearing, a handwritten notation had been made to indicate that **Hamilton** last saw L.M. as a patient on or around June 18, 1982.

On September 2, 2011, the ALJ rendered detailed written findings and recommendations. The ALJ found that the relationship between L.M. and **Hamilton** had become romantic after June 18, 1982, the date **Hamilton** last billed L.M. as a patient. The ALJ also found that **Hamilton**, despite the discontinuation of billing for his services, continued to provide L.M. with therapeutic advice through September 1982 on matters for which she had initially sought **psychological** treatment. The ALJ ultimately concluded that "the greater weight of the evidence establishe[d] that some sexual physical contact occurred during the course of the therapeutic relationship in 1982" and that the coexisting therapeutic and romantic relationships ended sometime in September 1982. The ALJ determined that "the preponderance of the evidence demonstrate[d] that **Hamilton** crossed the ethical professional boundaries regarding sexual intimacies with a client during the summer and early fall of 1982." The ALJ found, however, that the evidence was insufficient to establish that either a romantic or a therapeutic relationship existed beyond 1982, stating that L.M.'s "account of those events is not corroborated by any other credible source. In fact, her accounts were contradicted by the evidence, particularly her own letters to **Hamilton**. Therefore, ... the evidence failed to demonstrate that **Hamilton** violated the Professional Ethical Standards of Care from October 1982 through June 1994."

The ALJ ultimately determined that **Hamilton** had engaged in an inappropriate relationship with L.M. in violation of §§ 34–26–3 and 34–26–46, Ala.Code 1975, during the period beginning in June 1982 and ending in September 1982, and recommended that the Board impose sanctions against **Hamilton**, including placing him on probationary status for a six-month period and temporarily suspending his license, conditioned on his reimbursement to the Board of one-half the Board's expenses associated with prosecuting the administrative action. On September 22, 2011, the Board issued a final

order accepting the ALJ's findings and implementing, in part, the ALJ's recommendations of sanctions. The Board imposed additional sanctions beyond those recommended by the ALJ, including placing **Hamilton** on probationary status for a one-year period; temporarily suspending his license, conditioned not only on his reimbursement to the Board of one-half the expenses associated with prosecuting the administrative action, but also on his seeking treatment with a therapist approved by the Board; placing restrictions on his accepting any new female clients until he had completed therapy and received the Board's approval; and requiring him to notify all of his existing clients of the administrative action.

On September 26, 2011, **Hamilton** filed a notice of appeal with the Board pursuant to § 41–22–20, Ala.Code 1975, in order to appeal the Board's decision to the circuit court. **Hamilton** filed a petition for judicial review in the circuit court on September 27, 2011. He also filed in the circuit court a petition for a temporary restraining order and for a preliminary injunction or to stay imposition of the Board's sanctions. ***1090** On October 19, 2011, the circuit court granted the motion to stay and enjoined enforcement of the Board's order. On November 8, 2011, **Hamilton** filed a motion in the circuit court requesting that the order of the Board be reversed and vacated. **Hamilton** based his motion, in part, on the assertion that the Board's action was barred by the rule of repose. The circuit court subsequently held a hearing on the appeal, but no additional testimony was taken. On September 6, 2012, the circuit court entered a judgment reversing the Board's final order, holding in pertinent part:

> "To impose sanctions based on alleged acts that occurred more than 28 years ago is barred by the rule of repose and/or the doctrine of [laches]....
>
> "Based upon the foregoing, the decision of the Board is reversed and set aside. This case is REMANDED to the Alabama Board of **Examiners** in **Psychology**."

The circuit court cited the following cases in support of its judgment: *Ex parte Liberty Nat'l Life Ins. Co.*, 825 So.2d 758 (**Ala**.2002); *Ex parte Grubbs*, 542 So.2d 927 (**Ala**.1989); *Christ Hosp. & Med. Ctr. v. Human Rights Comm'n*, 271 Ill.App.3d 133, 648 N.E.2d 201, 207 Ill.Dec. 745 (1995); *Mank v. Board of Fire & Police Comm'rs, Granite City*, 7 Ill.App.3d 478, 288 N.E.2d 49 (1972); and *Appeal of Plantier*, 126 N.H. 500, 494 A.2d 270 (1985).

The Board filed an appeal to this court on October 4, 2012. On appeal, the Board asserts (1) that **Hamilton** did not properly raise the defense of laches before the circuit court; (2) that, although the doctrine of laches applies to proceedings under the AAPA, it is not applicable in the present case; and (3) that the rule of repose is not applicable to administrative actions commenced by the State of Alabama. This court granted the motion of the Alabama Board of Nursing, the Alabama Board of Social Work **Examiners**, and the Board of Dental **Examiners** of Alabama to file briefs as amici curiae. Oral arguments of the parties and of the amici curiae were heard on August 15, 2013.

Standard of Review

[1] [2] "Our standard of review mirrors that of the circuit court:

> " ' "Judicial review of an agency's administrative decision is limited to determining whether the decision is supported by substantial evidence, whether the agency's actions were reasonable, and whether its actions were within its statutory and constitutional powers. Judicial review is also limited by the presumption of correctness which attaches to a decision by an administrative agency." '

"*Ex parte Alabama **Bd**. of Nursing*, 835 So.2d 1010, 1012 (**Ala**.2001) (quoting *Alabama Medicaid Agency v. Peoples*, 549 So.2d 504, 506 (Ala.Civ.App.1989))."

*Alabama **Bd**. of Nursing v. Williams*, 941 So.2d 990, 995 (Ala.Civ.App.2005). Section 34–26–48, Ala.Code 1975, provides, in part:

> "Any action of, or ruling or order made or entered by the [B]oard ... recommending suspension or revocation of a certificate or license shall be subject to review by the courts of this state in the same manner and subject to the same powers and conditions as now provided by law in regard to rulings, orders, and findings of other quasi-judicial bodies in Alabama, where not otherwise specifically provided."

Judicial review of administrative-agency actions is

limited by § 41–22–20(k), Ala.Code 1975, which states:

> "(k) Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to ***1091** the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:
>
> "(1) In violation of constitutional or statutory provisions;
>
> "(2) In excess of the statutory authority of the agency;
>
> "(3) In violation of any pertinent agency rule;
>
> "(4) Made upon unlawful procedure;
>
> "(5) Affected by other error of law;
>
> "(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."

Analysis

I. *Failure to Raise the Issue of Laches on Appeal to the Circuit Court*

[3] The Board first contends that **Hamilton** failed to raise the doctrine of laches as a defense in his appeal to the circuit court; thus, the Board argues, the circuit court could not have properly relied on laches to overturn the Board's order. In support of this argument, the Board cites *Knoblett v. Alabama Board of Massage Therapy*, 963 So.2d 640 (Ala.Civ.App.2007). In *Knoblett*, this court noted that " ' "[a]n appeals court will consider only those issues properly delineated as such, and no matter will be considered on appeal unless *presented and argued in brief*." ' " 963 So.2d at 647 n. 3 (quoting *Tucker v. Cullman–Jefferson Cntys. Gas Dist.*, 864 So.2d 317, 319 (**Ala**.2003), quoting in turn *Braxton v. Stewart*, 539 So.2d 284, 286 (Ala.Civ.App.1988)). The argument asserted in *Knoblett* involved the failure of a party to raise an issue in a brief before this court, not the failure to raise a defense in an appeal of an administrative determination in the circuit court.

Section 41–22–20(h)(4), **Ala**. Court 1975, requires a party petitioning for review of an administrative determination in the circuit court to assert in the petition "[t]he grounds on which relief is sought." Without mentioning either the doctrine of laches or the rule of repose, **Hamilton** essentially asserted in his petition that the Board's final order was due to be reversed under the standards set forth in § 41–22–20(k)(1)–(7).

It is evident from the record that **Hamilton** raised the doctrine of laches as a defense in the administrative proceeding before the ALJ. The Board was apprised of **Hamilton's** reliance upon laches as a defense before the administrative hearing was conducted. At no time did **Hamilton** abandon that defense. In fact, the Board's response to **Hamilton's** motion for a summary judgment filed in the administrative proceeding briefed the issue of laches extensively. Based on the foregoing, we hold that the issue of the applicability of the defense of laches was properly before the circuit court and, consequently, is properly before this court.

II. *Applicability of the Defense of Laches*

[4] [5] This court has previously recognized that the doctrine of laches is applicable to administrative proceedings in instances where the legislature has not ***1092** defined a period of limitation for commencing such proceedings. See *Chafian v. Alabama **Bd**. of Chiropractic Exam'rs*, 647 So.2d 759, 762 (Ala.Civ.App.1994) ("Where there is no statutory time limitation applicable to the administrative proceeding, the issue of whether the action should be barred by time depends on the question

of laches." (citing *Appeal of Plantier*, 126 N.H. 500, 494 A.2d 270 (1985), and 2 Am.Jur.2d *Administrative Law* § 321 (1962))). Our supreme court has defined laches as

> "neglect to assert a right or a claim that, taken together with a lapse of time and other circumstances causing disadvantage or prejudice to the adverse party, operates as a bar. See *Black's Law Dictionary* 787 (5th ed. 1979). Laches is an equitable doctrine designed to prevent unfairness to a defendant ... due to a plaintiff's ... delay in filing suit, in the absence of an appropriate statute of limitations. *Equal Employment Opportunity Commission v. Dresser Industries, Inc.*, 668 F.2d 1199 (11th Cir.1982). It is based on the public policy discouraging stale demands and is not based upon mere lapse of time. It is principally a question of the inequity of permitting a claim to be enforced where some change in condition has taken place that would make the enforcement of the claim unjust. *Davis v. Alabama Power Co.*, 383 F.Supp. 880 (N.D.Ala.1974), affirmed, 542 F.2d 650 (5th Cir.1976), affirmed, 431 U.S. 581, 97 S.Ct. 2002, 52 L.Ed.2d 595 (1977). It is designed to prevent unfairness caused by a party's delay in asserting a claim or by his failure to do something that equity would have required him to do. *Sims v. Lewis*, 374 So.2d 298 (**Ala**.1979); *United States v. Olin Corp.*, 606 F.Supp. 1301 (N.D.Ala.1985); *Golightly v. Golightly*, 474 So.2d 1150 (Ala.Civ.App.1985)."

Ex parte Grubbs, 542 So.2d 927, 928–29 (**Ala**.1989). "The party asserting laches bears the burden of proving that the delay was unreasonable and that prejudice resulted from the delay." *Chafian*, 647 So.2d at 762. "Classic elements of undue prejudice, for purposes of determining the applicability of the doctrine of laches, include the unavailability of witnesses, changed personnel, and the loss of pertinent records." *Grubbs*, 542 So.2d at 929 (citing *Equal Employment Opportunity Commission v. Dresser Indus., Inc.*, 668 F.2d 1199 (11th Cir.1982)).

[6] [7] For the equitable doctrine of laches to bar an action, the evidence must show that a delay has caused such prejudice or disadvantage to a party that permitting the proceedings to continue would be fundamentally unfair. In the present case, **Hamilton** has asserted two specific examples of prejudice that he claims to have suffered in presenting a defense against L.M.'s allegations. First, he contends that his treatment records pertaining to L.M. had been destroyed in the regular course of business and could not be utilized in his defense to the Board's action. Second, **Hamilton** contends that the ALJ found L.M. to be an unreliable witness concerning the events occurring between 1983 and 1994 and that, therefore, the ALJ should have found L.M.'s testimony to have been equally unreliable concerning the events occurring in 1982.

[8] After a review of the record, and taking into consideration the arguments of the parties in their briefs and in oral arguments, we conclude that **Hamilton** failed to sufficiently establish that prejudice or disadvantage resulted from the lapse of time such that the defense of laches should have barred the proceedings. A showing that records have been destroyed, alone, is not sufficient. The party asserting laches must also prove to the trier of fact that the lack of the pertinent records renders the administration of justice difficult, if not ***1093** impossible. *Salter v. Hamiter*, 887 So.2d 230, 241 (**Ala**.2004). The evidence here does not meet that standard. Although **Hamilton** established that most of his treatment records for L.M. were destroyed in February 2010, there is no specific showing of how those records could have disproved the fact that he had engaged in an inappropriate relationship with L.M. **Hamilton** asserted on appeal to the circuit court that the missing records could have provided details concerning the contacts between him and L.M. and that they could have helped him to establish the beginning and end dates of their professional relationship. Based upon our review of the record, the destroyed documents would not have assisted the trier of fact in determining those issues. **Hamilton** testified at the administrative hearing that he last billed L.M. for services around June 18, 1982. The undestroyed records, i.e., the "face sheets," which were admitted into evidence, also support **Hamilton's** contention that the formal, in-office counseling sessions ended on or around June 18, 1982. That contention is not at odds with the ALJ's determination. However, the ALJ found that, despite the fact that he stopped billing L.M. on June 18, 1982, **Hamilton** continued to provide L.M. with therapeutic advice throughout the summer and fall of 1982, including advice on matters for which she had sought **psychological** treatment. Based on the record

before us, **Hamilton's** treatment records could not have provided information to dispute that finding, because they would have provided details concerning only the April to June 1982 time frame. The findings of the ALJ established that the misconduct upon which sanctions were based occurred between June 18 and September 1982. Testimony indicates that there would not have been any treatment records during this period, because the formal treatment sessions ended on June 18. Thus, the destroyed treatment records would not have provided any basis to disprove the existence of either a romantic relationship or a therapeutic relationship between the summer and early fall of 1982, during which, the ALJ determined, **Hamilton** had engaged in a romantic relationship with L.M. while continuing to provide her therapeutic services.

Although most of **Hamilton's** treatment records were not available, the record is replete with other documentation memorializing the interaction between **Hamilton** and L.M. in 1982. That documentation includes L.M.'s calendar, as well as written correspondence between **Hamilton** and L.M., some of which is in **Hamilton's** own handwriting. Although some of that documentation may have been unfavorable to **Hamilton** in the sense that the ALJ might have relied upon it to determine that a romantic relationship existed, the existence of that documentation undercuts any argument that **Hamilton** has been prejudiced by a lack of records. The voluminous written evidence that does exist in the record leads us to conclude that it was not " 'too late to ascertain the merits of the controversy.' " *Meeks v. Meeks*, 251 **Ala**. 435, 437, 37 So.2d 914, 916 (1948) (quoting 30 C.J.S. *Equity* § 119, p. 543).

[9] The other example of prejudice **Hamilton** raises on appeal is that L.M. was an unreliable witness. The ALJ questioned L.M.'s account of the events occurring subsequent to 1982, and it is apparent from the recommendations and findings that the ALJ weighed the evidence concerning these alleged interactions between **Hamilton** and L.M. and concluded that the weight of the evidence did not support L.M.'s allegations as to these matters. Likewise, the ALJ weighed the evidence concerning the allegations relating to events occurring in 1982, and she found L.M.'s account to be credible and supported by the evidence. Further, the record ***1094** does not show how any of **Hamilton's** destroyed records would have affected the ALJ's assessment of L.M.'s credibility. As the trier of fact in this matter, the ALJ had " 'the advantage of observing the witnesses' demeanor and ha[d] a superior opportunity to assess their credibility, [and, therefore, an appellate court] *cannot* alter the [ALJ's decision] unless it is so unsupported by the evidence as to be clearly and palpably wrong.' " *Ex parte Fann*, 810 So.2d 631, 636 (**Ala**.2001) (quoting *Ex parte D.W.W.*, 717 So.2d 793, 795 (**Ala**.1998)).

> " '[The appellate court is not] allowed to reweigh the evidence in this case. This [issue] ... turns on the [trier of fact's] perception of the evidence. The [trier of fact] is in the better position to evaluate the credibility of the witnesses ... and the [trier of fact] is in the better position to consider all of the evidence, as well as the many inferences that may be drawn from that evidence....' "

Ex parte Patronas, 693 So.2d 473, 475 (**Ala**.1997) (quoting *Ex parte Bryowsky*, 676 So.2d 1322, 1326 (**Ala**.1996)). The ALJ's findings are entitled to deference, and neither the circuit court nor this court is authorized to substitute its judgment as to the findings of the ALJ on this issue. See § 41–22–20(k), Ala.Code 1975 ("the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute"); see also *Alabama **Bd**. of Nursing v. Williams*, 941 So.2d at 999 ("In no event is a reviewing court 'authorized to reweigh the evidence or to substitute its decisions as to the weight and credibility of the evidence for those of the agency.' " (quoting *Ex parte Williamson*, 907 So.2d 407, 416–17 (**Ala**.2004))). The ALJ weighed L.M.'s credibility as a witness as to the allegations of misconduct between 1982 and 1994 and applied her judgment accordingly.

Although laches is an available defense and could form the basis of a reversal of an agency's decision under § 41–22–20(k)(7), Ala.Code 1975, on the ground that the agency decision is "unreasonable," the record here fails to show how any delay in L.M.'s reporting the allegations caused actual prejudice or actual disadvantage to **Hamilton**. Consequently, and consistent with the deference we must afford to the Board's decision, we conclude that the doctrine of laches does not support providing **Hamilton** relief from the Board's final order.

III. *Rule of Repose*

[10] [11] [12] [13] [14] [15] [16] [17] In its judgment, the circuit court also reversed the Board's disciplinary order based, in part, on the rule of repose. The applicability of the rule of repose to administrative proceedings appears to be a question of first impression.

> " 'The common-law rule of repose, which is an affirmative defense, *Rector v. Better Houses, Inc.*, 820 So.2d 75, 78 (**Ala**.2001), "bars actions that have not been commenced within 20 years from the time they could have been commenced." *Tierce v. Ellis*, 624 So.2d 553, 554 (**Ala**.1993). The rule of repose "is not affected by the circumstances of the situation, by personal disabilities, or by whether prejudice has resulted or evidence [has been] obscured." *Boshell v. Keith*, 418 So.2d 89, 91 (**Ala**.1982). "Lack of notice is not sufficient to avert the application of the [rule of repose]." *Ballenger v. Liberty Nat'l Life Ins. Co.*, 271 **Ala**. 318, 322, 123 So.2d 166, 169 (1960); accord *Ex parte Liberty Nat'l Life Ins. Co.*, 825 So.2d 758, 764 (**Ala**.2002), and *Ex parte Liberty Nat'l Life Ins. Co.*, 858 So.2d 950, 957–59 (**Ala**.2003) (Johnstone, J., dissenting). "[T]he only element of the rule of repose is time." *Boshell*, 418 So.2d at 91.' "

***1095** *Snider v. Morgan*, 113 So.3d 643, 650 (**Ala**.2012) (quoting *American General Life & Accident Ins. Co. v. Underwood*, 886 So.2d 807, 812 (**Ala**.2004)). The applicability of the rule of repose does not hinge on the denial of any substantive or procedural due-process rights; rather the rule serves as an absolute bar against stale claims, and the only element necessary for its application is the passage of time. Unlike the doctrine of laches, which requires an analysis of prejudice or disadvantage based on the circumstances of the case, and which might apply to invalidate an agency's decision under § 41–22–20(k)(7), Ala.Code 1975, the rule of repose serves as an absolute bar to any proceedings.

[18] [19] [20] [21] [22] [23] The AAPA sets out a statutorily created process applicable to state agencies and boards. The rule of repose is a creature of common law and not a statute. Judicial review of administrative-agency decisions is extremely limited, and a court may reverse an agency decision based only on specifically listed grounds. Courts are authorized to grant "appropriate relief from the agency action, equitable or legal," only if specific grounds are established. § 41–22–20(k), Ala.Code 1975. We recognize that one of the grounds for reversal of an agency decision is if the decision is "[a]ffected by other error of law." § 41–22–20(k)(5), Ala.Code 1975. But we do not find any legislative intent to support the argument that the failure to apply the rule of repose amounts to an "error of law" sufficient to support a court's reversal of an agency decision against a licensee; moreover, the rule of repose has not been codified as part of the AAPA for application to administrative proceedings. In fact, the legislature has not applied any limitations period to complaints initiated by the Board. In enacting the AAPA and the laws governing the Board, the legislature could have imposed a limitations period, including the rule of repose, to apply to complaints initiated by the Board, but it did not do so.

> "The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."

IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So.2d 344, 346 (**Ala**.1992).

Perhaps the legislature reasoned that administrative agencies should have the authority to prosecute claims against their licensees regardless of when the alleged misconduct occurred. As we stated in *Ex parte Medical Licensure Commission of Alabama*, 13 So.3d 397, 410 (Ala.Civ.App.2008):

> "The state has not only a strong interest, but an obligation, to protect the health, safety, and welfare of its citizens. The state's interest is far superior to the right of any individual to practice his profession, especially when incompetency or misconduct in the practice of that profession can threaten life itself."

Our supreme court has previously held that when the state has an interest in correcting a public wrong, rules of prescription, such as the rule of repose, are not available to bar the state from correcting that wrong. See *Folmar Mercantile Co. v. Town of Luverne*, 203 **Ala**. 363, 364, 83 So. 107, 108 (1919) ("It is because no right can be predicated of such a public wrong that neither rules of prescription nor statutes of limitations are available to preserve, against injunctive process, the offending status in a public highway."). In ***1096** *Brown v. First National Bank of Monroeville*, 447 So.2d 145, 148 (**Ala**.1983), our supreme court stated in dicta that the state may have a meritorious argument to overcome a defense of the rule of

repose, as well as the doctrine of laches, when it seeks to end a violation of a law that is designed to protect the public.

Thus, we conclude that there is no statutory basis for application of the rule of repose in the administrative setting unless or until the legislature directs otherwise. We hold that rejection of the applicability of the common-law rule of repose in administrative proceedings does not implicate any constitutional due-process rights, is not a violation of any statute, and does not amount to an "error of law." See § 41–22–20(k)(5), Ala.Code 1975. Therefore, **Hamilton** cannot rely on the rule of repose to defend against the Board's complaint.

Conclusion

A court may set aside an administrative agency's decision only if the record establishes one of the specific grounds listed in § 41–22–20(k), Ala.Code 1975. We are not permitted to substitute our judgment for that of the Board, regardless of whether we would have made the same decision. Because the record does not support a holding that the doctrine of laches was sufficiently established to overturn the Board's decision, and because the rule of repose is inapplicable to administrative proceedings, the circuit court's judgment in this matter must be reversed.

REVERSED AND JUDGMENT RENDERED.

THOMPSON, P.J., concurs.

PITTMAN, J., concurs in part and concurs in the result, with writing, which THOMAS, J., joins.

MOORE, J., concurs in the result, without writing.

PITTMAN, Judge, concurring in part and concurring in the result.

I concur in the result to reverse the circuit court's judgment, and I concur in the main opinion except to the extent that it concludes that a failure of an administrative agency to apply the common-law rule of repose in an appropriate case is not an "error of law" that can be corrected via reversal of the agency's decision in a judicial-review proceeding under the authority of Ala.Code 1975, § 41–22–20(k)(5). I am persuaded that reversal in this case is proper, however, based upon the apparent alternative rationale suggested in the main opinion that agencies of the state should, in certain circumstances, be entitled to avoid any effect that the rule of repose might otherwise have when such agencies are seeking to address violations of laws designed to protect the public welfare, and especially when, as in this case, those agencies act in a prompt manner upon first receiving notice of a violation of those laws.

THOMAS, J., concurs.

All Citations

150 So.3d 1085

Footnotes

1 This court granted a motion to refer to the complainant using only her initials.

941 So.2d 990
Court of Civil Appeals of Alabama.
ALABAMA BOARD OF NURSING

v.
Michael WILLIAMS.

2040082.
|
Nov. 18, 2005.
|
As Modified on Denial of Rehearing March 24, 2006.
|
Certiorari Denied May 12, 2006
Alabama Supreme Court 1050942.

Synopsis

Background: Board of Nursing initiated disciplinary proceedings regarding nursing instructor who allegedly engaged in inappropriate sexual conduct with students. After a hearing before a hearing officer, the Board suspended instructor's license. Instructor sought judicial review. The Montgomery Circuit Court, No. CV–03–3315, Tracy S. McCooey, J., reversed, and Board appealed.

Holdings: The Court of Civil Appeals, Pittman, J., held that:

[1] instructor's failure to "plead," during administrative proceeding, res judicata, collateral estoppel, or laches, did not amount to a waiver of the defenses;

[2] Board was not barred, by either claim preclusion or issue preclusion, from suspending instructor's license based on allegations of inappropriate sexual conduct as a result of decisions by community college that allegations lacked evidentiary support;

[3] Board's proceeding was not barred by laches; and

[4] evidence was sufficient to establish that instructor engaged in inappropriate sexual conduct with students.

Reversed and remanded with instructions.

Murdock and Bryan, JJ., concurred in the result.

West Headnotes (18)

[1] **Administrative Law and Procedure**
Arbitrary, unreasonable or capricious action; illegality
Administrative Law and Procedure
Substantial evidence

Judicial review of an agency's administrative decision is limited to determining whether the decision is supported by substantial evidence, whether the agency's actions were reasonable, and whether its actions were within its statutory and constitutional powers.

4 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Presumptions

Judicial review of an administrative decision is limited by the presumption of correctness which attaches to a decision by an administrative agency.

1 Cases that cite this headnote

[3] **Administrative Law and Procedure**
Judicial procedure; applicability in general

Strict rules of court procedure do not govern administrative proceedings.

Cases that cite this headnote

[4] **Health**
Complaint, petition, or pleading

Nursing instructor's failure, in administrative disciplinary proceeding before the Board of Nursing regarding allegations of inappropriate sexual conduct with students, to "plead" the doctrine of res judicata, collateral estoppel, or laches, did not amount to a waiver of those claimed defenses, where they were adequately raised in the form of objections to evidence offered by the Board in the administrative hearing. Rules Civ.Proc., Rule 8(c); Code 1975, § 41–22–13(1).

Cases that cite this headnote

[5] **Constitutional Law**
Health care professionals
Health
Scope of review

Reversal by the trial court, of decision of Board of Nursing to suspend license of nursing instructor, on ground that Board relied upon sexual-harassment charges that had been rejected by community college, was on grounds authorized by statute; trial court appeared to have concluded that Board's action deprived instructor of his license without due process of law, which, if true amounted to a violation of State and Federal constitutional provisions that guaranteed due process. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 6; Code 1975, § 41–22–20(k).

1 Cases that cite this headnote

[6] **Administrative Law and Procedure**
Res judicata

The doctrine of res judicata, which encompasses within its scope both claim preclusion and issue preclusion, may properly be applied to a previous agency decision only when that decision is made after a trial-type hearing, i.e., when what the agency does resembles what a trial court does.

Cases that cite this headnote

[7] **Administrative Law and Procedure**
Res judicata
Education
Evidence
Public Employment
Decision or determination

Board of Nursing was not barred, by either claim preclusion or issue preclusion, from suspending nursing instructor's license based on allegations of inappropriate sexual conduct with students as a result of decisions by community college that allegations lacked evidentiary support; sexual harassment complaints made against instructor were not resolved in a trial-type proceeding that warranted application of claim or issue preclusion principles, and employee review panel decision on college president's letter terminating instructor, which cited the prior sexual harassment complaints, was not by a party "substantially identical" to the college, though both the Board and the college were instrumentalities of the State, as Board and college were acting in different capacities.

Cases that cite this headnote

[8] **Judgment**
Identity of persons in general

For claim preclusion or issue preclusion to arise, there must be, at a minimum, substantial identity of the parties to the former adjudication.

Cases that cite this headnote

[9] **Judgment**
Representative or official capacity

A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules

of res judicata in a subsequent action in which he appears in another capacity. Restatement (Second) of Judgments § 36(2).

Cases that cite this headnote

[10] **Administrative Law and Procedure**
Time for hearing; continuance

In the absence of specific legislative authority, civil or criminal statutes of limitation are inapplicable to administrative proceedings.

Cases that cite this headnote

[11] **Administrative Law and Procedure**
Time for hearing; continuance

Where there is no statutory time limitation applicable to the administrative proceeding, the issue of whether the action should be barred by time depends on the question of laches; however, the party asserting laches bears the burden of proving that the delay was unreasonable and that prejudice resulted from the delay.

Cases that cite this headnote

[12] **Health**
Disciplinary Proceedings

Board of Nursing's disciplinary proceeding against nursing instructor, based on allegations of inappropriate sexual conduct with students, was not barred by laches, though one of the allegations was 12 years old and another was 9 years old, as instructor was not prejudiced by the delay; instructor was able to testify at length before the Board concerning many of the allegations and was able to present the testimony of several witnesses that was generally favorable to him.

Cases that cite this headnote

[13] **Health**
Evidence

Evidence in disciplinary proceeding before the Board of Nursing was sufficient to establish that nursing instructor at community college engaged in inappropriate sexual conduct with students; one student testified that instructor told her that she could raise her grades if they became intimate, and two letters from other students making complaints of a sexual nature were admitted into evidence.

Cases that cite this headnote

[14] **Administrative Law and Procedure**
Judicial procedure; applicability of rules of evidence
Administrative Law and Procedure
Admissibility

Administrative agencies are not restricted to a consideration of evidence which would be legal in a court of law and may consider evidence of probative force even though it may be hearsay or otherwise illegal. Code 1975, § 41–22–13(1).

Cases that cite this headnote

[15] **Administrative Law and Procedure**
Substantial evidence

"Substantial evidence" to support an administrative decision is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.

3 Cases that cite this headnote

[16] **Administrative Law and Procedure**
Credibility
Administrative Law and Procedure
Weight of evidence

A reviewing court is not authorized to reweigh the evidence or to substitute its decisions as to the weight and credibility of the evidence for those of an administrative agency.

5 Cases that cite this headnote

[17] **Administrative Law and Procedure**
Persons entitled to allege error

A party may not predicate an argument for reversal on "invited error," that is, error into which he has led or lulled the pertinent adjudicative body.

Cases that cite this headnote

[18] **Health**
Review

Nursing instructor invited alleged error of Board of Nursing in relying upon a matter beyond the scope of the charges, in disciplinary proceeding regarding allegations of inappropriate sexual conduct with students; during hearing before the Board instructor introduced without any conditions employee-review panel's decision overturning his termination that found that instructor had confronted a female coworker in a manner unbecoming to a faculty member, and could thus not complain of Board's consideration of such finding.

Cases that cite this headnote

Attorneys and Law Firms

***993** Troy King, atty. gen., and Gilda Branch Williams, asst. atty. gen. and gen. counsel, Alabama Board of Nursing, for appellant.

Gregory B. Stein of Stein, Brewster & Pilcher, L.L.C., Mobile; and William F. Patty of Beers, Anderson, Jackson, Hughes & Patty, PC, Montgomery, for appellee.

Opinion

PITTMAN, Judge.

The Alabama Board of Nursing ("the Board") appeals from a judgment of the Montgomery Circuit Court reversing an order of the Board that had suspended a license issued to Michael Williams to practice professional nursing and had imposed other disciplinary sanctions against Williams. We reverse the circuit court's judgment.

The record reveals that Williams was first licensed by the Board as a professional nurse in 1985; since 1990, he has been principally employed as a nursing instructor at Bishop State Community College ("the College"). However, beginning in 1991, a series of complaints were lodged against Williams to the effect that he had sexually harassed female students at the College. The College investigated two of those complaints, in 1992 and in 1995, but ultimately concluded that they lacked evidentiary support beyond the accusers' statements and determined that Williams should not be disciplined as to his employment. A third complaint, lodged in November 2000, was apparently not found to warrant discipline on the part of the College.

In 2001, the former husband of one of Williams's students filed complaints with the president of the College, with the Alabama Department of Postsecondary Education, and with the Board arising from Williams's alleged amorous relationship with that student. Although the Department ***994** of Postsecondary Education concluded that Williams had not violated policies of the College or of the State Board of Education, the Board undertook its own investigation of the sexual-harassment claims that had been brought against Williams.

In May 2002, the president of the College, after a hearing, indicated that Williams's employment would be terminated effective May 27, 2002, "based upon [his] continued insubordination and ineffective instruction." A letter sent by the president to Williams cited, as a basis for

his termination, his having failed to complete an administrative assignment that he had received from the president and alluded to "several serious student complaints" appearing in his personnel file, "including complaints of sexual harassment which are being investigated currently by the Alabama Board of Nursing." Williams later sought review of his termination from employment before a three-person employee-review panel, which was permitted under Ala.Code 1975, §§ 36–26–105 and 36–26–106, as they read in 2002 before the enactment of Act No. 2004–567, Ala. Acts 2004. The panel found that Williams had failed to complete an assignment as directed by the president of the College, had confronted a female coworker "in a manner unbecoming to a faculty member," and had arrived late to a mandatory meeting; however, exercising its prerogative to review Williams's punishment *de novo*, the panel determined that "termination was not the proper punishment for th[o]se transgressions" and instead imposed an unpaid 42–day suspension. On certiorari review, the Mobile Circuit Court entered a judgment affirming that determination, and this court, in turn, affirmed that judgment. *Bishop State Cmty. Coll. v. Williams* (No. 2021213, June 11, 2004), 915 So.2d 1184 (Ala.Civ.App.) (table), *cert. denied*, (No. 1031488, August 13, 2004) 920 So.2d 1142 (Ala.2004) (table).

On July 11, 2003, the Board issued a "Statement of Charges and Notice of Hearing" in which the Board ordered Williams to appear and show cause why his license to practice professional nursing should not be revoked on the basis that "[o]n multiple occasions from 1991 to 2001, [Williams] had engaged in inappropriate conduct of a sexual nature with students" at the College. According to the Board's statement and notice, Williams's conduct constituted grounds for disciplinary action under § 34–21–25, Ala.Code 1975, and under Board regulations barring, among other things, the exhibition of inappropriate or unprofessional conduct or behavior in the workplace. After a hearing before a hearing officer had been held, the Board entered an order containing findings of facts and conclusions of law; in its order, the Board determined that Williams's conduct warranted disciplinary action and imposed sanctions, including a 3–month suspension of his nursing license and a subsequent 24–month period of probationary licensure status.

Pursuant to § 41–22–20, Ala.Code 1975, Williams sought judicial review in the Montgomery Circuit Court of the Board's order. After the parties had filed written submissions in support of their respective positions, the circuit court entered a judgment reversing the Board's order as unlawful. The judgment did not cite any specific subdivision of § 41–22–20(k), Ala.Code 1975, which sets forth various grounds upon which an administrative agency's order may be reversed. However, the judgment plainly indicates the circuit court's agreement with Williams's argument that the Board's reliance upon the sexual-harassment charges lodged against Williams since 1991 was somehow violative ***995** of constitutional due-process guarantees; the judgment stated, in pertinent part, that "[e]ven though [the] College and the [Board] are separate entities, they are still both entities with the State of Alabama" and "[t]he State of Alabama cannot have two bites at the apple."

[1] [2] Our standard of review mirrors that of the circuit court:

> " 'Judicial review of an agency's administrative decision is limited to determining whether the decision is supported by substantial evidence, whether the agency's actions were reasonable, and whether its actions were within its statutory and constitutional powers. Judicial review is also limited by the presumption of correctness which attaches to a decision by an administrative agency.' "

Ex parte Alabama Bd. of Nursing, 835 So.2d 1010, 1012 (Ala.2001) (quoting *Alabama Medicaid Agency v. Peoples*, 549 So.2d 504, 506 (Ala.Civ.App.1989)).

[3] [4] We first address two preliminary contentions asserted by the Board. The Board first asserts that Williams's arguments in the circuit court regarding remoteness in time and the preclusive effect of the actions of the College and the employee-review panel with respect to the various sexual-harassment allegations lodged against Williams were equivalent to the affirmative defenses of the doctrine of res judicata, collateral estoppel, or laches and that those defenses were not affirmatively pleaded before the Board. The Board further avers that § 41–22–13(1), Ala.Code 1975, which provides that, as a general matter, "[t]he rules of evidence as applied in nonjury civil cases in the circuit courts of this state shall be followed" in contested cases before administrative agencies, mandates application of the rules of civil *procedure*, such as Rule 8(c), Ala. R. Civ. P., which requires the assertion of affirmative defenses in an response to a preceding pleading. However, no Alabama statute requires proceedings before the Board to comply with the Alabama Rules of Civil Procedure, and we are thus left to apply the general proposition that strict rules

of court procedure do not govern administrative proceedings. *See, e.g., Simpson v. Van Ryzin,* 289 Ala. 22, 30–31, 265 So.2d 569, 575–76 (1972); *State ex rel. Steele v. Board of Educ. of Fairfield,* 252 Ala. 254, 260, 40 So.2d 689, 695 (1949). We thus cannot conclude that Williams's failure to "plead" the doctrine of res judicata, collateral estoppel, or laches during the administrative proceedings amounts to a waiver of those claimed defenses where, as here, they were adequately raised in the form of objections to evidence offered by the Board in the administrative hearing.

[5] The Board also contends that the circuit court's judgment fails to comply with § 41–22–20(k), Ala.Code 1975, in that, the Board says, that court reversed the Board's order "on grounds other than those authorized by statute." We disagree. As we have noted, the circuit court appears to have concluded that the Board's actions deprived Williams of his nursing license without due process of law, which, if true, would amount at the least to a violation of state and federal constitutional provisions that guarantee due process. Reversal of an administrative order on that ground would be consistent with subsection (1) of § 41–22–20(k).

However, we reach a different conclusion than the circuit court with respect to the principal question raised by the Board's appeal: whether the Board was prevented, either by the results of the previous investigations and hearings by the College involving the sexual-harassment allegations made against Williams or by the passage of time, from disciplining ***996** Williams on the basis of the conduct evidenced by those allegations and by the testimony at the hearing tending to establish the truth thereof. Regardless of whether the circuit court's due-process holding is based upon Williams's prior-adjudication argument, upon his remoteness argument, or upon both arguments, neither amounts to a legally sufficient basis to disturb the Board's order.

[6] [7] We first consider the soundness of the circuit court's "two bites at the apple" reasoning. It is well settled that the doctrine of res judicata—a term which encompasses within its scope both claim preclusion and issue preclusion (*see Marshall County Concerned Citizens v. City of Guntersville,* 598 So.2d 1331, 1332 (Ala.1992))—may properly be said to apply to a previous agency decision "only when that decision is made after a trial-type hearing, i.e., 'when what the agency does resembles what a trial court does.' " *Kid's Stuff Learning Ctr., Inc. v. State Dep't of Human Res.,* 660 So.2d 613, 617 (Ala.Civ.App.1995) (quoting II K. Davis & R. Pierce, Jr., *Administrative Law Treatise* § 13.3 at 250 (3d ed.1994)); *accord, Restatement (Second) of Judgments* § 83(2) (1982) (administrative adjudication is conclusive "only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication," such as notice and the right to present and rebut evidence). As we have noted, four separate sexual-harassment complaints were made to the College: one in 1991–92 by complainant J.B. regarding conduct allegedly occurring in 1991, one in 1994 by complainant C.S. regarding conduct allegedly occurring in 1994, one in 2000 by complainant V.P. regarding conduct allegedly occurring in 1999 and 2000, and one in 2001 by complainant K.S. regarding conduct allegedly occurring in 2000 directed toward K.S.'s then-wife, S.S. However, a "trial-type" proceeding did not ensue in response to any one of those complaints; at the most, investigative inquiries and determinations were made in each case by College personnel (and, in K.S.'s case, by the Department of Postsecondary Education). As to those complaints, then, there has not been shown any adjudication that would warrant the application of claim or issue preclusion principles under *Kid's Stuff*.

However, the record also reflects that the president of the College, in her letter explaining the rationale for terminating Williams's employment, cited the existence of previous sexual-harassment complaints against Williams. The employee-review panel considering Williams's appeal from the termination did hold a trial-type hearing, and the judgment entered on certiorari review by the Mobile Circuit Court indicates that substantial evidence supported the panel's decision; specifically, the reviewing court noted that "there was substantial evidence to rebut the charges of sexual harassment made against" Williams. It is thus arguable, then, that the decision of the employee-review panel, which was affirmed on certiorari review and on further appeal, does constitute a decision as to which claim or issue preclusion may potentially apply, and we will so assume.

[8] However, to the extent that the circuit court's judgment is based upon claim or issue preclusion arising from the employee-review panel's decision, we must conclude that it is erroneous. It is well settled that for claim preclusion or issue preclusion to arise, there must be, at a minimum, *substantial identity* of the parties to the former adjudication. *See generally Stewart v. Brinley,* 902 So.2d 1, 9 (Ala.2004).

[9] Contrary to the intimation of the circuit court, the Board is not "substantially identical" to the College, even though ***997** both are instrumentalities of the State of Alabama. The Board is a governmental agency organized in order to regulate the practice of professional nursing by

persons throughout the state, whereas the College is an institution of higher learning established to educate students in various academic fields. The State's undertaking of disciplinary action against Williams in such different capacities does not give rise to claim or issue preclusion in that "[a] party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." *Restatement (Second) of Judgments* § 36(2) (1982). Comment f to that section of the *Restatement* is particularly instructive here:

> "In some circumstances, a prior determination that is binding on one agency and its officials may not be binding on another agency and its officials. The problem is analogous to that in determining the capacity in which the underlying transactions were conducted where private parties are concerned. *If the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, the earlier judgment should not be given preclusive effect in the second action.*"

Restatement (Second) of Judgments § 36 comment f (emphasis added).

The conclusion we draw here is by no means unique in American jurisprudence. In *Newberry v. Florida Department of Law Enforcement, Criminal Justice Standards & Training Commission*, 585 So.2d 500 (Fla.Dist.Ct.App.1991), a law-enforcement officer who was required to be certified by a state agency as a condition of her employment with a county school board was terminated from her employment by the school board. Although the officer's employment was later reinstated by a hearing officer, the facts giving rise to the termination action were reported to the state agency, which undertook proceedings to revoke the officer's law-enforcement certification. The appellate court agreed with the state agency that neither claim preclusion nor issue preclusion barred the agency from revoking the officer's law-enforcement certification, holding that " 'the doctrines of res judicata or estoppel by judgment are not applicable under the facts of the case where two separate and distinct governmental units independently considered similar factual allegation[s] but for different purposes.' " 585 So.2d at 501 (quoting *Todd v. Carroll*, 347 So.2d 618, 619 (Fla.Dist.Ct.App.1977)); *accord*, *Lusardi Constr. Co. v. Aubry*, 1 Cal.4th 976, 995, 824 P.2d 643, 655, 4 Cal.Rptr.2d 837, 849 (1992) ("The acts of one public agency will bind another public agency only when there is privity, or an identity of interests between the agencies."), and *Lamborn v. Workmen's Compensation Appeal Bd.*, 656 A.2d 593, 596 (Pa.Commw.Ct.1995) ("for collateral estoppel to apply between administrative agencies, there must be a showing that the policies and goals underlying the matter at issue are the same in both proceedings").

[10] [11] [12] Having concluded that the Board is not bound by the acts of the employee-review panel or by the administrative investigations undertaken on the part of the College or the Department of Postsecondary Education, we next consider whether the circuit court's judgment was correct because of the lapse of time between the first accusation made against Williams and the Board's institution of proceedings. There is no applicable statute ***998** placing a time limitation upon Board disciplinary proceedings, and "[i]n the absence of specific legislative authority, civil or criminal statutes of limitation are inapplicable to administrative proceedings." *Chafian v. Alabama Bd. of Chiropractic Exam'rs*, 647 So.2d 759, 762 (Ala.Civ.App.1994). Under *Chafian*, "[w]here there is no statutory time limitation applicable to the administrative proceeding, the issue of whether the action should be barred by time depends on the question of laches"; however, "[t]he party asserting laches bears the burden of proving that the delay was unreasonable and that prejudice resulted from the delay." *Id.* Williams has made no showing that he has been prejudiced by the Board's institution of disciplinary proceedings based upon such traditional elements of prejudice as "unavailability of witnesses, changed personnel, and the loss of pertinent records" (*see Ex parte Grubbs*, 542 So.2d 927, 929 (Ala.1989)); indeed, Williams testified at some length before the Board concerning many of the sexual-harassment allegations that had been lodged against him and presented testimony of several witnesses, both instructors and former students, that was generally favorable to him. We thus cannot affirm the circuit court's judgment to the extent that it is based upon remoteness.

[13] Further, we reject Williams's contention that the circuit court's judgment of reversal is due to be affirmed because, he says, the Board's order is not supported by substantial evidence. To the contrary, a review of the evidence adduced during the Board hearing reveals that

substantial evidence was adduced that Williams had engaged in inappropriate or unprofessional conduct. For example, J.B., the former student at the College who reported having been sexually harassed by Williams in 1991, testified at the Board hearing that she had taken courses from Williams in Medical Surgical Nursing and Critical Care Nursing during that year. According to J.B.'s testimony, during a visit by Williams to her mother's home that was ostensibly for the purpose of providing academic assistance, Williams told J.B. that "if he did something for [her], [she] would have to do something for him"; he then made an attempt to kiss J.B., which she rebuffed by turning her head. J.B. also testified that on another occasion, when she had asked Williams how he could help her raise her grade in the course she was taking from him during that academic term, he had responded by writing the word "intimacy" on a piece of paper and had given it to J.B., a proposition J.B. refused.

[14] The record further reveals that during Williams's testimony on direct examination during the Board hearing, the termination letter sent to Williams by the president of the College was admitted into evidence. Because that letter described Williams's personnel file as containing "a number of" student complaints, counsel for the Board asked Williams whether he had been investigated on other occasions regarding student complaints of a sexual nature, at which time Williams admitted that in addition to J.B., two other students, V.P. and C.S., had made such complaints. The complaint letters from V.P. and C.S. were then admitted into evidence despite hearsay objections.[1]

***999** [15] [16] To be sure, Williams disputed the veracity of J.B., V.P., and C.S., and adduced testimony from other students and from College personnel tending to prove that he would not have sexually harassed students. However, our review, just like that of the circuit court, is limited to ascertaining whether the Board's order is supported by "substantial evidence," *i.e.*, "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida*, 547 So.2d 870, 871 (Ala.1989); *accord*, *Ex parte Williamson*, 907 So.2d 407, 414–15 (Ala.2004) (applying *West* definition in administrative setting). In no event is a reviewing court "authorized to reweigh the evidence or to substitute its decisions as to the weight and credibility of the evidence for those of the agency." *Ex parte Williamson*, 907 So.2d at 416–17. We conclude that the Board's order disciplining Williams is supported by substantial evidence.

[17] [18] Williams also seeks affirmance of the circuit court's judgment on the basis that the Board's order, he says, improperly referred to the finding, contained in the determination of the employee-review panel that overturned the termination of Williams's employment, that Williams had confronted a female coworker "in a manner unbecoming to a faculty member." Williams contends that the Board's reference to that finding demonstrates that the Board "improperly relied upon a matter beyond the scope of the charges" set forth in the "Statement of Charges and Notice of Hearing." While the Board's statement of charges did not refer to that finding, evidence of that finding, in the form of the review panel's order itself, was submitted *by Williams himself* during the Board's hearing, and no conditions were placed upon its offer or acceptance into the evidentiary record. It is well settled that " '[a] party may not predicate an argument for reversal on "invited error," that is, "error into which he has led or lulled" ' " the pertinent adjudicative body. *Wood v. State Pers. Bd.*, 705 So.2d 413, 422 (Ala.Civ.App.1997) (quoting *Atkins v. Lee*, 603 So.2d 937, 945 (Ala.1992), quoting in turn *Dixie Highway Express, Inc. v. Southern Ry.*, 286 Ala. 646, 651, 244 So.2d 591, 595 (1971)). Williams, having introduced the employee-review panel's determination into evidence for the Board to consider, cannot now be heard to complain that the Board did consider that evidence in rendering its disciplinary order.

Having determined that the Board's order was properly entered, we reverse the circuit court's judgment, and we remand the cause for that court to enter a judgment affirming the Board's order.

REVERSED AND REMANDED WITH INSTRUCTIONS.

CRAWLEY, P.J., and THOMPSON, J., concur.

MURDOCK and BRYAN, JJ., concur in the result, without writing.

All Citations

941 So.2d 990

Footnotes

1 Administrative agencies, such as the Board, "are not restricted to a consideration of evidence which would be legal in a court of law and may consider evidence of probative force even though it may be hearsay or otherwise illegal." *Estes v. Board of Funeral Serv.,* 409 So.2d 803, 804 (Ala.1982); *see also* Ala.Code 1975, § 41–22–13(1) (allowing admission in administrative hearings of evidence "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs," even if such evidence would be inadmissible in judicial proceedings).

126 N.H. 500
Supreme Court of New Hampshire.

Appeal of Henry A. PLANTIER, M.D. (New Hampshire Board of Registration in Medicine).

No. 85–005.
|
May 23, 1985.

Synopsis
Physician appealed from revocation of his license to practice medicine by the Board of Registration in Medicine. The Supreme Court held that: (1) forcing physician to defend nine and a half-year-old complaint of sexual misconduct violated his due process rights; (2) physician was entitled to open hearing upon his request; (3) rules of evidence are not strictly applicable to physician disciplinary proceeding; and (4) the phrase "immoral conduct" as used in statute defining grounds for license revocation was not unconstitutionally vague.

Vacated and remanded.

West Headnotes (11)

[1] **Constitutional Law**
Benefits, rights and interests in

In determining whether governmental benefit is subject to due process requirements of Part I, Article 15 of the State Constitution, question is not whether benefit is a right or a privilege, but whether it is a protected property interest. Const. Pt. 1, Art. 15.

4 Cases that cite this headnote

[2] **Constitutional Law**
Health care professionals

Physician has legally protected property right in his license to practice medicine, and is thus entitled to procedural due process before the Board of Registration in Medicine. Const. Pt. 1, Art. 15.

6 Cases that cite this headnote

[3] **Health**
Disciplinary Proceedings

In order for physician disciplinary action to be barred by laches, physician must demonstrate prejudice caused by delay and that delay affected his ability to defend in that action.

6 Cases that cite this headnote

[4] **Health**
Disciplinary Proceedings

Laches will bar disciplinary action involving pediatrician only upon showing that complainant's delay in bringing complaint was not merely result of lack of awareness of the nature of alleged misconduct, due to young age, but that complainant, after becoming aware of misconduct, "slept on his rights."

5 Cases that cite this headnote

[5] **Constitutional Law**
Health care professionals

Due process required that pediatrician not be obligated to defend, in license revocation hearing, charge that he committed sexual misconduct nine and one-half years earlier at which time complainant was 17 years old. Const. Pt. 1, Art. 15.

3 Cases that cite this headnote

[6] **Health**
Hearing

Physician was entitled to open hearing before the Board of Registration in Medicine on charges of sexual misconduct upon his request. RSA 91–A:3, subd. 2(c), 329:17, subd. 10.

1 Cases that cite this headnote

[7] **Constitutional Law**
Health care professionals

Fact that two members of Board of Registration in Medicine were not physicians or surgeons did not deny physician's due process rights in disciplinary action. RSA 329:2; Const. Pt. 1, Art. 15.

1 Cases that cite this headnote

[8] **Constitutional Law**
Health care professionals

Due process does not require strict adherence to rules of evidence in disciplinary proceedings before the Board of Registration in Medicine, although privileges apply, and irrelevant, immaterial, unreliable or incompetent evidence is to be excluded. RSA 541–A:18, subd. 2; Const. Pt. 1, Art. 15.

2 Cases that cite this headnote

[9] **Constitutional Law**
Health
Health
Validity

Delegation of power to Board of Registration in Medicine to impose discipline on physicians was not an overly broad delegation of authority, in light of statutory guidelines. RSA 329:17.

3 Cases that cite this headnote

[10] **Health**
Validity

The term "immoral conduct" as used in statute governing grounds for physician disciplinary actions, RSA 329:17, subd. 6(d), was not unconstitutionally vague.

2 Cases that cite this headnote

[11] **Health**
Grounds in general

Board of Registration in Medicine may assert jurisdiction over physician on ground that he engaged in immoral conduct even where criminal justice system has chosen not to prosecute complaint for lack of evidence.

Cases that cite this headnote

Attorneys and Law Firms

****271 *503** Stephen E. Merrill, Atty. Gen. (Douglas L. Patch, Asst. Atty. Gen., on the brief and orally), for the State.

McSwiney, Jones & Semple, Concord (Carroll F. Jones (orally) and Elaine L. Clark on the brief), for Henry A. Plantier.

Scotch & Zalinsky, Manchester (Barry M. Scotch on the brief and orally), for Parents for Doctor Plantier, as amicus curiae.

Opinion

PER CURIAM.

This appeal raises a variety of due process and procedural issues concerning the revocation of Dr. Henry A. Plantier's (the doctor) license to practice medicine in this State. We conclude that the New Hampshire Board of Registration in Medicine committed reversible error in considering a complaint over nine years old and in denying the appellant an open hearing. We therefore vacate and remand for a new hearing.

In the spring of 1984, the New Hampshire Board of Registration in Medicine (board) received two complaints against the doctor alleging incidents of sexual misconduct. One complainant, John X., alleged that improper sexual contact took place during the course of ***504** a physical examination in July 1975, when he was 17 years of age. The second complainant, Robert X., claimed that improper sexual contact took place during a physical examination in 1977, when he was 14 years of age, and again in February 1980, when he was 17 years of age.

After a hearing before the board, pursuant to RSA 329:17, the board concluded that Dr. Plantier had engaged in unprofessional and immoral conduct in violation of RSA 329:17, VI(d) and, on December 18, 1984, revoked his license to practice medicine. Dr. Plantier's motion for rehearing was denied, and this appeal followed.

We first address the doctor's argument that the board's consideration of John X's complaint alleging events taking place in excess of nine years prior to the board's hearing was a violation of due process, in that the nine-year delay prejudiced the doctor's ability to defend the accusation. The doctor argues that he is entitled to protection against stale complaints by the due process clause of the New Hampshire Constitution. N.H. CONST. pt. I, art. 15.

We begin our analysis by noting that RSA chapter 329 does not contain a limitation on the age of acts subject to disciplinary proceedings. Nor do the rules promulgated by the board pursuant to RSA 541–A:2, I (Supp.1983) provide for such a limitation. The board, pursuant to RSA 329:2, II(b), is required by law to undertake "disciplinary proceedings and disciplinary action against licensees, as authorized by RSA 329:17...." RSA 329:17 provides, in part, that "[t]he board may undertake disciplinary proceedings ... upon written complaint of any person which charges that a person licensed by the board has committed ****272** misconduct as set forth in paragraph VI of this section...." RSA 329:17, I(b). RSA 329:17, VI(d) provides, in turn, that "[t]he board, after hearing, may take disciplinary action against any person licensed by it upon finding that the person ... [h]as engaged in dishonest, unprofessional or immoral conduct or negligence in practicing medicine or surgery."

The doctor's due process argument is grounded upon the fact that he had approximately 100,000 patient visits between John's fifteen minute appointment in 1975 and his hearing before the board. Dr. Plantier asserts that such "delay prejudiced [his] ability to defend against the accusation in that neither [he] nor any member of his staff had any independent recollection of the complainant or his visit to the office ... [and] the testimony in [his] defense was therefore limited to office procedure and testimony from the medical records."

Where there are "no statutory time limitations applicable to particular administrative proceedings ... the question of whether or ***505** not there is a bar by time may turn on the question of laches." 2 Am.Jur.2d *Administrative Law* § 321 (1962). In *Tighe v. Commonwealth State Board of Nurse Examiners,* 40 Pa.Cmwlth. 367, 397 A.2d 1261 (1979), a Pennsylvania case in which a nurse lost her license for tampering with drugs, the commonwealth court stated:

> "Assuming that laches may be asserted as a defense in an administrative disciplinary action involving a professional license (and there seems to be some support for this proposition in *Pennsylvania State Board of Medical Education and Licensure v. Schireson,* 360 Pa. 129, 61 A.2d 343 (1948), laches nevertheless cannot be imputed by the mere passage of time. It must be determined from all of the circumstances of the case, one of which must be the existence of harm occasioned by the delay. The appellant has failed to show how the delay in this case prejudiced her defense to the citation or how it otherwise harmed her."

Id., 397 A.2d at 1262.

" 'Laches, unlike limitation, is not a mere matter of time, but is principally a question of the inequity of permitting

the claim to be enforced—an inequity founded on some change in the conditions or relations of the property or the parties involved.' " *Wood v. General Elec. Co.*, 119 N.H. 285, 289, 402 A.2d 155, 157 (1979) (quoting 14 Am.Jur.2d *Certiorari* § 30, at 807 (1964)); *Jenot v. White Mt. Acceptance Corp.*, 124 N.H. 701, 710, 474 A.2d 1382, 1387 (1984).

In determining whether to apply laches, " '[n]either law nor equity nor science has been able to develop any mechanical gauge that will automatically tell litigants or the court the number of months or years that are required to constitute reasonable promptness in bringing a suit to avoid the defense of laches.' " *Jenot v. White Mt. Acceptance Corp.*, *supra* at 710, 474 A.2d at 1387 (quoting *Valhouli v. Coulouras*, 101 N.H. 320, 322, 142 A.2d 711, 712–13 (1958)). "The party asserting laches bears the burden of proving both that the delay was unreasonable and that prejudice resulted from the delay." *Jenot v. White Mt. Acceptance Corp. supra.*

Although the doctor has shown why a nine-year delay has affected his ability to defend himself, we must determine whether, in the absence of a statute of limitations, a laches-type doctrine applies to administrative actions as a requirement of procedural due process.

In determining whether challenged procedures satisfy the due process requirement of the State Constitution, this court employs a two-part analysis. "First, it must be determined whether ***506** the challenged procedures concern a legally protected interest. Second, it must be determined whether the procedures afford the appropriate procedural safeguards." *Appeal of Portsmouth Trust Co.*, 120 N.H. 753, 756, 423 A.2d 603, 605 (1980) (citations omitted).

****273** [1] In addressing the first consideration, we must determine whether the interest at stake is a protected liberty or property interest. *See Duffley v. N.H. Interschol. Ath. Assoc., Inc.*, 122 N.H. 484, 490, 446 A.2d 462, 466 (1982). In making such a determination, the touchstone of our analysis is not whether the governmental benefit conferred is characterized as a right or a privilege, but whether it is a protected property interest under part I, article 15. *See Wheeler v. State*, 115 N.H. 347, 351, 341 A.2d 777, 781 (1975), *cert. denied*, 423 U.S. 1075, 96 S.Ct. 860, 47 L.Ed.2d 86 (1976). We previously have recognized:

> " 'The hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except "for cause." Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact." ' "

Duffley v. N.H. Interschol. Ath. Assoc., Inc., supra, 122 N.H. at 491, 446 A.2d at 466 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982) (citations omitted)). In that regard, "[t]he loss of a privilege once granted is clearly different from the denial of a privilege that has never been given." *Stone v. Perrin*, 118 N.H. 109, 111, 382 A.2d 1112, 1113 (1978); *see Medina v. Rudman*, 545 F.2d 244, 250 (1st Cir.1976), *cert. denied*, 434 U.S. 891, 98 S.Ct. 266, 54 L.Ed.2d 177 (1977).

[2] This court has held that the renewal of a license to sell insurance may not be denied without affording due process. *Union Fidelity Life Ins. Co. v. Whaland*, 114 N.H. 832, 834, 330 A.2d 782, 783 (1974). Likewise, a physician's license to practice medicine may not be revoked absent adequate procedural safeguards. *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 238–39, 77 S.Ct. 752, 755–56, 1 L.Ed.2d 796 (1957) (State cannot exclude a person from the practice of law or from any other occupation in a manner that contravenes due process); *see also Medina v. Rudman*, *supra* at 250–51 (the right to engage in common occupations of life, once all the standards have been complied with, is subject to due process protection).

Having concluded that the doctor has a legally protected property right in his license to practice medicine and thus is entitled to procedural due process before the board, we now turn to the second part of our analysis; that is, whether the challenged procedures afford the appropriate procedural safeguards. In analyzing ***507** what procedures are due in a particular case, we consider the following factors:

> " 'First, the private interest that will be affected by the official action; second, 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 finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' "

Appeal of Portsmouth Trust Co., 120 N.H. at 757, 423 A.2d at 605 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)).

The private interest affected by the governmental action here is substantial. The right to engage in one's occupation is a privilege of fundamental significance. *See Medina v. Rudman,* 545 F.2d at 250–51. At stake in a disciplinary proceeding is a physician's license to practice his livelihood and profession. The loss of a license to practice medicine after years of training and experience is certainly a grievous loss.

In the absence of any limitation on the time in which a disciplinary proceeding may be brought in a case such as the one before us, the risk of an erroneous deprivation of a physician's license to practice medicine is great.

We previously have recognized that the primary purpose of limitations on the bringing of actions is fairness to the defendant. *See Raymond v. Eli Lilly & Co.,* 117 N.H. 164, 169, 371 A.2d 170, 173 (1977). ****274** It is elemental that an individual should not "be called on to resist a claim when 'evidence has been lost, memories have faded and witnesses have disappeared.' " *Id.* at 169–70, 371 A.2d at 174 (quoting *Developments in the Law—Statute of Limitations,* 63 Harv.L.Rev. 1177, 1185 (1950) (citation omitted)).

In a case such as this, the above considerations are particularly important. Here a complainant has alleged sexual misconduct. The incident underlying the complaint occurred on July 10, 1975, almost a decade prior to the hearing. It is clear that a case involving a delay of nine and one-half years is a stale one in which memories are likely to have faded or become distorted and witnesses are likely to be difficult to locate.

Moreover, this is a classic case in which the disposition turns on the credibility of the witnesses' testimony. Resolution of the matter "boils down to the question of 'who do you believe.' " *Desmarais v.* ***508** *State Personnel Comm'n,* 117 N.H. 582, 587, 378 A.2d 1361, 1363 (1977). Because the resolution turns on the credibility of testimonial evidence, the failure to impose a limitation on the time in which such a disciplinary proceeding may be brought would significantly increase the problems of proof and would increase the danger of false, fraudulent, frivolous, speculative or uncertain claims. *See Raymond v. Eli Lilly & Co.,* 117 N.H. at 174–75, 371 A.2d at 177.

It is important to note that the situation is different in a disciplinary proceeding in which the evidence is largely *documentary,* rather than testimonial. "Certainly, doctors and hospitals meticulously maintain and store records of patient treatments." *Raymond v. Eli Lilly & Co.,* 117 N.H. at 174, 371 A.2d at 176. Because documentary evidence "is not the kind of evidence that is lost or becomes unreliable as time passes," *id.,* disciplinary actions turning on evidence that is documentary in nature are less likely to be prejudiced by the passage of time.

We conclude that the use of a laches-type doctrine, in cases in which the bringing of a complaint was significantly delayed, will lessen the risk of erroneously depriving a physician of his property interest in a license to practice his livelihood. Our analysis does not end here, however, for we must also consider the interest of the government in an action such as the one before us.

The government's interest is also significant. The primary purposes of RSA chapter 329 are to assure a high quality of medical care and to protect the public from persons unfit to practice medicine. To that end, the board is given the authority to undertake disciplinary action to protect the public interest.

[3] Because of the importance of the government's function in disciplinary actions, we conclude that in a case such as this laches cannot be imputed by the mere passage of time. At the very minimum, there must be a showing that the licensee has been harmed by the delay in bringing the complaint. The burden is on the licensee to demonstrate the prejudice caused by the delay and to show that the delay affected his or her ability to defend the charges.

[4] Furthermore, it is important to note, especially in the case of a pediatrician, who treats individuals who may not understand the proper scope of a physical examination or whether there has been any misconduct relating to the doctor's fitness to practice, that the burden is on the licensee to show that the complainant's delay in bringing a complaint was not merely a result of the lack of awareness of the nature of the conduct, but that the complainant, after becoming aware of the misconduct, "slept on his rights." *See Raymond v. Eli Lilly & Co.,* 117 N.H. at 170, 371 A.2d at 174.

***509** While we do not adopt the analogous statutes of limitations as a *per se* guide to determine the time after which a disciplinary action on a complaint will deny due process, the statutes do serve as an appropriate benchmark in the case before us. ****275** Had the complainant John X. attempted to sue the doctor or seek criminal charges in this case, the actions would have been dismissed as being barred by the applicable six-year statute of limitations. *See* RSA 508:4; RSA 625:8, I.

[5] "Due process under our constitutional republic has, as a

primary consideration, the notion that no matter how rich or how poor, all of our citizens are entitled to fundamental fairness" when the government seeks to take action that will deprive them of their property or liberty interests. *Appeal of Public Serv. Co. of N.H.*, 122 N.H. 1062, 1072, 454 A.2d 435, 441 (1982). It is fundamentally unfair to make a physician defend a nine-year-old complaint when the complaint was not delayed by fraud or the lack of ability to discover the misconduct. To hold otherwise would be to hold that there is no constitutional outer time limit, and we will not do that. Due process is the New Hampshire Constitution's version of the principles of equity, and application of a laches-type doctrine is deemed a part of the process due a person whose economic life and professional career are on the line. It must be noted, however, that this case involves a license *revocation.* The use of "stale" incidents may lead to a different result if considered in a *new* license application context.

Dr. Plantier has demonstrated that the delay in bringing the complaint has prejudiced his ability to defend the charges. Moreover, this is not a case in which the delay was occasioned by a lack of awareness of the misconduct. Rather, John X. simply chose not to take any action until some nine years after the alleged incident and eight years after attaining age 18.

Although complainant John X.'s allegations should have been dismissed, the same result is not called for in the case of Robert X., who saw Dr. Plantier in 1980. Because the board considered both cases in its decision, however, we must reverse and remand for a new hearing. Our disposition of the case obviates the need for a discussion concerning the reasonableness of the board's findings and of the severity of the discipline imposed, since, on remand, the board may reach a different decision regarding both its findings and any discipline. We note that credibility in this case is of paramount importance, and, therefore, upon remand the board members who participated in these proceedings should each consider whether or not they can impartially judge this matter upon any new hearing.

Because some of the remaining issues are likely to arise in the ***510** second hearing, we will consider the doctor's additional arguments, in the interest of judicial economy. *See State v. Shannon*, 125 N.H. 653, ——, 484 A.2d 1164, 1171 (1984). We turn first to the doctor's argument that the board erred in denying him an open hearing.

A prehearing conference was held on October 4, 1984, before Stuart Russell, M.D., chairperson of the board. At that time, the doctor first requested an open hearing. The chairperson recognized that the doctor had the right to an open hearing. On the first day of the hearing on John X.'s complaint, however, the board entertained the motion of John's counsel to meet in executive session pursuant to RSA 91–A:3, II(c) (Supp.1983). The doctor then renewed his request for an open hearing under RSA 329:17, X. The board denied the doctor's request, reasoning that RSA 91–A:3, II(c) (Supp.1983) permitted it to go into executive session, because the matter under consideration would affect adversely the reputation of the complainant.

On October 16, 1984, the Superior Court (*Nadeau*, J.) denied the doctor's petition for injunctive relief, ruling that RSA 329:17, X neither required an open hearing at the physician's request, nor deprived the board of its right to exercise discretion to close the hearing. Hence, the board also went into executive session to hear the testimony of the second complaining witness, Robert X.

The doctor does not dispute the fact that the Right to Know Law, RSA chapter 91–A (1977 & Supp.1983), applies to the board. ****276** *See* RSA 91–A:1–a, III (Supp.1983) (applicable to any functions affecting citizens by "[a]ny board or commission of any State agency or authority"); *see also Lodge v. Knowlton*, 118 N.H. 574, 575–76, 391 A.2d 893, 894 (1978). It is the doctor's position, however, that RSA 329:17, X entitles him to an open hearing and should have prevailed over RSA 91–A:3, II(c) (Supp.1983).

It is a well settled rule of statutory construction "that in the case of conflicting statutory provisions, the specific statute controls over the general statute." *In re Robert C.*, 120 N.H. 221, 225, 412 A.2d 1037, 1040 (1980); *City of Claremont v. Truell*, 126 N.H. 30, ——, 489 A.2d 581, 590 (1985). RSA chapter 91–A is the more general of the two statutes. It was designed to assure "the greatest possible public access to the actions, discussions and records of *all public bodies*...." RSA 91–A:1 (Supp.1983) (emphasis added). The chapter applies to " 'each department, agency, board and commission within the state.' " *Lodge v. Knowlton, supra*, 118 N.H. at 575, 391 A.2d at 894 (quoting Executive Order No. 74–1). RSA 91–A:3, II(c) (Supp.1983), which embodies an exception to the general rule that "[a]ll sessions at which information, evidence or testimony in any form is received ***511** ... shall be open to the public," RSA 91–A:3, I (Supp.1983), likewise applies to the proceedings of all public bodies. Under RSA 91–A:3, II(c), a board may go into executive session and exclude the public in matters which "likely would affect adversely the reputation of any person...."

By contrast, RSA chapter 329 governs only physicians and surgeons in this State. RSA 329:17, X, which

provides that "[h]earings held under this section shall not be open to the public unless the person whose conduct is at issue requests an open hearing," applies to one specific administrative body—the New Hampshire Board of Registration in Medicine. The provision was tailor-made for disciplinary proceedings before the board.

[6] The legislature has specifically provided that a physician is entitled to an open disciplinary hearing, if he requests one. Had the legislature intended to qualify RSA 329:17, X by stating that it was subject to the provisions of RSA 91–A:3, II(c) (Supp.1983), or by otherwise providing for the confidentiality of complainants' testimony, it could have so provided, if otherwise consistent with the requirements of due process. *See Claremont v. Truell*, 126 N.H. at ——, 489 A.2d at 590.

Accordingly, the above-quoted principle of statutory construction resolves the conflict between RSA 91–A:3, II(c) (Supp.1983) and RSA 329:17, X. On remand, the doctor is entitled to an open hearing, if he chooses to request one.

[7] The doctor next argues that because only three members of the board are physicians or surgeons, the composition of the board violates his due process rights. In essence, it is his position that the "public member" and "paramedical member," *see* RSA 329:2, do not have the training to evaluate a physician's conduct to determine whether it warrants disciplinary action.

A similar argument was rejected by this court in *Appeal of Beyer*, 122 N.H. 934, 453 A.2d 834 (1982). There we stated:

> "Due process requires that the decision-maker hearing the complaint be fair and impartial. It does not require that the decision-maker be an expert in the underlying bases of the complaint. If this were true, trials before judges and juries could violate due process because judges and juries are not experts on every subject that is litigated."

Id. at 939, 453 A.2d at 837 (citation omitted).

[8] Similarly, we reject the doctor's contention that due process requires adherence to the rules of evidence in disciplinary proceedings before the board. The legislature has spoken in this ***512** regard, RSA 541–A:18, II (Supp.1983), as have we. "The law is well settled that administrative tribunals are not bound by the strict technical rules ****277** of evidence governing court proceedings ... even though the administrative agency is acting in an adjudicatory or quasi-judicial capacity...." *N.H. Milk Dealers' Ass'n v. Milk Control Board*, 107 N.H. 335, 340, 222 A.2d 194, 199 (1966); *Auclair Transp. Inc. v. Ross Express, Inc.*, 117 N.H. 630, 634, 376 A.2d 146, 148–49 (1977); *New England Tel. & Tel. Co. v. State*, 113 N.H. 92, 101, 302 A.2d 814, 821 (1973); *Roy v. Water Supply Comm'n*, 112 N.H. 87, 92, 289 A.2d 650, 654 (1972); *see In re Mundy*, 97 N.H. 239, 85 A.2d 371 (1952). In fact, in holding that administrative bodies need not follow the rules of evidence, this court has expressly recognized that "[t]he due process requirements binding administrative procedures are quite different from those binding judicial procedure." *Roy v. Water Supply Comm'n supra; see also In re Mundy supra.* Of course, privileges apply, and irrelevant, immaterial, unreliable or incompetent evidence is to be excluded.

We turn next to the doctor's argument that RSA chapter 329 represents an overly broad delegation of authority by the legislature to an administrative body, in that the chapter gives the board too much discretion in the type of discipline to be imposed and improperly grants the board power that is judicial in nature.

[9] The provision at issue does not express " 'its commands ... in such broad terms as to leave the ... agency with unguided and unrestricted discretion in the assigned field of its activity....' *Ferretti v. Jackson*, 88 N.H. 296, 302, 188 A. 474, 478 (1936); *State Farm Mut. Auto Ins. v. Whaland*, 121 N.H. 400, 404, 430 A.2d 174, 177 (1981). RSA 329:17 not only provides a gradation of permissible disciplinary measures, *see* RSA 329:17, VII, but it also includes specifics, which must be proven in order to take such disciplinary action, *see* RSA 329:17, VI. Certainly, one of the functions of the board is "to fill in details to effectuate the purpose of the statute." *Kimball v. N.H. Bd. of Accountancy*, 118 N.H. 567, 568, 391 A.2d 888, 889 (1978). The board is not accorded unbridled discretion, since disciplinary action taken by the board may be appealed to this court. RSA 329:17, VIII.

"This court has long recognized that executive officers may be vested with some judicial power to enable them to perform practically their executive duties and that some overlapping of judicial power is permissible...." *Smith Insurance, Inc. v. Grievance Committee*, 120 N.H. 856, 862, 424 A.2d 816, 819 (1980). "[W]hen an executive board has regulatory functions, it may hear and determine controversies which are incidental thereto...." *Opinion of the Justices*, 87 N.H. 492, 493, 179 A. 357, 359 (1935). Accordingly, the ***513** board of registration in medicine

has the authority to undertake disciplinary proceedings against its licensees in order to protect the public interest.

Finally, we address the doctor's argument that the term "immoral conduct," as used in RSA 329:17, VI(d) is unconstitutionally vague. The substance of the doctor's argument is that the phrase gives physicians no warning of the type of conduct that it proscribes.

We begin by noting that RSA 329:17, VI(d) permits the board to take disciplinary action "against any person licensed by it upon finding that the person ... [h]as engaged in dishonest, unprofessional or immoral conduct ... in practicing medicine or surgery...." RSA chapter 329 does not define "immoral conduct."

"Due process requires that a statute proscribing conduct not be so vague as to fail to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *In re Doe,* 123 N.H. 634, 641, 465 A.2d 924, 929 (1983). Courts which have considered the meaning of the phrase "immoral conduct" have construed it to mean "conduct which is willful, flagrant, or shameless and which shows a moral indifference to the opinion of the good and respectable members of the community." *Searcy v. State Bar of Texas,* 604 S.W.2d 256, 258 (Tex.Civ.App.1980); *In re Monaghan,* ****278** 126 Vt. 53, 64, 222 A.2d 665, 674 (1966).

[10] Although it is true that even after judicial definition, the phrase "immoral conduct" does not lend itself to definite boundaries by which it can be marked, we do not believe that the phrase is unconstitutionally vague. The forms which immoral conduct may take are numerous and varied, making it virtually impossible for the legislature to set forth all of the acts which come within the meaning of the phrase. "We will not hold that due process requires that [the board] anticipate every conceivable type of misconduct in which any of its [licensees] may indulge, and then fashion and announce a [code] to fit each act of misconduct." *In re Ruffalo,* 370 F.2d 447, 454 (6th Cir.1966).

Furthermore, "[c]ourts are reluctant to strike down statutes on the ground of vagueness where the statute 'by [its] terms or as authoritatively construed [applies] without question' to those litigants before the court." *In re Doe,* 123 N.H. at 642, 465 A.2d at 929 (quoting *Parker v. Levy,* 417 U.S. 733, 755–56, 94 S.Ct. 2547, 2561, 41 L.Ed.2d 439 (1974) (citation omitted)). A person of ordinary intelligence certainly would know that it would be "immoral" for a physician to perform fellatio on and masturbate minor male patients during the course of a physical examination.

***514** Additionally, the statute at issue provides "an ascertainable standard by which it is applied to proscribe conduct." *In re Doe,* 123 N.H. at 643, 465 A.2d at 930. RSA 329:17, VI(d) specifically provides that the person against whom disciplinary action is brought must have engaged in immoral conduct "in *practicing medicine* or *surgery.*" (Emphasis added.) Hence, the statute can only be construed as including conduct that directly relates to a physician's practice of his or her profession and demonstrates that the physician is morally incompetent to conduct that practice. *Cf. Cole v. Combined Ins. Co. of America,* 125 N.H. 395, 480 A.2d 178 (1984).

[11] We find no merit in the doctor's argument that the board may not assert jurisdiction over a physician on the ground that he engaged in immoral conduct, when the criminal justice system has chosen not to prosecute a complaint against the physician for lack of evidence. The jurisdiction of the board in this matter is clearly independent of any criminal action taken against the doctor. We find no merit in the doctor's additional arguments.

Vacated and remanded.

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Applicability of statute of limitations or doctrine of laches to proceeding to revoke or suspend license to practice medicine

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I. Preliminary Matters

§ 1[a] Introduction—Scope

The purpose of this annotation[1] is to collect and analyze the state and federal cases which discuss whether or not statutory limitations of actions or the equitable doctrine of laches apply to proceedings to revoke or suspend[2] a physician's license to practice medicine. Proceedings to revoke or suspend the license of an osteopath or chiropractor are within the scope of this annotation.[3]

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments bearing upon this subject. Since these are discussed herein only to the extent that they are reflected in the reported cases within the scope of this annotation, the reader is advised to consult the appropriate statutory or regulatory compilations.

§ 1[b] Introduction—Related matters

Related Annotations are located under the Research References heading of this Annotation.

§ 2[a] Summary—Generally

The states are fully empowered to regulate the practice of medicine, including the licensing of physicians.[4] In exercising these powers, the states have generally enacted statutes which provide for the suspension or revocation of licenses to practice medicine on certain enumerated grounds.[5] Usually, the state legislature delegates to an administrative tribunal, frequently a state medical licensing board, the power to hear and determine charges for the revocation or suspension of doctors' licenses.[6] The decision of an administrative statutory board to revoke or suspend a doctor's license to practice medicine is subject to review by the courts either by virtue of statutory provisions or judicial determination that license revocation is quasi-judicial in nature and therefore is subject to judicial review.[7]

Although courts generally apply general statutes of limitation to administrative proceedings, the opposite is true with respect to proceedings which are in the public interest, such as proceedings to suspend or revoke a license to practice medicine.[8] Thus, courts have held without exception that, in the absence of a statute which applies specifically to medical license revocation proceedings, statutes of limitation do not apply to such disciplinary proceedings (§ 3). The rationale behind this rule, when enunciated by the courts, is twofold: first, when the state regulates the medical profession, it is acting in its sovereign capacity and for the public good, and therefore general civil and criminal statutes of limitation do not apply; and second, the purpose of general statutes of limitation is to discourage unnecessary delay, promote justice, and forestall prosecution of stale claims, whereas proceedings to revoke physicians' licenses serve to protect the public by insuring that only properly qualified individuals practice medicine, and the staleness of the charges do not necessarily make them reflect less on the character of the person charged (§ 3).

Those courts that follow the same rule with respect to the doctrine of laches, that is, that laches do not operate as a bar to proceedings to revoke or suspend physicians' licenses, apply a similar rationale: laches cannot attach when the state is acting in its sovereign capacity to protect a public right (§ 5). On the other hand, several courts have expressed the view that while the mere passage of time is not sufficient to support the defense of laches, if a doctor could prove that his defense was prejudiced due to an unreasonable delay, laches might act as a bar to the license revocation proceedings (§ 6). However, if the delay is of the doctor's own making, laches will not attach (§ 8). Under the particular circumstances of the cases holding that laches could apply if there was a demonstration of prejudice, the courts, with one exception,[9] did not find sufficient prejudice to the physician for laches to bar the disciplinary actions (§ 7).

In one case, the doctrine of laches was applied to bar a claim against a doctor in a license revocation proceeding on the grounds that it was required by due process (§ 10).

Courts have consistently held that a continuing offense prevents the application of either a statute of limitations (§ 4) or laches (§ 9[a], 9[b]) as a defense in a disciplinary proceeding to revoke or suspend a physician's license. Thus, a continuing pattern of inappropriate medical treatment by a physician over several years was considered a continuing offense which precluded the use of laches as a defense in a license revocation proceeding (§ 9[b]). And in instances where a license to practice medicine was fraudulently obtained, it has been held that each use of the license continues the fraud, and therefore laches (§ 9[a]) and any statute of limitations (§ 4) cannot operate to bar the license revocation proceedings, no matter how many years have elapsed since the initial fraudulent act.

§ 2[b] Summary—Practice pointers

Counsel for a physician faced with disciplinary proceedings should be aware that although generally laches will not be applied to administrative disciplinary proceedings, several courts have indicated a willingness to consider the defense of laches if the physician can prove that his defense against the charge was prejudiced by unreasonable delay in bringing the proceedings.[10] It appears that the sort of prejudice envisioned by the courts centers around oral testimony, where memories

can fail or witnesses can become unavailable due to the passage of time.[11]

Where a court will entertain the defense of laches, counsel should note that the physician bears the burden of proving that there was prejudice caused by the delay, in that the delay affected his ability to fully defend the charges.[12]

Statutes providing for the revocation of licenses to practice medicine are strictly construed in favor of the physician,[13] and thus counsel for a licensee threatened with license suspension or revocation should carefully examine the statute to insure that the charges fall within the statutory language. One court overturned a license revocation which was based on statutory language that a revocation could be based on a physician's conviction of a felony, defining felony as any offense which, if committed in that jurisdiction, would constitute a felony, where the physician was convicted of a federal offense related to the mails which was not a felony in that jurisdiction.[14]

Depending upon the particular circumstances of the case, counsel for a physician whose license has been revoked should consider an appeal based on the defense of entrapment;[15] or based on one or more of the panoply of defenses associated with the guaranty of due process which applies to statutes authorizing, and proceedings seeking to effect, the suspension or revocation of a license to practice medicine.[16]

II. Statutes of limitation

§ 3. View that statutes of limitation are not applicable to disciplinary proceedings

[Cumulative Supplement]

The courts in the following cases held or recognized the rule that statutes of limitation which are not specifically written to apply to disciplinary proceedings involving the licensing of physicians do not apply to proceedings to revoke or suspend an individual's license to practice medicine.

Cal
Bold v Board of Medical Examiners (1933) 133 Cal App 23, 23 P2d 826 (recognizing rule)
Hartman v Board of Chiropractic Examiners (1937) 20 Cal App 2d 76, 66 P2d 705
Shea v Board of Medical Examiners (1978, 3d Dist) 81 Cal App 3d 564, 146 Cal Rptr 653 (apparently recognizing rule)
Colo
Colorado State Bd. of Medical Examiners v Jorgensen (1979) 198 Colo 275, 599 P2d 869
DC
Kemp v Board of Medical Supervisors (1917) 46 App DC 173 (apparently recognizing rule)
Fla
In Re Weathers (1947) 159 Fla 390, 31 So 2d 543 (by implication)
Farzad v Department of Professional Regulation (1983, Fla App D1) 443 So 2d 373
Hawaii
Chock v Bitterman (1984) 5 Hawaii App 59, 678 P2d 576
Mich
Latreille v Michigan State Board of Chiropractic Examiners (1959) 357 Mich 440, 98 NW2d 611
NJ
Blumberg v State Board of Medical Examiners (1921) 96 NJL 331, 115 A 439 (apparently recognizing rule)
NY
Frank v Board of Regents (1965, 3d Dept) 24 App Div 2d 909, 264 NYS2d 413, cert den 385 US 815, 17 L Ed 2d 55, 87 S Ct 37
Pepe v Board of Regents (1968, 3d Dept) 31 App Div 2d 582, 295 NYS2d 209
Sinha v Ambach (1982, 3d Dept) 91 App Div 2d 703, 457 NYS2d 603

Chaplan v Ambach (1982, 3d Dept) 91 App Div 2d 736, 457 NYS2d 980
Fischman v Ambach (1983, 3d Dept) 98 App Div 2d 854, 470 NYS2d 819
Monti v. Chassin, 237 A.D.2d 738, 655 N.Y.S.2d 145 (3d Dep't 1997)
Or
Spray v Board of Medical Examiners (1981) 50 Or App 311, 624 P2d 125, mod 51 Or App 773, 627 P2d 25 (apparently recognizing rule)
Wash
State Medical Examining Board v Stewart (1907) 46 Wash 79, 89 P 475
Wis
State v Schaeffer (1906) 129 Wis 459, 109 NW 522
State v Josefsberg (1957) 275 Wis 142, 81 NW2d 735, 63 ALR2d 1071
Thus, the court affirmed the revocation of a doctor's license for performing criminal abortions in Bold v Board of Medical Examiners (1933) 133 Cal App 23, 23 P2d 826, holding that the civil statute of limitations did not bar the proceedings before the state medical licensing board. The doctor argued that since the complaint before the board was filed 3 years after the alleged abortion took place, the proceedings should have been barred by the statute of limitations, since they were special proceedings of a civil nature within the language of the statute. The court held that the statute of limitations applied only to actions or special proceedings in courts, and not to hearings before boards, even though the board exercised a power which was judicial in its nature. The court noted that the purpose of the act under which the proceeding was instituted was to keep unqualified or undesirable individuals, or those guilty of unprofessional conduct, out of the medical profession, and the staleness of the charge did not necessarily make it reflect less upon the character of the person charged. The court commented that there was no statutory bar applicable to such proceedings, and therefore the effect of the staleness of such charge, if any, was a matter exclusively within the jurisdiction of the board.

Holding in part that the general statute of limitations did not apply to professional disciplinary proceedings, the court in Colorado State Bd. of Medical Examiners v Jorgensen (1979) 198 Colo 275, 599 P2d 869, affirmed the state board of medical examiners' revocation of a license to practice medicine due to professional misconduct on the part of the osteopath. The board revoked the osteopath's license based on his commission of grossly negligent malpractice, his engaging in conduct unbecoming a person licensed to practice medicine, and his felony conviction for unlawfully dispensing controlled substances. The osteopath's appeal was based in part on his argument that consideration of his prior conviction as a basis for the revocation of his license was barred by the general statute of limitations which provided that legal actions must be commenced within 3 years. The court commented that the purpose of the statute of limitations was to promote justice, discourage unnecessary delay, and forestall the prosecution of stale claims. That rationale, the court said, did not apply to the admissibility of evidence of a prior conviction in a disciplinary hearing to determine the qualifications of a professional for two reasons: first, a statute of limitations was not applicable to the evidentiary use of an incident; and second, the general statute of limitations applied to the commencement of civil or criminal legal actions, and not to the institution of an administrative disciplinary proceeding. Consequently, the court concluded, the general statute of limitations did not apply to the consideration of the osteopath's felony conviction in the administrative proceeding.

In Farzad v Department of Professional Regulation (1983, Fla App D1) 443 So 2d 373, a case not factually within the scope of this annotation in that it involves a reprimand rather than a license revocation or suspension, the court upheld the state medical licensing board's reprimand of a doctor for misconduct, holding that the statute of limitations asserted by the doctor was not applicable to the administrative disciplinary hearing. Three years prior to receiving a license to practice medicine from the state, and over 9 years prior to the filing of the complaint charging her with misconduct, the doctor fraudulently took an examination for foreign medical graduates in her sister's name so that the sister could become eligible to take medical training in an intern program in the United States. The incident would likely have gone undiscovered, except that the doctor's former husband revealed it during a child custody battle. The board filed a complaint 2 years after it was notified of the doctor's misconduct. The doctor contended that the disciplinary proceeding was barred by the statute of limitations. The court followed the general rule that in the absence of specific legislative authority, civil or criminal statutes of limitation are inapplicable to administrative license revocation proceedings, which are disciplinary proceedings brought in the name of the sovereign, and therefore held that this administrative disciplinary proceeding was not barred by any statute of limitations.

The court in Latreille v Michigan State Board of Chiropractic Examiners (1959) 357 Mich 440, 98 NW2d 611, held that there was no statute of limitations which applied to the license suspension proceedings, affirming an order of the state chiropractic board suspending the license of a chiropractor because the license was procured by fraud. Apparently the chiropractor had

falsified the date on a certificate of matriculation to a college to indicate that he graduated prior to the institution of a state requirement for all chiropractors to take a basic science examination. The chiropractor argued that the 7-year hiatus between the issuance of his license and the complaint barred the suspension entered by the state board. The court found that there was no limitation in time as to the board's right to refuse or suspend a chiropractor's license pursuant to the specific statutory grant of power. Furthermore, the court held that the general statute of limitations which applied to a cause of action commenced in any of the courts of the state did not apply to the present proceedings, even by analogy, because the suspension of a professional license until statutory qualifications were met should not be considered as punishment, but rather as an exercise of the state's discretion as to whether the licensee is properly qualified to continue holding the license.

The court upheld the suspension of a doctor's license in Sinha v Ambach (1982, 3d Dept) 91 App Div 2d 703, 457 NYS2d 603, denying the doctor's contention that due process considerations required the application of a statute of limitations to the charges against him, where the state board found that he engaged in conduct evincing a moral unfitness to practice medicine. The court cited the rule that a statute of limitations is not applicable to administrative disciplinary hearings, and opined that a license to practice medicine imposed on the doctor an obligation to serve the public's good with concomitant adherence to strict ethical standards, and errant behavior which contravened such high standards should not be protected by the shield of a statute of limitations.

CUMULATIVE SUPPLEMENT

Cases:

There was no statute of limitations governing the initiation of professional misconduct proceeding against physician. Corines v. State Bd. for Professional Medical Conduct, 700 N.Y.S.2d 303 (App. Div. 3d Dep't 1999).

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[END OF SUPPLEMENT]

§ 4. Fraud in obtaining license as continuing offense

The courts in the following cases held that the procurement of a license to practice medicine by fraud was a continuing offense, and therefore a statute of limitations did not apply to proceedings to suspend or revoke the license based on such fraud.

In Bockman v Arkansas State Medical Board (1958) 229 Ark 143, 313 SW2d 826, the court held that a statutory limitation of actions was not applicable to a disciplinary proceeding dealing with an accusation that a license to practice medicine was fraudulently obtained, where the doctor sought to overturn the state licensing board's revocation of his license. Apparently, over 30 years prior to the hearing at which his license was revoked, at the time he applied for his medical license, the doctor stated under oath that he had received a medical degree. It was later proved that the doctor never graduated from medical school, and therefore his license was obtained by means of false representations. The court held that the practice of medicine under a license fraudulently obtained was a continuing offense, and therefore no issue of statutory time limitations could be raised.

See Latreille v Michigan State Board of Chiropractic Examiners (1959) 357 Mich 440, 98 NW2d 611, § 3, where, in denying the chiropractor's argument that the statute of limitations applied to the license revocation proceeding, the court noted that the

chiropractor never had a legal right to practice until he had taken the required basic science examination, and thus the order suspending his license deprived him of nothing to which he was ever entitled.

Holding that where the doctor's license to practice medicine was procured by fraud, each use of the license continued the fraud, and therefore the statute of limitations did not apply, the court affirmed the revocation of a doctor's license in Cunningham v State (1935, Tex Civ App) 79 SW2d 180, writ ref. Apparently, the doctor had substituted his name for that of a licensee who recently had died, and based upon the forged record and his false representations, had maintained a medical license for several years. In appealing the board's revocation of his license based on its fraudulent procurement and use, the doctor argued, in part, that the statute of limitations acted to bar the prosecution of the action to revoke his license. The court held that the license had been procured by a series of fraudulent acts continuing from the original act through to the time the license was revoked, and stated that a privilege such as a license to practice medicine which was conceived in fraud and procured by fraud could not be raised by continued fraudulent devices to the dignity of a vested right, and the state could withdraw the privilege at any time the fraud was uncovered. Consequently, the court held, the action was not barred by a statutory time limitation.

III. Laches

§ 4.5. Running of limitations period

[Cumulative Supplement]

CUMULATIVE SUPPLEMENT

Cases:

Where medical practice act provided that state Department of Professional Regulation could file complaint against physician no more than five years after date of allegedly illegal incident or act, and psychiatrist's unethical conduct involved his receipt of benefits from trusts set up by patient, statutory period for Department's filing complaint against psychiatrist began to run when Department knew or reasonably should have known about violations, not when violations actually occurred. Doe v Department of Professional Regulation (1992, 1st Dist) 238 Ill App 3d 349, 179 Ill Dec 557, 606 NE2d 389, app den 148 Ill 2d 641, 183 Ill Dec 17, 610 NE2d 1261.

[Top of Section]

[END OF SUPPLEMENT]

§ 5. View that doctrine of laches is not applicable to disciplinary proceedings

In the following cases involving the suspension or revocation of a physician's license to practice medicine, the courts have

followed or acknowledged the rule that the doctrine of laches does not apply to such disciplinary proceedings.

Following the rule that the doctrine of laches does not apply to an administrative disciplinary proceeding, the court in Farzad v Department of Professional Regulation (1983, Fla App D1) 443 So 2d 373, a case not factually within the scope of this annotation in that it involves a reprimand rather than a license suspension or revocation, upheld the state medical licensing board's reprimand of a doctor for misconduct. Nine years prior to the board's proceedings to discipline her, the doctor fraudulently took an eligibility examination in her sister's name to qualify the sister to take medical training in the United States. The board was not notified of the misconduct until 7 years after it occurred, and it waited 2 additional years before instituting the action against the doctor. The doctor argued, inter alia, that due to the excessive amount of delay in bringing the proceedings, the disciplinary action was barred by the doctrine of laches. The court rejected the argument, following the line of authority that the doctrine of laches is inapplicable to a proceeding to revoke a license to practice medicine because such a proceeding is a disciplinary proceeding brought in the name of the sovereign, and therefore is not subject to laches.

See Chaplan v Ambach (1982, 3d Dept) 91 App Div 2d 736, 457 NYS2d 980, the facts of which are set out in § 7, wherein the court, although stating that neither laches nor the statute of limitations applies to disciplinary proceedings, went on to observe that the physician failed to prove that any delay in instituting the proceedings resulted in any prejudice to him, and therefore the revocation of his license to practice medicine would not be annulled based on delay.

The court held that laches could not be upheld as a defense to a medical license revocation proceeding in State v Josefsberg (1957) 275 Wis 142, 81 NW2d 735, 63 ALR2d 1071, where the revocation was based on fraud committed by the doctor 26 years before the hearing. In response to charges that he had fraudulently represented to the licensing board that he graduated from a foreign medical school, the doctor argued that he had received the degree, and that the 26 years which elapsed between the time of the issuance of his license and the commencement of the proceedings to revoke his license had prejudiced his ability to prove that he was a graduate because witnesses had died or moved and because chaotic events in Europe during World War II adversely affected his chances of tracing witnesses, documents, and facts to support his position. The doctor contended that the state was barred by laches from revoking his license because the licensing board failed to take timely action in commencing the revocation proceeding. The court noted the general principle that laches on the part of the government in bringing suit is not to be a defense in the case of a claim which is founded on a sovereign right, and held that since this action was brought by the state in its sovereign capacity to protect a public right, the doctrine of laches was not applicable.

§ 6. View that delay absent showing of prejudice is insufficient to support laches

Courts in the following cases held or recognized that while mere delay is insufficient to invoke the doctrine of laches in a proceeding to revoke or suspend a physician's license to practice medicine, laches might be a bar to such a disciplinary proceeding on a sufficient showing of prejudice to the physician caused by unreasonable delay.

Cal
Gore v Board of Medical Quality Assur. (1980, 2d Dist) 110 Cal App 3d 184, 167 Cal Rptr 881 (recognizing rule)
Hawaii
Chock v Bitterman (1984) 5 Hawaii App 59, 678 P2d 576
NH
Appeal of Plantier (1985) 126 NH 500, 494 A2d 270, 51 ALR4th 1129
NY
Dannenberg v Board of Regents (1980, 3d Dept) 77 App Div 2d 707, 430 NYS2d 700 (apparently recognizing rule)
Fischman v Ambach (1983, 3d Dept) 98 App Div 2d 854, 470 NYS2d 819
Or
Spray v Board of Medical Examiners (1981) 50 Or App 311, 624 P2d 125, mod 51 Or App 773, 627 P2d 25 (recognizing rule)
Pa
Pennsylvania State Board of Medical Education & Licensure v Schireson (1948) 360 Pa 129, 61 A2d 343 (recognizing rule)
Flickinger v Commonwealth, Dept. of State (1982) 64 Pa Cmwlth 147, 439 A2d 235

Thus, in Fischman v Ambach (1983, 3d Dept) 98 App Div 2d 854, 470 NYS2d 819, the court dismissed the argument of three podiatrists that the doctrine of laches barred the suspension of their licenses, holding that laches did not apply to medical license suspension proceedings when the licensees failed to demonstrate that the delay prejudiced them, where the license suspensions were based on the podiatrists' guilty pleas to charges of attempted bribery 5 years prior to the proceedings. The court stated that it was following the general rule that the doctrine of laches does not apply to disciplinary proceedings in the absence of a showing of prejudice caused by the delay, and as the podiatrists were not prejudiced by the delay in this case, laches did not attach.[17]

Holding that laches did not attach because a chiropractor showed no harm or prejudice resulting from the delay, the court affirmed the board of chiropractic examiners' suspension of his license in Flickinger v Commonwealth, Dept. of State (1982) 64 Pa Cmwlth 147, 439 A2d 235, where the suspension was based on the chiropractor's guilty pleas to allegations that he had received payment from the welfare department for treatment which he had not rendered. The doctor alleged that the nearly 2 1/2-year delay between the completion of the board's hearing and the order of suspension should be barred by laches because, due to the delay, he assumed that the charges had been dropped and re-established his practice in another community. The court applied the rule that the claim of laches requires more than a mere passage of time and the delay must cause some harm or prejudice to the party asserting it, and held that as the chiropractor's defense was not prejudiced by the delay, laches was not applicable.

§ 7. Application of view to particular circumstances

[Cumulative Supplement]

Applying the rule that delay alone is not sufficient to support application of the doctrine of laches to proceedings to revoke or suspend a license to practice medicine, the courts held that under the particular circumstances involved in the following cases, physicians asserting laches failed to establish prejudice or harm sufficient to invoke the doctrine.

In Gore v Board of Medical Quality Assur. (1980, 2d Dist) 110 Cal App 3d 184, 167 Cal Rptr 881, the court upheld the state medical quality board's suspension of a doctor's license, finding that the delay between the time that the board discovered the incident upon which the license suspension was based and the time of the proceedings was not unreasonable and did not prejudice the doctor, and therefore the administrative proceeding was not barred by laches. The doctor had failed to diagnose, monitor, and take sufficient steps to remedy a fluid and salt imbalance in the postoperative treatment of a patient, resulting in her death. The state medical quality board suspended his license on the basis that his actions constituted gross negligence. The doctor appealed the license suspension arguing, inter alia, that his defense of the allegations was prejudiced by loss of recollection of the pertinent events, which occurred more than 4 years prior to commencement of the board's proceeding. The court commented that any claim alleging delay in commencing administrative proceedings should be premised on the time when the board learned or should have learned of the facts on which it based its accusation, which in this case was only 12 months prior to the institution of the administrative proceedings. Consequently, the court found against the defense of laches in part because the 12 months elapsing between the order approving the malpractice settlement and commencement of the accusatory proceeding by the board was not an unreasonable delay. The doctor further argued that he was prejudiced as a result of the delay. The court denied the doctor's contention that he was prejudiced, observing that his deposition in the malpractice action which was taken 5 months after the events reflected the same inability to remember the details of his management of the postoperative care of the deceased that was evidenced in his testimony in the administrative hearing concerning the suspension of his license to practice medicine.

Holding in part that laches, which required a showing of prejudice as a result of the delay, was not supported by the facts, the court in Chock v Bitterman (1984) 5 Hawaii App 59, 678 P2d 576, affirmed the suspension of a doctor's license to practice medicine, where the license was suspended for the doctor's overdosing several children with steroids. The doctor argued that the 4-year delay between his notification by the board that a charge had been filed against him and the lodging of the formal complaint adversely affected his rights and put him at a severe disadvantage in preparing a defense. The court noted that there

was authority holding that the doctrine of laches did not apply to disciplinary proceedings, but held that since the doctor had not been able to show prejudice from the delay or to show anything except the passage of time which might support his argument for the application of laches, there was no need for it to decide whether as a general rule laches applied to disciplinary proceedings, since laches did not apply in any case.

On the other hand, the court in Appeal of Plantier (1985) 126 NH 500, 494 A2d 270, 51 ALR4th 1129, found that a doctor whose license was revoked based, in part, on a charge brought 9 years after the alleged misconduct occurred, was prejudiced by the delay, and held that laches operated to dismiss the charge. The delay was due to a patient's waiting 9 years to file his complaint against the doctor. The court held that the delay was long enough to cause memories to fade and witnesses to disappear, and as the disposition of the proceedings turned on the credibility of witnesses' testimony, the use of a laches-type doctrine was necessary to lessen the risk of erroneously depriving the doctor of his property interest in a license to practice his livelihood.

In Dannenberg v Board of Regents (1980, 3d Dept) 77 App Div 2d 707, 430 NYS2d 700, the court held the doctor had not shown that the delay in instituting the proceedings to revoke his license resulted in any prejudice to him, where the doctor was charged with writing illegal prescriptions. The court did not decide if the delay could be a bar to the proceedings, noting that the decision need not be made because there was no prejudice shown to the doctor.

The court upheld the revocation of a physician's license in Chaplan v Ambach (1982, 3d Dept) 91 App Div 2d 736, 457 NYS2d 980, noting that there was no evidence that the delay in instituting the proceedings prejudiced the physician. The physician had been convicted of medicaid fraud, and subsequently proceedings were instituted to revoke his license to practice medicine. He contended that the delay in the commencement of the disciplinary proceeding was unwarranted, but the court dismissed the argument by holding, in part, that the physician did not demonstrate that the delay in commencing the disciplinary action resulted in any prejudice to him, and consequently the determination to revoke the doctor's license would not be annulled on the basis of any delay.

See Fischman v Ambach (1983, 3d Dept) 98 App Div 2d 854, 470 NYS2d 819, § 6, where the court did not apply laches to the proceedings to suspend the licenses to practice medicine of three podiatrists because the 5-year delay between their conviction of attempted bribery and the license suspensions did not prejudice them.

In Spray v Board of Medical Examiners (1981) 50 Or App 311, 624 P2d 125, mod on other grounds 51 Or App 773, 627 P2d 25, the facts of which are set out in § 9[b], the court dismissed the assertion of laches as a defense in part because the doctor did not prove any harm as a result of the delay in initiating the proceedings to suspend his license.

The court in Pennsylvania State Board of Medical Education & Licensure v Schireson (1948) 360 Pa 129, 61 A2d 343, in discussing the doctor's assertion of the doctrine of laches in license revocation proceedings, held that laches could not be imputed by the mere passage of time, but must be determined from all the circumstances of the case. The state licensing board's proceedings to revoke the doctor's license to practice medicine were based on alleged fraud, misrepresentation, and deception in obtaining the license which was issued to the doctor 34 years prior to the commencement of the proceedings. In an earlier proceeding to block the hearing on the matter,[18] the court held that the defense of laches could not be raised at that time because there were not enough circumstances in the record to enable the court to apply the doctrine. The court in the instant action again dismissed the laches defense, but noted that there was significance in the length of the delay, stating that since it obscured evidence, it operated by way of a presumption in favor of innocence and against the imputation of fraud. Consequently, the court overturned the revocation of the doctor's license because there was not sufficient evidence to rebut the presumption of innocence and because the alleged fraud was not proved.

See Flickinger v Commonwealth, Dept. of State (1982) 64 Pa Cmwlth 147, 439 A2d 235, § 6, where the court held that laches did not attach because the chiropractor did not show that the delay caused prejudice to his defense of the proceedings to suspend his license to practice. The 2 1/2-year delay occurred between the completion of the hearing and the order suspending his license, during which time the chiropractor started a new practice in another community. Noting that the chiropractor's defense in the proceedings could not have been prejudiced because the delay occurred after the hearing was completed, and that there was nothing to warrant his assumption that the board's charges had been dropped, the court held that laches did not apply.

CUMULATIVE SUPPLEMENT

Cases:

Trial court erred in overturning, on laches theory due to 3-year delay, discipline imposed by state medical board against doctor as result of patient's death from complications of undiagnosed ectopic pregnancy where trial court did not find demonstrable prejudice to doctor by delay, and legislature, in failing to impose statute of limitations on physician disciplinary proceedings, evinced intent to protect people from incompetent doctors, regardless of how long it took state medical board to act. Furthermore, doctor did not produce sufficient evidence of prejudice to support court's finding. Fahmy v Medical Bd. of California (1995, 2nd Dist) 38 Cal App 4th 810, 45 Cal Rptr 2d 486, 95 CDOS 7536, 95 Daily Journal DAR 12898.

Absent any contrary evidence, finding that there was no evidence to support claim that Board of Medical Examiners failed to exercise diligence in bringing sexual contact charge against anesthesiologist precluded application of doctrine of laches to bar disciplinary action. Colorado State Bd. of Medical Examiners v. Ogin, 56 P.3d 1233 (Colo. Ct. App. 2002), as modified, (Sept. 12, 2002).

Physician could not claim prejudice from any delay by Board of Registration in Medicine regarding complaints of alleged sexual misconduct with adolescent female patients, and, thus, license revocation was not barred by laches or due process clause; the Board acted immediately on receiving information regarding the complaints of two patients, one patient reported abuse seven years after treatment at age thirteen, and physician could not use her failure to report during her tender years as a shield. U.S.C.A. Const.Amend. 14. Ingalls v. Board of Registration In Medicine, 445 Mass. 291, 837 N.E.2d 232 (2005).

Equitable doctrine of laches did not bar State Medical Board from taking disciplinary action against physician; although physician argued that the delay in bringing disciplinary proceedings prejudiced her ability to defend herself, one of the allegations against physician was her failure to maintain proper medical records and time did not alter physician's medical records, and physician was also charged with failure to use reasonable care in selection and administration of controlled substances, and even if she could not recall specific information for patients, had there been medically sound basis for prescribing large quantities of controlled substances, physician could have offered that medically approved explanation. Reed v. State Med. Bd. of Ohio, 162 Ohio App. 3d 429, 2005-Ohio-4071, 833 N.E.2d 814 (10th Dist. Franklin County 2005).

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[END OF SUPPLEMENT]

§ 8. Delay caused by party asserting defense as barring laches

In the following case, the court held that laches was not applicable to a proceeding to revoke a license to practice medicine because the delay was caused by the party asserting the defense.

Holding in part that the doctrine of laches did not apply when the delay was caused by the doctor asserting the defense, the court affirmed the state board's revocation of a doctor's license to practice medicine in Pepe v Board of Regents (1968, 3d Dept) 31 App Div 2d 582, 295 NYS2d 209. Apparently, the doctor had been convicted of selling examination questions and answers to candidates for medical licenses, and had pursued every legal avenue available to him to avoid the conviction. As a result of his avid pursuance of relief from conviction, more than 6 years elapsed between the time the doctor first spoke to the state board and the time the disciplinary proceeding was brought to cancel his medical license. The doctor contended that

there was undue delay in commencing the disciplinary proceedings, but the court held that since the delay was of the doctor's own making, there was no basis for laches as a bar to the license revocation proceedings.

§ 9[a] Continuing course of conduct as barring laches—Fraud

The courts in the following cases found that procurement of a license to practice medicine by fraud was a continuing offense, and therefore the doctrine of laches did not attach to proceedings to suspend or revoke the license based on such a fraud.

An injunction allowing a doctor to keep his license to practice medicine was overturned in Eclectic State Medical Board v Beatty (1941) 203 Ark 294, 156 SW2d 246, the court holding that although the initial fraud in obtaining the license occurred 9 or 10 years previously, every time the doctor undertook to practice under his license he continued the fraud, and therefore laches did not apply to the revocation of his license. Apparently, the doctor represented to the state medical licensing board that he had graduated from a legitimate medical school. Nine or 10 years later, the board became aware that the doctor had not graduated from medical school, and instituted proceedings to revoke his license on the grounds that the doctor's diploma was illegally and fraudulently obtained and that his license to practice medicine was obtained by fraud and deception. The doctor argued among other things that the licensing board was estopped by laches from revoking his license because they waited 9 or 10 years to start proceedings based on grounds which existed at the time he was licensed. The court held that laches was not applicable because obtaining a license from a state medical licensing board by false or fraudulent representations is a continuing offense, and thus every time the doctor practiced under his license, he kept up the fraud initiated when he obtained his authority to practice by false representations.

In Bockman v Arkansas State Medical Board (1958) 229 Ark 143, 313 SW2d 826, the facts of which are set out in § 4, the court held that the practice of medicine under a license fraudulently obtained is a continuing offense, and therefore no issue of laches could be raised to bar the license revocation proceedings.

The court in Cunningham v State (1935, Tex Civ App) 79 SW2d 180, writ ref, the facts of which are set out in § 4, held that each use of a license to practice medicine which had been obtained by fraud continued the fraud, and therefore the doctrine of laches was not applicable to the proceedings to revoke the doctor's license.

§ 9[b] Continuing course of conduct as barring laches—Malpractice

In the following case, the court held that the doctrine of laches was not applicable to the proceedings to revoke a medical license because the misconduct charged was a continuing course of conduct.

The court in Spray v Board of Medical Examiners (1981) 50 Or App 311, 624 P2d 125, mod on other grounds 51 Or App 773, 627 P2d 25, reversing the state board of medical examiners' revocation of a doctor's license to practice medicine on other grounds, held that laches did not apply to the proceeding because the disciplinary action was based on a continuing course of conduct which allegedly continued up to the time of the license revocation. The complaint against the doctor charged him with failing to take medical histories, perform physical examinations, or make diagnoses which were sufficiently detailed to demonstrate the need for and the appropriateness of the drugs prescribed in treating drug dependent patients. The doctor alleged that although the board knew of his practices for some time, they took no action against him for 13 years before filing the complaint which resulted in the revocation of his medical license. The doctor argued that the proceeding should have been dismissed because of the passage of time, basing his argument in part on the doctrine of laches. The court found that the proceedings were based on the consistent utilization of inappropriate medical treatment which was continuing up to the time of the license revocation, and therefore laches could not and did not apply.

§ 10. Laches as required by due process

[Cumulative Supplement]

In the following case, the court held that due process required the application of the doctrine of laches to the medical license revocation proceedings.

The court applied the doctrine of laches in dismissing a complaint against a doctor made 9 years after the alleged professional misconduct took place in Appeal of Plantier (1985) 126 NH 500, 494 A2d 270, 51 ALR4th 1129, but upheld a similar 4-year-old complaint, finding that the circumstances surrounding the delay in the first complaint were such that laches was a valid defense, where the doctor's license to practice medicine had been revoked by the state licensing board based on the two complaints. The doctor, a pediatrician, was accused by one former patient of engaging in improper sexual contact during a physical examination 9 years previously, and by another former patient of similar behavior 4 and 7 years prior to filing of the complaint. The doctor argued that the board's consideration of the first complaint violated due process and that the 9-year delay prejudiced his ability to defend the accusation. The court noted that the statute governing conduct of the medical profession did not contain a limitation on the age of acts subject to disciplinary proceedings, but held that laches could be asserted as a defense in an administrative disciplinary action involving a professional license. The court analyzed the board hearing according to a two-part test to determine if the proceedings satisfied the due process requirement of the state constitution. First, the court found that the doctor had a legally protected property right in his license to practice medicine because the license, once granted, was an individual entitlement granted in state law which could not be removed except for cause, and as a result of the property right the doctor was entitled to procedural due process before the board. In applying the second part of the test, the court examined three factors to determine whether the board's procedures provided the doctor with due process by implementing sufficient procedural safeguards. First, the court found that the private interest, the doctor's license to practice his profession, affected by governmental action was substantial, noting that what was at stake in the disciplinary proceeding was the doctor's license to practice his livelihood and profession. Second, the court held that the risk of an erroneous deprivation of that interest was great and that the risk would be significantly decreased by the application of a laches-type doctrine. The court commented that because the case turned on the credibility of the witnesses' testimony, failure to impose a limitation on the time in which such a disciplinary proceeding could be brought significantly increased the problems of proof and increased the danger of false, fraudulent, frivolous, speculative, or uncertain claims. In an aside, the court suggested that the situation would be different in a disciplinary proceeding in which the evidence was largely documentary rather than testimonial, because actions turning on documentary evidence were less likely to be prejudiced by the passage of time. The third factor considered by the court was the government's interest, which the court found to be to protect the public interest. Because of the importance of the government's function in disciplinary actions, the court observed, laches could not be imputed merely by the passage of time, but required that the doctor demonstrate the prejudice caused by the delay, show that the delay affected his ability to defend the charges, and prove that the delay was caused not by lack of the complainant's awareness of the nature of the conduct, but by the complainant sleeping on his rights. The court found that the circumstances surrounding this action indicated that the doctor met those requirements, and therefore the doctrine of laches applied. Furthermore, the court commented, fundamental fairness was a primary consideration under due process, and it was fundamentally unfair to make a doctor defend a 9-year-old complaint when the complaint was not delayed by fraud or the lack of ability to discover the misconduct.

CUMULATIVE SUPPLEMENT

Cases:

State Committee of Psychologists' disciplinary decision did not violate psychologist's substantive due process rights even though complaint was filed approximately five years after alleged misconduct, in absence of evidence or argument showing how Committee's decision was truly irrational or unrelated to Committee's primary purpose or that delay harmed psychologist or rendered proceedings unreliable. U.S.C.A. Const. Amends. 5, 14. Lane v. State Committee of Psychologists, 954 S.W.2d 23 (Mo. Ct. App. E.D. 1997).

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[END OF SUPPLEMENT]

RESEARCH REFERENCES

West's Key Number Digest

- West's Key Number Digest, Constitutional Law 287.2(5)
- West's Key Number Digest, Limitation of Actions 5(3)
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- West's Key Number Digest, Physicians and Surgeons 11.3(1)
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- Index to Annotations, Laches and Delay
- Index to Annotations, Licenses and Permits
- Index to Annotations, Limitation of Actions
- Index to Annotations, Physicians and Surgeons
- Pretrial Discovery in Disciplinary Proceedings Against Physician, 65 A.L.R.6th 295
- Wrongful or Excessive Prescription of Drugs as Ground for Revocation or Suspension of Physician's or Dentist's License to Practice, 19 A.L.R.6th 577
- False or fraudulent statements or nondisclosures in application for issuance or renewal of license to practice as ground for disciplinary action against, or refusal to license, medical practitioner, 32 A.L.R.5th 57
- Rights as to notice and hearing in proceeding to revoke or suspend license to practice medicine, 10 A.L.R.5th 1
- Licensing and regulation of practice of physical therapy, 8 A.L.R.5th 825
- Necessity of expert evidence in proceeding for revocation or suspension of license of physician, surgeon, or dentist, 74 A.L.R.4th 969
- Tort liability of medical society or professional association for failure to discipline or investigate negligent or otherwise incompetent medical practitioner, 72 A.L.R.4th 1148
- Filing of false insurance claims for medical services as ground for disciplinary action against dentist, physician, or other medical practitioner, 70 A.L.R.4th 132
- Improper or immoral sexually related conduct toward patient as ground for disciplinary action against physician, dentist, or other licensed healer, 59 A.L.R.4th 1104
- Physician's or other healer's conduct in connection with defense of resistance to malpractice action as grounds for revocation of license or other disciplinary action, 44 A.L.R.4th 248
- Validity and construction of state statutory provision forbidding court to stay, pending review, judgment or order revoking or suspending professional, trade, or occupational license, 42 A.L.R.4th 516

- Physician's or other healer's conduct, or conviction of offense, not directly related to medical practice, as ground for disciplinary action, 34 A.L.R.4th 609
- Wrongful or excessive prescription of drugs as ground for revocation or suspension of physician's or dentist's license to practice, 22 A.L.R.4th 668
- Use, in attorney or physician disciplinary proceeding, of evidence obtained by wrongful police action, 20 A.L.R.4th 546
- Entrapment as a defense in proceedings to revoke or suspend license to practice law or medicine, 61 A.L.R.3d 357
- Revocation of nurse's license to practice profession, 55 A.L.R.3d 1141
- Mandamus to compel disciplinary investigation or action against physician or attorney, 33 A.L.R.3d 1429
- Pretrial discovery in disciplinary proceedings against physician, 28 A.L.R.3d 1440
- Professional incompetency as ground for disciplinary measure against physician or dentist, 28 A.L.R.3d 487
- Improper or immoral conduct toward female patient as ground for disciplinary measure against physician or dentist, 15 A.L.R.3d 1179
- Disqualification, for bias or interest, of member of occupation or profession sitting in license revocation proceeding, 97 A.L.R.2d 1210
- Revocation or suspension of physician's or surgeon's license for false claims, medical reports, or bills for medical services in personal injury litigation, 95 A.L.R.2d 873
- Alcoholism, narcotics addiction, or misconduct with respect to alcoholic beverages or narcotics, as ground for revocation or suspension of license to practice medicine or dentistry, 93 A.L.R.2d 1398

Legal Encyclopedias

- Am. Jur. 2d, Administrative Law §§ 321, 322
- Am. Jur. 2d, Physicians, Surgeons, and Other Healers § 104

Forms

- 19A Am. Jur. Pleading and Practice Forms, Physicians, Surgeons, and Other Healers, Forms 13, 22-25

Additional References

- Boolean Search Query: laches or (statut! pre/2 limit!) w/150 doctor or physician or podiatrist or osteopath or chiropractor w/75 disciplinary proceeding or (licens! w/50 revok! or suspend! or practice or medic!)

Footnotes

[1] The present annotation supersedes the annotation at 63 A.L.R.2d 1080.

[2] Disciplinary proceedings taken against physicians other than license suspensions or revocations are not within the scope of this discussion.

[3] Actions to suspend or revoke licenses against other health care professionals such as nurses and X-ray technicians will not be discussed herein. For an annotation dealing with the revocation of a nurse's license to practice, see 55 A.L.R.3d 1141.

[4] See Am. Jur. 2d, Physicians, Surgeons, and Other Healers §§ 26, 27.

[5] See Am. Jur. 2d, Physicians, Surgeons, and Other Healers §§ 74, 75.

[6] See Am. Jur. 2d, Physicians, Surgeons, and Other Healers § 102.

[7] See Am. Jur. 2d, Physicians, Surgeons, and Other Healers § 117.

[8] See Am. Jur. 2d, Administrative Law § 322.

[9] Appeal of Plantier (1985) 126 NH 500, 494 A2d 270, 51 ALR4th 1129, §§ [7], [10].

[10] See, for example, Chock v Bitterman (1984) 5 Hawaii App 59, 678 P2d 576; Fischman v Ambach (1983, 3d Dept) 98 App Div 2d 854, 470 NYS2d 819; and Flickinger v Commonwealth, Dept. of State (1982) 64 Pa Cmwlth 147, 439 A2d 235.

[11] In Gore v Board of Medical Quality Assur. (1980, 2d Dist) 110 Cal App 3d 184, 167 Cal Rptr 881, for example, the court indicated that a legitimate showing by the doctor that he was unable to remember the details of the incident on which the license suspension was based because of an unreasonable delay in bringing the disciplinary proceedings could constitute sufficient prejudice to support the defense of laches. And in Appeal of Plantier (1985) 126 NH 500, 494 A2d 270, 51 ALR4th 1129, the court allowed laches to bar a complaint asserted against a doctor 9 1/2 years after the alleged incident took place, noting that where the disposition of a case turns on the credibility of witnesses' testimony, memories fade or become distorted after the passage of time, resulting in prejudice to the doctor.

[12] See Appeal of Plantier (1985) 126 NH 500, 494 A2d 270, 51 ALR4th 1129.

[13] See Am. Jur. 2d, Physicians, Surgeons, and Other Healers § 74.

[14] Re Weathers (1947) 159 Fla 390, 31 So 2d 543.

[15] For an annotation dealing with entrapment as a defense in proceedings to revoke or suspend a license to practice law or medicine, see 61 A.L.R.3d 357.

[16] See Appeal of Plantier (1985) 126 NH 500, 494 A2d 270, 51 ALR4th 1129, which supports the imposition of laches based on a due process analysis. And see 98 L Ed 851 for an early annotation dealing with the suspension or revocation of medical or legal professional licenses as violating due process.

[17] Attention is called to Chaplan v Ambach (1982, 3d Dept) 91 App Div 2d 736, 457 NYS2d 980, § 7, wherein the court stated that laches did not apply to disciplinary proceedings, but went on to note that the license revocation could not be overturned based on delay because the physician did not sufficiently demonstrate that the delay resulted in prejudice to him.

[18] Schireson v Shafer (1946) 354 Pa 458, 47 A2d 665, 165 ALR 1133.

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Heizer v. Cincinnati, New Orleans and Pacific Ry. Co., Ky.App., August 6, 2004

105 Ariz. 442
Supreme Court of Arizona. In Banc.

Milton BROOKS, a single man, Appellant,
v.
SOUTHERN PACIFIC COMPANY, a Delaware corporation and F. E. Wechten, Phoenix Traffic Manager of Southern Pacific Company, Appellees.

No. 9860-PR.
|
March 19, 1970.

Synopsis
Action under Federal Employers' Liability Act for damages resulting from mental and physical injuries allegedly sustained when plaintiff, while employed by defendant railroad, slipped and fell from train on which he was working. The Superior Court, Maricopa County, Warren L. McCarthy, J., denied plaintiff's motion for partial summary judgment and dismissed the complaint, and plaintiff appealed. The Court of Appeals affirmed, 10 Ariz.App. 535, 460 P.2d 206. On plaintiff's petition for review, this Supreme Court, Udall, J., held that although the limitation period of Federal Employers' Liability Act may be tolled by reason of a plaintiff's incompetency, evidence was not sufficient to sustain plaintiff's contention that he was incompetent from day of accident, since defendant had not had an opportunity for cross-examination.

Reversed and remanded and decision of Court of Appeals vacated.

West Headnotes (6)

[1] **Limitation of Actions**
Effect of federal statute in state courts

State statute providing that if person is of unsound mind at time his cause of action accrues, period of disability is not deemed portion of limitation period was not applicable to claim arising under Federal Employers' Liability Act, and limitation period of federal statute would be applied. A.R.S. § 12–502; Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

1 Cases that cite this headnote

[2] **Labor and Employment**
Time to sue and limitations

Three-year Federal Employers' Liability Act limitation provision, although containing no exceptions or saving clauses, does not bar all suits commenced outside three-year period; basic inquiry is whether congressional purpose is best effectuated by tolling limitation period in given circumstances. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

2 Cases that cite this headnote

[3] **Limitation of Actions**
Nature of statutory limitation

Policy underlying statute of limitations is primarily for protection of defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses' memories faded, but policy may be outweighed where interests of justice require vindication of plaintiffs' rights.

20 Cases that cite this headnote

[4] **Labor and Employment**
Time to sue and limitations

Extent to which legislative bodies have provided exceptions for mental disabilities is relevant factor in considering policies underlying

three-year limitation of Federal Employers' Liability Act. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

Cases that cite this headnote

[5] **Limitation of Actions**
Insanity or Other Incompetency

Three-year limitation of Federal Employers' Liability Act may be tolled by reason of the plaintiff's incompetency. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

9 Cases that cite this headnote

[6] **Appeal and Error**
Issues not addressed below in general

Where suit under Federal Employers' Liability Act came to trial court on motion for partial summary judgment and court made no factual determinations concerning plaintiff's alleged incompetence subsequent to his accident, affidavits in support of plaintiff's contention that he was incompetent from day of accident were insufficient to sustain such contention, necessitating remand for additional proceedings to determine whether three-year limitation of federal statute had been tolled. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51, et seq., 56.

8 Cases that cite this headnote

Attorneys and Law Firms

***443 **737** Finn, Meadow & Thrasher, by Stephen T. Meadow, Phoenix, for appellant.

Evans, Kitchel & Jenckes, by Ralph J. Lester, Phoenix, for appellees.

Opinion

UDALL, Justice:

This is a suit filed under the Federal Employers' Liability Act (FELA), 45 U.S.C. s 51 et seq. (1964 ed.). In December, 1963 plaintiff, while employed by defendant railroad, slipped and fell from a train on which he was working. On June 9, 1967, three years and six months after the accident he filed an action in the Superior Court, Maricopa County for damages resulting from mental and physical injuries allegedly incurred in the fall.

The applicable statute of limitations is 45 U.S.C. s 56, which provides that 'no action shall be maintained * * * unless commenced within three years from the day the cause of action accrued.'

Plaintiff moved the trial court for partial summary judgment solely on the issue of the statute of limitations, urging that the statute should be tolled by reason of plaintiff's mental incompetency. Plaintiff's motion was supported by three affidavits. One affidavit was executed by plaintiff himself. A second was executed by his mother, and a third by Dr. Rex Whitney, identified therein as special assistant to the director of the Arizona State Hospital in Phoenix.

Plaintiff's affidavit recited, inter alia, that prior to the accident he had no mental problems of any consequence and that after the fall his mental faculties were seriously impaired. He further stated that he was a mental patient at the Arizona State Hospital in 1964 and 1965, and that between the date of his fall in December 1963 and the month of January 1967 his memory of events was vague and intermittent. Dr. Whitney's affidavit stated that the hospital records showed Mr. Brooks was, by court order, officially declared incompetent to handle his own affairs and that he was hospitalized at the Arizona State Hospital for two periods of time in 1964 and 1965.

The trial court denied plaintiff's motion for partial summary judgment and dismissed the complaint, stating in part as follows:

> 'The Court having taken the matter under advisement and having considered the memoranda and affidavits filed herein, finds that although the plaintiff may have been incompetent at the time his cause of action herein accrued and may have continued to be incompetent until

> January, 1967, his claim herein is neverthe less barred by limitations.'

The Court of Appeals affirmed, Brooks v. Southern Pacific Company, 10 Ariz.App. 535, 460 P.2d 206, and we granted Mr. Brooks' petition for review.

The initial question for resolution here is whether as a matter of law, the incompetence of a plaintiff may toll the FELA limitation period.

[1] Arizona has adopted a specific saving statute providing that if a person is of unsound mind at the time his cause of action accrues, the period of the disability is not deemed a portion of the limitation period. A.R.S. s 12—502. The Arizona statute is not applicable here because the ***444 **738** claim is one arising under federal law, and we must apply instead the FELA. Burnett v. New York Central Railroad Co., 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965).

[2] The defendant correctly points out that the FELA limitation provision contains no exceptions or saving clauses. Nevertheless, this fact is not dispositive of the question before us. It has become well-established since 1947 that not all suits commenced outside the three-year limitation period are barred.

The limitation period was first held to have been tolled when the plaintiff was a prisoner of war or a nonresident enemy alien. Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947); Frabutt v. New York, Chicago & St. Louis R. Co., 84 F.Supp. 460 (W.D.Pa.1949). Plaintiffs have since been permitted to begin suit after the three-year period where there has been fraud by the defendant. Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959); Louisville & Nashville Railroad Co. v. Disspain, 275 F.2d 25 (6th Cir. 1960); Scarborough v. Atlantic Coast Line R. Co., 190 F.2d 935 (4th Cir. 1951). More recently it has been held that the period may be tolled where plaintiff was misled by defendant's actions even where there was no intent to mislead. Mumpower v. Southern Railway Co., 270 F.Supp. 318 (W.D.Va.1967). See also Scarborough v. Atlantic Coast Line R. Co., supra; Louisville & Nashville Railroad Co. v. Disspain, supra.

In the most recent Supreme Court case dealing with the FELA statute of limitations, the Supreme Court emphasized the broad, humanitarian purpose of Congress. '* * * (T)he FELA limitation period is not totally inflexible, but, under appropriate circumstances, it may be extended beyond three years. * * * (T)he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.' Burnett v. New York Cent. R. Co., 380 U.S. 424, 427, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965). In that case the Supreme Court held that the statute was tolled where a state court action was filed within the limitation period but dismissed for lack of proper venue.

[3] The policy underlying the statute of limitations is primarily for the protection of the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses' memories faded. This policy is sound and necessary for the orderly administration of justice. However, this policy may be outweighed 'where the interests of justice require vindication of the plaintiff's rights.' Burnett v. New York Cent. R. Co., supra, at 428, 85 S.Ct. at 1055.

[4] The fundamental unfairness of rigidly enforcing the statute of limitations against mentally incompetent persons has been recognized by the statutes of the District of Columbia and nearly all the states, including Arizona.[1] These statutes provide ***445 **739** in varying ways for suspension of the statute of limitations when the plaintiff is 'insane', of 'unsound mind', 'mentally incompetent' or under other definitions of mental disability. See, Developments in the Law, Statute of Limitations, 63 Harvard Law Review 1177, 1229 (1950). We emphasize that we are here deciding a question of federal law and are not applying the statutes of this or any other state. However, the extent to which legislative bodies have provided exceptions for mental disabilities is a relevant factor in considering the policies underlying the statute of limitations. Burnett v. New York Central R. Co., supra.

[5] The FELA limitation provision is sometimes compared to that of the Suits in Admiralty Act, 46 U.S.C. ss 741 et seq., 745 (1964 ed.). In Williams v. United States, 133 F.Supp. 317 (E.D.Va.), aff'd 228 F.2d 129 (4th Cir.), cert. denied, 351 U.S. 986, 76 S.Ct. 1054, 100 L.Ed. 1499 (1955), it was held that insanity of the plaintiff did not suspend the time limitation of the Suits in Admiralty Act. The court there considered two factors in reaching its result. First, like the FELA, the limitation provision contained no saving provisions. But secondly, unlike the FELA, the statute authorized suit against the United States Government, and the United States is immune from suit except where there is strict compliance with the terms of the statute. The second factor is not present here, and we do not deem the rationale of the Williams case applicable, particularly in view of the Supreme Court's subsequent opinion in Burnett, supra, pointing to the humane and remedial intent of Congress in passing the FELA.

Only one case has come to our attention wherein the question of tolling the FELA limitation period for insanity was directly decided. Alvarado v. Southern Pacific Co., 193 S.W. 1108 (Tex.Civ.App.1917). In that case the Texas court held that insanity did not toll the FELA limitation period for the reason that no exceptions whatsoever are permitted by the statutory language. Alvarado v. Southern Pacific Co., supra, was decided long before the cases previously discussed wherein the courts have determined that despite the lack of any specific saving language in the statute, the limitation period may be tolled under some circumstances. Thus although the Texas court in Alvarado took the position that the statute could not be tolled for fraud, as well as insanity, it is now well established that fraud will suspend the limitation period. Glus v. Brooklyn Eastern Dist. Terminal, supra; Louisville & Nashville Railroad Co. v. Disspain, supra; Mumpower v. Southern Railway Co., supra. See also Belton v. Traynor, 381 F.2d 82, 86 (4th Cir. 1967). Similarly, defendant relies upon a number of cases containing dicta that insanity will not toll the statute. Sgambati v. United States, 172 F.2d 297 (2d Cir. 1949), cert. denied 337 U.S. 938, 69 S.Ct. 1514, 93 L.Ed.2d 1743; Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947); Taylor v. Southern R. Co., 6 F.Supp. 259 (E.D.Ill.1934); Wichita Falls & S.R. Co. v. Durham, 132 Tex. 143, 120 S.W.2d 803 (1938). Yet all of these cases were decided long before the Supreme Court's decisions in Burnett v. New York Central R. Co., supra and Glus v. Brooklyn Eastern Dist. Terminal, supra. We do not consider that these early cases which, like Alvarado v. Southern Pacific Co., supra, adopt a strict, literal interpretation of the statute, are still accurate statements of the law.

Accordingly we must conclude that the FELA statute of limitations may be tolled by reason of a plaintiff's incompetency. However, additional proceedings should be conducted in the instant case to resolve the factual question of plaintiff's incompetence.

[6] This matter came to the trial court on a motion for partial summary judgment. The trial court made no factual determinations concerning plaintiff's incompetence. Plaintiff argues that he was incompetent from the time of the accident in December, 1963 until January, 1967. But the affidavit of Dr. Whitney shows only that plaintiff was declared incompetent and was hospitalized during two separate ***446 **740** periods of time: from February 3, 1964 until July 8, 1964, and from May 7, 1965 until September 15, 1965. In addition, the records of the Superior Court indicate that, with respect to the first declaration of incompetence in 1964, the court signed an order restoring plaintiff to competency on July 27, 1964.

We have carefully reviewed the additional affidavits of plaintiff and his mother. At this stage of the litigation we are unable to find that the general statements contained therein are sufficient to sustain plaintiff's contention that he was incompetent from the day of the accident, since defendant has not had an opportunity for cross-examination.

The decision of the Court of Appeals is vacated. The judgment of the Superior Court is reversed and the cause is remanded for proceedings not inconsistent herewith.

LOCKWOOD, C.J., STRUCKMEYER, V.C.J., and McFARLAND and HAYS, JJ., concur.

All Citations

105 Ariz. 442, 466 P.2d 736

Footnotes

1 Code of Ala. Tit. 7, s 36; Alaska Stat. s 09.10.140; Ariz.Rev.Stat. s 12—502; Ark.Stat. s 37—226; Deering's Cal.Code of Civ.Proc. s 352; Colo.Rev.Stat. s 87—1—17; Dela.Code Ann.1967, Tit. 10, s 8115; D.C.Code Ann.1967, s 12—302; Fla.Stat. s 744.62, F.S.A.; Code of Ga.Ann. s 3—801; Hawaii Rev.Stat. s 657—13; Idaho Code s 5—230; Ill.Stat. Tit. 83, s 22; Burns' Indiana Stat. s 2—605; Iowa Code Ann. s 614.8; Kan.Stat.Ann. s 60—515; Ky.Rev.Stat. s 413.170(1); Me.Rev.Stat.Ann. s 14—853; Ann.Code of Md. Art. 57, s 2; Mass.Gen.Laws Ann. c. 260 s 7; Mich.Stat.Ann. s 27A.5851, Comp.Laws 1948, s 600.5851 (Pub.Acts 1961, No. 236); Minn.Stat.Ann. s 541.15; Miss.Code 1942, s 738; Vernon's Ann.Mo.Stat. s 516.170; Mont.Rev. Codes 1947, s 93—2703; Neb.Rev.Stat. s 25—213; Nev.Rev.Stat. s 11.180; N.J.Stat.Ann. 2A:14—21; N.M.Stat.1953, s 23—1—10; McKinney's N.Y.Civ.Prac.Law and Rules, s 208; N.C.Gen.Stat. s 1—17; N.D.Century Code, s 28—01—25; Page's Ohio Rev.Code, s 2305.16; Okla.Stat.Ann. s 12—96; Ore.Rev.Stat. s 12.160; R.I.Gen.Laws, s 9—1—19; S.C.Code of Laws, s 10—104; S.D.Code s 33.0204; Tenn.Code Ann. s 28—107; Vernon's Ann.Tex.Civ.Stat. Art. 5535; Utah Code Ann. s 78—12—36; Vt.Stat.Ann. Tit. 12, s 551; Va.Code s 8—30; Wash.Rev.Code Ann. s 4.16.190; W.Va.Code Ann.1961, s 5407; West's Wis.Stat.Ann. s 330.33; Wyo. Stat.1957, s 1—22.

38 Cal.App.4th 810, 45 Cal.Rptr.2d 486, 95 Cal. Daily Op. Serv. 7536, 95 Daily Journal D.A.R. 12,898

HOSNI NAGIB FAHMY, Plaintiff and Respondent,
v.
MEDICAL BOARD OF CALIFORNIA, Defendant and Appellant.

No. B082927.
Court of Appeal, Second District, Division 2, California.
Sep 26, 1995.

SUMMARY

In a mandamus proceeding, the trial court overturned, on a laches theory, the discipline imposed by the state medical board against a doctor as a result of his patient's death from the complications of an undiagnosed ectopic pregnancy. The trial court concluded that the medical board delayed unreasonably and thereby lost jurisdiction to act against the doctor by delaying for over three years between discovery of the relevant facts and instituting proceedings to revoke the doctor's medical license. (Superior Court of Los Angeles County, No. BS025541, Robert H. O'Brien, Judge.)

The Court of Appeal reversed and directed the trial court to issue a new order denying the writ petition and to enter judgment in favor of the medical board. The court held that the trial court erred in failing to find demonstrable prejudice to the doctor, and further in determining as a matter of law that a three-year delay was unreasonable. Dismissal of an administrative proceeding on the basis of laches is only warranted where the party asserting the laches theory has been substantially prejudiced. A statute of limitations may not be created by judicial fiat; the Legislature, in failing to impose a statute of limitations on physician disciplinary proceedings, has evinced its intent to protect people from incompetent doctors, regardless of how long it takes the state medical board to act. Furthermore, the doctor did not produce sufficient evidence of prejudice to support the court's finding. (Opinion by Boren, P. J., with Nott, J., and Brandlin, J.,* concurring.)

HEADNOTES

Classified to California Digest of Official Reports

([1])
Mandamus and Prohibition § 74--Mandamus--Rehearing and Appeal--Review.
In a mandamus proceeding, where the facts forming the basis of the trial court's ruling are not in dispute, the reviewing court is not bound by the trial court's legal determinations, and must arrive at its own legal conclusions on appeal.

([2a], [2b])
Healing Arts and Institutions § 24--Physicians--Regulation-- Disciplinary Proceedings--Judicial Review--Laches.
In a mandamus proceeding brought by a doctor, whose patient died of complications that resulted from an undiagnosed ectopic pregnancy, against the state medical board to overturn its administrative decision to revoke his medical license, the trial court erred in overturning the administrative decision on a theory of laches. Although a trial court has the inherent power to dismiss administrative proceedings brought to revoke a state-issued license where there has been an unreasonable delay between discovery of the relevant facts and the commencement of revocation proceedings, dismissal is only warranted where the party asserting the laches theory has been substantially prejudiced. The trial court here did not find demonstrable prejudice, but instead determined that a three-year delay was unreasonable as a matter of law by analogizing this license revocation proceeding to a medical malpractice or manslaughter proceeding, then shifted to the medical board the burden of proving that the doctor had not been prejudiced.

[See 11 **Witkin,** Summary of Cal. Law (9th ed. 1990) Equity, § 15.]

([3])
Healing Arts and Institutions § 24--Physicians--Regulation-- Disciplinary Proceedings--Judicial Review--Laches.
The Legislature, in failing to impose a statute of limitations on physician disciplinary proceedings, has evinced its intent to protect people from incompetent doctors, regardless of how long it takes the state medical board to act. A statute of limitations may not be created

by judicial fiat; limitations periods are products of legislative authority and control. By focusing solely on the passage of time, and not on the issue of disadvantage and prejudice, a court risks imposing a de facto-and impermissible-statute of limitations in a situation where the Legislature chose not to create a limitation on actions. Even inordinately long delays in taking administrative action have been judicially allowed. Administrative agencies such as the state medical board take action for the public welfare rather than for their own financial gain and should not be hampered by time limits in the execution of their duty to take protective remedial action.

([4])
Healing Arts and Institutions § 24--Physicians--Regulation-- Disciplinary Proceedings--Judicial Review--Laches--Sufficiency of Evidence of Prejudice.
In a mandamus proceeding brought by a doctor against the state medical board to overturn its administrative decision to revoke his medical license, the doctor did not produce sufficient evidence of prejudice to support the court's finding of laches in the three-year delay between the medical board's discovery of the relevant facts and their institution of the administrative proceeding. Even assuming the medical records relating to the patient's treatment two days prior to her death were incomplete, possible negligence in failing to diagnose the patient's ectopic pregnancy two days earlier did not excuse this doctor's failure to assess the patient's hemoglobin levels or his performance of a suction curettage the day of her death from blood loss. Thus, those earlier records had negligible relevance. Also, no contention was made that any of the witnesses, including the doctor, was unable to testify effectively or be cross-examined at the administrative hearing due to the passage of time. Moreover, the doctor's recollection of the incident was memorialized in a deposition taken during the year following the patient's death.

COUNSEL
Daniel E. Lungren, Attorney General, and Rosa M. Mosley, Deputy Attorney General, for Defendant and Appellant.
Rosner, Owens & Nunziato, David L. Rosner and Phil J. Montoya, Jr., for Plaintiff and Respondent.

BOREN, P. J.

A patient died from the complications of an undiagnosed ectopic pregnancy after seeking medical care from respondent Hosni Nagib Fahmy, M.D. The Medical Board of California, Division of Medical Quality (the Medical Board) took disciplinary action against Fahmy as a result of the patient's death. The discipline imposed by the Medical Board was overturned by the trial court on a laches theory. The court concluded that the Medical Board, by investigating the case for three years and three months before instituting proceedings against Fahmy's medical license, lost jurisdiction to act because it delayed unreasonably "as a matter of law." We reverse.

Facts

On May 8, 1986, a 33-year-old patient named Claudia Caventou presented herself as a first-time patient at the medical clinic of respondent Fahmy. She ***813** reported that she was pregnant, and complained of severe abdominal pain, vaginal bleeding, shortness of breath and nausea. Fahmy's notes indicate his belief that Caventou might be suffering a miscarriage, and his awareness that he needed to rule out the possibility of an ectopic pregnancy, ovarian cyst, or ulcer.

Without performing a blood test to determine Caventou's hemoglobin level-which would have revealed substantial blood loss-Fahmy performed a suction curettage with the idea of sending the patient to the hospital afterward to check for an ectopic pregnancy or cyst. The patient was conscious, alert and ambulatory after the intrauterine procedure. About 20 minutes later, she collapsed in Fahmy's office and was transported to a hospital. Surgery was performed, but physicians were unable to save her due to an excessive loss of blood. Approximately one hour passed from the time Fahmy first examined her to the time she collapsed.

The Medical Board learned of Caventou's death on June 22, 1989, when Fahmy's malpractice insurer sent out a notice of settlement as required by law. An investigation followed. An accusation was filed against Fahmy by the Medical Board on October 20, 1992. Following a disciplinary hearing, the Medical Board revoked Fahmy's license in July of 1993 on the grounds he committed gross negligence in his treatment of the decedent. The findings underlying the Medical Board's determination were that (1) Fahmy "failed to give Caventou a blood test to determine her hemoglobin level which was essential to detect her substantial blood loss and which would have in light of her multiple symptoms, alerted him to the appropriate diagnosis of ectopic pregnancy," and (2) "At the time of respondent's examination of Caventou, the performance of curettage surgery was not indicated considering the entire syndrome of impending cardio-vascular failure."

In its decision, the Medical Board rejected Fahmy's claim of laches, finding that there was no showing of prejudice because the medical records affecting the outcome of Fahmy's case were in his possession and because his recollection of the incident was memorialized in a deposition taken in 1987. The Medical Board stayed the revocation of Fahmy's license and placed him on probation for five years. It ordered him to take a course relating to the complications of pregnancy and to pass an oral examination in the field of obstetrics and gynecology.

Fahmy filed a petition for a writ of mandamus on October 12, 1993. He sought to have the Medical Board's administrative decision overturned on the grounds that (1) the revocation decision was not supported by the ***814** findings or evidence, (2) there was insufficient evidence establishing that his conduct fell below the relevant standard of care, and (3) the Medical Board's delay in initiating proceedings against him denied him the right to a fair trial.

The trial court granted the writ on February 18, 1994. The court listed the factual bases for granting the writ. Specifically, the factual predicate cited by the court was that (1) the incident giving rise to the charges arose on May 8, 1986, (2) the Medical Board learned of the incident on June 22, 1989, and (3) the Medical Board's action against Fahmy was filed on October 20, 1992. Based on these undisputed facts, the court concluded, "The delay in filing the Accusation against petitioner, at least, over three (3) years after knowledge of the incident is unreasonable as a matter of law. The effect of the delay is to shift the burden to the [Medical Board] to prove that its delay was reasonable and the petitioner was not prejudiced thereby. In order to excuse its delay, the [Medical Board] must show exceptional circumstances prevented earlier action." The court determined that the unreasonable delay meant that the Medical Board proceeded without jurisdiction, that Fahmy was denied a fair hearing, and that there was laches.

Discussion

([1]) The trial court decided the writ as a matter of law. The facts forming the basis of the trial court's ruling, which in this instance are the dates upon which certain specified events occurred, are not in dispute. We are not bound by the trial court's legal determinations, and must arrive at our own legal conclusions on appeal. (*Karpe v. Teachers' Ret irement Bd.* (1976) 64 Cal.App.3d 868, 870 [135 Cal.Rptr. 21]; *Wilson v. State Personnel Bd.* (1976) 58 Cal.App.3d 865, 870 [130 Cal.Rptr. 292].)

([2a]) The parties agree that no statute of limitations applies to physician discipline proceedings. Nevertheless, Fahmy cites the rule that "... the trial court has the inherent power to dismiss administrative proceedings brought to revoke a state-issued license where there has been an unreasonable delay between the discovery of the facts constituting the reason for the revocation and the commencement of revocation proceedings, and where the licensee has been prejudiced by the delay." (*Gates v. Department of Motor Vehicles* (1979) 94 Cal.App.3d 921, 925 [156 Cal.Rptr. 791].)

The court in *Gates* found that the licensee, an automobile dismantler, was prejudiced and deprived of a fair administrative hearing because "... the ***815** memories of witnesses had diminished to a point where respondent could not engage in effective cross-examination." (94 Cal.App.3d at pp. 925-926.)[1] This was the result of an unexplained 16-month delay between discovery of the facts and the filing of license revocation charges.

The *Gates* opinion cites several Supreme Court holdings in State Bar disciplinary proceedings which "suggest[] that dismissal would be warranted *if a party established that he was prejudiced* by an unreasonable delay in initiating charges against him." (94 Cal.App.3d at p. 925, italics added.) Additional authority similarly emphasizes that the burden of proving prejudice due to delay rests upon the party asserting the theory: "Laches is an equitable defense which requires both unreasonable delay and prejudice resulting from the delay. The party asserting and seeking to benefit from the laches bar bears the burden of proof on these factors." (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 188 [258 Cal.Rptr. 302].) Thus, it is not enough for a tribunal to simply find that a delay was, by virtue of the passage of time, unreasonable "as a matter of law." That finding *must* be supported by substantial evidence of prejudice. (*Id.* at p. 189; see also *Brown v. State Personnel Bd.* (1985) 166 Cal.App.3d 1151, 1159 [213 Cal.Rptr. 53] [" '[d]elay is not a bar unless it works to the *disadvantage or prejudice* of other parties.' "].)

In this case, the trial court did not find that Fahmy was demonstrably prejudiced by the Medical Board's delay. Rather, the court inexplicably selected three years as the period after which delay in bringing charges becomes unreasonable as a matter of law, then shifted to the Medical Board the burden of justifying the delay and proving Fahmy was not prejudiced.

The trial court's determination that a three-year delay is unreasonable as a matter of law flies in the face of the Legislature's informed refusal to impose a statute of limitations on physician disciplinary proceedings. The Legislature has seen fit to impose a limitation on actions in other administrative disciplinary settings. (See, e.g., Gov. Code, § 19635, which places a three-year statute of limitations on administrative actions against state employees for violation of any civil service law, or for fraud, embezzlement, or ***816** falsification of records.) ([3]) In fact, when the Legislature passed the Medical Judicial Procedure Improvement Act a few years ago (Stats. 1990, ch. 1597, § 39, p. 7702, its statement of legislative intent evinced a concern for "protecting the people of California," *not* for protecting the right of incompetent doctors to retain their licenses.[2] The new law noticeably lacks a statute of limitations. The Legislature is presumably aware that there are statutes limiting the right to bring action in other, arguably analogous situations.[3] Yet the Legislature chose not to impose any limitation on the Medical Board in this precise situation.

It is important to remember that "a statute of limitations may not be created by judicial fiat" (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd., supra,* 210 Cal.App.3d at p. 188) and that limitations periods "are products of legislative authority and control." (*Zastrow v. Zastrow* (1976) 61 Cal.App.3d 710, 715 [132 Cal.Rptr. 536].) By focusing solely on the passage of time, and not on the issue of disadvantage and prejudice, a court risks imposing a de facto-and impermissible-statute of limitations in a situation where the Legislature chose not to create a limitation on actions. Even inordinately long delays in taking administrative action have been judicially allowed. (See *NLRB v. Ironworkers* (1984) 466 U.S. 720 [80 L.Ed.2d 715, 104 S.Ct. 2081], where the delay in taking administrative action lasted from 1978 until 1982, and related to wrongdoing which occurred from 1972 onward.) There is without a doubt a realization on the part of the Legislature that administrative agencies such as the Medical Board take action for the public welfare rather than for their own financial gain, and should not be hampered by time limits in the execution of their duty to take protective remedial action. That is particularly true in the case of the Medical Board, which is charged with protecting the lives and health of the citizenry from incompetent or grossly negligent medical practitioners. It is apparent that the Legislature wishes to have the Medical Board protect California patients from physicians who are incapable of providing appropriate services in life or death situations, regardless of how long it takes the Medical Board to act.[4] ***817**

Fahmy and the trial court relied on the case of *Brown v. State Personnel Bd., supra,* 166 Cal.App.3d 1151, for the proposition that an administrative delay can be unreasonable as a matter of law, which in turn shifts the burden to the agency of explaining the delay and disproving prejudice. There, a state university professor was dismissed from his job after students complained he was sexually harassing them. The appellate court found a strong analogy between the professor's position with the state and the position of other state employees who were subject to a three-year statute of limitations if they were to be disciplined for instances of misconduct. Accordingly, the court applied the three-year statute of limitations by analogy to the professor's claim of laches, and shifted the burden of proving laches to the agency.

We find the *Brown* case inapposite in the context of a license revocation proceeding.[5] The purpose of a license revocation proceeding is to protect the public from incompetent practitioners by eliminating those individuals from the roster of state-licensed professionals. The license revocation proceeding is civil in nature, not criminal. By contrast, the purpose of a criminal proceeding is to punish someone for a specific act of wrongdoing, and the purpose of a civil proceeding for medical malpractice is to compensate financially for a particular loss occasioned by negligence. Neither a criminal prosecution nor a malpractice action serves the purpose intended by license revocation proceedings. "The purpose of such a proceeding is not to punish but to afford protection to the public upon the rationale that respect and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent." (*Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 540 [92 Cal.Rptr. 525]; *Lam v. Bureau of Security & Investigative Services, supra*, 34 Cal.App.4th at p. 38.) ([2b]) Thus, it was not appropriate for the trial court to "borrow" a statute of limitations by analogizing this license revocation ***818** proceeding to a medical malpractice or manslaughter proceeding, nor to shift the burden of disproving laches to the Medical Board. (*Lam, supra*, at p. 38.)

([4]) We must now determine whether Fahmy produced sufficient evidence of prejudice to justify the dismissal of disciplinary charges against him. In his trial brief below, Fahmy made no argument or showing whatsoever that he was prejudiced by the Medical Board's delay. In his appellate brief, Fahmy asserts that "it is impossible to identify all evidence which has been lost or is otherwise unavailable and which would have aided [him] in defending the [a]ccusation against him." He specifically complains that Caventou's medical records relating to her prior treatment at Harbor-UCLA Medical Center on May 6, 1986, were incomplete and the names of the physicians

who treated her there were unknown. He suggests that this compromised his ability to prove that other physicians contributed to Caventou's death.

The hearing exhibits reveal that the custodian of medical records at Harbor-UCLA Medical Center provided the parties with "all the records" relating to UCLA's treatment of Caventou. Even if this disciplinary action had been brought earlier, there is no reason to believe there would have been any more records than were produced at the hearing in 1993. Assuming that some of the records from UCLA were missing, their absence did not affect the outcome of this case. The physicians at UCLA may have been negligent in failing to diagnose the ectopic pregnancy on May 6. Nevertheless, this does not excuse Fahmy's failure to assess Caventou's hemoglobin levels on May 8, when an ectopic pregnancy was an acknowledged possibility, and she was bleeding and in severe pain. Nor does it excuse Fahmy's performance of a suction curettage when the patient was exhibiting signs of "impending cardio-vascular failure." Thus, the records or witnesses from UCLA have negligible relevance to Fahmy's conduct on the day of Caventou's death.

No contention is made that any of the witnesses, including Fahmy, were unable to testify effectively or be cross-examined at the administrative hearing due to the passage of time. (Cf. *Gates v. Department of Motor Vehicles, supra*, 94 Cal.App.3d 921, 924.) Moreover, Fahmy's recollection of the incident was memorialized in a deposition taken in 1987, the year after Caventou's death. In short, there is no colorable showing of prejudice to support a finding of laches. ***819**

Disposition

The judgment is reversed. The trial court is directed to issue a new order denying the writ, and to enter judgment in favor of appellant Medical Board of California. Costs, if any, to the prevailing party.

Nott, J., and Brandlin, J.,* concurred.

Respondent's petition for review by the Supreme Court was denied December 13, 1995. ***820**

Footnotes

* Judge of the Municipal Court for the South Bay Judicial District sitting under assignment by the Chairperson of the Judicial Council.

1 The trial court in *Gates* found, " 'The delay from investigation to accusation to hearing was such that the DMV witnesses had no recollection of many of the events they testified to and were simply reading their records. Likewise, petitioner [Gates] and his wife had difficulty recalling the events relating to the alleged violations out of all the cars and records handled by them two years before. This unreasonable delay in commencing the proceedings made effective cross-examination of the DMV investigators impossible.' " (94 Cal.App.3d at p. 924.)

2 "The 1989-90 Regular Session of the Legislature declares that the physician discipline system administered by the board's Division of Medical Quality is inadequate to protect the health, safety, and welfare of the people of California against incompetent or impaired physicians." (Stats. 1990, ch. 1597, § 1, p. 7683.)

3 Fahmy analogizes the Medical Board's disciplinary action to a private medical malpractice suit, for which there is a three-year statute of limitations. (Code Civ. Proc., § 340.5.) He also analogizes this proceeding to a criminal prosecution for involuntary manslaughter, for which there is a three-year statute of limitations. (Pen. Code, §§ 192, 193, 801.)

4 In a somewhat different context, which involved the timeliness of disciplinary action by a state agency, our Supreme Court recently acknowledged, "[W]e cannot assume that the Legislature intended to penalize state agencies and the people of this state by mandating reinstatement of an incompetent or untrustworthy employee solely because the Board failed to render a timely decision in the employee's appeal. The statute clearly contemplates review of the adverse action by the court, not reinstatement of an employee whose conduct may have proven the employee unfit for public service or for the position currently held, or otherwise justifies punitive action." (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1150 [43 Cal.Rptr.2d 693, 899 P.2d 79].)

5 We note that in the 10 years since *Brown* was decided, the section of the opinion applying a statute of limitations to a laches

defense in an administrative setting has never been followed, except by the same court in the recent case of *Lam v. Bureau of Security & Investigative Services* (1995) 34 Cal.App.4th 29 [40 Cal.Rptr.2d 137]. Even then, the court in *Lam* refused to apply a statute of limitations by analogy to the laches theory asserted by a locksmith who was having his license revoked after using his professional skill to break into someone's apartment.

* Judge of the Municipal Court for the South Bay Judicial District sitting under assignment by the Chairperson of the Judicial Council.

192 Ariz. 333
Court of Appeals of Arizona,
Division 1, Department C.

In re the ESTATE OF Martha TRAVERS,
Deceased.
William STEWART, Personal Representative,
Appellant, Cross-Appellee,
v.
Richard TRAVERS, Appellee, Cross-Appellant.

No. 1 CA-CV 97-0356.
|
March 26, 1998.
|
Review Denied Oct. 20, 1998.

Synopsis
Former husband brought action against deceased former wife's estate for fraud and misconduct relating to parties' divorce settlement. The Superior Court, Maricopa County, PB 95-01491, Pamela J. Franks, J., ordered estate to return money to former husband, and estate appealed. The Court of Appeals, Lankford, J., held that: (1) former husband was reasonably ascertainable creditor entitled to actual notice of probate proceedings, but (2) former husband's claim was time-barred.

Reversed and remanded.

West Headnotes (5)

[1] **Executors and Administrators**
Notice to Creditors

Decedent's former husband was reasonably ascertainable creditor entitled to actual notice of probate proceedings, even though he had not filed claim at time of probate proceedings, where, pursuant to divorce, decedent sought lump sum settlement after discovering she had serious illness, but did not inform her husband. A.R.S. § 14-3801.

1 Cases that cite this headnote

[2] **Divorce**
Laches and Limitations

Statute suspending statutes of limitations on actions against decedent during four months following decedent's death did not apply to extend time in which decedent's former husband was required to file motion for relief from divorce judgment. 16 A.R.S. Rules Civ.Proc., Rule 60(c)(3); A.R.S. § 14-3802.

Cases that cite this headnote

[3] **Judgment**
Time for Application

Rule for filing for relief from judgment is not a statute of limitations, and statute suspending statutes of limitations on actions against decedent during first four months following decedent's death cannot extend six-month period to file for relief from judgment under rule. 16 A.R.S. Rules Civ.Proc., Rule 60(c); A.R.S. § 14-3802.

4 Cases that cite this headnote

[4] **Divorce**
Laches and Limitations

Six-month period of limitations for claims under catchall relief from judgment rule did not apply to former husband's claim against his deceased former wife's estate; husband's claim for fraud or misconduct relating to divorce settlement was governed by specific subsection of rule with four-month statute of limitations, and catchall provision applied only to claims not cognizable under other subsections. 16 A.R.S. Rules Civ.Proc., Rule 60(c)(3, 6).

2 Cases that cite this headnote

[5] **Executors and Administrators**
Time for Presentation

Former husband's claim against his deceased former wife's estate for fraud or misconduct relating to divorce judgment was not independent action either for discovery sanctions or for fraud upon the court, but was properly cognizable as part of probate action, and would be subject to six-month period of limitations for seeking relief from judgment; proper method for raising alleged disclosure violation discovered after judgment was to file posttrial motion for new trial or for relief from judgment. 16 A.R.S. Rules Civ.Proc., Rules 37(a)(1), 59(a), 60(c)(3).

7 Cases that cite this headnote

Attorneys and Law Firms

****67 *333** Sacks Tierney P.A. by Scot C. Stirling, Phoenix, for Appellant/Cross-Appellee.

Law Offices of John A. Propstra by John A. Propstra, Douglas V. Drury, Phoenix, for Appellee/Cross-Appellant.

OPINION

LANKFORD, Judge.

[1] ¶ 1 This appeal raises two issues relating to decedents' estates. The first issue is whether the decedent's former spouse was an ascertainable creditor entitled to actual ****68 *334** notice of probate proceedings. The second issue is whether or not the time for filing a motion for relief from judgment is a "statute of limitations" subject to extension by statute.

¶ 2 We hold that the decedent's former husband was entitled to actual notice of the probate proceedings. Additionally, because Arizona Rules of Civil Procedure 60(c) is not a statute of limitations, the trial court erred when it applied Arizona Revised Statutes Annotated ("A.R.S.") section 14-3802 to extend the time for filing. Accordingly, we reverse.

¶ 3 The facts are as follows. The decedent ("Martha") and her former husband ("Richard") were married for 20 years. In 1993, Richard filed for divorce. On January 10, 1995, the parties entered into a settlement agreement in which Richard agreed to buy an annuity that would pay Martha $3,000 per month. He also agreed to pay her $26,000 to equalize the community property division. Both parties waived spousal maintenance.

¶ 4 On February 13, Martha's attorney informed Richard's attorney that Martha had changed her mind. She wanted a lump sum instead of the $3,000 monthly payment. Richard agreed and paid Martha $297,987.95, representing the cost of the annuity. The parties signed an amended settlement agreement and the court entered a divorce decree on February 23, 1995.

¶ 5 During these negotiations, Martha had been admitted to the emergency room and diagnosed with renal failure. On February 16, Martha's family doctor had referred her to Dr. Parise, a nephrologist, who admitted Martha to the hospital for a kidney biopsy on February 22. He released her the following day. Later that day Martha signed the amended settlement agreement at her attorney's office. She told neither her attorney nor Richard about her medical condition.

¶ 6 On February 25, the doctor again admitted Martha to the hospital. The steroid and cytoxen drug treatments she received depressed her immune system. She died two weeks later from an infection. According to Dr. Parise, her death was unexpected.

¶ 7 After her death, the court appointed Martha's son, Dr. William Stewart ("Dr. Stewart"), as personal representative of her estate. He published a notice to creditors on May 5, 1995, but failed to notify Richard. In the fall of 1995,[1] Richard presented a claim against the estate alleging that Martha had fraudulently withheld information regarding her illness so that he would agree to the $297,987.95 lump sum payment. The estate disallowed the claim as untimely.

¶ 8 Richard filed a petition in superior court to allow the claim. The estate filed two motions to dismiss. The first

motion argued the claim was untimely pursuant to A.R.S. section 14-3803. The second motion argued the petition was untimely under Rule 60(c) of the Arizona Rules of Civil Procedure. The court denied both motions.

¶ 9 When Richard later moved for summary judgment, the court granted it. It found that Martha had violated Ariz. R. Civ. P. 26.1, by hiding her illness. The court then conducted a bench trial and entered additional findings that Martha had intentionally withheld material information about her health in an effort to defraud Richard, who would not have paid her $297,987.95 had he known about her condition. The court ordered the estate to return the money to Richard. However, the court denied Richard's request for attorneys' fees.

¶ 10 The Estate of Martha Travers appeals from a judgment ordering it to return $297,987.95 to Richard because Martha fraudulently withheld material information regarding her health during settlement negotiations in their divorce action. Richard cross-appeals from the court's denial of his request for attorneys' fees. We have jurisdiction pursuant to A.R.S. sections 12-2101(B), 12-2101(F)(1) and 12-2101(J).

¶ 11 The issues which determine this appeal are legal ones which we decide *de novo*. *See City of Scottsdale v. Thomas*, 156 Ariz. 551, 552, 753 P.2d 1207, 1208 (App.1988) (the Court of Appeals is not bound by the trial ****69 *335** court's conclusions of law). Interpretation of statutes and rules presents legal issues which we consider independently of the trial court's decision. *See State v. Getz*, 189 Ariz. 561, 563, 944 P.2d 503, 505 (1997). When the statutory language is clear and unequivocal, the court must abide by it. *See id.* (citing *Pima Cty. Juv. App. No. 74802-2*, 164 Ariz. 25, 33, 790 P.2d 723, 731 (1990) and *Canon Sch. Dist. No. 50 v. W.E.S. Construction Co., Inc.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994)).

¶ 12 We first consider the timeliness of Richard's claim pursuant to A.R.S. section 14-3803. Pursuant to the Probate Code, a personal representative must publish notice to the estate's creditors of his or her appointment, address and that claims against the estate must be filed within a limited time. A.R.S. § 14-3801(B). The personal representative must mail *actual* notice to the same effect to all known or reasonably ascertainable creditors of the estate. A.R.S. §§ 14-3801(B); *see also Matter of Estate of Barry*, 184 Ariz. 506, 508, 910 P.2d 657, 659 (App.1996).

¶ 13 Richard received no actual notice of the time to file a creditor's claim. The court found that Richard was a reasonably ascertainable creditor entitled to actual notice. The estate could not explain its failure to give Richard notice. Accordingly, the court denied the motion to dismiss.

¶ 14 The estate argues that Richard was not a "creditor" entitled to notice until he attacked the final divorce decree on September 27, 1995. We reject the estate's attempt to distinguish an "actual" creditor from a "potential" creditor. In *Matter of Estate of Kopely*, 159 Ariz. 391, 394, 767 P.2d 1181, 1184 (App.1988), although the creditor had not yet filed an action, the court held that if the identity of a person with a tort claim against the decedent's estate was known or reasonably ascertainable, that person is entitled to actual notice. The statute also requires notice to a "reasonably ascertainable" creditor. A.R.S. § 14-3801.

¶ 15 Richard's claim was ascertainable. His claim was equivalent to the tort claim in *Kopely*. According to the record, the estate knew Richard was interested in obtaining Martha's medical records as early as April 1995. In a letter to the estate's attorney dated May 16, 1995, Richard's attorney referred to a "possible lawsuit" regarding Martha's knowledge of her health prior to the divorce becoming final. This letter demonstrates that the estate, through its attorney, had reason to believe Richard might be a potential claimant at least by the date of the letter.

[2] ¶ 16 The court correctly concluded that Richard was a reasonably ascertainable creditor of Martha's estate entitled to actual notice. Because Richard had not received actual notice, the four-month time period in A.R.S. section 14-3803 never began to run and his claim was timely.

¶ 17 Having concluded that Richard's claim against the estate was timely, we now consider whether the court properly extended the time for Richard to file his petition for enforcement of his right to present a claim. In October 1995, Richard petitioned the court to force the estate to pay the claim. The court treated Richard's petition as a Rule 60(c)(3) motion for relief from judgment because the claim conflicted with the divorce judgment providing for a lump sum payment.

¶ 18 Neither party challenges the propriety of the trial court's decision to apply Rule 60.[2] The court concluded that A.R.S. section 14-3802 extended the time limit for Rule 60 motions by four months. It is this proposition with which we must disagree.

¶ 19 Pursuant to Rule 60(c)(3), Richard had six months to seek relief from the divorce judgment.[3] The decree was final on ****70 *336** February 23, 1995, allowing Richard

until August 23, 1995 to file his motion for relief. However, he did not file his petition until October 2, 1995-more than six months after the entry of judgment.

¶ 20 The court concluded that a probate statute extended the time. A.R.S. section 14-3802 provides, in relevant part:

> The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the four months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow.

¶ 21 A statute of limitations is a legislative enactment which sets maximum time periods during which certain actions can be brought. Black's Law Dictionary 927 (6th ed.1990). After the time period has run, legal actions are barred. *Id.*

[3] ¶ 22 The court interpreted Rule 60 as a statute of limitations for the purposes of probate proceedings. However, the Arizona Supreme Court, not the Arizona Legislature, promulgates the rules governing procedure in our courts. Because Rule 60 is procedural, we hold that Rule 60 is not a "statute of limitations." *See* 12 James W. Moore *et al.*, Moore's Federal Practice § 60.20 at 60-47 (3d ed. 1997) (The rule "does not assume to define the substantive law ... but merely prescribes the practice in proceedings to obtain relief") (referring to similar Rule 60(b), Fed.R.Civ.P.). The Rule 60 remedy is "purely procedural." *Id.* at 60-48. Because section 14-3802 applies to statutes of limitation and not to procedural rules, it cannot extend the six month time period under Rule 60. By applying section 14-3802, moreover, the trial court ignored Rule 6(b),[4] which expressly bars the extension of time for filing a Rule 60(c)(3) motion.

¶ 23 We are unpersuaded by the trial court's rationale. When it extended the six month period, the court erroneously concluded Richard would have had no other remedy without such relief. Its minute entry reflects an assumption that Rule 60(c)(3) would have precluded Richard from filing a motion in the divorce action because Martha "had died and no personal representative had been appointed." However, Rule 25(a) provides a procedure for substituting the personal representative for the deceased party. Because Dr. Stewart was appointed as personal representative of Martha's estate four months before Richard's time to file a Rule 60(c)(3) motion had expired, Dr. Stewart could have been substituted had Richard filed a motion in the divorce case.

[4] ¶ 24 Richard also contends he is entitled to relief under Rule 60(c)(6), which allows relief from a final judgment for "any other reason justifying relief from the operation of the judgment." For this clause to apply, none of the particular reasons set forth in clauses one through five can apply, and the motion must raise "extraordinary circumstances of hardship or injustice." *Webb v. Erickson,* 134 Ariz. 182, 186-87, 655 P.2d 6, 10-11 (1982); *see also Edsall v. Superior Ct.*, 143 Ariz. 240, 243, 693 P.2d 895, 898 (1984).

¶ 25 Richard's claim for relief under Rule 60(c)(6) fails to satisfy the first requirement. He sought relief on the basis of Martha's fraud or misconduct, which falls squarely within the fraud and misconduct provisions of ****71 *337** Rule 60(c)(3). Thus, there is no independent reason justifying relief under Rule 60(c)(6).

[5] ¶ 26 In a final effort to avoid the Rule 60(c)(3) time limit, Richard contends that his petition is an independent action either for discovery sanctions or for "fraud upon the court." Richard had no independent action for discovery violations. Rule 37 sets forth the procedures for imposing sanctions for discovery violations, and it contemplates a proceeding within a pending action. *See* Ariz. R. Civ. P. 37(a)(1) (application for a discovery order may be made to the court where the action "is pending" or in the county where a deposition "is being taken").

¶ 27 The proper method for raising an alleged disclosure violation discovered *after* judgment is to file a post-trial motion for new trial or for relief from judgment. *See* Ariz. R. Civ. P. 59(a), 60(c). A violation of Rule 26.1 by intentional nondisclosure may entitle a party to relief under Rule 60(c)(3). *Cf. Estate of Page v. Litzenburg,* 177 Ariz. 84, 93, 865 P.2d 128, 137 (App.1993) (" 'Misconduct' within [Rule 60(c)(3)] need not amount to fraud or misrepresentation, but may include even accidental omissions.").

¶ 28 Pursuant to Rule 60(c)(3), the petition should have been filed no later than six months after the divorce decree became final. Richard filed his petition after this time limit had expired. The trial court erred in denying the estate's motion to dismiss Richard's petition as untimely. Accordingly, the judgment against the estate is reversed and we direct that the trial court dismiss Richard's petition.

¶ 29 Because we have reversed the judgment, Richard is

no longer the successful party. This moots his cross-appeal challenging the court's failure to award him attorneys' fees as the successful party.

FIDEL, P.J., and GRANT, J., concur.

All Citations

192 Ariz. 333, 965 P.2d 67, 265 Ariz. Adv. Rep. 38

Footnotes

1 Richard's attorney signed the claim on September 27, 1995. For reasons not evident in the record, no one filed the claim until October 2, 1995.

2 The estate noted that Richard's petition neither cited Rule 60 nor expressly requested relief from the divorce decree. In its opening brief, the estate assumed that treating Richard's petition as a motion for relief from judgment was permissible. Richard appears to agree. He notes that the court *could* have proceeded solely on the Rule 26.1 claims, but he pled in the alternative and the court permissibly chose to proceed pursuant to Rule 60.

3 Rule 60(c), Ariz. R. Civ. P., provides:

> On motion and upon such terms as are just the court may relieve a party ... from a final judgment, order or proceeding for the following reasons: ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; ... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than six months after the judgment or order was entered or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court.

4 Rule 6(b), Ariz. R. Civ. P., provides in relevant part:

> When ... an act is required or allowed to be done at or within a specified time, the court ... may at any time in its discretion (1) ... order the period enlarged ...; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(d), (g) and (*l*), and 60(c), except to the extent and under the conditions stated in them....

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Long v. Board of Professional Responsibility of Supreme Court, Tenn., June 4, 2014

918 A.2d 1109
Supreme Court of Delaware.

In the Matter of a Member of the Bar of the Supreme Court of Delaware Joel D. TENENBAUM, Respondent.

No. 565, 2006.
|
Submitted: Dec. 13, 2006.
|
Decided: Feb. 6, 2007.

Synopsis

Background: The Office of Disciplinary Counsel (ODC) filed a petition for discipline against attorney who was under suspension, 880 A.2d 1025.

Holdings: The Supreme Court held that:

[1] disbarment of attorney was warranted;

[2] attorney's conduct violated the code of professional responsibility; and

[3] as a matter of first impression, the doctrine of laches did not bar the ODC from initiating disciplinary proceeding against attorney.

Disbarment ordered.

West Headnotes (13)

[1] **Attorney and Client**
Review

The Supreme Court's scope of review of factual findings of the Board on Professional Responsibility is limited to a determination of whether the record contains substantial evidence supporting the findings.

Cases that cite this headnote

[2] **Attorney and Client**
Review

The Supreme Court's standard of review of conclusions of law of the Board on Professional Responsibility is de novo.

Cases that cite this headnote

[3] **Attorney and Client**
Review

If substantial evidence supporting a decision of the Board on Professional Responsibility exists in the record, and the Board has made no error of law, its decision will be affirmed on appeal.

Cases that cite this headnote

[4] **Attorney and Client**
Proceedings

Although the Delaware Lawyer Rules of Professional Conduct prohibit raising a statute of limitations defense in disciplinary proceedings, they do not preclude all consideration of time lapses or the applicability of time-bar doctrines independent of the statute of limitations. Rules of Disciplinary Procedure, Rule 26.

Cases that cite this headnote

[5] **Attorney and Client**
Jurisdiction of Courts

Attorney and Client
Discretion

The Supreme Court has exclusive authority and wide latitude in determining disciplinary sanctions over lawyers.

Cases that cite this headnote

[6] **Attorney and Client**
Nature and Purpose

When deciding upon the appropriate sanction in an attorney disciplinary case, the Supreme Court must consider that the primary purpose of disciplinary proceedings is to protect the public, to foster public confidence in the Bar, to preserve the integrity of the profession, and to deter other lawyers from similar misconduct.

2 Cases that cite this headnote

[7] **Attorney and Client**
Nature and Form in General

The lawyer discipline system was not designed to be either punitive or penal in nature.

Cases that cite this headnote

[8] **Attorney and Client**
Factors Considered

The Supreme Court examines four factors when considering an appropriate sanction in an attorney disciplinary case: (1) the nature of the duty violated; (2) the lawyer's mental state; (3) the actual/potential injury caused by the misconduct; and (4) the existence of aggravating and mitigating circumstances.

1 Cases that cite this headnote

[9] **Attorney and Client**
Crime of Moral Turpitude

Disbarment of attorney was warranted, where attorney engaged in felonious conduct involving moral turpitude by sexually assaulting a female client, which client reported more than 20 years after it occurred, in the previous ten years attorney had sexually harassed female clients and employees, both verbally and physically, and attorney had previously been suspended from the practice of law for three years due to his sexual harassment of females. Code of Prof.Resp., DR 1-102(a)(3) (1983).

Cases that cite this headnote

[10] **Attorney and Client**
Criminal Offenses and Conviction Thereof

Attorney's conduct in removing his pants and pulling out his penis in front of client, and in "grinding" on client while he put his hand in her vagina violated the code of professional responsibility that prohibited a lawyer from engaging in illegal conduct involving moral turpitude. 11 West's Del.C. § 768; Code of Prof.Resp., DR 1-102(a)(3) (1983).

1 Cases that cite this headnote

[11] **Attorney and Client**
Criminal Offenses and Conviction Thereof

Attorney's conduct in fondling client's breasts and placing his fingers in her vagina while client attempted to push attorney away and yelled, and in covering client's mouth with his hand and telling her that no one would hear her, violated the code of professional responsibility that prohibited a lawyer from engaging in illegal conduct involving moral turpitude. 11 West's Del.C. § 761; Code of Prof.Resp., DR

1-102(a)(3) (1983).

Cases that cite this headnote

[12] **Attorney and Client**
Criminal Offenses and Conviction Thereof

Attorney's conduct in locking client in attorney's office and holding her down in a chair while she attempted to get away violated the code of professional responsibility that prohibited a lawyer from engaging in illegal conduct involving moral turpitude. 11 West's Del.C. § 781; Code of Prof.Resp., DR 1-102(a)(3) (1983).

Cases that cite this headnote

[13] **Attorney and Client**
Proceedings

Attorney was not prejudiced by the 22-year delay in former client's filing a disciplinary complaint against attorney, and thus the doctrine of laches did not bar the Office of Disciplinary Counsel (ODC) from initiating disciplinary proceeding against attorney; the mere passage of time was insufficient to establish prejudice, client's failure to report attorney's sexual assault immediately after it occurred was not unreasonable under the circumstances, and the Office of Disciplinary Counsel initiated disciplinary proceedings soon after client filed her complaint. Rules of Disciplinary Procedure, Rule 26.

2 Cases that cite this headnote

***1111** Disciplinary Proceeding Upon Final Report of the Board on Professional Responsibility of the Supreme Court. **Disbarment Imposed.**

Attorneys and Law Firms

Jeffrey M. Weiner, Esquire, Wilmington, Delaware, for respondent, Joel D. Tenenbaum.

Andrea L. Rocanelli, Esquire, Office of Disciplinary Counsel, Wilmington, Delaware.

Before HOLLAND, BERGER and JACOBS, Justices.

Opinion

PER CURIAM.

This is an attorney disciplinary matter involving charges of professional misconduct filed against Joel D. Tenenbaum, the Respondent. Tenenbaum is currently suspended from the practice of law for three years following this Court's order of August 5, 2005.[1] The Petition for Discipline at issue in this proceeding was filed by the Office of Disciplinary Counsel (the "ODC"). It alleges the following three counts of illegal conduct involving moral turpitude: (1) Indecent Exposure; (2) Sexual Assault; and (3) Unlawful Imprisonment. In a Report dated May 8, 2006 (the "Violation Report"),[2] the Board on Professional Responsibility (the "Board) found that the foregoing allegations of illegal conduct involving moral turpitude had been established by clear and convincing evidence. In this opinion, we affirm the findings of facts and conclusions of law in the Board's Violation Report.

In a Report dated October 16, 2006 (the "Discipline Report"),[3] the Board recommended that Tenenbaum be disbarred. We have made an independent determination that the sanction recommended in the Board's Discipline Report is appropriate. Accordingly, we have decided that Tenenbaum must be disbarred.

Petition for Discipline

The current Petition for Discipline alleges that, in or about 1983, Tenenbaum engaged in illegal conduct involving moral turpitude. The relevant portion of the then applicable code of professional conduct is DR 1-102(A)(3), which prohibited illegal conduct involving moral turpitude.[4] The allegations in the Petition are based entirely upon the complaints of Carolyn Catts,[5] a former client of Tenenbaum. She alleges that Tenenbaum sexually assaulted her during an after-hours meeting at his law office in the Independence Mall. At the ***1112** time of

the alleged assault, Ms. Catts was in her early twenties.

Laches Defenses

Tenenbaum admits "upon information and belief" that he represented Carolyn Catts, as her defense attorney, in connection with a charge of "driving while under the influence" in or about 1983. Otherwise, Tenenbaum states he has no specific recollection of Catts or his representation of her. Tenenbaum denies all of the alleged acts of illegal conduct. Tenenbaum also raises the affirmative defenses of laches and violation of due process, *i.e.*, that the delay in prosecution of the disciplinary charges against him for more than twenty-two years constitutes actual prejudice. In support of his laches defense, Tenenbaum asserts that:

> 1. His file in connection with any representation of Ms. Catts was destroyed by the firm in due course approximately 7-10 years after the conclusion of the representation;
>
> 2. His time records in connection with Ms. Catts were destroyed by the firm in due course approximately seven to ten years after the conclusion of representation;
>
> 3. Any alleged furniture referenced by Ms. Catts in her complaint has not been in the possession, custody and/or control of Tenenbaum since Tenenbaum's firm moved from the Independence Mall to 3200 Concord Pike approximately 13 years ago
>
> 4. Tenenbaum's secretary died in June, 2002 and thus is unavailable as a witness;
>
> 5. Tenenbaum has no recollection of Ms. Catts and/or of his representation of her after the passage of 22 years; and
>
> 6. Ms. Catts destroyed documents pertaining to this matter several months prior to lodging her complaint with the ODC.

Board's Violation Report

The Board identified the two issues before it at the violation hearing as follows:

Issue 1. Did the ODC establish by clear and convincing evidence that Respondent engaged in illegal conduct involving moral turpitude, in violation of the then applicable DR 1-102(a)(3) of the Code of Professional Responsibility?

Issue 2. If the ODC established by clear and convincing evidence that Respondent engaged in illegal conduct involving moral turpitude, in violation of the then applicable DR 1-102(a)(3) of the Code of Professional Responsibility, should the Board nonetheless dismiss the case because of the delay of more than 22 years in the prosecution of disciplinary charges against him?

The Board answered those two inquiries, as follows:

Board Findings-Issue 1. The Board finds that the record established at the hearing demonstrates the Respondent engaged in illegal conduct involving moral turpitude, in violation of the then applicable DR 1-102(a)(3) of the Code of Professional Responsibility, and that ODC met its burden of proving the charged misconduct by clear and convincing evidence, as required by the Delaware Lawyers' Rules of Disciplinary Procedure ("Procedural Rules"), Rule 15(c) (standard of proof) and Rule 15(d) (burden of proof).

Board Findings-Issue 2. The Board finds that the public interests at issue and the standards limiting laches defenses set forth in the *Kotler* and *Bash* cases are as applicable to lawyer disciplinary proceedings as they are to physician disciplinary proceedings. The Board finds that Respondent did not meet his burden of proving both that the delay in the initiation of disciplinary proceedings was unreasonable, and that prejudice resulted from the delay. The Board finds that Ms. Catts' reporting ***1113** of the assault nearly 22 years after the fact was not unreasonable under the circumstances, and there was no unreasonable delay in ODC's initiation of disciplinary proceedings thereafter. Because of the nature of the complaint, the Board does not find that the grounds alleged by Respondent constitute prejudice that requires the dismissal of this disciplinary proceeding. The Board's findings under Issue 2 require that the Board's findings under Issue 1 stand as the Board's determination that Respondent has engaged in professional misconduct.

Standard of Review

[1] [2] [3] The standard of proof required for the Board to find a violation of the Rules of Professional Conduct is by clear and convincing evidence.[6] Our scope of review of the Board's factual findings is limited to a determination of whether the record contains substantial evidence supporting the findings.[7] Our standard of review of the Board's conclusions of law is *de novo*.[8] If substantial evidence supporting the Board's decision exists in the record, and the Board has made no error of law, its decision will be affirmed on appeal.

Violation Report Affirmed

The conduct of a person is always relevant to the question of fitness to practice law. Accordingly, the standards for admission to the Bar of this Court and the provisions for lawyer discipline are equally important to protect both the public and the integrity of the legal profession. Delaware Rule of Disciplinary Procedure 26 provides: "There shall be no statute of limitations with respect to any proceedings under these Rules."[9] That rule is consistent with this Court's requirement for admission to the practice of law, which mandates the disclosure of all information regarding character and fitness.[10]

[4] Although the Delaware Lawyer Rules of Professional Conduct prohibit raising a statute of limitations defense in disciplinary proceedings, they do not preclude all consideration of time lapses, or the applicability of time-bar doctrines independent of the statute of limitations. The commentary on the ABA Model Rule states that the time between the commission of the alleged misconduct and the filing of a complaint predicated thereon may be pertinent to whether and to what extent discipline should be imposed.[11] It is well settled in certain civil proceedings that, "[l]aches is an affirmative defense that the plaintiff unreasonably delayed in bringing suit after the plaintiff knew of an infringement of his [or her] rights, thereby resulting in material prejudice to the defendant."[12]

The Board recognized that Tenenbaum's assertion of a laches defense in a Delaware lawyer disciplinary proceeding presents a ***1114** question of first impression. Although Delaware courts have not decided prior cases involving lawyer discipline that presented a laches defense, that defense has been considered in the context of other professions. In *Bash v. Board of Medical Practice*,[13] a matter involving physician discipline, a laches defense was addressed by the Superior Court:

> It has been held that there are no statutes of limitation applicable to [professional] disciplinary proceedings and therefore generally no basis for laches. Where [laches] has been successfully asserted as a defense in administrative disciplinary actions involving professional licenses, laches cannot be imputed by the mere passage of time. It must be determined from all of the circumstances of the case, one of which must be the existence of harm occasioned by the delay. The party asserting laches bears the burden of proving both that the delay was unreasonable and that prejudice resulted from the delay.[14]

We agree with the *ratio decidendi* in *Bash*,[15] and extend it to Delaware lawyer disciplinary proceedings. The Board applied that standard in considering the merits of Tenenbaum's laches defense.

We have carefully and completely reviewed the findings of fact and conclusions of law in the Board's Violation Report. The record reflects clear and convincing evidence to support the Board's findings that Tenenbaum violated his ethical responsibilities. The record also reflects that the Board properly applied the *Bash* legal standard to the applicable facts in rejecting Tenenbaum's defense of laches and due process. Accordingly, we affirm both the findings of fact and conclusions of law reached by the Board on the basis of and for the reasons stated in its Violation Report.[16]

Disbarment Appropriate Sanction

[5] [6] [7] [8] "This Court has exclusive authority and wide latitude in determining disciplinary sanctions over lawyers."[17] When deciding upon the appropriate sanction, the Court must consider that "[t]he primary purpose of disciplinary proceedings is 'to protect the public; to foster public confidence in the Bar; to preserve the integrity of the profession; and to deter other lawyers from similar misconduct.' "[18] The lawyer discipline system was not designed to be either punitive or penal in nature.[19] This Court examines four factors when considering an appropriate sanction: (1) the nature of the duty violated; (ii) the lawyer's mental state; (iii) the actual/potential injury caused by the misconduct; and (iv) the existence of aggravating and mitigating circumstances.[20]

[9] When Tenenbaum was suspended for three years, "the

evidence establishe [d] that, during the past 5-10 years, Tenenbaum [had] sexually harassed female clients and employees, both verbally and physically."[21] In this case, the clear and convincing ***1115** evidence establishes that Tenenbaum engaged in felonious conduct that would subject him to possible imprisonment, except that a criminal prosecution is barred by the applicable statutes of limitations. This evidence and the evidence from the prior suspension proceeding demonstrate that, for more than two decades, Tenenbaum has committed egregious abuses of his female clients' trust, by engaging in a repeated and systematic pattern of sexual misconduct that was not only unethical but also unlawful. Accordingly, we are in complete agreement with the analysis and recommendation in the Board's Discipline Report. We conclude that any sanction other than disbarment would not provide the necessary protection for the public, serve as a deterrent to the legal profession, or preserve the public's trust and confidence in the integrity of the Delaware lawyers' disciplinary process.

Conclusion

It is ordered that Joel D. Tenenbaum be disbarred from membership in the Delaware Bar. His name shall be immediately stricken from the Roll of Attorneys entitled to practice law before the courts of this State.

APPENDIX I

BOARD ON PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of a Member of the Bar of the Supreme Court of Delaware:

JOEL D. TENENBAUM, Respondent.

Board Case No. 36, 2005

REPORT OF BOARD ON PROFESSIONAL RESPONSIBILITY

A. *The Case; Pleadings.* Pending before a panel of the Board on Professional Responsibility ("Board") is a Petition for Discipline filed October 5, 2005 in Board Case No. 36, 2005 ("Petition"), involving Joel D. Tenenbaum, Esq. ("Respondent"), a member of the Bar of the Supreme Court of the State of Delaware, currently suspended from the practice of law for a period of three years by this Court's Order of August 5, 2005. An Answer to Petition for Discipline was filed October 25, 2005 ("Answer"). The Petition and Answer are part of the Court's file and are hereby incorporated by reference into the Board's record.

B. *Underlying Complaint.* The Petition alleges that in or about 1983, Respondent engaged in illegal conduct involving moral turpitude. The relevant portion of the then applicable code of conduct is DR 1-102(A)(3), which prohibited illegal conduct involving moral turpitude.[22] The allegations in the Petition are based entirely upon the complaints of Carolyn Catts[23], a former client of the Respondent in or about 1983, who alleges that Respondent sexually assaulted her in his law office during an after-hours meeting at Respondent's office in the Independence Mall. At the time of the alleged assault, Ms. Catts was in her early twenties.

C. *Alleged Illegal Conduct.* The Petition includes three counts of illegal conduct involving moral turpitude based upon the alleged acts of Respondent:

Count 1: Indecent Exposure;

***1116** Count 2: Sexual Assault; and

Count 3: Unlawful Imprisonment.

D. *Response; Affirmative Defenses.* Respondent admits "upon information and belief" that Carolyn Catts was his client in connection with his defense of a motor vehicle DUI charge in or about 1983, but otherwise has no specific recollection of her or his representation of her (Answer; paragraphs 4, and 8 through 12; T-132; 140). Respondent denies all Counts of illegal conduct. Respondent raises the affirmative defenses of laches and violation of due process, *i.e.*, that the delay in prosecution of the disciplinary charges against him for more than 22 years constitutes actual prejudice, violating his due process rights.[24] Specifically, Respondent maintains that:

7. His file in connection with any representation of Ms. Catts was destroyed by the firm in due course

approximately 7-10 years after the conclusion of the representation;

8. His time records in connection with Ms. Catts were destroyed by the firm in due course approximately seven to ten years after the conclusion of representation;

9. Any alleged furniture referenced by Ms. Catts in her complaint has not been in the possession, custody and/or control of Respondent since Respondent's firm moved from the Independence Mall to 3200 Concord Pike approximately 13 years ago;

10. Respondent's secretary died in June, 2002 and thus is unavailable as a witness;

11. Respondent has no recollection of Ms. Catts and/or of his representation of her after the passage of 22 years; and

12. Ms. Catts destroyed documents pertaining to this matter several months prior to lodging her complaint with the ODC.

E. *ODC's Case*. The ODC presented the following evidence in support of its case:

1. The testimony of Ms. Catts (Transcript pages 68-130; hereafter "T-___");

2. The testimony of James Layton, now a retired Delaware State Policeman and then the arresting officer in the motor vehicle DUI case in which Respondent was retained to represent Ms. Catts (T-5-29); and

3. The testimony of Stephen Christopher DeJulio, Ph.D., a clinical psychologist who testified (T-30-67) as an expert in the field of sexual abuse and assault, and resulting trauma (T-30-33). Respondent did not dispute Dr. DeJulio's expertise, but maintained the testimony was irrelevant to the proceeding (T-30, 33).

F. *Ms. Catts' Testimony*. Ms. Catts first testified about a driving under the influence arrest in 1983 (T-68-71; "DUI"). She then testified that she retained Respondent to represent her in connection with the DUI (T-72). After an initial meeting where Respondent agreed to take the case and established a fee ($800.00), a second meeting was scheduled in Respondent's office at 7:00 p.m., after Ms. Catts finished work (T-74). She testified that when she arrived, she was surprised because the office was empty, and had thought Respondent maintained evening hours (T-74). She met Respondent in the ***1117** lobby area and followed him into his office, where he closed and locked the door behind her (T-75). Although Ms. Catts questioned why Respondent locked the door, she accepted his answer that it was for privacy reasons (T-76). Respondent and Ms. Catts discussed the case and Ms. Catts gave Respondent the fee. After getting up to leave, and as Ms. Catts and Respondent neared the door, Respondent assaulted Petitioner. Her testimony of the details of the assault appears in the Transcript at pages 77-81 and 116-123.

Ms. Catts then testified that the Respondent told her not to tell anyone and threatened harm to her and her family if she did (T-82-83).

Ms. Catts further testified that on the day of the JP Court hearing, Respondent insisted that she sit in his car prior to the hearing and attempted to prostitute her to the arresting officer, Cpl. Layton (T-84; 124-125). Specifically, she testified that Respondent told Cpl. Layton that "she'll do anything to get off" (T-84). Cpl. Layton testified that when he pulled into the parking lot prior to the hearing, he recalled Ms. Catts sitting in the front seat of Respondent's car, and wondered why she would be seated there (T-11). He recalled having a conversation with Respondent in the parking lot prior to the hearing but did not recall the substance of the conversation (T-11-12). He did not recall any explicit offer to exchange sexual services or favors for reducing the charges or dropping the charges (T-25, 26).

Ms. Catts testified that she never told anyone about Respondent's actions at the time because she was frightened and because Respondent threatened to harm her family (T-82; 122). She only brought the matter to the attention of the Office of Disciplinary Counsel ("ODC") after reading an August 11, 2005 article in *The News Journal* about Respondent's three year suspension from the practice of law, based upon the Delaware Supreme Court's finding that Respondent engaged in a pattern of illegal activities involving sexual harassment of female clients and employees.[25]

I. *Cpl. Layton's Testimony*. Mr. James Layton, then Cpl. Layton of the Delaware State Police, verified that he was the arresting officer who issued the DUI ticket to Ms. Catts, appeared at the later arraignment in J.P. Court and appeared at trial. Most of his testimony was not based upon his specific recollection of events, except for his recollection of Respondent and Ms. Catts being seated in Respondent's convertible automobile in the parking lot of the J.P. Court when he arrived for the trial. He testified that this specific recollection was due to his prior role as arresting officer of Respondent's wife (for speeding)

where Respondent had represented his wife at the same J.P. Court. The Board viewed Cpl. Layton's testimony (with the documentary evidence relating to the DUI charge and its disposition; Joint Exhibits 1-5; hereafter "Ex. ___") generally as corroborating Ms. Catts' testimony as to Respondent's representation of her, and of her testimony that she was in Respondent's car outside J.P. Court before the trial (see, generally, T-5-29).

J. *Dr. DeJulio's Testimony.* The Board then heard the testimony of Dr. Stephen Christopher DeJulio, who testified as an expert in the fields of sexual abuse and assault and the resulting trauma (T-32-33). In the context of his private practice in clinical psychology, Dr. DeJulio has treated and evaluated several hundred individuals who are "sexual abuse survivors" (T-32). Since 1996, Dr. DeJulio has performed consultations under contract with ***1118** SOAR (Survivors of Abuse in Recovery, Inc.), a non-profit agency that provides psychological assessments and psychotherapy for survivors of sexual abuse. Dr. DeJulio has served as this agency's clinical director since September, 2004 (T-30-33; Joint Ex. 6).

Dr. DeJulio met with Ms. Catts on two occasions for about an hour, the first visit to hear about the alleged assault; the second to conduct "more of a traditional mental status exam, psychological evaluation, more of an interview assessment and some operating skills" (T-34). Dr. DeJulio testified that Ms. Catts described a number of symptoms that "were consistent with both the diagnosis of major depression and post-traumatic stress disorder" (T-34).

Dr. DeJulio related three studies he had reviewed regarding rape reporting by victims. The rates of "non-reporting" [probably more accurately described as delayed reporting] in the three studies cited by Dr. DeJulio ranged from 63% (Department of Justice, Bureau of Statistics, National Crime Victims Survey report dated 2002-only 36% of rapes were reported, T-35); to 84.9% (National Violence Against Women Survey, 1995-96-only 15.1% of rapes were reported, T-37; see generally T-34-39).

Dr. DeJulio testified that Ms. Catts' delay in reporting in this instance was both consistent with his experience in the field (T-36) and the studies he cited (T-39). He testified that he had specific discussions with Ms. Catts about the delay in reporting and found her "presentation" consistent with both the studies and other cases he had had over the years (T-39). He found in Ms. Catts the symptoms reported and experienced by victims: fear of reprisal, embarrassment and the thought that nothing would be done about it (T-37-40). Dr. DeJulio found Ms. Catts' life experiences over the past twenty years as consistent with someone who had been assaulted (T-39-41). Lastly, Dr. DeJulio testified that Ms. Catts felt that she could come forward with the reporting of the assault now, after reading the newspaper article, "because she didn't feel alone" (T-49), but that she was still terrified of coming forward and that it had been a "painful process" for her (T-47-48).

K. *Respondent's Testimony.* Respondent apparently learned Carolyn Catts' real name on the day of the hearing. In addition, the day of the hearing was apparently the first time he had the opportunity to see her in person (T-132). He testified that he had no recollection of Ms. Catts or of representing her (T-132). He added that based upon the testimony of Cpl. Layton, he had no doubts that he did represent her (T-132-133) and that during time period, he would schedule cases in Kent and Sussex Counties on a Friday or a Monday during July and August, apparently to coordinate with his weekend visits to his beach house in Sussex County (T-133).

Respondent testified about the type of file he would have kept at the time of his representation of Ms. Catts and stated that the file would have been destroyed at the time his office was moved from Independence Mall to Concord Pike, where his office is currently located, or otherwise in accordance with the firm's policy to destroy files after ten years (T-134-135). He testified that he had recently visited the Independence Mall space where his office had been located to refresh his memory. He described the layout of the Mall and described his first floor office as being only a sidewalk-width distant from the parking lot (T-135-138). He described his office as being 8 ½ feet by 11 ½ feet in size, the second office beyond a reception area, with a window behind his desk (T-139-140; Joint Ex. 9A & 9B). Respondent testified ***1119** he could sometimes hear conversations of people walking by the sidewalk next to the parking lot outside his office (T-145-146). Respondent drew a diagram of his office and drew in the desk, a desk chair, an armoire, a coat rack and three chairs facing the desk (T-140-142; Joint Ex. 10). Respondent denied there was ever a wing chair in his office, and stated "there was no space for a chair and nothing on the right" (T-142).

L. *Issues Presented.* The Board is presented with the following issues:

> 1. Did the ODC establish by clear and convincing evidence that Respondent engaged in illegal conduct involving moral turpitude, in violation of the then applicable DR 1-102(a)(3) of the Code of Professional Responsibility?

2. If the ODC established by clear and convincing evidence that Respondent engaged in illegal conduct involving moral turpitude, in violation of the then applicable DR 1-102(a)(3) of the Code of Professional Responsibility, should the Board nonetheless dismiss the case because of the delay of more than 22 years in the prosecution of disciplinary charges against him?

[10] [11] [12] **M.** *Board Analysis-Issue 1.* The considered the following matters in analyzing Issue 1.

1. *Ms. Catts' Credibility.* The Board found Ms. Catts' testimony credible. As argued by ODC, she has no apparent reason to fabricate the assault. The statute of limitations has run for any criminal or civil litigation arising from the assault.[26] The Board found credible Ms. Catts' explanation as to why she did not come forward with a reporting of the assault until she read the newspaper article about Respondent's suspension from the practice of law based upon findings of sexual harassment of female clients and employees (see Section H, above, generally; T-81-83; 85-88; 122; 128; 130; 58). According to Dr. DeJulio, Ms. Catts suffered substantial personal and emotional hardship as a result of coming forward and testifying (T-47-48).

2. Corroborating Testimony and Documentary Evidence. The facts relating to Respondent's representation of Ms. Catts in the DUI matter before the JP Court were corroborated by the testimony of then Cpl. Layton (T-5-29) and documentary evidence (see Joint Ex. 1-5). The fact of Ms. Catts' presence, seated in the front seat of Respondent's car outside the J.P. Court prior to the hearing as she testified, was corroborated by Cpl. Layton. He testified: "When I pulled into the court parking lot basically two things struck me. Number 1, I had-the reason I knew Mr. Tenenbaum, I had arrested his wife for speeding I'm guessing two-two months earlier, and he had represented her at the same court. And when I pulled up into the court, I recall the defendant at the time was setting in his car. And I don't remember the car, but one of the things that went through my mind, it's a nice car. Seems to me it was an expensive convertible, along those lines. And the second thing I was kind of wondering is why she was setting in the shotgun seat of the car, which would be the right ***1120** passenger, right front passenger" (T-10-11). In response to cross examination as to whether he thought that unusual, Cpl. Layton Responded, "I can't say it was unusual other than the fact that they were in the car together" (T-23). While Cpl. Layton did not definitively confirm Ms. Catts' contention that Respondent "prostituted" her to Cpl. Layton, the statement she recalls Respondent making to Cpl. Layton ("She'll do anything to get off"; T-84) was vague enough for Ms. Catts to construe it as she did and for Cpl. Layton not to have recalled an explicit offer of sexual services or favors (T-23, 25-26).

3. *Expert Testimony.* As noted above, Dr. Stephen Christopher DeJulio testified as an expert in the fields of sexual abuse and assault and the resulting trauma (T-32-33)[27]. He testified that Ms. Catts reporting in 2005 of a rape that occurred in 1983 was consistent with numerous studies on the low incidences of reporting and delayed reporting of rapes (T-34-38). Dr. DeJulio met with Ms. Catts on two occasions and performed a traditional mental status exam and a psychological evaluation (T-34). His diagnosis of Ms. Catts (major depression and post-traumatic stress disorder) based upon reported symptoms and his evaluations, are consistent with the studies and his knowledge, experience and training (T-34-40). Dr. DeJulio testified that Ms. Catts' reported life experiences, based upon his personal interviews of her, were also consistent with a person who has been sexually assaulted (T-41-42). On ***1121** cross examination, it appeared that Ms. Catts failed report to Dr. DeJulio that she had seen a psychiatrist in 2000 in connection with the divorce of her second husband (T-89, 90). It also appeared that Ms. Catts did not want Dr. DeJulio to contact Dr. Mark Glassner, her family doctor since she was 16 (T-92), to obtain her medical records. However, her explanation (that she did not want her long-time family doctor to learn about her reporting of the assault, through a request for medical records) seem plausible to the Board, and not indicative of a lack of credibility on Ms. Catts' part (T-88-97). The Board generally viewed Dr. DeJulio's testimony as supportive of Ms. Catts' testimony that she was assaulted and explanatory of her failure to report the assault.

4. *Conduct Established Supporting Disciplinary Charges.* The conduct involving moral turpitude, established by clear and convincing evidence, as presented by ODC, is as follows:

a. *Count One: Indecent Exposure*

"A person is guilty of indecent exposure if he

exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm." 11 *Del. C.* § 768. Pursuant to Section 768, indecent exposure is a class B misdemeanor in the State of Delaware. This statute was in effect at the time of the events established by the testimony of Ms. Catts. Specifically, she testified that the Respondent took down his pants and pulled out his penis, and was grinding it on her, while putting his hand in her vagina (T-78; 120). That she was alarmed was also established by her testimony: she testified that she tried to push him away, that he was bigger than she and that she had no control; and that she tried to yell, but that he covered her mouth with his hand and told her no one could hear her because no one was in the building (T-77-78; 199-121). The Board finds that Respondent engaged in illegal conduct involving moral turpitude in violation of DR 1-102(A)(3) by indecently exposing himself to Ms. Catts as prohibited by Section 768.

b. *Count Two: Sexual Assault.*

"A person is guilty of sexual assault when he has sexual contact with another person not his spouse or causes the other to have sexual contact with him or a third person if: (1)[h]e knows that the contact is offensive to the victim; or (2)[h]e knows that the contact occurs without the consent of the victim." 11 *Del. C.* § 761. Pursuant to Section 761, sexual assault is a class A misdemeanor in the State of Delaware. This statute was in effect at the time of the events established by the testimony of Ms. Catts. Specifically, she testified that Respondent fondled her breasts and put his fingers inside her vagina (T-78-80; 120). Respondent knew the contact was offensive and that Ms. Catts did not consent to it: she testified that she tried to push him away and tried to yell. In response to her reaction, Respondent leaned his weight against her, covered her mouth with his hand, and told her no one could hear her because no one was in the building (T-77-79; 120-121). The Board finds that Respondent engaged in illegal conduct involving moral turpitude in violation of DR 1-102(A)(3) by sexually assaulting Ms. Catts as prohibited by Section 761.

c. *Count Three: Unlawful Imprisonment.*

"A person is guilty of unlawful imprisonment in the second degree when he ***1122** knowingly and unlawfully restrains another person." 11 Del. C. § 781. Pursuant to Section 781, unlawful imprisonment in the second degree is a class A misdemeanor in the State of Delaware. This statute was in effect at the time of the events established by the record evidence. Ms. Catts was locked inside the Respondent's office, and was restrained by him (T-78; 117-118). Respondent knew she was trying to get away because he held her down in the chair while she tried to push him away (T-77-79). The Board finds that Respondent engaged in illegal conduct involving moral turpitude in violation of DR 1-102(A)(3) by unlawfully imprisoning Ms. Catts as prohibited by Section 781.

N. *Board Findings-Issue 1.* The Board finds that the record established at the hearing demonstrates the Respondent engaged in illegal conduct involving moral turpitude, in violation of the then applicable DR 1-102(a)(3) of the Code of Professional Responsibility, and that ODC met its burden of proving the charged misconduct by clear and convincing evidence, as required by the Delaware Lawyers' Rules of Disciplinary Procedure ("Procedural Rules"), Rule 15(c) (standard of proof) and Rule 15(d) (burden of proof).

[13] **O.** *Board Analysis-Issue 2.* The Board next considered whether the case should be dismissed because of the delay of more than 22 years in the prosecution of disciplinary charges against Respondent.

1. Rule 26 of the Delaware Rules of Disciplinary Procedure states: "There shall be no statute of limitations with respect to any proceedings under these Rules".

2. The issue arises from Respondent's affirmative defense of laches. Respondent initially argued that it is Respondent's burden to show that he suffers actual prejudice, as a result of the delay in the prosecution of disciplinary proceedings against him, and establish actual prejudice by a preponderance of the evidence (OB-8). Respondent notes that the Delaware Superior Court has addressed the circumstances under which delay may violate due process in the context of an administrative proceeding. In *Sandefur v. Unemployment Insurance Appeals Board* [1993 WL 389217 (Del.Super.), Exhibit "A" to this Report], the Superior Court held that "rudimentary requirements of fair play" satisfy the due process requirements for administrative proceedings, citing *Mitchell v. Delaware Alcoholic Bev. Control Comm'n.,* 193 A.2d 294, 312 (De1.[Del.]Super.1963), rev'd. on other grounds, 196 A.2d 410 (Del.1963); and referencing 73A C.J.S. *Public Administrative Law and Procedure,* Section 60 (1983). The *Sandefur* Court further noted

that "[A]s a general rule, an individual's due process rights are not violated, and will not affect the validity of an administrative determination, *unless actual prejudice is shown* [emphasis added].

3. Respondent's case that he suffered actual prejudice is generally based upon the six grounds set forth in Section D of this Report, above. In his Opening Brief, Respondent supports these grounds as follows:

• First, Respondent Tenenbaum, even when confronted with the physical presence of Carolyn Catts at the hearing, had no recollection of Ms. Catts and/or her representation in connection with her DUI charge (T-132).

• Second, Respondent Tenenbaum's file folder in connection with any ***1123** representation of Ms. Catts was destroyed approximately 13 years ago (T-133-134). That file folder would have contained an interview sheet, copies of any correspondence, pleadings and/or other documents pertaining to the case including, without limitation, whether or not an evening meeting was scheduled as Claimant Catts contends.

• Third, Claimant Catts shredded any documents or records that she maintained pertaining to her representation by Respondent Tenenbaum approximately two months prior to complaining to ODC (T-129-130).

• Fourth, Respondent Tenenbaum's office has not been in the Independence Mall for approximately 13 years (T-134). The parties were foreclosed from actual measurements of the office, including the desk, chairs and/or alleged wing chair. In short, the delay prevented Respondent Tenenbaum from presenting a to-scale layout of his office in 1983 to be evaluated by the Board in the light of Ms. Catts' allegations.

• Fifth, the most credible and knowledgeable independent person who could corroborate Respondent Tenenbaum's testimony that there never was a wing chair in his office, specifically, his secretary, Fran Dreisbach, died several years ago (T-144).

• Sixth, Claimant Catts asserted that she kept yelling "Why are you doing this?" "Stop." (T-121). With the passage of 22 years, Respondent Tenenbaum is foreclosed from ascertaining whether anyone, whether tenant or cleaning persons, was on the second floor above the office, on offices/doors on either side of the office, walking on the sidewalk in front of the office, and whether or not the alleged yelling was heard. Moreover, even if anyone associated with the building could be found, how could that person testify as to the absence of any "screaming" or "yelling" on an unknown weekday evening between May 14, 1983 and July 8, 1983, more than 22 years ago.

• Seventh, any physical evidence has been lost with the passage of time. Claimant Catts did not retain the clothes she wore and, although she contends that Mr. Tenenbaum "just literally like ripped them (my pants) down," the pants cannot be inspected for damage such as stretching, tearing or anything at all (T-129).

• Eighth, the leather/vinyl chairs in Mr. Tenenbaum's office went to other offices concurrent with the firm's move 13 years prior to the filing of the Complaint (T-143).

Respondent further argues in his Opening Brief that the memory of all witnesses had faded, citing examples of lack of recollection of specific events by Ms. Catts, Cpl. Layton and Respondent (OB-11).

4. ODC first argues that because Respondent threatened Ms. Catts, he has unclean hands and his equitable defenses must be rejected (AB-10). ODC argues that this factor prohibits Respondent's laches defense, as the threat of harm contributed to Ms. Catts' delay in reporting of the assault for many years (AB-10-11).

5. ODC argue that the doctrine of laches does not bar the prosecution of the charges in this proceeding, but did not apply the same test as that stated in *Sandefur*. ODC first cited two Chancery Court decisions, one limiting the application of a laches ***1124** defense when asserted against a public authority (*Singewald v. Girden*, 127 A.2d 607, 617 (Del.Ch.1956) (citation omitted) and one noting that "[i]n certain circumstances such as those involving a fiduciary, this Court may refrain from lock-step application of a legal rule that would result in an injustice and invoke its equitable powers to ensure that the dispute is resolved in a fair and just manner." *Gotham Partners v. Millwood [Hallwood] Realty Partners*, 714 A.2d 96, 104 (Del.Ch.1998) (footnote omitted).

6. ODC then applied a three-prong test for determining whether an affirmative defense of laches

is met, as recited by the Delaware Supreme Court in *Homestore, Inc. v. Tafeen*, [888 A.2d 204] 2005 WL 3091887, at (Del.Supr., Nov. 17, 2005) (footnote omitted)6. ODC then applied a three-prong test for determining whether an: *i.e.*, establishing (1) knowledge by the claimant; (2) unreasonable delay in bringing the claim; and (3) prejudice to the defendant. The defense of laches can be defeated by showing that any one of these elements is missing. *Gotham Partners*, 714 A.2d at 104-105. ODC then applied the rule, *equating ODC, as the petitioning party herein, to the "claimant" in addressing the first two prongs* (*i.e.*, arguing that ODC, as the petitioning party, did not have knowledge of the claim until August, 2005 and thereafter, ODC, as the petitioning party, did not delay in prosecution of the charges that form the substance of this case (AB-13-15). ODC addressed the third prong of the test directly, arguing Respondent was not prejudiced by an inability to defend. Relevant portions of ODC's arguments follow:

> • To successfully assert the doctrine of laches, the Respondent must prove that he has been prejudiced by delay. He cannot prove this element of the defense.
>
> • The Respondent asserts that he has been prejudiced because his firm destroyed the relevant file (Tenenbaum: p.133 1.20-p.134 1.22), because his secretary at the time is now dead (Tenenbaum: p.143 1.21-p. 144 1.11), because any injuries Ms. Catts suffered cannot be examined (*cf.* Catts: p. 119 1.3-13), and because the chair onto which the Respondent ejaculated has not been tested or viewed.
>
> • There is no prejudice however, because the file would not have had any information which would tend to prove or disprove the assault; the Respondent's secretary was not in the office at the time of the alleged assault; Ms. Catts testified that her clothing was not torn and she was not scratched or bruised (Catts: p.119 1.3-13; p.128 1.24-p. 129 1.12); in 1983 DNA evidence would not have been available [footnote omitted; see AB-16]; and the chair was within the custody, control or possession of the Respondent and not the victim or the ODC [footnote omitted; see AB-16].
>
> • Moreover, it is immaterial that the Respondent's law firm destroyed any documents related to the representation [footnote omitted; see AB-16] because the representation is not in dispute. The destruction or loss of documents adds nothing to proving the charged misconduct. Consequently, the only value of these lost or destroyed items is that ***1125** they prove that Respondent represented Ms. Catts, a fact that ODC has already established.
>
> • Contrary to the Respondent's claim of prejudice, the passage of time did not diminish the Respondent's ability to emphatically and vehemently deny the allegations. He denied categorically that he assaulted Ms. Catts (Tenenbaum: p. 144 1.12-16). He denied absolutely that he prostituted Ms. Catts to Trooper Layton (Tenenbaum: p,145 1.10-15). Also, the Respondent was not prejudiced because he visited the location and reviewed photographs of his former office to refresh his recollection; he reviewed documents from J.P. Court regarding Ms. Catts' hearing; and he could have visited his former law firm to inspect the furniture. The Respondent's own testimony precludes any finding of prejudice based on diminished memory or delay.
>
> • The Respondent was able to refresh his recollection of his office despite the passage of time. Although his firm had moved from that office space in 1992 (Tenenbaum: p149 1.11-15), his visit to the strip mall where his old office was located, within 24 hours of the hearing refreshed his recollection (Tenenbaum: p.135 1.7-15). He recalled "very clearly" the layout of his office (Tenenbaum: p.135 1.4-6). He admitted he did have a lock on his office door, and admitted that he had had sex with at least one client on at least one occasion inside this office (Tenenbaum: p. 149 1.11-22). He testified in great detail regarding the office layout and furnishings (Tenenbaum: p.135 1.16; p. 140 1.5; p. 141 1.10-142 1.18; p. 142 1.24-p.143 1.20; p. 150 1.6-p. 152 1.1; p. 158 1.24-p. 159 1.10); drew two sketches of the interior (Tenenbaum: p 140 1.6-20); and provided animated detail in response to questions by members of the Board Panel (Tenenbaum: p.155 1.17-p. 158 1.19; p.159 1.11-18). Also, as an additional method of refreshing his recollection, the Respondent produced at the hearing two photographs of his 50th birthday party given by staff at this office location [footnote omitted; AB-17]; (Tenenbaum: p 140 1.22-p. 141 1.13; p.152 1.2-11).

7. ODC then noted that it is consistent with public policy, and Delaware Supreme Court Rules of Disciplinary Conduct, Rule 26, to reject a statute of

limitations for disciplinary matters (AB-18).

8. The Board questioned the propriety of considering the actions of ODC, as the party initiating the action in the context of a lawyer disciplinary proceeding, rather than the actions of the complaining party, in applying the first two prongs of the above-cited three-prong test, for determining whether an affirmative defense of laches is met. The Board requested supplemental briefing on this issue. ODC and Respondent both provided supplemental memoranda in response to the Board's request.

9. Respondent contends that this proceeding is a case of first impression in Delaware; *i.e.*, it is the first time that delay has been presented as an affirmative defense to disciplinary charges against an attorney (OB-7). ODC states "No Delaware court has specifically addressed the issue of laches in a lawyer misconduct proceeding" ***1126** (ODC-SM-7). Based upon the submissions provided by the parties, and without extensive independent research to confirm, the Board believes this is the case. ODC did note in its Answering Brief that the Delaware Supreme Court "did not hesitate to suspend a Delaware lawyer in 1993 for misconduct which had taken place at an unspecified time between 1978 and 1989" (citing *In re Barrett,* 630 A.2d 652, 653 (Del.1993)) and further noted that "the Court held Barrett responsible for the loss of client property despite the passage of time, Barrett's inability to recollect the matter, and the unavailability of the firm's files (*Id.* at 655, 657). However, it does not appear that Barrett raised delay as an affirmative defense.

10. Both parties cite *Kotler v. Board of Medical Practice,* 630 A.2d 1102 (Del.1993) (Exhibit B to this Report) as directly applicable to the issue of the application of the doctrine of laches to an administrative proceeding seeking to suspend or revoke a professional's license. The Delaware Supreme Court has held that the interest in *not* applying the doctrine is substantial": "Although courts generally apply general Statutes of Limitation to administrative proceedings, the opposite is true with respect to proceedings which are in the public interest such as proceedings to suspend or revoke a license to practice medicine. Thus, courts have held without exception that, in the absence of a statute which applies specifically to medical license revocation proceedings, Statutes of Limitation do not apply to such disciplinary proceedings. The rationale behind this rule, when enunciated by the Courts, is twofold: first, when the state regulates the medical profession, it is acting in its sovereign capacity and for the public good, and therefore general civil and criminal Statutes of Limitations do not apply; and second, the purpose of general Statutes of Limitation is to discourage unnecessary delay, promote justice, and forestall prosecution of stale claims, or as proceedings to revoke physicians' licenses, serve to protect the public by insuring that only properly-qualified individuals practice medicine, and the staleness of the charges do not necessarily make them reflect less on the character of the person charged.

> "Those courts that follow the same rule with respect to the doctrine of laches, that is, that laches do not operate as a bar to proceedings to revoke or suspend physicians' licenses, apply a similar rationale: latches cannot attach when the state is acting in its sovereign capacity to protect a public right. On the other hand, several courts have expressed the view that while the mere passage of time is not sufficient to support the defense of laches, if a doctor could prove that his defense was prejudiced due to an unreasonable delay, laches might act as a bar to the license revocation proceeding. *Natalyn O. Harlow,* ANN: Applicability of Statute of Limitations or Doctrine of Laches to Proceedings to Revoke or Suspend License to Practice Medicine, 51 A.L.R.4th 1147, 1151-52 (1987)."

11. Respondent states in 'Respondent Tenenbaum's Supplemental Memorandum' at page2 (hereafter "R-SM-___"): "There cannot, however, be any dispute that Delaware has joined the Courts that have ***1127** held that if a professional could prove that his defense was prejudiced due to an unreasonable delay, laches might act as a bar to the license revocation proceedings", noting the Court's reference in *Kotler* to the case of *Bash v. Board of Medical Practice,* 579 A.2d 1145 (Del.Super.1989) (Exhibit C to this Report). In *Bash,* the Superior Court stated "It has been held that there are no statutes of limitation applicable to disciplinary proceedings and therefore generally no basis for laches. *Id.* at 1152, citing *61 Am.Jur. 2nd, Physicians, Surgeons and Other Healers,* § 104 (1981). The *Bash* Court continued: "Where it has been successfully asserted as a defense in

administrative disciplinary actions involving professional licenses, laches cannot be imputed by the mere passage of time. It must be determined from all the circumstances of the case, one of which must be the existence of harm occasioned by the delay." *Id.* The Superior Court further stated that "(t)he party asserting laches bears the burden of proving both that the delay was unreasonable and that prejudice resulted from the delay." *Id.*, at 1153, citing *Appeal of Plantier*, 126 N.H. 500, 494 A.2d 270 (1985), citing *Tighe v. Commonwealth State Board of Nurse Examiners*, 40 Pa.Cmwlth. 367, 397 A.2d 1261 (1979). The party asserting laches bears the burden of proving both that the delay was unreasonable and that prejudice resulted from the delay. *Appeal of Plantier, supra.*

12. The Board believes the standards for addressing laches defenses, as set forth in *Kotler* and *Bash,* are appropriately applied to lawyer disciplinary cases, as the government interests in protecting the public and upholding the integrity of the profession are just as applicable to the legal profession as they are to the medical profession.

13. ODC cited *Kotler* and *Bash* as applicable to the laches issue as well, but also relied on *Bash* in response to the issue of whether the focus of the 'delay' is appropriately the ODC (the Board of Medical Practice in *Bash*) or the complaining party. ODC noted in it's Supplemental Memorandum, p. 5 (hereafter ODC-SM-___") "[B]ecause the only delay was that of the complaining patients-the Board having initiated action within months of receipt of the complaints-it must be concluded that the Court considered the actions of the Board of Medical Practice in this regard, and not timing of the reports by the two female patients who had complained in 1987 and 1988 that each had been assaulted in 1971".

14. Respondent cites case law supporting the proposition that laches may bar untimely prosecution based on prejudicial delay attributable to the prosecuting entity (R-SM-4-5) *and* that laches may also be based upon prejudicial delay attributable to the original complainant (R-SM-6-8), concluding that "there is no distinction to be drawn between prejudicial delay attributable to the prosecuting entity and that of the original complainant" (R-SM-9-10). After reviewing all cases cited (including cases cited by ODC that it is appropriate to focus on delay attributable to the disciplinary body in the laches analysis; ODC-SM-7-8), and in light of the holdings ***1128** and rationale of *Kotler* and *Bash,* the Board agrees with Respondent's conclusion on this point.

15. ODC notes the similarities of the facts and circumstances in the *Bash* case to those of this proceeding. ODC argues: "The *Bash* case is instructive for the case now before the Board on Professional Responsibility. As was true in *Bash,* the present lawyer disciplinary matter addresses an allegation of serious sexual misconduct by a male professional with a female client in violation of applicable professional conduct rules. In *Bash,* complaints were made in 1987 and 1988 regarding misconduct alleged to have occurred in 1971-a difference of at least 17 years. In the instant case, a complaint was made in 2005 regarding misconduct alleged to have occurred in 1983-a difference of 22 years. In the *Bash* case, the Board of Medical Practice filed a formal complaint in July 1988, having received complaints in late 1987 and early 1988. In the instant case, the complaint was made on August 17, 2005; the Respondent was notified on August 22, 2005; a Petition for Discipline was approved by the Preliminary Review Committee and filed by the ODC on October 5, 2005 (ODC-SM-5-6).

16. ODC further analogizes the *Bash* Court's consideration of the laches defense and Bash's claims of prejudice to the instant case. ODC argues: "The allegations in *Bash* were as follows: one female patient stated that Dr. Bash had sexual intercourse with her during a therapy session in 1971; one female patient stated that Dr. Bash gave her a firm kiss on the mouth at the end of a therapy session in 1971; and the third female patient stated that Dr. Bash had inappropriately touched her breasts at the end of a therapy session in 1987. *Id.* at 1147. The three female patients testified and Dr. Bash testified, as well as two other psychiatrists. *Id.* at 1148. The Superior Court found that Dr. Bash was not prejudiced. The Court stated:

'Dr. Bash has not specifically identified any witnesses who have become unavailable or evidence which has been lost due to the passage of time. Instead, the substance of his laches argument seems to be that the passage of time somehow makes his version of the facts more credible and the Panel's refusal to believe his version amounts to prejudice. On this record, the Court finds that Dr. Bash has not established a defense in this case under the doctrine of laches". *Id* at 1153. (ODC-SM-6).

17. The Board does not agree that the grounds for the

> *Bash* Court's findings are directly analogous to the instant case. Repondent [Respondent] argues, *inter alia*, that "the most credible, knowledgeable independent person who could corroborate that there never was a wing chair in his office, specifically his secretary, Fran Dreisbach, died several years ago" (OB-10). However, for the reasons set forth in Section N(5) of this Report, the Board does not find that Respondent has met his burden of showing prejudice resulting from delay.
>
> 18. The Board further finds that the delay in this instance, attributable to the complainant Ms. Catts and not the ODC, was not unreasonable, based upon the testimony of ***1129** Ms. Catts, as reviewed in Section F and M(1) of this Report, and the testimony of Dr. DeJulio, as reviewed in Sections J and M(3) of this Report.

P. *Board Findings-Issue 2.* The Board finds that the public interests at issue and the standards limiting laches defenses set forth in the *Kotler* and *Bash* cases are as applicable to lawyer disciplinary proceedings as to physician disciplinary proceedings. The Board finds that Respondent did not meet his burden of proving both that the delay in the initiation of disciplinary proceedings was unreasonable, and that prejudice resulted from the delay. The Board finds that Ms. Catts' reporting of the assault nearly 22 years after the fact was not unreasonable under the circumstances, and there was no unreasonable delay in ODC's initiation of disciplinary proceedings thereafter. Because of the nature of the complaint, the Board does not find that the grounds alleged by Respondent constitute prejudice requiring the dismissal of this disciplinary proceeding. The Board's findings under Issue 2 require that the Board's findings under Issue 1 stand as the Board's determination that Respondent has engaged in professional misconduct.

Q. *Sanctions.* Rule 9(d) of the Delaware Rules of Disciplinary Procedure provides in part that "[I]f the Board initially finds that the Respondent has engaged in professional misconduct, the Board shall then make a separate finding as to the appropriate disciplinary sanction". The Rule further provides that "the Board may conduct a separate hearing on sanctions in order to evaluate evidence of possible aggravating and mitigating factors. The ODC and counsel for Respondent are hereby requested to confer and either agree to submit memoranda to the Board with their respective positions on sanctions, within twenty (20) days of the date of this Report, or to schedule a hearing through Mr. Stephen Taylor, contacting Mr. Taylor in either event within seven (7) days of the date of this Report.

Dated: May 8, 2006

APPENDIX II

BOARD ON PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of a Member of the Bar of the Supreme Court of Delaware:

JOEL D. TENENBAUM, Respondent.

Board Case No. 36, 2005

REPORT OF BOARD ON PROFESSIONAL RESPONSIBILITY

Pending before a panel of the Board on Professional Responsibility is Board Case No. 36, 2005, involving Joel D. Tenenbaum, Esq. ("Respondent"), a member of the Bar of the Supreme Court of the State of Delaware, currently suspended from the practice of law for a period of three years by this Court's Order of August 5, 2005 in: *Matter of Tenenbaum,* Board Case Nos. 48 and 52, 2004. The hearing in the above-captioned case was held November 16, 2005. Post hearing briefing was completed as of February 9, 2006. The Board requested that the parties supplement post-hearing briefing to address an issue pertaining to a legal defense, and these submissions were received by the Board April 7, 2006.

The Board filed its Report with the Delaware Supreme Court on May 8, 2006 ("Board Report" or "BR-___"). The Board framed its Report to address two issues presented, restated here:

> 3. Did the ODC establish by clear and convincing evidence that Respondent engaged in illegal conduct involving ***1130** moral turpitude, in violation of the then applicable DR 1-102(a)(3) of the Code of Professional Responsibility?
>
> 4. If the ODC established by clear and convincing

> evidence that Respondent engaged in illegal conduct involving moral turpitude, in violation of the then applicable DR 1-102(a)(3) of the Code of Professional Responsibility, should the Board nonetheless dismiss the case because of the delay of more than 22 years in the prosecution of disciplinary charges against him?

The Board's findings on these issues, as set forth in the Board Report, are restated

> 1. The Board finds that the record established at the hearing demonstrates the Respondent engaged in illegal conduct involving moral turpitude, in violation of the then applicable DR 1-102(a)(3) of the Code of Professional Responsibility, and that ODC met its burden of proving the charged misconduct by clear and convincing evidence, as required by the Delaware Lawyers' Rules of Disciplinary Procedure ("Procedural Rules"), Rule 15(c) (standard of proof) and Rule 15(d) (burden of proof).
>
> 2. The Board finds that the public interests at issue and the standards limiting laches defenses set forth in the *Kotler* and *Bash* cases are as applicable to lawyer disciplinary proceedings as to physician disciplinary proceedings. The Board finds that Respondent did not meet his burden of proving both that the delay in the initiation of disciplinary proceedings was unreasonable, and that prejudice resulted from the delay. The Board finds that Ms. Catts'[28] reporting of the assault nearly 22 years after the fact was not unreasonable under the circumstances, and there was no unreasonable delay in ODC's initiation of disciplinary proceedings thereafter. Because of the nature of the complaint, the Board does not find that the grounds alleged by Respondent constitute prejudice requiring the dismissal of this disciplinary proceeding. The Board's findings under Issue 2 require that the Board's findings under Issue 1 stand as the Board's determination that Respondent has engaged in professional misconduct.

Rule 9(d) of the Delaware Rules of Disciplinary Procedure provides in part that "[I]f the Board initially finds that the Respondent has engaged in professional misconduct, the Board shall then make a separate finding as to the appropriate disciplinary sanction". The Rule further provides that "the Board may conduct a separate hearing on sanctions in order to evaluate evidence of possible aggravating and mitigating factors". Counsel for Respondent requested a hearing on sanctions, which was held July 11, 2006. ODC filed a Memorandum of Law Addressing Sanctions prior to the hearing (hereafter "ODC Memorandum"). Respondent also filed a Memorandum of Law Addressing Sanctions, by agreement with ODC and approval of the Board, following the hearing hereafter "Respondent's Memorandum"). This is the Board's Report on sanctions.

***1131** In the performance its analysis and determination of the appropriate sanction, the Board is given specific guidance:

> The objectives of the lawyer disciplinary system are to protect the public, to protect the administration of justice, to preserve confidence in the legal profession, and to deter other lawyers from similar misconduct. To further these objectives and to promote consistency and predictability in the imposition of disciplinary sanctions, the Court looks to the ABA Standards for Imposing Lawyer Sanctions as a model for determining the appropriate discipline warranted under the circumstances of each case. The ABA framework consists of four key factors to be considered by the Court: (a) the ethical duty violated; (b) the lawyer's mental state; (c) the extent of the actual or potential injury caused by the lawyer's misconduct; and (d) aggravating and mitigating factors." *In re Bailey*, 821 A.2d 851, 866 (Del.2003) (Citations omitted); See also *In re Fountain*, 878 A.2d 1167, 1173 (Del.2005).

The Board now considers those four enumerated factors. After reviewing the first three factors, and making a preliminary determination of the appropriate sanction, the Board will then review the aggravating and mitigating circumstances to determine if an increase or decrease in the sanction is warranted. *In re Steiner*, 817 A.2d 793, 796 (Del.2003).

1. *Ethical Duty Violated.*

The Board found that Respondent violated the duties owed by a Delaware lawyer to the public under the then

applicable code of conduct, DR 1-102(A)(3)[29], which prohibited illegal conduct involving moral turpitude. The Board believes that the specific conduct in which the Respondent engaged, as found by the Board, rises to the level of conduct for which the applicable ABA Standard (ABA Standard 5.1) suggests disbarment as an appropriate remedy. A further discussion or the Board's rationale appears in Section 4, below.

1. *The Lawyer's Mental State.*

An analysis of this factor requires a determination of the lawyer's state of mind, *i.e.*, whether it was intentional, knowing or negligent. The ODC, arguing that the Respondent acted intentionally, noted:

> The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result (citing ADA Standards, Theoretical Framework; Black Letter Rules, Definitions; *In re McCoy,* 767 A.2d 191, 195 (Del.2001) ("Intentional misconduct is the most culpable form of misconduct."). ODC Memorandum, p. 3.

Respondent urges that the Board must include consideration of his personal and emotional problems, as discussed in the Professional Renewal Center's February 4, 2005 letter/report ("PRC Report") which, as noted in Respondent's Memorandum, includes "diagnosis of Major Depressive Disorder, Recurrent, Moderate; Dysthymic Disorder; and Personality Disorder NOS with Narcissistic and Histrionic Features." Respondent's Memorandum, p. 2. Respondent offered the PRC Report at the conclusion of the Hearing on sanctions as an Exhibit, since it was referenced in the Supreme Court's August 5, 2005 Order in: ***1132** *Matter of Tenenbaum,* Board Case No. 36, 2005. Respondent's counsel suggested that review of the PRC Report would allow the Board to consider the underlying bases to references to the PRC Report in the Supreme Court's Order of August 5, 2005 in: *Matter of Tenenbaum,* Board Case Nos. 48 and 52, 2004.[30] A copy of the Professional Renewal Center's February 4, 2005 letter/report is attached to this Report as Exhibit "A".

The Board did review the PRC Report (along with the entire Board Report, attached to the Supreme Court's Order of August 5, 2005), without the benefit of testimony as to whether any of these conditions directly or indirectly negate intentional conduct, or support a finding of a lesser mental state of mind. The Board notes particularly portions of the PRC Report that seem to have a bearing on the issue of intent:

> "There are numerous significant discontinuities between Mr. Tenenbaum's perceptions of his behaviors and those of the witnesses described in Mrs. Rocanelli's documents. Some possible hypotheses to explain these discontinuities will be discussed later in this report" (PRC Report, Relevant History Section, fourth paragraph, p. 3).
>
> > "Mr. Tenenbaum possesses significant narcissistic and histrionic personality traits. His obliviousness in certain social situations can be attributed to a predominant "thick-skinned" narcissistic character structure. In this regard, he can be self-centered, episodically hedonistic, predisposed to use arrogance as a way to fend off internally perceived inadequacies, and possesses significant deficits in this ability to use empathy to be more self-reflective and sensitive to other people's needs and boundaries. When he becomes beset with high levels of stress, however, his personality structure shifts to a more "thinned-skinned" narcissistic presentation-that is, he can become more inhibited and timid, more dependent on others, naïve in his understanding of social contexts, overly sensitive to perceived slights from others, and beset with feelings of low self-esteem.
>
> Presently, he is quite vulnerable and struggling to manage intense feelings of helplessness that are intruding into consciousness in the form of unbidden disturbing ideas and feelings that give rise to significant levels of anxiety. Despite being overwhelmed, he is not exhibiting a significant regression in his ability to think logically. *There are no indications in the psychological test data to suggest the presence of a severe mood disorder, a thought disorder, a psychotic process, psychopathy, or impulse control disorder.* His predominant modes of psychological defense are repression, somatization, projective identification, and externalization. These psychological defenses prevent him from accurately seeing the way in which his conduct and choices can affect others and, as a result,

> predispose him to minimize, and thus have little insight into his difficulties. (PRC Report, Summary of Psychological Testing Section, fifth and sixth paragraphs, p. 8 [emphasis added]).

These statements in the PRC Report lead the Board to surmise that although Respondent may have some psychological ***1133** impediments to discerning the line one should not cross in expressing oneself in a business or social context, the PRC Report does not support a finding of Respondent's resulting diminished mental state. The Board also noted Respondent's own testimony, as contained in the Board's Report in the prior case, as supportive of a finding of an intentional state of mind:

> "He testified briefly regarding the sexual relationship he had with a client during the course of his representation in 1998, noting that this came to light as a result of his admission of that relationship, and not as a result of a complaint to the ODC (T-177-178). He acknowledged that this conduct was wrongful ("*malum prohibitum*" and "*malum in se* ") even prior to the Rule change (T-177-178)."

It is difficult for the Board to decide that Respondent, knowing the wrongfulness of having sex with a client, did not know the criminal conduct at issue in the case before the Board was wrongful, as well. The Board concludes the Respondent acted intentionally.

3. *The Extent of the Actual or Potential Injury Caused by the Lawyer's Misconduct.*

ABA Standards (Black Letter Rules) state "injury" is harm to a client, the public, the legal system or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no injury". The Board believes that Ms. Carolyn Catts suffered actual injury, as did the public and the legal profession, as a result of Respondent's conduct.

4. *Initial Assessment of Sanctions.*

As an initial matter, and based upon Respondent's mental state, and the actual or potential injury suffered, the Board begins its analysis with ABA Standard 5. 1, Failure to Maintain Personal Integrity, which states:

> "Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases involving dishonesty, fraud, deceit, or misrepresentation:
>
> Section 5.11: Disbarment is generally appropriate when:
>
> (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or ...
>
> (b) a lawyer engages in other intentional conduct involving dishonesty, fraud, deceit, or misrepresentations that seriously adversely reflects on the lawyer's fitness to practice."

The ODC argues, but the Board does not agree, that a violation of ABA Standard 5.11(a) has been established. ODC argues that the Board "found that Corporal Layton's testimony corroborated Ms. Catts' testimony. BR 9-10" (ODC Memorandum, p. 3). ODC cites the Board's statement from the Board Report: "While Cpl. Layton did not definitely confirm Ms. Catts' contention that Respondent 'prostituted' her to Cpl. Layton, the statement she recalls Respondent making to Cpl. Layton ("She'll do anything to get off"; T-94) was vague enough for Ms. Catts to construe it as she did and for Cpl. Layton not to have recalled an explicit offer of sexual services or favors (T-23, 25-26). BR-10" (ODC Memorandum, p. 3, 4).

***1134** The Board clarifies here that its reference to this testimony was intended to convey its belief that Cpl. Layton's testimony (that he did not recall any explicit offer of sexual services or favors) did not contradict or negate Ms. Catts' *belief* that Respondent had 'prostituted' her, nor did it lessen her credibility. However, Ms. Catts' recollection of this statement, by itself, does not support a finding, by clear and convincing evidence, that Respondent interfered with the administration of justice. The Board did not make such a finding in its Board Report.

It remains, then, to determine whether a violation of ABA Standard 5.11(b) has been established. In the Board

Report, the Board found that ODC established by clear and convincing evidence (but not through criminal conviction) that Respondent engaged in criminal conduct, *i.e.*, sexual assault, indecent exposure and unlawful imprisonment. The Board believes that this criminal conduct meets the *general language and intent* of Standard 5.0 (*i.e.*, "the following sanctions [disbarment] are generally appropriate in cases involving *commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects* ... " [emphasis added]). Whether the conduct in this case, egregious as it is, specifically involves "dishonesty, fraud, deceit, or misrepresentation" as required under Section 5.11(b), is a more difficult question, as each of these terms denotes a dishonest motive or an intent to mislead. Neither the ODC nor Respondent cites Delaware or other case law directly on this point. The Board reviewed numerous cases from other jurisdictions (see, e.g., 43 A.L.R.4th 1062, "Sexual Misconduct as Ground for Disciplining Attorney or Judge", and cases cited therein) and find there is support for both suspension and disbarment of attorneys in cases of serious sexual misconduct. The Board finds support for its belief that the improper sexual behavior in this case warrants disbarment, even if the Respondent's conduct may arguably not involve "dishonesty, fraud, deceit, or misrepresentation". For example, in *In re Gould*, 4 A.D.2d 174, 164 N.Y.S.2d 48 (1957), the Court noted, in response to the respondent's claim that he was insane at the time of the commission of the acts, and ordered disbarment:

> "This may be a defense to a criminal charge, where the intent to commit the wrongful acts is a necessary ingredient; but in disciplinary proceedings, dependent upon the nature of the misconduct, the attorney's conduct may be judged not only by his intent but also by the objective nature of his conduct and the quality of his act. A disciplinary proceeding is not concerned with meting out punishment but with the question of fitness to continue on the role of qualified attorneys. The primary consideration is the protection of the public in its reliance upon the integrity and responsibility of the legal profession. Practitioners, whether incapable or unwilling to distinguish between right and wrong, cannot be allowed to remain members of the Bar." *In re Gould*, 4 A.D.2d 174, 176, 164 N.Y.S.2d 48, 49 (1957).

A copy of this decision is attached to this Report as Exhibit "B". Lastly, the Board notes that the ABA Standards are intended to serve as guidelines, and based upon the foregoing, the Board believes the appropriate initial sanction is disbarment.

5. *Aggravating and Mitigating Factors.*

Aggravating Factors

As indicated in the previous subsection, the initial considerations indicate disbarment is the appropriate sanction. However, ABA Standard Section 9.21 provides ***1135** that aggravation or aggravating circumstances may justify an increase in the degree of discipline to be imposed; and ABA Standard Section 9.31 provides that mitigation or mitigating circumstances may be considered as factors that justify a reduction in the degree of discipline to be imposed. The Board now reviews any aggravating or mitigating factors.

ABA Standard Section 9.22(a)-"Prior Disciplinary Offenses". The ODC notes Respondent's prior disciplinary record:

> • In 1984, Respondent was privately admonished for a violation of Canon 1, DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), and DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice), based upon Respondent's false testimony in support of a claim for fees;
>
> • In 1995 Respondent was privately admonished for violations of Rules 3.3(a)(2) (knowingly failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client) and Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice) in his failure to disclose to the Family Court certain matters pertaining to Respondent's client; and
>
> • In 2005, Respondent was suspended for three years for violations of former Rule 1.7(b), Rules 1.8(j), 8.4(a) and 8.4(b), wherein the Respondent was suspended for three years with the Court's finding that Respondent had sexually harassed female clients and employees, both verbally and physically during the past five to ten years, establishing a pattern of illegal activities. ODC Memorandum, pp. 4, 5.

Respondent argues that, notwithstanding the last recited, prior *discipline* for sexual misconduct involving clients and office staff, the *conduct* at issue before the Board predates the violations that are the grounds for his current three-year suspension, and thus the prior-in-time violations "should not be considered as aggravated by this

previous discipline, based upon events and sanctions which occurred after the alleged event giving rise to the Board's finding". Respondent's Memorandum, pp. 3, 4. Respondent supports this argument with analogies to Delaware case law that confirms the requirement of separate convictions, each successive to the other, with opportunity for a criminal defendant's rehabilitation after each sentencing, in the application of the habitual criminal offender penalties (see Respondent's Memorandum, citing: *Buckingham v. State*, 482 A.2d 327, 330-331 (Del.1984); *State v. Colon*, [2006 WL 1067282 (Del.Super.)]). ODC notes without authority that "it would not be appropriate to consider in mitigation the fact that Respondent did not have a disciplinary record as of 1983" ODC Memorandum, p. 6.

In addressing a similar assertion (*i.e.*, that prior discipline should not be considered an aggravating factor relevant to the Court's consideration of current misconduct), The Supreme Court of Florida stated:

> "McHenry asserts that his past disciplinary record should not be considered an aggravating factor relevant to our evaluation of the appropriate discipline for the present charges against him. We recognize that McHenry's prior violations of the professional rules were associated with and explained somewhat by this former addition to alcohol. Even so, his prior conduct sheds light upon his character and fitness to practice law. His behavior toward two of his clients in the two separate incidents at issue in this case demonstrates severe moral turpitude, and his character and conduct ***1136** are wholly inconsistent with approved professional standards." *The Florida Bar v. McHenry*, 605 So.2d 459, 17 Fla. L. Weekly S598 (1992).

A copy of this decision is attached to this Report as Exhibit "C".

Based upon this reasoning, and the premise that the ABA Standards are intended as guidelines, the Board believes the violations that are the grounds for Respondent's current three-year suspension, may be considered as aggravating circumstances. Conversely, the Board believes that the lack of a disciplinary violation in 1983 is not an appropriate factor in mitigation in this proceeding.

ABA Standard Section 9.22(b)-"Dishonest or Selfish Motive". ODC states, without further notation that "the Respondent acted from a dishonest and selfish motive". ODC Memorandum, p. 4. Again, the Board questions whether the conduct at issue meets the definition implied in these terms, but does not feel its decision is affected by this question.

ABA Standard Section 9.22(c)-"Pattern of Misconduct". After noting Respondent's prior disciplinary record, ODC argues that this prior record establishes a pattern of misconduct. ODC Memorandum, p. 4. The Board agrees.

ABA Standard Section 9.22(d)-"Multiple Offenses". ODC notes that "even viewing the Respondent's assault on Ms. Catts in isolation, multiple offenses were involved; BR 11-14". ODC Memorandum, p. 5). The Board agrees.

ABA Standard Section 9.22(g)-"Refusal to Acknowledge Wrongful Nature of Conduct". ODC states that "Respondent has not acknowledged the wrongful nature of his conduct". Respondent has maintained throughout this proceeding that the conduct alleged did not occur.

ABA Standard Section 9.22(i)-"Substantial Experience in the Practice of Law". Respondent, admitted to the Delaware Bar in 1972, had practiced law for a period of ten years at the time of the alleged assault of Ms. Catts.

Mitigating Factors

The ABA Standards, at Section 9.32, set forth numerous factors that may serve in mitigation.

Mitigating factors can include:

> (a) absence of a prior disciplinary record;
>
> (b) absence of a dishonest or selfish motive;
>
> (c) personal or emotional problems;
>
> (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
>
> (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
>
> (f) inexperience in the practice of law;
>
> (g) character or reputation;
>
> (h) physical disability;
>
> (i) mental disability or chemical dependence including alcoholism or drug abuse when:
>
> > (1) there is medical evidence that the respondent is affected by a chemical dependence or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation;

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

(j) delay in disciplinary proceedings;

***1137** (k) interim rehabilitation;

(*l*) imposition of other penalties or sanctions;

(m) remorse;

(n) remoteness of prior offenses.

ODC suggests, generally, that mitigating factors do not support a decrease in sanctions in this case. The Board has already addressed the issue of Respondent's prior disciplinary record (see discussion above under "Prior Disciplinary Offenses") and Respondent's disability or impairment (see Section 2, above, "The Lawyers Mental State"). There are two other issues involving mitigation which are raised by Respondent: Respondent's record of public and community service, and Respondent's lack of conviction of any serious criminal act in connection with this violation. The Board will address these alleged mitigating factors, in reverse order.

Respondent distinguishes cases cited by ODC as supporting the sanction of disbarment: *In Re: Vinokur*, [2003 WL 23111988 (Del.)] and *In Re: Fink*, [2003 WL 21295919 (Del.)]. Respondent correctly notes that *Vinokur* consented to the sanction of disbarment, and that *Fink* was charged and convicted beyond a reasonable doubt of 30 felony counts (confirmed on appeal). In addition, *Fink* ultimately stipulated to disbarment from the practice of law, without further proceedings. (Respondent's Memorandum, p. 4). The fact that Respondent distinguishes the above cases from the facts and circumstances presented in this case, however, goes to the issue of the propriety of the initial finding of disbarment as an appropriate sanction, rather than to the issue of mitigation. The Board is unaware of any Delaware case law addressing disciplinary cases involving serious criminal conduct without a criminal conviction. For reasons set forth in its discussion on ABA Standard Section 5.11, above, the Board believes that disbarment may be an appropriate initial sanction, in cases of serious criminal behavior established by clear and convincing evidence, subject to modification as a result of aggravating or mitigating factors.

The Board does believe that Respondent's record of substantial public and community service, throughout the course of his legal career, is a factor in mitigation (generally, character or reputation). The Board felt that Respondent's significant work with the Community Legal Aid Society, Inc., Catholic Charities and his related work in the area of termination of parental rights and child adoption, including his participation in establishing important legal precedent in these areas of practice, is a positive factor (see Transcript of Board Hearing 7/11/2006, pages 4-14; hereafter "T-___"). Likewise, Respondent's participation in the Delaware State Bar Association, chairing the Delaware State Bar Family Law Section, and later chairing the Adoption Committee of the American Bar Association Family Law Section, reflects positively on Respondent. In both of these organizations, Respondent worked to have important legislation passed, including the Uniform Adoption Act (T-15-19).

The Board does not believe, however, considering all of the facts and circumstances before it and the aggravating factors, that the mitigating factors should operate to reduce the sanction of disbarment. The Board recommends that the Court enter an order imposing the sanction of disbarment.

Dated: October 17, 2006

All Citations

918 A.2d 1109

Footnotes

1 *In re Tenenbaum,* 880 A.2d 1025 (Del.2005).

2 Appendix I.

3 Appendix II.

4 Rule 8.4(b) of the Delaware Lawyers' Rules of Professional Conduct is the substantial equivalent of DR 1-102(A)(3) and provides "[a] lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

5 Carolyn Catts is a pseudonym for Respondent's former client, the complaining witness in this case.

6 *See* Rule 15 of the Board on Professional Responsibility. *Matter of Berl,* 540 A.2d 410 (Del.1988).

7 *Matter of Lewis,* 528 A.2d 1192, 1193 (Del.1987).

8 *Matter of Berl,* 540 A.2d 410 (Del.1988) (citing *Olney v. Cooch,* 425 A.2d 610, 613 (Del.1981)).

9 This rule is substantively the same as the ABA Model Rules for Lawyer Disciplinary Enforcement, Section II, Procedure for Disciplinary Proceedings, Rule 32, Statute of Limitations. (Proceedings under these rules shall be exempt from all statutes of limitations).

10 *See* Delaware Supreme Court Rule 52(a)(1) and Board of Bar Examiners Rule 7.

11 ABA Model Rules for Lawyer Disciplinary Enforcement, § 2, R.32, Procedure for Disciplinary Proceedings, Statute of Limitations.

12 *U.S. Cellular Inv. Co. of Allentown v. Bell Atlantic Mobile Systems, Inc.,* 677 A.2d 497, 502 (Del.1996) (citing *Nationwide Mut. Ins. Co. v. Starr,* 575 A.2d 1083, 1088 (Del.1990)).

13 *Bash v. Board of Medical Practice,* 579 A.2d 1145 (Del.Super.1989).

14 *Id.* at 1152-1153 (internal citations omitted).

15 *Id.*

16 Appendix I.

17 *In re Figliola,* 652 A.2d 1071, 1076 (Del.1995) (citing *In re Agostini,* 632 A.2d 80, 81 (Del.1993)).

18 *Id.* quoting *In re Agostini,* 632 A.2d at 81.

19 *In re Rich,* 559 A.2d 1251, 1257 (Del.1989).

20 *In re Figliola,* 652 A.2d at 1076.

21 *In re Tenenbaum,* 880 A.2d 1025, 1026 (Del.2005).

22 Rule 8.4(b) of the Delaware Lawyers' Rules of Professional Conduct is the substantial equivalent of DR 1-102(A)(3) and provides "[a] lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

23 Carolyn Catts is a pseudonym for Respondent's former client, the complaining witness in this case. Her testimony appears in the Transcript under the name "Carolyn Katz" (T-68-131).

24 Answer, paragraph 24; Respondent's 'Answering Brief in Opposition to the Office of Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law and Reply Brief in Support of Dismissal Filed by Respondent Joel D. Tenenbaum' (hereafter "RB-___").

25 Complaint, paragraph 3; T-86-88.

26 The Court has ruled there is no private cause of action arising from a criminal statute; see *Brett v. Berkowitz,* 706 A.2d 509, 512 (1998).

27 It is noteworthy that prior to any testimony being given by Dr. DeJulio, Respondent's counsel, Mr. Weiner, noted his objection to the relevance of Dr. DeJulio's testimony, stating that "any testimony offered by Mr. DeJulio would be irrelevant for criminal purposes under Delaware law, but since we are going to have post-hearing briefing, I'll reserve that issue for post-hearing briefing ..." (T-30;33). Respondent raised only one legal issue in his opening post-hearing brief, *i.e.,* "whether Respondent sustained actual prejudice from more than 22 years delay in the prosecution of disciplinary charges against him" ('Opening Post-Hearing Brief of Respondent Joel D. Tenenbaum'; hereafter "OB-___"; see Statement of Questions Involved and Argument sections, OB-6, 7). In his 'Answering Brief in Opposition to the Office of Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law and Reply Brief in Support of Dismissal Filed by Respondent Joel D. Tenenbaum' (hereafter "AB-___"), Respondent touched upon the issue, in the subsection of the Answering Brief supporting Respondent's overall contention that the ODC failed to establish, *by clear and convincing evidence,* that Respondent engaged in conduct involving moral turpitude (AB-1). In the subsection entitled "Moral Turpitude in Violation of Former DR 1-102(A)(3)", Respondent states: "Respondent denies that he indecently exposed himself, sexually assaulted and/or unlawfully imprisoned Ms. Catts; however, Respondent concedes that a finding *beyond a reasonable doubt* that any one of these three criminal offenses had occurred would have been sufficient to constitute moral turpitude in violation of DR 1-102(A)(3)" (AB-5). Thus it appears to the Board, by the manner in which Respondent presented issues in the post-trial briefing, that the parties agree that ODC must meet its burden of proving the charged misconduct by 'clear and convincing evidence', as required by the Delaware Lawyers' Rules of Disciplinary Procedure ("Procedural Rules"), Rule 15(c) (standard of proof) and Rule 15(d) (burden of proof), and not 'beyond a reasonable doubt', the applicable standard for proving the criminal conduct in a criminal proceeding. It further appears to the Board that Respondent abandoned the argument that Dr. DeJulio's testimony is irrelevant to these proceedings. The Board did not independently research this issue further.

28 Carolyn Catts is a pseudonym for Respondent's former client, the complaining witness in this case. BR-2, Note 2.

29 Rule 8.4(b) of the Delaware Lawyers' Rules of Professional Conduct is the substantial equivalent of DR 1-102(A)(3) and provides "[a] lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

30 In that combined case, Respondent and ODC stipulated (as a mitigating factor) that the Respondent "has experienced personal and emotional problems, including diagnosis of as a result of Major Depressive Disorder, Recurrent, Moderate; Dysthymic Disorder; and Personality Disorder NOS with Narcissistic and Histrionic Features", referencing the PRC Report, Joint Exhibit 3 to the Board Report to the Court.

445 Mass. 291
Supreme Judicial Court of Massachusetts,
Suffolk.

David P. INGALLS
v.
BOARD OF REGISTRATION IN MEDICINE.

Argued Oct. 7, 2005.
|
Decided Nov. 14, 2005.

Synopsis
Background: Physician petitioned for review of decision by Board of Registration in Medicine revoking license for sexual misconduct with adolescent female patients. A single justice of the Supreme Judicial Court, Suffolk County, Spina, J., reported case.

Holdings: The Supreme Judicial Court, Ireland, J., held that:

[1] Board was not required to make a specific, written finding of good cause prior to entertaining complaints of allegedly stale claims;

[2] physician could not claim prejudice from any delay by Board regarding the complaints;

[3] patients' statements about harm did not prejudice physician;

[4] error by complaint counsel in failing to send to physician a copy of request to use the ten-minute presentation period during disposition hearing did not prejudice physician; and

[5] evidence supported revocation.

Affirmed.

West Headnotes (16)

[1] **Health**
Disciplinary Proceedings

Board of Registration in Medicine was not required to make a specific, written finding of good cause prior to entertaining complaints of physician's sexual misconduct with adolescent female patients more than six years before filing of complaints; the regulation on stale matters did not require an explicit, written finding of good cause before pursuing a complaint arising out of acts or omissions occurring more than six years prior to the date of filing. 243 CMR 1.03(16).

Cases that cite this headnote

[2] **Administrative Law and Procedure**
Construction

A regulation is to be read in the same manner as a statute.

Cases that cite this headnote

[3] **Administrative Law and Procedure**
Construction

Courts give to words of a regulation their plain and ordinary meaning.

Cases that cite this headnote

[4] **Health**
Disciplinary Proceedings

Statements of allegations by Board of Registration in Medicine regarding physician's sexual misconduct with adolescent female patients more than six years earlier were sufficient to show finding of good cause to pursue stale claims, where the Board declared in opening statement its reason to believe that the physician committed sexual misconduct. 243 CMR 1.03(9, 16).

Cases that cite this headnote

[5] **Constitutional Law**
Health Care Professionals

Due process rights are implicated in administrative proceedings that may affect the right to practice medicine. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[6] **Constitutional Law**
Health Care Professionals
Health
Disciplinary Proceedings

Physician could not claim prejudice from any delay by Board of Registration in Medicine regarding complaints of alleged sexual misconduct with adolescent female patients, and, thus, license revocation was not barred by laches or due process clause; the Board acted immediately on receiving information regarding the complaints of two patients, one patient reported abuse seven years after treatment at age thirteen, and physician could not use her failure to report during her tender years as a shield. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[7] **Equity**
Rights of Public

Laches is not generally a bar where a public right is being enforced.

Cases that cite this headnote

[8] **Health**
Review

Patients' statements that were heard by the Board of Registration in Medicine after the administrative magistrate had issued her recommended decision did not prejudice physician in proceeding to revoke his license for sexual misconduct with adolescent female patients; the administrative magistrate's factual findings that three adolescent girls were inappropriately touched in a sexual manner during routine visits supported an inference of harm, and, therefore, the Board properly included harm in its decision.

Cases that cite this headnote

[9] **Health**
Hearing

Physician was not entitled to cross-examine patients who spoke at hearing to sanction physician for sexual misconduct with patients; the hearing was a sanctioning hearing where the physician presented his objections to the administrative magistrate's recommended decision and his position regarding the appropriate sanction, and the statutory testimonial strictures thus did not apply. M.G.L.A. c. 30A, § 1 et seq.

Cases that cite this headnote

[10] **Health**
Hearing

Complaint counsel erred by failing to send to physician a copy of request to use the ten-minute presentation period permitted by the Board of Registration in Medicine during disposition hearing in proceeding to revoke license.

Cases that cite this headnote

[11] **Administrative Law and Procedure**
Harmless or Prejudicial Error

There must be some showing of prejudice before an agency's disregard of its rules may constitute reversible error.

Cases that cite this headnote

[12] **Health**
Review

Error by complaint counsel in failing to send to physician a copy of request to use the ten-minute presentation period permitted by the Board of Registration in Medicine during disposition hearing did not prejudice physician in proceeding to revoke license; Board letter informed the parties that they could allow complainants to speak, that letter gave to physician ample notice of the possibility that the complainants would speak, and the physician had no right to cross-examine them.

Cases that cite this headnote

[13] **Health**
Scope of Review

The Supreme Judicial Court will not disturb the Board of Registration in Medicine's findings unless review of the record as a whole fails to disclose substantial evidence to support it.

Cases that cite this headnote

[14] **Health**
Evidence

Evidence supported decision to revoke physician's license for sexual misconduct with adolescent female patients; the patients saw physician for medical issues not requiring breast examination, the incidents were similar, and memory lapses throughout physician's testimony supported finding that he lacked credibility.

Cases that cite this headnote

[15] **Administrative Law and Procedure**
Fact Questions
Administrative Law and Procedure
Credibility

It is for the agency, not the courts, to weigh the credibility of witnesses and to resolve factual disputes.

1 Cases that cite this headnote

[16] **Administrative Law and Procedure**
Arbitrary, Unreasonable or Capricious Action; Illegality
Administrative Law and Procedure
Substantial Evidence

While the task of assessing the credibility of witnesses is one uniquely within an agency's discretion, a court may modify or set aside findings and conclusions that are arbitrary or unsupported by substantial evidence.

3 Cases that cite this headnote

Attorneys and Law Firms

****234** Eve Slattery, Boston (Paul Cirel with her) for the plaintiff.

William W. Porter, Assistant Attorney General, for the defendant.

Present: MARSHALL, C.J., IRELAND, SPINA, & CORDY, JJ.

Opinion

IRELAND, J.

***291** On November 19, 2003, the Board of Registration in Medicine (board) revoked David P. Ingalls's (plaintiff's) license to practice medicine based on findings that he had committed ***292** repeated acts of misconduct with adolescent female patients. On December 5, 2003, the plaintiff filed a petition for judicial review pursuant to G.L. c. 30A, §§ 14 and 15, and G.L. c. 112, § 64, and a motion for a stay of revocation pending appeal. A single justice of this court denied the plaintiff's motion for a stay pending appeal.

On December 23, 2004, a different single justice reserved and reported five questions raised in the plaintiff's petition to the full court: (1) whether 243 Code Mass. Regs. § 1.03(16) (1993) requires a specific, written finding of good cause to proceed on complaints more than six years old or whether the issuance of a statement of allegations is sufficient to imply a finding of good cause; (2) whether the due process protections of the United States Constitution or the Massachusetts Declaration of Rights were violated by the board's hearing complaints filed significantly after the incidents complained of had occurred; (3) whether victim impact statements properly may be accepted by the board after the close of evidence, but before it makes its decision whether to accept, reject, or amend the administrative magistrate's recommended decision, and, if proper, whether such statements are subject to the testimonial strictures of G.L. c. 30A; (4) whether due process was violated by the manner in which the board received the victim impact statements; and (5) whether the decision of the board was supported by substantial evidence. Because we conclude that the board's proceedings were proper and its decision to revoke the plaintiff's license to practice medicine is supported by substantial evidence, we affirm the final decision and order of the board revoking the plaintiff's license.

Facts and procedural history. We present facts from the record, reserving some details for our discussion of the issues. On January 9, 2002, the board commenced proceedings against the plaintiff by issuing a statement of allegations under G.L. c. 112, § 5, alleging that the plaintiff engaged in sexual misconduct with Patients A, B, and C. The board referred the matter to the division of administrative law appeals (DALA) to conduct an adjudicatory hearing. On August 21, 2002, a second statement ***293** of allegations regarding the plaintiff's sexual misconduct was filed as to Patients D and E, which was also referred to DALA.[1]

Following a hearing on the allegations, on June 5, 2003, the administrative magistrate issued a twenty-nine page recommended decision in which she found that the counsel prosecuting the case on behalf of the board (complaint counsel) had established ****235** that the plaintiff had committed sexual misconduct with Patients A, C, and D, and recommended to the board that it impose appropriate sanctions on the plaintiff.

On July 2, 2003, the board notified the parties by letter of the final disposition hearing. The letter stated that each party would be permitted to make a presentation and required that the presenting party notify the board and opposing party by letter of its plan to make a presentation prior to the hearing. The complaint counsel appropriately requested the board's permission to present the testimony of Patients A, C, or D, but failed to notify the plaintiff that the patients would testify at the disposition hearing. The parties appeared before the board on September 17, 2003, and the plaintiff objected to the inclusion of the testimony of Patients A and C during the complaint counsel's presentation.[2]

On November 19, 2003, the board issued a final decision and order revoking the plaintiff's license to practice medicine. The board adopted the administrative magistrate's recommended decision, and added that it had explicitly found good cause to proceed in the case when it issued the statement of allegations. The board concluded that revocation was the proper sanction ***294** for each violation of law, "and not a combination of any or all of them."

Standard of review. "Under G.L. c. 112, § 64, a person whose license to practice medicine has been revoked may petition the court to 'enter a decree revising or reversing the decision of the board, in accordance with the standards for review provided' in G.L. c. 30A, § 14(7)." *Weinberg v. Board of Registration in Med.*, 443 Mass. 679, 685, 824 N.E.2d 38 (2005), quoting *Fisch v. Board of Registration in Med.*, 437 Mass. 128, 131, 769 N.E.2d 1221 (2002). "The court may modify or set aside the board's final decision only if the petitioner demonstrates that the decision was legally erroneous, procedurally defective, unsupported by substantial evidence, arbitrary or capricious, or contained one or more of three other enumerated defects not at issue here." *Weinberg v. Board of Registration in Med., supra*, citing *Fisch v. Board of Registration in Med., supra.* We now turn to the reported questions.

[1] *Discussion.* 1. *Board proceeding.* a. *Good cause.* With

respect to Patients A and D, the plaintiff argues that, where the events that gave rise to their allegations occurred more than six years before the complaint was filed, the complaints were stale, and therefore, the board was required to make a specific, written finding of good cause prior to proceeding with the investigation. He further argues that the statements of allegations are insufficient to show that the board made a finding of good cause. We find both arguments unpersuasive.

[2] [3] The regulation regarding stale complaints states:

> "*Stale Matters.* Except where the Complaint Committee or the Board determines otherwise for good cause, the Board shall not entertain any complaint arising out of acts or omissions occurring more than six years prior to the date the complaint is filed with the Board."

243 Code Mass. Regs. § 1.03(16) (1993). "A regulation is to be read in the same manner as a statute." *Tesson v. Commissioner* ****236** *of Transitional Assistance,* 41 Mass.App.Ct. 479, 482, 671 N.E.2d 977 (1996). We give words of the regulation their plain and ordinary meaning. See *id.*

The regulation clearly states that either the complaint committee ***295** or the board must determine that good cause exists prior to entertaining a complaint regarding a physician; however, there is no language requiring that an explicit, written finding of good cause must be made before pursuing a complaint.[3]

Moreover, even if we agreed that the regulation requires a specific finding of good cause in cases filed more than six years after the misconduct, there would be inadequate grounds to reverse the board's determination that the plaintiff's license should be revoked. The board imposed the sanction of revocation "for *each* violation of law listed in the Conclusion section [of the administrative magistrate's recommended decision] and not a combination of any or all of them." Patient C's December, 1999, complaint was filed fourteen months after the plaintiff's misconduct, and thus it was not "stale." Therefore, because the conclusions with respect to Patient C provide an independent ground for revoking the plaintiff's license, the result in this case would not change.

[4] With respect to the statement of allegations, the plain reading of the applicable regulation, 243 Code Mass. Regs. § 1.03(9) (1993), also applies. A statement of allegations is issued when "there is reason to believe that the acts alleged occurred and constitute a violation for which a licensee may be sanctioned by the Board." *Id.*[4] The regulation does not require an explicit finding of "good cause" on the face of a statement of allegations.

In this case, on two occasions, the board issued a statement of allegations (statement) regarding the complaints against the plaintiff. In the opening paragraph of each statement, the board declared that it "has reason to believe that [the plaintiff] committed sexual misconduct." Because the regulation requires nothing more, the statements were sufficient.

As to the plaintiff's argument that the board never found good cause to proceed with the investigation in any event, we ***296** disagree. Prior to the board's investigation, there were three separate, but similar, allegations regarding the plaintiff's sexual misconduct with adolescent females. Good cause is evident.[5]

[5] [6] b. *Due process.* The plaintiff argues that his due process rights were violated by the board's hearing complaints filed significantly after the incidents complained of occurred. He argues that he was prejudiced by these proceedings because the board exercised undue delay in pursuing the patients' claims, and he does not recall the appointments that are the subject of the allegations. Due process rights are implicated in administrative proceedings that may affect the right to practice medicine. See *Goldstein v. Board of* ****237** *Registration of Chiropractors,* 426 Mass. 606, 613, 689 N.E.2d 1320 (1998). However, the plaintiff's assertions fail to give rise to any violations of due process.

[7] The plaintiff's claims are based on laches. The plaintiff relies on *Appeal of Plantier,* 126 N.H. 500, 508–509, 494 A.2d 270 (1985), in which the Supreme Court of New Hampshire held that under the due process clause of the New Hampshire Constitution, a defense of laches could be raised by a physician in a disciplinary hearing, to argue that a similar defense applies in this case. In Massachusetts, however, "[l]aches is not generally a bar where a public right is being enforced." *Wang v. Board of Registration in Med.,* 405 Mass. 15, 20, 537 N.E.2d 1216 (1989) (four-year delay by board before initiating investigation of physician did not trigger doctrine of laches). Certainly here, where there is no evidence of delay by the board, and no evidence that the record before the administrative magistrate was incomplete, the plaintiff was not prejudiced by the proceedings. Cf. *Weiner v. Board of Registration of Psychologists,* 416 Mass. 675, 682, 624 N.E.2d 955 (1993) (record incomplete because of twenty-year delay of board prosecution, prejudicing

petitioner).

The board acted immediately on receiving information regarding the complaints of Patients A and C from the Essex County district attorney's office in 1999. It was reasonable for the board to investigate the allegations in the period between 1999 ***297** and 2002, at the conclusion of which it issued a statement of allegations as to Patients A and C.

Further, the delay regarding Patient D was not due to the board. Patient D reported the alleged abuse in March, 2002, seven years after she received treatment as a thirteen year old and two days after reading a newspaper article about the charges facing the plaintiff. The board acted quickly thereafter, investigating the complaint and issuing a statement of allegations regarding her complaint in August of 2002.

Moreover, the plaintiff does not claim that the complainants' records were missing or incomplete during his administrative hearing. Indeed, the administrative magistrate considered the full record, including the patients' complete medical files. We therefore conclude that there was no delay on the part of the board and no evidence of prejudice.

The plaintiff's claim that he does not remember the appointments that are the subject of the allegations also lacks merit. We base our analysis on the administrative magistrate's findings of fact.

The plaintiff was made aware of the allegations as to Patient A immediately after the misconduct took place. Patient A and her parents met with the plaintiff at the Newburyport police station in the fall of 1985, shortly after Patient A reported the plaintiff's massaging of her breast and looking down her underpants during a July, 1985, "routine" preemployment physical for a supermarket cashier position. At a subsequent meeting at a court house between Patient A, her parents, and the plaintiff, the plaintiff agreed to get psychiatric counseling and to have a nurse or chaperone present during future examinations of female patients. Based on these events, as the administrative magistrate found, it is not credible for the plaintiff to claim that he does not recall the appointment that was the subject of Patient A's allegations. Therefore, as to Patient A, he was not prejudiced.

With respect to Patient C, the plaintiff also learned of the patient's allegations immediately after his misconduct. From 1996 to 1998, the plaintiff was the primary care physician for Patient C, who was then ****238** living at a boarding school for adolescents who were involved with the Department of Mental Health and had problems at home. On November 1, 1998, ***298** Patient C approached her school nurse regarding multiple separate incidents where the plaintiff touched her breasts for no apparent medical purpose. The patient specifically recalled an October 30, 1998, appointment where the plaintiff groped her breasts when she sought treatment for a sore throat. Patient C later revealed several such instances that occurred over the course of a two-year period. After Patient C's report, the case was referred for criminal investigation, and on May 25, 1999, the plaintiff was interviewed by State troopers regarding his conduct. The plaintiff read his statement after the interview and initialed each page, thereby verifying that he had read it and that it was accurate. The board issued a statement of allegations as to Patient C in 2002. Based on these distinct events following the plaintiff's appointment with Patient C, and the short time between the plaintiff's misconduct as to Patient C and the board investigation, the plaintiff was not prejudiced.

Patient D was thirteen years old when she saw the plaintiff, in 1995, for a sore throat. The plaintiff cupped his hands around her breasts while leaning up against her knees with an erection. For many reasons, including her young age, Patient D failed to report this misconduct until 2002, not fully two years after she reached her majority. The plaintiff may not use Patient D's failure to report during her tender years as a shield. See *Flynn v. Associated Press*, 401 Mass. 776, 780 n. 6, 519 N.E.2d 1304 (1988) ("Plaintiffs who are minors are protected by tolling of the statute of limitations until they attain their majority"). Given these circumstances, the delay was understandable, and therefore the plaintiff may not claim prejudice.

[8] 2. *Victim impact statements.* a. *Propriety of victim impact statements.* The plaintiff argues that the statements of Patients A and C, heard by the board after the administrative magistrate issued her recommended decision, were new evidence the board relied on to make its final determination. In particular, the plaintiff asserts that the board's sanction discussing the victims' "harm" illustrates that the board improperly considered testimony outside the record. We disagree.

The board adopted the findings of the administrative magistrate, and concluded:

> "The [plaintiff] has committed repeated acts of ***299** misconduct with adolescent female patients by conducting unnecessary examinations that failed to meet the standard of care. The pattern, extent, and severity of misconduct over time, and the *harm* the

> [plaintiff] has caused three patients, is so egregious that it merits revocation of the [plaintiff's] license to practice medicine" (emphasis added).

[9] The administrative magistrate's factual findings that three adolescent girls were inappropriately touched in a sexual manner during "routine" visits to the doctor clearly supports an inference of harm. Therefore, the board properly included harm in its decision. In light of the foregoing, the plaintiff was not prejudiced by the patients' statements to the board, and as such, this argument fails.[6]

**239 [10] [11] b. *Due process.* The plaintiff argues that his due process rights were violated by the complaint counsel's failure to notify him of the planned introduction of the testimony of Patients A and D at the disposition hearing and the plaintiff's inability to cross-examine the patients during the hearing. We conclude that the complaint counsel erred by failing to send the plaintiff a copy of her request to use the ten-minute presentation period permitted by the board; however, "[t]here must be some showing of prejudice before an agency's disregard of its rules may constitute reversible error." *Martorano v. Department of Pub. Utils.*, 401 Mass. 257, 262, 516 N.E.2d 131 (1987).

[12] The letter from the board regarding the final disposition meeting stated that each party was permitted to make a ten-minute presentation that could be used in any way the party chose, including that the complaint counsel "may use all of the time, or may give some or all of the time to the complainant(s)." This ***300** language clearly indicates that statements by complainants were foreseeable. Therefore, we conclude that the board's letter gave the plaintiff ample notice of the possibility that the complainants would speak. Given that more specific notice would not have informed the plaintiff as to the content of the presentation, and that there is no right to cross-examine witnesses at the sanctioning stage of the proceedings in any event, see *Weinberg v. Board of Registration in Med.*, 443 Mass. 679, 690, 824 N.E.2d 38 (2005), the plaintiff was not prejudiced by the complaint counsel's presentation.[7]

3. *Substantial and credible evidence of misconduct.* The plaintiff argues that the decision of the board was not supported by substantial evidence. Specifically, he contends that the board systematically ignored any evidence that weighed against the patients' testimony in the administrative hearing and that the testimony of Patients A, C, and D was not credible.

[13] [14] "We will not disturb the board's findings unless our review of the record as a whole fails to disclose substantial evidence to support it." *Fisch v. Board of Registration in Med.*, 437 Mass. 128, 136–137, 769 N.E.2d 1221 (2002). " 'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1(6). "We have noted the limited nature of our review under the substantial evidence standard. 'While we must consider the entire record, and must take into account whatever ... detracts from the weight of the agency's opinion ... as long as there is substantial evidence to support the findings of the agency, we will not substitute our views as to the facts' " (citations omitted). *Wang v. Board of Registration in Med.*, 405 Mass. 15, 21, 537 N.E.2d 1216 (1989). Applying this standard, we find that there is substantial evidence to support the board's decision.

240 The record reflects that all three patients saw the plaintiff for ***301 medical issues not requiring a breast examination. Each patient was an adolescent, and each patient testified to nearly identical incidents where, while unchaperoned in one of the plaintiff's examination rooms, their breasts were massaged, groped, or cupped for no apparent medical purpose. In the case of the two patients who were youngest when the incidents occurred, their testimony was that the doctor rubbed his erect penis directly against their legs for anywhere between one and several minutes.

The board's expert, Dr. Robert A. Baldor, also testified that there would be no legitimate medical reason to touch the breasts of any of the three patients in the circumstances surrounding their treatment. He further testified that when examining the breasts of an adolescent, the standard practice is to have a chaperone present in the examination room. In no circumstance, he explained, is it proper for a physician to have his groin in contact with a patient; when examining a seated patient from the front, the practice is to stand to the right of the patient.

Contrary to the plaintiff's assertions, regarding the strikingly similar improprieties that took place from 1985 to 1998 in the plaintiff's examination rooms with these young women, the administrative magistrate did not systematically ignore any testimony or evidence. The patients' testimony was consistent. The board adopted each of the administrative magistrate's 128 well-supported findings of fact. We see no reason to disturb those findings.

[15] [16] With respect to the witnesses' credibility, "[i]n reviewing agency decisions such as these, '[i]t is for the agency, not the courts, to weigh the credibility of witnesses and to resolve factual disputes.' " *Fisch v. Board of Registration in Med., supra* at 138, 769 N.E.2d

1221, quoting *Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 529, 517 N.E.2d 830 (1988). "While the task of assessing the credibility of witnesses is one uniquely within an agency's discretion ... this court may modify or set aside findings and conclusions that are arbitrary or unsupported by substantial evidence." *Herridge v. Board of Registration in Med.*, 420 Mass. 154, 161, 648 N.E.2d 745 (1995), *S.C.*, 424 Mass. 201, 675 N.E.2d 386 (1997), quoting *Bettencourt v. Board of Registration in Med.*, 408 Mass. 221, 227, 558 N.E.2d 928 (1990), and cases cited. The administrative magistrate ***302** quite clearly explained her reasons for finding the patients' testimony credible and the plaintiff's testimony lacking in credibility. Therefore, we do not disturb her findings in this regard. Cf. *Herridge v. Board of Registration in Med.*, *supra* at 164–165, 648 N.E.2d 745, and cases cited (board improperly chose to rely on some portions of witness's own conflicting testimony while rejecting other, significant portions of it, and failed to provide explicit analysis of credibility).

The administrative magistrate found the incidents about which the patients testified remarkably similar. She also found that the patients' ages, lack of maturity, lack of organization, and lack of a reason to fabricate the allegations were sufficient to support a finding that the plaintiff committed the alleged acts. The testimony of the various patients did not suffer from the level of internal inconsistencies seen in the *Herridge* case. Therefore, a more specific analysis of credibility was not required.

By contrast, the administrative magistrate found the plaintiff unreliable by virtue of, among other things, "the loopholes in his stories and his general demeanor during the course of the hearing." See *Fisch v. Board of Registration in Med.*, ****241** *supra* at 138, 769 N.E.2d 1221 (magistrate "did not find [psychiatrist] to be a credible witness because there were 'simply too many errors to ascribe them to mistake or memory lapse,' and that he observed the demeanor of each witness who contradicted [psychiatrist's] testimony and found the key witnesses to be credible and without bias or motive to lie").

With respect to Patient A, the plaintiff stated that a full breast examination is not a normal part of a preemployment physical for an adolescent girl. He then testified that he did not have any specific recollection of his examination of Patient A. He did recall, however, being questioned by the police shortly after his appointment with Patient A based on Patient A's complaint about the examination. As to any subsequent meetings, however, he testified to being unable to remember any settlement agreement between him, Patient A, and her parents in a court house where he agreed to get psychiatric counseling and have a chaperone present during his examination of female patients. With respect to Patient C, he admitted to conducting an unchaperoned breast examination on her even though he knew ***303** that there was no real reason to do so. As to Patient D, he simply testified that he could not recall leaning up against her during the examination. There were similar memory lapses throughout the plaintiff's testimony, supporting the administrative magistrate's determination as to his lack of credibility.[8]

Because we find that substantial evidence supports the findings, and the administrative magistrate's determinations as to the credibility of the witnesses were well reasoned and supported by the record, we will not disturb the board's final decision and order.

Conclusion. The decision of the board revoking the plaintiff's license to practice medicine is affirmed.

So ordered.

All Citations

445 Mass. 291, 837 N.E.2d 232

Footnotes

1 The administrative magistrate later found that the plaintiff "committed sexual misconduct and boundary violations with three (3) adolescent females, ages thirteen (13), fifteen (15) and seventeen (17). During the physical examinations in his office, he touched the breasts of these young women for no legitimate medical purpose, several times in the case of Patient C...." She also found that the plaintiff viewed the pubic area of one of the girls "for no legitimate medical purpose, and leaned or rubbed his penis against two of them during the course of the physical examinations."

2 The parties failed to exercise their right to have the sanction hearing proceedings transcribed; however, there is no requirement that the sanction hearing be transcribed. See *Weinberg v. Board of Registration in Med.*, 443 Mass. 679, 690, 824 N.E.2d 38 (2005). Moreover, the board does not contest that the plaintiff's objection was made.

3 We have considered, but need not address, every argument the plaintiff has advanced in support of his interpretation of the regulation.

4 Title 243 Code Mass. Regs. § 1.03(9) (1993) states, in relevant part: "*Board Action Required.* ... [I]f the Committee determines that there is reason to believe that the acts alleged occurred and constitute a violation for which a licensee may be sanctioned by the Board, the Committee may recommend to the Board that it issue a Statement of Allegations."

5 At oral argument, citing no authority, the board averred that its discrete good cause determination prior to investigation is not separately reviewable by this court. Based on our conclusion that in this case good cause to proceed is plainly evident, we need not reach the issue of reviewability.

6 The plaintiff's claim that he lacked an opportunity to cross-examine the patients who spoke at the sanctioning hearing is similarly spurious. The fact finding in this case was conducted at the DALA hearing, where the plaintiff was given ample opportunity to cross-examine the board's witnesses and present his testimony and that of his witnesses. By contrast, the September 17, 2003, hearing was a sanctioning hearing where the plaintiff presented his objections to the administrative magistrate's recommended decision and his position regarding the appropriate sanction. It "[was] dispositional in nature, not part of the underlying fact finding." *Weinberg v. Board of Registration in Med.,* 443 Mass. 679, 690, 824 N.E.2d 38 (2005). As such, the testimonial strictures of G.L. c. 30A did not apply.

7 We further note that in proceedings of this type victim impact statements are now expressly permitted by statute. See G.L. c. 112, § 5, as amended through St.2004, c. 108 ("Upon final consideration of a disciplinary matter before the board, and before the board's vote on final disposition, the board shall provide the victim or his representative an opportunity to be heard through an oral or written victim impact statement, at the victim's or his representative's option, about the impact of the injury on the victim and his family and on a recommended sanction").

8 The record also reveals several instances where the plaintiff's counsel appeared to be coaching him. Indeed, the administrative magistrate warned counsel against as much. This further supports the administrative magistrate's finding that the plaintiff lacked credibility.

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275 Wis.2d 626
Court of Appeals of Wisconsin.

Lee R. KRAHENBUHL, DDS, Plaintiff–Appellant,
v.
WISCONSIN DENTISTRY EXAMINING BOARD,
Defendant–Respondent.

No. 03–2864.
|
Submitted on Briefs May 5, 2004.
|
Opinion Filed June 30, 2004.

Synopsis
Background: Dentist petitioned for judicial review of decision of Dentistry Examining Board suspending and imposing conditions on dentist's license for engaging in unprofessional conduct. The Circuit Court, Winnebago County, T.J. Gritton, J., affirmed. Dentist appealed.

Holdings: The Court of Appeals, Nettesheim, J., held that:

[1] six-year statute of limitations applicable to an action upon a liability created by statute when a different limitation is not prescribed by law did not apply to disciplinary proceeding;

[2] Board's conclusion that statute of limitations did not apply to disciplinary proceeding was subject to de novo review;

[3] dentist's claims that Board acted as its own expert and improperly shifted the burden of proof to him in disciplinary proceeding were subject to substantial evidence standard of review;

[4] dentist's claims that Board acted as its own expert and improperly shifted the burden of proof to him in disciplinary proceeding were essentially challenges to the sufficiency of the evidence to support Board's findings;

[5] evidence supported Board's finding that dentist failed to take post-treatment x-ray and to rectify overfill, warranting disciplinary action; and

[6] evidence supported Board's finding that dentist overfilled patient's tooth, warranting disciplinary action.

Affirmed.

West Headnotes (20)

[1] **Limitation of Actions**
Liabilities Created by Statute

Six-year statute of limitations applicable to an action upon a liability created by statute when a different limitation is not prescribed by law does not apply to a disciplinary proceeding, the focus of which is to monitor and supervise the performance of a person who has been granted the privilege of a license in state. W.S.A. 893.93(1)(a).

Cases that cite this headnote

[2] **Health**
Disciplinary Proceedings

Six-year statute of limitations applicable to an action upon a liability created by statute when a different limitation is not prescribed by law did not apply to disciplinary proceeding brought against licensed dentist by Dentistry Examining Board, even though action and sanctions had a "liability" ring; protection of the public, rather than the imposition of penalty or punishment, lay at the core of disciplinary proceeding. W.S.A. 893.93(1)(a).

Cases that cite this headnote

[3] **Administrative Law and Procedure**
Scope

In an appeal involving an administrative agency's decision, Court of Appeals reviews the decision of the administrative agency, not that of

the circuit court.

Cases that cite this headnote

[4] **Administrative Law and Procedure**
Substantial evidence

An agency's factual findings will be upheld on appeal if supported by substantial evidence. W.S.A. 227.57(6).

2 Cases that cite this headnote

[5] **Administrative Law and Procedure**
Weight of evidence

Court of Appeals will not reverse an administrative decision even if it is against the great weight and clear preponderance of the evidence where there is substantial evidence to sustain it.

1 Cases that cite this headnote

[6] **Administrative Law and Procedure**
Substantial evidence

"Substantial evidence," for the purpose of reviewing an administrative decision, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

2 Cases that cite this headnote

[7] **Administrative Law and Procedure**
Law questions in general

Appropriate level of scrutiny a court should use in reviewing an agency's decision on questions of law depends on the comparative institutional capabilities and qualifications of the court and the agency to make a legal determination on a particular issue.

Cases that cite this headnote

[8] **Administrative Law and Procedure**
Law questions in general

No deference is due an agency's conclusion of law when an issue before the agency is one of first impression or when an agency's position on an issue provides no real guidance.

Cases that cite this headnote

[9] **Administrative Law and Procedure**
Law questions in general

When no deference is given to an administrative agency's conclusions of law, a court engages in its own independent determination of the questions of law presented, benefiting from the analyses of the agency and the courts that have reviewed the agency action.

Cases that cite this headnote

[10] **Administrative Law and Procedure**
Deference to agency in general

Due weight deference to agency's conclusion of law is appropriate when agency has some experience in the area but has not developed the expertise that necessarily places it in a better position than a court to interpret and apply a statute.

Cases that cite this headnote

[11] **Administrative Law and Procedure**
Law questions in general

Under the due weight deference standard of reviewing agency's conclusion of law, a court need not defer to agency's interpretation which, while reasonable, is not the interpretation which the court considers best and most reasonable.

Cases that cite this headnote

[12] **Administrative Law and Procedure**
Deference to agency in general
Administrative Law and Procedure
Consistent or longstanding construction; approval or acquiescence

Great weight deference to agency's conclusion of law is appropriate when: (1) an agency is charged with administration of the particular statute at issue; (2) its interpretation is one of long standing; (3) it employed its expertise or specialized knowledge in arriving at its interpretation; and (4) its interpretation will provide uniformity and consistency in the application of the statute.

Cases that cite this headnote

[13] **Administrative Law and Procedure**
Law questions in general

When a legal question calls for value and policy judgments that require the expertise and experience of an agency, the agency's decision, although not controlling, is given great weight deference.

Cases that cite this headnote

[14] **Health**
Scope of review

Dentistry Examining Board's conclusion that six-year statute of limitations that governed miscellaneous actions did not apply to licensing disciplinary proceeding was subject to de novo review; statutory construction and application of statute of limitations to such a proceeding presented a question of law that the Board had no special expertise in addressing. W.S.A. 893.93(1)(a).

1 Cases that cite this headnote

[15] **Health**
Scope of review

Dentist's claims that Dentistry Examining Board acted as its own expert and improperly shifted the burden of proof to him in disciplinary proceeding, although framed in terms of due process, were essentially challenges to the sufficiency of the evidence to support Board's findings, and thus Board's findings were subject to substantial evidence standard of review. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[16] **Health**
Discipline, Revocation, and Suspension

Objectives of medical professional discipline include the rehabilitation of the licensee, the protection of the public, and deterrence to other licensees from engaging in similar conduct.

Cases that cite this headnote

[17] **Constitutional Law**
Health care professionals
Health
Disciplinary Proceedings

Because disciplinary proceeding brought by Dentistry Examining Board affected dentist's license, which was necessary to engage in his

profession, dentist was entitled to the procedural protections of the due process clause. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[18] **Health**
Review

Dentist's claims that Dentistry Examining Board acted as its own expert and improperly shifted the burden of proof to him in disciplinary proceeding, although framed in terms of due process, were essentially challenges to the sufficiency of the evidence to support Board's findings and would be treated by Court of Appeals as such. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[19] **Health**
Evidence

Evidence supported Dentistry Examining Board's finding that dentist failed to take post-treatment x-ray and to rectify overfill, warranting disciplinary action for unprofessional conduct; finding was based on testimony of Division of Enforcement's expert, affidavit of dentist's expert, opinion of administrative law judge (ALJ), patient records, and billing and insurance records. W.S.A. 447.07(3)(a, h); Wis.Admin. Code § 5.02(5) (DE).

Cases that cite this headnote

[20] **Health**
Evidence

Evidence supported Dentistry Examining Board's finding that dentist overfilled patient's tooth during root canal procedure, warranting disciplinary action for unprofessional conduct; patient and his mother testified that patient had not received any intervening treatment, and there was testimony that resorption would not have caused such an extreme overfill, and that routine dental neglect would not cause extension of gutta percha into the jawbone. W.S.A. 447.07(3)(a, h); Wis.Admin. Code § 5.02(5) (DE).

Cases that cite this headnote

Attorneys and Law Firms

****594 *631** On behalf of the plaintiff-appellant, the cause was submitted on the briefs of Raymond M. Roder, of Reinhart, Boerner, Van Deuren, S.C. of Madison, and Charles J. Hertel, of Dempsey, Williamson, Lampe, Young, Kelly & Hertel, of Oshkosh.

On behalf of the defendant-respondent, the cause was submitted on the brief of Peggy A. Lautenschlager, attorney general, and Robert M. Hunter, assistant attorney general.

Before BROWN, NETTESHEIM and SNYDER, JJ.

Opinion

¶ 1 NETTESHEIM, J.

Lee R. Krahenbuhl, DDS, appeals from a trial court order upholding a decision of the Wisconsin Dentistry Examining Board (DEB) to suspend and impose conditions on Krahenbuhl's dentistry license based on a violation of the professional conduct requirements set forth in WIS. STAT. § 447.07(3)(a) and (h) (2001–02)[1] and WIS. ADMIN. CODEE § DE 5.02(5). Krahenbuhl contends that the disciplinary action, brought more than six years after the patient treatment that is at issue in this case, is barred by the six-year statute of limitations set forth in WIS. STAT. § 893.93(1)(a). Krahenbuhl additionally contends that his due process rights were violated when the DEB improperly acted as its own expert witness and improperly shifted its burden of proof to Krahenbuhl.

[1] ¶ 2 We conclude that the six-year statute of limitations set forth in WIS. STAT. § 893.93(1)(a) does not apply to a disciplinary proceeding, the focus of which is to monitor and supervise the performance of a person ***632** who has

been granted the privilege of a license in this state. We further conclude that Krahenbuhl's due process arguments are essentially a challenge to the sufficiency of the evidence, one that fails in this case. The DEB was presented with substantial evidence to support its finding that Krahenbuhl's treatment constituted a violation of professional standards.

APPLICABLE LAW

¶ 3 Krahenbuhl was disciplined on grounds that he engaged in unprofessional conduct contrary to WIS. STAT. § 447.07(3)(a) and (h) and WIS. ADMIN. CODE § DE 5.02(5). WISCONSIN STAT. ch. 447 governs the DEB; § 447.07 governs the disciplinary proceedings of the DEB. Krahenbuhl's violations pertain to the following provisions of § 447.07:

> **(3)** Subject to the rules promulgated under s. 440.03(1), the examining board may make investigations and conduct hearings in regard to any alleged action of any dentist or dental hygienist, or of any other person it has reason to believe is engaged in or has engaged in the ****595** practice of dentistry or dental hygiene in this state, and may, on its own motion, or upon complaint in writing, reprimand any dentist or dental hygienist who is licensed or certified under this chapter or deny, limit, suspend or revoke his or her license or certificate if it finds that the dentist or dental hygienist has done any of the following:
>
> (a) Engaged in unprofessional conduct.
>
> ....
>
> (h) Engaged in conduct that indicates a lack of knowledge of, an inability to apply or the negligent application of, principles or skills of dentistry or dental hygiene.

***633** WISCONSIN ADMIN. CODEE § DE 5.02(5) provides that "[u]nprofessional conduct by a dentist ... includes ... [p]racticing in a manner which substantially departs from the standard of care ordinarily exercised by a dentist or dental hygienist which harms or could have harmed a patient."

¶ 4 The statute of limitations at issue on appeal is set forth in WIS. STAT. § 893.93(1)(a) which governs miscellaneous actions. It provides:

> **(1)** The following actions shall be commenced within 6 years after the cause of action accrues or be barred:
>
> (a) An action upon a liability created by statute when a different limitation is not prescribed by law.

BACKGROUND

¶ 5 The dental procedure giving rise to the disciplinary proceedings in this case was performed on a fifteen-year-old patient, Michael Mosher, in 1994. On November 29, 1996, Mosher's mother filed a complaint with the Department of Regulation and Licensing stating concerns regarding a root canal that Krahenbuhl had performed on her son. On September 27, 2000, the Division of Enforcement filed, on behalf of the DEB, a complaint against Krahenbuhl alleging the following: On July 5 and 11, 1994, Krahenbuhl performed root canal therapy on Mosher's tooth 18. On April 29, 1996, Mosher visited a subsequent treating dentist, John LeMaster, with complaints of pain localized to tooth 18. The complaint alleged that x-rays taken by LeMaster showed inadequate filling of the distal canal of tooth 18, decay of the tooth at the top of the distal canal, and extension of the filling placed in the canal by more than five millimeters past the end of the distal root.

***634** ¶ 6 During the course of the investigation, Krahenbuhl provided the DEB with x-rays, which he represented were taken on July 5 and 11, 1994. The Division's complaint alleges that the x-ray represented to have been taken on July 11, 1994, following Krahenbuhl's filling of Mosher's root canal, could not have been taken on that date because it depicted a radio-opaque area at the top of the tooth which is of an irregular shape and approximately twice as large as the radio-opaque area on the July 5, 1994 x-ray. The x-ray taken by LeMaster on April 29, 1996, depicts a radio-opaque area at the top of the tooth which is of the same size as that depicted in the July 5, 1994 x-ray. LeMaster's x-ray also depicted an overfill of the distal canal of Mosher's tooth 18. Therefore, the Division's complaint alleged that Krahenbuhl falsely represented that an x-ray was taken post-treatment on July 11, 1994, and reflected a permanent crown installed between July 5 and 11, 1994.

¶ 7 The Division alleged that a minimally competent dentist will take a post-treatment x-ray of endodontic treatment "to check that the canals are ... not overfilled

through the apical end of the tooth" and that a minimally competent dentist who sees that endodontic treatment has overfilled ****596** a canal will take immediate steps to rectify the overfill. Failure to correct an overfill presents an unacceptable risk to the patient of infection, pain and loss of the tooth.

¶ 8 Krahenbuhl filed an answer to the Division's complaint on October 16, 2000, and followed with a motion on February 20, 2001, seeking to dismiss the complaint as barred by the six-year statute of limitations set forth in WIS. STAT. § 893.93(1)(a).[2] The Division ***635** opposed Krahenbuhl's motion. The Administrative Law Judge (ALJ), William Black, denied Krahenbuhl's motion on March 15, 2001, stating that Krahenbuhl "failed to present a sufficient basis in either the law or the facts ... upon which to base a dismissal of the present complaint on the legal theory of laches or any applicable statute of limitations."

¶ 9 A contested hearing was held before ALJ Black on April 12, 2001. The Division presented the videotaped testimony of Mosher and his mother and the in-person testimony of an expert, John Sadowski, D.D.S. Krahenbuhl presented his own testimony and the affidavits of his expert, Terry Kippa, D.D.S. In addition, both parties utilized the documentary evidence of Mosher's records and x-rays.

¶ 10 On November 20, 2001, ALJ Black filed a proposed decision with the Department of Regulation and Licensing recommending that the DEB's complaint be dismissed. ALJ Black found that the State had failed to prove by a preponderance of the evidence that Krahenbuhl had violated WIS. STAT. § 447.07(3)(a) and (h) or WIS. ADMIN. CODE § DE 5.02(5). The ALJ also found that the Division's witness, Sadowski, was not qualified to testify as an expert witness. On December 6, 2001, the Division filed a motion to remand the matter to ALJ Black for additional findings of fact. Krahenbuhl opposed the Division's motion.

¶ 11 On May 2, 2002, the DEB issued its final decision and order without remanding the matter to the ALJ. The DEB's decision was contrary to the ALJ's recommendation and found that Krahenbuhl had violated WIS. STAT. § 447.07(3)(a) and (h) and WIS. ADMIN. CODE § DE 5.02(5). The DEB held that Krahenbuhl had substantially departed from the standard of care ordinarily exercised by a dentist. The DEB suspended ***636** Krahenbuhl's license for six months, prohibited Krahenbuhl from performing endodontic procedures, and directed that Krahenbuhl's patient records be monitored for a period of not less than two years.

¶ 12 Krahenbuhl filed a petition for judicial review of the DEB's decision. On October 27, 2002, the circuit court ordered the matter remanded to the DEB, ruling that the DEB had failed to first consult with the ALJ before issuing its decision rejecting the ALJ's recommendation. The DEB complied and, after consulting the ALJ, issued a further Final Decision and Order on December 6, 2002, again finding that Krahenbuhl had engaged in unprofessional conduct. The DEB again suspended Krahenbuhl's license for six months and imposed other conditions on Krahenbuhl's practice.

¶ 13 On December 20, 2002, Krahenbuhl filed another petition for judicial review of the DEB's latest decision. Krahenbuhl argued, among other things, that (1) the statute of limitations in WIS. STAT. § 893.93(1)(a) barred the DEB's complaint, (2) the DEB's decision improperly placed ****597** the burden of proof on Krahenbuhl and (3) the DEB's decision was not based on substantial evidence. Krahenbuhl's petition requested a stay of the DEB's order and dismissal of the underlying complaint.

¶ 14 Following briefing by the parties, the circuit court issued an oral decision on September 23, 2003, rejecting Krahenbuhl's challenges and denying his request for a stay. The court entered a written order reflecting its decision on October 13, 2003. Krahenbuhl appeals.

637** ***DISCUSSION

Standard of Review

[2] [3] [4] ¶ 15 "In an appeal involving an administrative agency's decision, this court reviews the decision of the administrative agency, not that of the circuit court." *Painter v. Dentistry Examining Bd.*, 2003 WI App 123, ¶ 8, 265 Wis.2d 248, 665 N.W.2d 397 (citation omitted). An agency's factual findings will be upheld on appeal if supported by substantial evidence. *Jicha v. DILHR*, 169 Wis.2d 284, 290, 485 N.W.2d 256 (1992); WIS. STAT. § 227.57(6).[3]

[5] [6] ¶ 16 We will not reverse an administrative decision even if it is against the great weight and clear preponderance of the evidence where there is substantial

evidence to sustain it. *Vill. of Menomonee Falls v. DNR*, 140 Wis.2d 579, 594, 412 N.W.2d 505 (Ct.App.1987). Substantial evidence, for the purpose of reviewing an administrative decision, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

[7] [8] [9] [10] [11] [12] [13] ¶ 17 With respect to our review of the DEB's conclusion of law, the supreme court recently set forth ***638** the levels of deference to be afforded on review. *Brown v. LIRC*, 2003 WI 142, ¶¶ 13–16, 267 Wis.2d 31, 671 N.W.2d 279.

> Over time, we have developed a three-level approach to an agency's conclusions of law: a court gives an agency's conclusion of law no deference (the court makes a de novo determination of the question of law); a court gives an agency's conclusion of law due weight deference; or a court gives an agency's conclusion of law great weight deference. The appropriate level of scrutiny a court should use in reviewing an agency's decision on questions of law depends on the comparative institutional capabilities and qualifications of the court and the agency to make a legal determination on a particular issue.
>
> No deference is due an agency's conclusion of law when an issue before the agency is one of first impression or when an agency's position on an issue provides no real guidance. When no deference is given to an administrative agency, a court engages in its own independent determination of the questions of law presented, benefiting from the analyses of the agency and the courts that have reviewed the agency action.
>
> Due weight deference is appropriate when an agency has some experience in the area but has not developed the expertise that necessarily places it in a better position than a court to interpret and apply a statute. Under the due weight deference standard "a court need not defer to an agency's interpretation ****598** which, while reasonable, is not the interpretation which the court considers best and most reasonable."
>
> Great weight deference is appropriate when: (1) an agency is charged with administration of the particular statute at issue; (2) its interpretation is one of long standing; (3) it employed its expertise or specialized knowledge in arriving at its interpretation; and (4) its ***639** interpretation will provide uniformity and consistency in the application of the statute. In other words, when a legal question calls for value and policy judgments that require the expertise and experience of an agency, the agency's decision, although not controlling, is given great weight deference.

Id. (footnotes omitted).

¶ 18 The parties dispute the level of deference to be afforded the DEB's conclusions of law in this case. Krahenbuhl contends that de novo review is appropriate because the issues presented on appeal—whether the statute of limitations applies and whether the DEB acted as its own expert and shifted its burden to Krahenbuhl—present questions of law which are within this court's area of expertise. The DEB contends that its conclusions of law are entitled to great weight deference because it has been charged with administering the licensing requirements for dentists under WIS. STAT. § 447.07 and has long maintained that its authority to regulate licensure is not subject to a statute of limitations.

[14] [15] ¶ 19 We conclude that de novo review is appropriate as to the statute of limitations question. The statutory construction and application of WIS. STAT. § 893.93(1)(a) to a licensing disciplinary proceeding presents a question of law that the DEB has no special expertise in addressing. However, Krahenbuhl's remaining challenges, while framed as due process claims, travel to the evidence presented to the DEB and, therefore, are subject to the substantial evidence standard.

***640** *Statute of Limitations*

¶ 20 The statute of limitations at issue in this case is set out in WIS. STAT. § 893.93(1)(a). It states:

> **Miscellaneous actions. (1)** The following actions shall be commenced within 6 years after the cause of action accrues or be barred:
>
> (a) An action upon a liability created by statute when a different limitation is not prescribed by law.

¶ 21 Krahenbuhl contends that an action brought by a professional licensing board is an "action upon a liability created by statute" under this statute. Krahenbuhl argues that "liability" is a broad term, which includes his responsibilities, obligations and duties under the administrative code regulations. As we have noted, whether WIS. STAT. § 893.93(1)(a) applies to the disciplinary proceeding in this case presents a question of law which we review de novo.

¶ 22 The DEB contends that its enforcement of the regulations governing Krahenbuhl, a licensee of the State,

does not arise from a liability created by statute. In support, the DEB cites to *Kenosha County v. Town of Paris*, 148 Wis.2d 175, 434 N.W.2d 801 (Ct.App.1988), for the proposition that the courts have consistently given a narrow construction to WIS. STAT. § 893.93(1)(a). In *Kenosha County*, the court of appeals held that the term "liability" did not apply in an action seeking to void a town zoning ordinance that was enacted without county approval. *Kenosha County*, 148 Wis.2d at 178, 187, 434 N.W.2d 801. The town argued that the "liability" was the statutory duty of the ****599** town to seek county approval of its ordinance. *Id.* at 187, 434 N.W.2d 801. The court of appeals held:

> We have examined the type of cases to which sec. 893.93(1)(a), Stats., has been applied, and we conclude ***641** that this is not such a case. Section 60.74, Stats. (1967), establishes prerequisites for the validity of a town zoning ordinance, but it does not hold the town "liable" for a violation thereof. There is no "liability" created by sec. 60.74 which would require that an action to determine an ordinance's validity be commenced within six years pursuant to sec. 893.93(1)(a).

Kenosha County, 148 Wis.2d at 187, 434 N.W.2d 801.

[16] ¶ 23 Here, while the DEB's action and sanctions against Krahenbuhl have a "liability" ring, it is the protection of the public, rather than the imposition of penalty or punishment, that lies at the core of the DEB's disciplinary proceeding against Krahenbuhl. *See State v. MacIntyre*, 41 Wis.2d 481, 484, 164 N.W.2d 235 (1969) (addressing the primary purpose of attorney licensing/disbarment proceedings). It is well established that the objectives of professional discipline include the rehabilitation of the licensee, the protection of the public, and deterrence to other licensees from engaging in similar conduct. *Galang v. State Med. Examining Bd.*, 168 Wis.2d 695, 700, 484 N.W.2d 375 (Ct.App.1992).

¶ 24 In *State v. Josefsberg*, 275 Wis. 142, 150, 81 N.W.2d 735 (1957), the supreme court held that the statute of limitations did not apply to the state's action to revoke and annul a license to practice medicine issued to the defendant by the Wisconsin state board of medical examiners. The defendant's license was issued in 1927 and the state's action was not brought until 1953. *Id.* at 142, 144, 81 N.W.2d 735. The state alleged that the defendant had fraudulently obtained his license. *Id.* at 144–45, 81 N.W.2d 735.

¶ 25 In rejecting the application of the statute of limitations, the *Josefsberg* court cited to its earlier ***642** decision in *State v. Schaeffer*, 129 Wis. 459, 109 N.W. 522 (1906), which also involved a license revocation. *See Josefsberg*, 275 Wis. at 148–49, 81 N.W.2d 735. In *Schaeffer*, the court held that a license revocation was "not an action to enforce a penalty or forfeiture, but a civil action to set aside a certificate of registration" and, therefore, the action was not barred by any statute of limitation. *Josefsberg*, 275 Wis. at 149, 81 N.W.2d 735. Noting that " [t]here is no special provision in the statutes barring actions of this nature within any prescribed time," the *Josefsberg* court stated, "We are aware of no valid reason for departing from the principle enunciated in *State v. Schaeffer* to the effect that the general statutes of limitation do not apply to actions brought for the revocation of a physician's license procured through fraud." *Josefsberg*, 275 Wis. at 150, 81 N.W.2d 735.

¶ 26 Krahenbuhl contends that *Josefsberg* does not apply in this case because *Josefsberg* involved a continuing violation—the continuing use of a license obtained by fraud—whereas Krahenbuhl's case involves a singular, capsulized event concerning his treatment of Mosher. Krahenbuhl argues that while a license revocation is not an action to enforce a penalty or forfeiture, the instant DEB action is exactly that, and therefore the general statute of limitations applies.

¶ 27 We reject Krahenbuhl's attempt to distinguish *Josefsberg*. As in a license revocation proceeding, the DEB's proceeding in this case focused on the qualifications of a licensee and the responsibility of the DEB to assure that the public is protected from persons who may be providing improper ****600** or inadequate treatment. This is true whether the DEB has improperly licensed that person in the first instance or whether a properly licensed person is performing in a manner which substantially departs from the ordinary standard of care. ***643** As the court observed in *Strigenz v. Department of Regulation and Licensing*, 103 Wis.2d 281, 287, 307 N.W.2d 664 (1981):

> The state has created the Dentistry Examining Board and the provisions of ch. 447, Stats., to assure the public that only competent persons will practice dentistry. When the professional license is issued to a dentist, the state assures the public of the

> competence of that person. *As long as that person holds the dentistry license*, the state of Wisconsin continues to assure the public of his or her competence as a dentist. The state does not rank nor rate the competence of the dentist but at the very least, *the state does assure the public that the licensed dentist is competent to perform at a minimal standard as determined by others in the profession*. (Emphasis added.)

¶ 28 Krahenbuhl additionally argues that the public interest reasoning relied on by the *Josefsberg* line of cases has effectively been overruled by *State v. Holland Plastics Co.*, 111 Wis.2d 497, 331 N.W.2d 320 (1983), and *State v. Chrysler Outboard Corp.*, 219 Wis.2d 130, 580 N.W.2d 203 (1998). In both *Holland* and *Chrysler*, the supreme court concluded that the state's actions were subject to statutes of limitations. *Holland*, 111 Wis.2d at 504, 331 N.W.2d 320 (applying a six-year statute of limitations to the state's action against Holland for negligent construction of a University of Wisconsin building); *Chrysler*, 219 Wis.2d at 145, 580 N.W.2d 203 (applying a general ten-year statute of limitations to the state's action to collect penalties for violations of the Spills law).

¶ 29 We reject Krahenbuhl's reliance on *Holland* and *Chrysler* for two reasons. First, neither case concerned WIS. STAT. § 893.93(1)(a), the statute at issue in this case. Thus, neither case had occasion to expressly ***644** discuss the "action upon a liability created by statute" language that lies at the crux of this case.

¶ 30 Second, even allowing that the defendants' liability in *Holland* and *Chrysler* is the "liability" contemplated by WIS. STAT. § 893.93(1)(a), we see a marked difference between an original circuit court proceeding that seeks damages flowing from a breach of contract (*Holland*) or fines for environmental violations (*Chrysler*) on the one hand and an administrative proceeding which supervises and regulates licensees on the other. The *Josefsberg* line of cases expressly recognize that a state action against a licensee is not principally about damages, penalties or forfeitures but rather is about the protection of the public. *See also Doersching v. Funeral Dirs. & Embalmers Examining Bd.*, 138 Wis.2d 312, 328, 405 N.W.2d 781 (Ct.App.1987) ("The state's purpose in licensing professionals is to protect its citizens. *Strigenz*, 103 Wis.2d at 286, 307 N.W.2d at 667. License revocation is the ultimate means of protecting the public short of fining or imprisonment.").

¶ 31 We conclude that WIS. STAT. § 893.93(1)(a) does not apply to disciplinary proceedings, the core purpose of which is not to punish the provider but to protect the public and to ensure the performance of licensees meets the accepted standard of care. We therefore conclude that the DEB's disciplinary proceeding against Krahenbuhl is not time-barred.

Due Process Challenge/Substantial Evidence

[17] [18] ¶ 32 Krahenbuhl next raises a due process challenge, claiming that the ****601** DEB acted as its own expert contrary to ***645** *Gilbert v. State Medical Examining Board*, 119 Wis.2d 168, 349 N.W.2d 68 (1984), and that the DEB improperly shifted the burden of proof to him. Because this proceeding affects Krahenbuhl's license, which is necessary to engage in his profession, Krahenbuhl is entitled to the procedural protections of the due process clause. *See Stein v. State Psychology Examining Bd.*, 2003 WI App 147, ¶ 16, 265 Wis.2d 781, 668 N.W.2d 112, *review denied*, 2003 WI 126, 265 Wis.2d 419, 668 N.W.2d 559 (Wis. Aug. 13, 2003) (No. 02–2726). However, Krahenbuhl's challenges, while couched in terms of due process, are essentially challenges to the sufficiency of the evidence to support the DEB's findings and conclusions of law and we treat them as such.

[19] ¶ 33 Turning first to Krahenbuhl's contention that the DEB acted as its own expert, we observe *Gilbert's* holding that a board "cannot rely on the expert knowledge of its members to make such inferences from inconclusive testimony. Its actions must be based only upon the record before it. The Board may not substitute its knowledge for evidence which is lacking." *Gilbert*, 119 Wis.2d at 205, 349 N.W.2d 68.

¶ 34 In its decision, the DEB found that Krahenbuhl had overfilled the distal canal of Mosher's tooth 18. The DEB concluded that by failing to properly perform the root canal therapy on Mosher and by failing to properly address the complications of that root canal treatment, Krahenbuhl engaged in conduct warranting disciplinary action. In making these findings, the DEB relied on the evidence, not on the contribution of its own expertise de hors the record.

¶ 35 Krahenbuhl contends that the DEB acted as its own

expert witness in the finding that he misrepresented the x-ray of Mosher's tooth 18 as taken following the endodontic procedure on July 11, 1994. Krahenbuhl argues that the Division's expert, Sadowski, had retreated ***646** from his position that the July 11, 1994 x-ray did not depict Mosher's tooth 18 following the root canal procedure. From this, Krahenbuhl reasons that there was no other testimony to support the DEB's finding on this matter. However, the DEB did not view the sequencing of the x-rays as a critical issue. Rather, it stated:

> For the purpose of this matter, it is not necessary for the Board to determine the date when the x-ray ... was taken or the specific treatment or sequence of treatment provided by [Krahenbuhl] in September 1993 and July 1994. [Krahenbuhl's] violations relate to the facts that he overfilled the distal root canal of Tooth # 18 ... and did not take a post treatment x-ray, or if one was taken, did not utilize it to rectify the overfill.

Moreover, the DEB's decision addresses Krahenbuhl's concerns regarding Sadowski's testimony in its decision and states that its finding as to the sequence of the x-rays is based on other testimony from Sadowski, the affidavit of Kippa who was Krahenbuhl's expert, the opinion of the ALJ, Mosher's patient records, and the billing and insurance records.

¶ 36 While Krahenbuhl additionally challenges the DEB's use of billing records, the fact remains that there is substantial evidence, meaning such relevant evidence that a reasonable mind might accept as adequate, to support the DEB's conclusion that the July 11, 1994 x-ray was not taken on that date. The affidavit of Krahenbuhl's expert, Kippa, stated that the x-rays labeled July 5 and July 11 appeared to be in reverse chronological order and that the crown depicted in the July 5, 1994 x-ray is the same crown depicted in LeMaster's ****602** April 29, 1996 x-ray. However, that crown is not depicted in the July 11, 1994 x-ray.

***647** ¶ 37 We conclude that there is substantial evidence to sustain the DEB's decision. While Krahenbuhl correctly argues that there is also evidence in the record that might support a contrary finding, we will not reverse an administrative decision even if it is against the great weight and clear preponderance of the evidence where there is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Vill. of Menomonee Falls*, 140 Wis.2d at 594, 412 N.W.2d 505. We are satisfied that such evidence exists in this case and that the DEB did not act as its own expert in reaching its decision.

[20] ¶ 38 Krahenbuhl next argues that the DEB shifted its burden of proof to him. Specifically, Krahenbuhl argues that the DEB based its decision on the premise that it was Krahenbuhl's duty to prove that something else caused the apparent overfill of Mosher's tooth. Again, Krahenbuhl's argument essentially boils down to an evidentiary challenge.

¶ 39 First, Krahenbuhl argues that the Division failed to prove that the x-ray was not taken on July 11, 1994, despite the ALJ's finding that the x-ray jacket dated July 11, 1994, provided unrebutted evidence that the x-ray was taken on that date. As discussed above, there was evidence that supported the DEB's finding that the x-ray was out of sequence regardless of the notation on its jacket. Moreover, the crux of the DEB concern regarding this x-ray was not *when* it was taken, but rather *whether it correctly represented the post-treatment condition of Mosher's tooth 18.* Hence, the DEB's observation that "it is not necessary for the Board to determine the date when the x-ray ... was taken or the specific treatment or sequence of treatment provided by [Krahenbuhl]." Rather, the DEB saw ***648** this information as bearing on: (1) whether the x-ray conveyed false information, and (2) the adequacy of Krahenbuhl's record keeping procedures.

¶ 40 Krahenbuhl also argues that the Division failed to show how Krahenbuhl found that Mosher had wet root canals on July 5, 1994, if the root canal filling was already in place, or how the "overfill" caused the condition of Mosher's tooth as it was found on April 29, 1996, when there were other possible causes such as decay due to patient neglect or intervening treatment. Again, Krahenbuhl overlooks certain of the evidence that was presented to the DEB. Both Mosher and his mother testified that Mosher had not received any treatment other than that provided by Krahenbuhl and the later treatment by LeMaster. The Division was not required to scour the innumerable other potential sources of treatment when Mosher and his mother—the two persons with firsthand knowledge on the topic—unequivocally stated that no such other treatment occurred.

¶ 41 Further, the DEB's focus was on the question of whether Krahenbuhl had overfilled Mosher's tooth and there was substantial evidence presented at the hearing that he had. The DEB relied on LeMaster's records, the affidavit of Kippa and the testimony of Sadowski in concluding that Mosher's tooth 18 had been overfilled.

This, coupled with testimony that Mosher had not received any intervening treatment, that resorption would not have caused such an extreme overfull, and that routine dental neglect would not cause the extension of gutta percha into the jawbone provided the DEB with a solid basis to conclude that Krahenbuhl was responsible for the overfill.

***649** ¶ 42 Finally, although the DEB did not expressly state that Krahenbuhl was not a credible witness, certain of its statements indicate that concern. The DEB rejected ****603** Krahenbuhl's several explanations for the overfill. The DEB rejected Krahenbuhl's explanation for his placement of a permanent crown as "far-fetched." The DEB represented Krahenbuhl's explanations as " contrary to logic." Finally, the DEB noted Krahenbuhl's prior criminal conviction for false representation as suggesting a pattern of misrepresentation in his practice.

CONCLUSION

¶ 43 We conclude that WIS. STAT. § 893.93(1)(a) does not apply to disciplinary proceedings, the core purpose of which is not to punish the provider but to protect the public and to ensure the performance of licensees meets the accepted standard of care. We therefore conclude that the DEB's disciplinary proceeding against Krahenbuhl is not time-barred. We further reject Krahenbuhl's due process arguments and conclude that the DEB's decision is supported by substantial evidence. We affirm the circuit court's order upholding the DEB's decision.

Order affirmed.

All Citations

275 Wis.2d 626, 685 N.W.2d 591, 2004 WI App 147

Footnotes

1 All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

2 Krahenbuhl additionally argued that the action was barred under the doctrine of laches and the Medical Practice Act, WIS. STAT. § 448.02. Krahenbuhl does not renew these arguments on appeal.

3 WISCONSIN STAT. § 227.57(6) provides:

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

954 S.W.2d 23
Missouri Court of Appeals,
Eastern District,
Division One.

James P. LANE, Appellant,
v.
STATE COMMITTEE OF PSYCHOLOGISTS,
Respondent.

No. 71680.
|
Oct. 14, 1997.

Synopsis
Psychologist appealed from judgment of the Circuit Court, St. Louis County, John F. Kintz, J., affirming discipline imposed by State Committee of Psychologists. The Court of Appeals, Gary M. Gaertner, J., held that disciplinary decision did not violate psychologist's substantive due process rights even though complaint was filed approximately five years after alleged misconduct.

Affirmed.

West Headnotes (6)

[1] **Health**
Scope of review

Court of Appeals reviews disciplinary decision of State Committee of Psychologists and not judgment of circuit court.

Cases that cite this headnote

[2] **Health**
Scope of review

Scope of judicial review of disciplinary decision of State Committee of Psychologists is limited to determination of whether decision was supported by competent and substantial evidence on whole record, whether decision was arbitrary, capricious, or unreasonable, or whether administrative action constituted abuse of discretion.

Cases that cite this headnote

[3] **Health**
Scope of review

On review of disciplinary decision of State Committee of Psychologists, Court of Appeals views evidence and all reasonable inferences therein in light most favorable to findings and decision.

Cases that cite this headnote

[4] **Constitutional Law**
Reasonableness, rationality, and relationship to object

Substantive due process requires that state action which deprives one of life, liberty, or property be rationally related to legitimate state interest. U.S.C.A. Const.Amends. 5, 14.

3 Cases that cite this headnote

[5] **Constitutional Law**
Reasonableness, rationality, and relationship to object

To assert substantive due process claim, one must establish that government action complained of is truly irrational, more than arbitrary, capricious, or in violation of state law. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

[6] **Constitutional Law**
Social workers, counselors, and psychologists
Health
Disciplinary Proceedings

State Committee of Psychologists' disciplinary decision did not violate psychologist's substantive due process rights even though complaint was filed approximately five years after alleged misconduct, in absence of evidence or argument showing how Committee's decision was truly irrational or unrelated to Committee's primary purpose or that delay harmed psychologist or rendered proceedings unreliable. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

Attorneys and Law Firms

***23** Lawrence J. Altman, Chesterfield, for appellant.

Jeremiah W. (Jay) Nixon, Atty. Gen., Darryl R. Hylton, Asst. Atty. Gen., Jefferson City, for respondent.

Opinion

GARY M. GAERTNER, Judge.

Appellant, James P. Lane, appeals the judgment of the Circuit Court of St. Louis County affirming the discipline imposed by the State Committee of Psychologists ("Committee") after a finding by the Administrative Hearing Commission ("AHC") of cause to discipline appellant We affirm.

Appellant is a licensed psychologist. In late 1986, he was a consultant for St. John's Mercy Medical Center. P.E. was a student intern at Edgewood, a Division of St. John's Mercy Medical Center. P.E. had an office next door to appellant's office. When P.E. began having trouble with her marriage, she started seeing appellant for therapy at least twice a week. At some point during therapy, appellant detected transference by P.E.[1] Appellant ***24** also detected countertransference from himself to P.E.[2] Appellant's countertransference manifested in his hugging P.E. during therapy, making spoken and written expressions of love to her, and appearing uninvited at a party for P.E. When P.E. expressed discomfort with appellant's behavior, he labeled her discomfort as emotional dysfunction.

In July 1987, P.E. terminated therapy with appellant. Appellant continued to send P.E. written expressions of love and gifts until August of 1988.

On March 17, 1993, P.E. filed a complaint against appellant with Committee. AHC conducted a hearing on the complaint and found that appellant's license to practice psychology was subject to disciplinary action by Committee for violations of RSMo sections 337.035.2(5) and (13).[3]

Committee received the record of the proceedings before AHC and the decision, then set the matter for a disciplinary hearing. Appellant was served notice of the disciplinary hearing. On November 18, 1995, Committee held the hearing to determine the appropriate discipline to impose upon appellant's license to practice. Following that hearing, Committee entered a disciplinary order suspending appellant's license to practice psychology for two years but staying the suspension and placing appellant's license on probation for three years. Pursuant to the terms of his probation, appellant was to undergo an evaluation and abide by the recommendations of the evaluating psychologist. In addition, during his disciplinary period appellant was not to work in settings that increased his risk of sexual misconduct. A copy of the above disciplinary order was mailed to appellant on January 30, 1996.

Appellant filed a petition for review in the circuit court, pursuant to RSMo section 535.110. The trial court affirmed the decision of Committee.

Appellant thereafter filed a motion for new trial arguing the filing of the complaint and the hearing on that complaint violated his substantive due process rights. The motion was heard, then denied. This appeal follows.

Appellant's sole point on appeal is his claim the trial court erred in affirming Committee's decision to discipline him because that decision was arbitrary and unreasonable as it was based upon an "untimely" complaint and therefore violated his substantive due process rights.[4] We disagree.

[1] [2] [3] We review the decision of the Committee and not the judgment of the circuit court. *Boyd v. Bd. of Registration for Healing Arts,* 916 S.W.2d 311, 318 (Mo.App. E.D.1995); *Larocca v. State Bd. of Registration for Healing Arts,* 897 S.W.2d 37, 39 (Mo.App. E.D.1995). "The scope of judicial review is limited to a

determination of whether the administrative decision was supported by competent and substantial evidence on the whole record; whether the decision was arbitrary, capricious, or unreasonable; or whether the administrative action constituted an abuse of discretion." *Boland v. State Dept. of Social Services,* 910 S.W.2d 754, 758 (Mo.App. W.D.1995). We view the evidence and all reasonable inferences therein in the light most favorable to the findings and decision. *Larocca,* 897 S.W.2d at 39.

[4] [5] As stated, appellant alleges his substantive due process rights were violated when he was disciplined based upon an "untimely" complaint. Substantive due process requires the state action which deprives one of life, liberty or property, be rationally related to a legitimate state interest. *Lile v. Hancock Place School Dist.,* 701 S.W.2d 500, 507 (Mo.App. E.D.1985). To assert a substantive due process claim one must establish ***25** that the government action complained of is "truly irrational," more than arbitrary, capricious, or in violation of state law. *Frison v. City of Pagedale,* 897 S.W.2d 129, 132 (Mo.App. E.D.1995).

While it is plain appellant has a property interest in his license to practice psychology, so too does Committee have a vital interest in safeguarding the public health and welfare. *Larocca,* 897 S.W.2d at 42. Indeed this is its primary purpose. *Id.* Therefore, we must determine if Committee's action, which affected appellant's property interest, was "truly irrational" or was not rationally related to its primary purpose.

[6] Appellant presented no evidence or argument showing how Committee's decision was "truly irrational" or unrelated to Committee's primary purpose. The fact the complaint was filed approximately five years after the alleged misconduct does not in and of itself make Committee's actions "truly irrational" or unrelated to its primary purpose. Appellant offers no argument that the delay harmed him in any way or rendered the proceedings unreliable.[5] Therefore, we find Committee's action was rationally related to its primary purpose of protecting patients such as P.E. from inappropriate behavior on the part of their psychologists.

This finding is consistent with our holding in *Larocca,* 897 S.W.2d at 42, wherein we rejected an appellant's claim that a five year delay between the filing of a complaint against him and the State Board of Registration for the Healing Arts notifying him of the charge violated his procedural due process rights. In affirming the Board's decision to discipline the appellant, we noted neither RSMo section 334.100 nor RSMo section 621.145 provide for a time period within which the Board must file a complaint or within which the AHC must hold a hearing. *Id.*

We note other jurisdictions which have addressed the applicability of statutes of limitations to these types of proceedings have held, without exception, that in the absence of a statute which applies to these proceedings, there is no time bar to what might be considered an otherwise "untimely" complaint. *See* Noralyn O. Harlow, "Applicability of Statute of Limitations or Doctrine of Laches to Proceeding to Revoke or Suspend License to Practice Medicine," 51 A.L.R.4th 1147 (1987). The rationale announced for the above is twofold: (1) when the state regulates the medical profession, it is acting in its sovereign capacity and for the public good, therefore, the general civil and criminal statutes of limitations do not apply; and (2) the purpose of a general statute of limitations is to discourage unnecessary delays, whereas proceedings to revoke a physician's license serve to protect the public, and the staleness of a claim does not necessarily make it reflect less on the character of the person. *Id.* at 1151. The rationale announced by other jurisdictions that have addressed this issue is persuasive as it is consistent with Committee's primary purpose.

Based upon the foregoing, we affirm the judgment of the Circuit Court of St. Louis County affirming the discipline imposed by the Committee.

GRIMM, P.J., and PUDLOWSKI, J., concur.

All Citations

954 S.W.2d 23

Footnotes

1 Transference is a phenomenon in long-term patient-therapist relationships. It occurs when a patient develops and transfers onto a therapist unrealistic feelings which stem from the underlying difficulties for which a patient seeks treatment.

2 Countertransference refers to feelings a therapist develops towards a patient in response to transference from the patient.

3 All statutory references are to RSMo 1994 unless otherwise noted.

4 Within his sole point on appeal, appellant argues, in the alternative, his behavior was not so egregious as to warrant the punishment he received. However, as appellant failed to raise this issue in his point relied upon, we decline to address it. *See* Rule 84.04(d)-(e).

5 As appellant failed to provide us with the transcript of the hearing, we have no way of knowing the cause of the delay in P.E. bringing the claim.

End of Document

295 A.D.2d 764, 744 N.Y.S.2d 64, 2002 N.Y. Slip Op. 05243

In the Matter of Richard E. Pearl, Petitioner,
v.
New York State Board for Professional Medical Conduct, Respondent.

Third Department,
90131
(June 20, 2002)

CITE TITLE AS: Matter of Pearl v New York State Bd. for Professional Med. Conduct

HEADNOTES

ADMINISTRATIVE LAW
TIMELINESS OF ADMINISTRATIVE ACTIONS AND PROCEEDINGS

([1]) There is no credible basis for petitioner's claim that his due process rights were violated because of 14-year delay between his care of patient and filing of charges; although petitioner's office records were no longer available, he testified in great detail from hospital records of patient; as negligent treatment charge only involved treatment of patient while in hospital, petitioner has failed to show how any purportedly unavailable documents would exonerate him or assist in his defense, and petitioner has failed to show that unavailability of patient's treating oncologist would have altered outcome.

ADMINISTRATIVE LAW
JUDICIAL REVIEW

([2]) In physician disciplinary proceeding, petitioner's attack on Hearing Committee's findings of gross negligence, fraud and deliberate false reporting, premised on his claim that there is no basis for Committee finding that he lacked credibility, is rejected; even if Committee erroneously decided that he had lied about his authorship of certain medical papers and his board certification status, petitioner's testimony on those issues is not particularly relevant to Committee's determination that he lacked credibility with respect to gross negligence, fraud and deliberate false reporting charges; credibility issues are outside scope of Court's review.

PHYSICIANS AND SURGEONS
DISCIPLINARY PROCEEDINGS

([3]) There is rational basis for finding that petitioner was grossly negligent and guilty of fraud in electing to proceed with patient's total hip replacement despite clear evidence of cancerous lesion, thereby delaying treatment therefor --- there is credible evidence that petitioner obtained patient's closed record from Medical Records Room, inserted notation that "risks, alternatives and benefits" of certain treatments had been explained to her, and then, after discovering that unaltered copy of record had already been sent to patient's attorney, petitioner used "white-out" to eliminate alteration ---based on petitioner's own testimony and documentary proof, it was appropriately concluded that petitioner falsely indicated that he was in good standing with hospital when he applied for appointment to medical staff of other hospital.

PHYSICIANS AND SURGEONS
DISCIPLINARY PROCEEDINGS

([4]) Determination which revoked petitioner's license to practice medicine confirmed --- petitioner was found guilty of committing gross negligence in his care of patient, failing to maintain records which accurately reflected evaluation and treatment of five patients, and committing fraud by altering patient's medical record and by misrepresenting termination of his privileges at hospital when applying for privileges at another institution --- findings of fraud by petitioner are alone sufficient to merit penalty imposed; thus, revocation is all more appropriate given finding of gross negligence.

Mugglin, J.

Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to Public Health Law § 230-c [5]) to review a determination of the ***765** Administrative Review Board for Professional Medical Conduct which revoked petitioner's license to practice medicine in New York.

On September 5, 2000, the Bureau of Professional Medical Conduct (hereinafter BPMC) charged petitioner with 24 specifications of professional misconduct arising from his treatment of six patients (hereinafter patients A, B, C, D, E and F) between 1986 and 1995, his alteration of patient F's medical records and his false statements on an application for hospital privileges. After the close of evidence, the Hearing Committee of respondent (hereinafter Committee) sustained 10 of these specifications. Among these were that petitioner had committed gross negligence in his care of patient B, that he had failed to maintain records which accurately reflected the evaluation and treatment of patients A, B, C, D and E, and that he had committed fraud by altering patient F's medical record and by misrepresenting the termination of his privileges at the Hospital for Joint Diseases when applying for privileges at another institution. As a result, the Committee fined petitioner $50,000 and suspended his medical license for three years, the latter two years of which were stayed. Subsequently, the Administrative Review Board for Professional Medical Conduct (hereinafter ARB) affirmed the Committee's findings and conclusions, but overturned its penalty of suspension and fine and, instead, revoked petitioner's license to practice medicine. Petitioner then instituted the instant CPLR article 78 proceeding seeking review of the ARB's determination.

In his 67-page brief, petitioner makes no argument concerning the Committee's findings of inadequate or incomplete recordkeeping. His attacks on the Committee's findings of gross negligence, fraud and deliberate false reporting are premised on his claim that there is no basis for the Committee finding that he lacked credibility. Even if there might be some merit to petitioner's claim that the Committee erroneously decided that he had lied about his authorship of certain medical papers and his board certification status, petitioner's testimony on those issues is not particularly relevant to the Committee's determination that he lacked credibility with respect to the gross negligence, fraud and deliberate false reporting charges. Moreover, credibility issues are to be exclusively determined by the administrative factfinder and are outside the scope of this Court's review (*see, Matter of Richstone v Novello,* 284 AD2d 737, 737; *Matter of O'Keefe v State Bd. for Professional Med. Conduct,* 284 AD2d 694, 695, *lv denied* 96 NY2d 722; *Matter of Wahba v New York State Dept. of Health,* 277 AD2d 634, 635; ***766** *Matter of Corines v State Bd. for Professional Med. Conduct,* 267 AD2d 796, 799, *lv denied* 95 NY2d 756).

In addition, it is well settled that our review of an ARB determination is whether the " 'determination was made in violation of lawful procedure, was affected by an error of law[,] or was arbitrary and capricious or an abuse of discretion' " (*Matter of Rudell v Commissioner of Health of State of N.Y.,* 194 AD2d 48, 50, *lv denied* 83 NY2d 754, quoting CPLR 7803 [3]). Applying that standard, we conclude that there is a rational basis for the finding that petitioner was grossly negligent in electing to proceed with patient B's total hip replacement despite clear evidence of a cancerous lesion, thereby delaying treatment therefor. The finding of fraud is similarly supported. A physician is guilty of fraud when there is evidence of an intentional misrepresentation or concealment of a known fact with intent to deceive (*see, Matter of Choudhry v Sobol,* 170 AD2d 893, 894). With respect to patient F's records, there is credible evidence that petitioner obtained this closed record from the medical records room, inserted a notation that "risks, alternatives and benefits" of certain treatments had been explained to her, and then, after discovering that an unaltered copy of the record had already been sent to the patient's attorney, petitioner used "white-out" to eliminate the alteration. Also, based on petitioner's own testimony and the documentary proof, the Committee appropriately concluded that petitioner falsely indicated that he was in good standing with the Hospital for Joint Diseases when he applied for appointment to the medical staff of one of the hospitals under the control of Beth Israel Medical Center.

Parenthetically, we find no credible basis for petitioner's claim that his due process rights were violated because of a 14-year delay between his care of patient B and the filing of these charges. There is no statute of limitations and the doctrine of laches does not apply to physician disciplinary proceedings (*see, Matter of Schoenbach v DeBuono,* 262 AD2d 820, 823, *lv denied* 94 NY2d 756; *Matter of Reddy v State Bd. for Professional Med. Conduct,* 259 AD2d 847, 848, *lv denied* 93 NY2d 813). Therefore, petitioner must make a showing of actual prejudice to succeed in this contention (*see, Matter of Kashan v DeBuono,* 262 AD2d 817, 818). Here, although petitioner's office records were no longer available, he

testified in great detail from the hospital records of patient B concerning "one of the most unusual cases [of his] career." As the negligent treatment charge only involved treatment of the patient while in the hospital, petitioner has failed to show how any purportedly unavailable ***767** documents would exonerate him or assist in his defense (*see, Matter of Giffone v DeBuono,* 263 AD2d 713, 714-715), and petitioner has failed to show that the unavailability of Michael Lewis, patient B's treating oncologist, would have altered the outcome by Lewis's favorable testimony on his behalf (*see, Matter of Kashan v DeBuono, supra* at 818).

Finally, the penalty of revocation imposed is "not so shocking to one's sense of fairness nor disproportionate to the misconduct to be deemed irrational as a matter of law" (*Matter of Schoenbach v DeBuono, supra* at 823; *see, Matter of Kole v New York State Educ. Dept.,* 291 AD2d 683, 687). Indeed, the findings of fraud by petitioner are alone sufficient to merit the penalty imposed. Thus, revocation is all the more appropriate given the finding of gross negligence (*see, Matter of Harris v Novello,* 276 AD2d 848, 851; *Matter of Post v State of New York Dept. of Health,* 245 AD2d 985, 987).

Mercure, J.P., Crew III, Rose and Lahtinen, JJ., concur.

Adjudged that the determination is confirmed, without costs, and petition dismissed.

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Ongom v. State, Dept. of Health, Office of Professional Standards, Wash.App. Div. 1, January 3, 2005

113 Wash.App. 499
Court of Appeals of Washington,
Division 2.

James F. NIMS, Appellant,
v.
WA. BOARD OF REGISTRATION, et al,
Respondents.

No. 27431–1–II.
|
Aug. 30, 2002.
|
As Amended Oct. 14, 2002.

Synopsis
Registered professional engineer appealed state licensing board's decision revoking his license. The Superior Court, Pacific County, Joel Penoyar, J., affirmed. Engineer appealed. The Court of Appeals, Morgan, J., held that: (1) engineer did not waive right to cite to case that was decided after engineer submitted opening brief; (2) engineer was entitled to clear, cogent, and convincing burden of persuasion; (3) licensing board retained jurisdiction over disciplinary proceeding after engineer allowed his registration to lapse; (4) two-year statute of limitations did not apply in disciplinary proceedings; (5) collateral estoppel did apply to prevent relitigation of whether statute of limitations applied in disciplinary proceedings; and (6) employee of licensing department was empowered to bring complaint alleging ethical violations to licensing board.

Affirmed in part, reversed in part, and remanded.

West Headnotes (6)

[1] **Licenses**
Revocation, suspension, or forfeiture; discipline in general

Engineer contesting disciplinary proceeding did not waive right to cite to case on appeal, even though he did not cite to case before disciplinary board, trial court, or in opening appellate brief, where case was not decided until after appeal was initiated and opening brief submitted, and engineer cited to case on his first opportunity after case was decided.

Cases that cite this headnote

[2] **Licenses**
Revocation, suspension, or forfeiture; discipline in general

Burden of persuasion in disciplinary proceeding of registered engineer was clear, cogent, and convincing evidence, where the same burden of persuasion in disciplinary proceedings of like kind, regardless of profession, was applicable.

6 Cases that cite this headnote

[3] **Licenses**
Revocation, suspension, or forfeiture; discipline in general

Licensing board had jurisdiction over disciplinary proceeding of registered engineer at the outset, and thus, board did not lose jurisdiction after engineer chose not to renew his license, where proceeding began when engineer had valid license. West's RCWA 18.43.110 (2001); WAC 196–27–010(4).

3 Cases that cite this headnote

[4] **Licenses**
Revocation, suspension, or forfeiture; discipline in general

Two-year statute of limitations did not apply to charges brought against engineer in disciplinary proceeding and thus, charges brought against engineer based on events that were discovered

more than two years before were not barred. West's RCWA 4.16.130.

1 Cases that cite this headnote

[5] **Judgment**
Courts or Other Tribunals Rendering Judgment
Judgment
Scope and Extent of Estoppel in General

State licensing board was not estopped from denying application of two-year statute of limitations regarding charges brought against engineer in disciplinary proceeding, even though trial court in another proceeding against the licensing board ruled that two-year statute of limitations applied, since collateral estoppel did not prevent appellate court from relitigating important issues, and higher court was not bound by trial court decision.

Cases that cite this headnote

[6] **Licenses**
Revocation, suspension, or forfeiture; discipline in general

Ethical charges could be brought against engineer by any person, including an employee of Department of Licensing, and thus, sworn complaint by employee was sufficient to form basis for disciplinary proceeding, even though employee was not a "private person," where statute did not limit power to file sworn complaint to private persons, but merely to "any person."

Cases that cite this headnote

Attorneys and Law Firms

****52 *501** James Titchener Schmid, Asst. Attorney General, Seattle, for Respondents.

Rhys Alden Sterling, Hobart, for Appellant.

Opinion

****53** MORGAN, J.

James F. Nims appeals the revocation of his engineering license. We reverse and remand for application of the correct burden of persuasion. In all other respects, we affirm.

Nims was a registered professional engineer. He was licensed by the Department of Licensing and subject to discipline by the Board of Registered Professional Engineers.[1]

On July 1, 1998, the Department commenced a disciplinary proceeding against Nims. Then and in amended charges filed September 20, 1999, the Department accused Nims of engaging in various acts and omissions that amounted to "incompetence, gross negligence and/or other acts contrary to the accepted standard of practice of professional ***502** engineers."[2] One charge, involving a business called the Snack Shack, was based only on the sworn complaint of an employee of the Department of Licensing. More than one charge was based not only on RCW 18.43.110, but also on other sections of chapter 18.43 RCW.[3] At least one charge involved conduct more than two years old.

Nims' license was due to expire on October 25, 1999. He made no effort to renew it, so it lapsed on that date.

The Board held hearings in March and April 2000. It upheld some charges but dismissed others. In August 2000, it entered findings of fact based on a preponderance of the evidence. It also entered conclusions of law and revoked Nims' license. It ordered that he have "no right to reapply" unless he completed an ethics class and met "all of the requirements for licensure as a new applicant, including successfully passing the full examination for licensure."[4]

Nims appealed to the Pacific County Superior Court, which affirmed. He then brought this appeal, in which he makes five claims.

I.

Nims first claims that Board erred by basing its findings of fact on a preponderance of the evidence. Citing *Nguyen v. Department of Health, Medical Quality Assurance Commission*,[5] he claims that the Board was required to base its findings on clear, cogent, and convincing evidence.

[1] In *Nguyen*, the Medical Quality Assurance Commission found by a preponderance of evidence that a physician had engaged in inappropriate sexual contact with three patients. The Commission revoked his license to practice ***503** medicine, and the case went to the Supreme Court. The issue was whether the Board had applied the correct burden of persuasion. Reversing, the Supreme Court held that in a proceeding to discipline a physician, the facts must be proved by clear and convincing evidence.

The Department asserts that Nims cannot rely on *Nguyen* because he did not cite it to the Board or the superior court, or in the opening brief that he filed with this court; he first mentioned it in the reply brief that he filed with this court on September 25, 2001. According to the record, however, Nims filed his opening brief in this court on July 6, 2001, and *Nguyen* was not decided until August 23, 2001. Necessarily then, Nims could not have argued *Nguyen* before the Board, before the superior court, or in the opening brief that he filed with this court. He cited *Nguyen* as soon as he reasonably could have, and it has now been briefed by both sides. Under these circumstances, Nims has not waived his right to argue *Nguyen.*

If *Nguyen* applies, it requires us to remand to the Board for findings based on clear, cogent, and convincing evidence. In the Department's view, however, *Nguyen* does not apply to a registered professional engineer like Nims. To support that view, the Department relies on *Eidson v. Department of Licensing.*[6]

****54** [2] In *Eidson*, the Department of Licensing revoked the license of a real estate appraiser after finding by a preponderance of the evidence that the appraiser had made fraudulent misrepresentations. The appraiser appealed to superior court, which affirmed, and then to Division One, which also affirmed. Division One reasoned that an incompetent doctor creates a more "direct and immediate threat" to health, safety and welfare than an incompetent appraiser; thus, it was appropriate to use a clear and convincing burden of persuasion for the doctor, but a ***504** preponderance burden of persuasion for the appraiser.[7] Division One also reasoned that different burdens of persuasion are proper for doctors and appraisers because doctors' training involves more time and money than appraisers' training.[8] Finally, Division One reasoned that the charges in *Nguyen* were subjective while the charges in *Eidson* were objective; thus, it was appropriate to use a clear and convincing burden of persuasion in *Nguyen* but a preponderance burden of persuasion in *Eidson.*[9] Consequently, Division One " declin[ed] to extend *Nguyen's* holding to encompass proceedings under the Certified Real Estate Appraiser Act."[10]

We cannot agree with the *Eidson* court's first reason for not following *Nguyen.* The court derived that reason, at least in part, from cases decided in other states.[11] In general, these out-of-state cases hold that the degree of risk created by professional incompetency varies with the profession involved. Incompetency among doctors, for example, creates a "direct and immediate threat to physical health, safety and welfare [.]"[12] Incompetency among lawyers does not, at least to the same degree. Thus, these out-of-state cases conclude that a state is constitutionally free to apply a lower, more discipline-friendly, preponderance burden of persuasion to the profession that creates the higher risk (e.g., doctors), while at the same time applying a higher, less discipline-friendly, clear and convincing burden of persuasion to the profession that creates the lower risk (e.g., lawyers).

***505** We do not dispute these holdings, but we cannot agree with the *Eidson* court's application of them. Based on the out-of-state cases just discussed, the *Eidson* court asserted or implied that incompetent doctors create a greater risk to human health, safety, and welfare than incompetent appraisers.[13] It then reasoned that doctors—the profession creating the *greater* risk—should receive the benefits of a *higher* (*less* discipline-friendly) burden of persuasion, while appraisers—the profession creating the *lesser* risk—should receive the detriments of a *lower* (*more* discipline-friendly) burden of persuasion. That does not make sense to us, and it is not an approach that we are willing to emulate.

Nor can we agree with the *Eidson* court's view that the time and money spent on training justifies different burdens of persuasion for different professions. In our view, the time and money spent on training has so little bearing on disciplinary proceedings that it cannot, by itself, justify a higher or lower burden of persuasion.

Nor can we agree with the *Eidson* court's reliance on the "subjective" nature of the charges in *Nguyen,* as opposed to the "objective" nature of the charges in *Eidson.* It is our view that the applicable burden of persuasion should be constant for disciplinary proceedings of like kind, and that

the burden of persuasion should not vary according to the nature of the charges in the particular case.

****55** *Nguyen* is the law of this state, whether one agrees with it or not. *Nguyen* held that a physician is entitled to a clear, cogent, and convincing burden of persuasion. A registered professional engineer is entitled to the same, so far as is shown here or in *Eidson.* Accordingly, we hold that the Board erred by basing its findings on a mere preponderance of the evidence, and that it must make new findings based on clear, cogent, and convincing evidence. So long as the Board otherwise follows the law, it may make such new ***506** findings from the record already in existence,[14] or it may take new evidence.

II.

We address Nims' remaining issues because they are potentially dispositive or likely to arise on remand. They are (A) whether, when Nims chose not to renew his license, the Board lost jurisdiction of the disciplinary proceeding that was then ongoing; (B) whether the Board can discipline for reasons set forth in RCW 18.43.105; (C) whether the statute of limitations or collateral estoppel precluded the Board from considering certain charges; (D) whether the Department properly supported its charges with sworn complaints; and (E) whether the Board properly notified Nims of the charges against him.

A.

[3] Nims claims that the Board lost jurisdiction when he elected not to renew his license. He bases this claim on RCW 18.43.110, which provides that the Board shall have the exclusive power to discipline a "registrant;" on WAC 196–27–010(4), which defines a registrant as "any person holding a certificate of registration issued by this board[;]" and on a Connecticut case called *Stern v. Connecticut Medical Examining Board.*[15]

We first address whether the Board had jurisdiction at the outset of this disciplinary proceeding against Nims. The answer is yes. The Department filed charges on July 1, 1998, and it amended those charges on September 20, 1999. On both dates, Nims was a "registrant" within the meaning ***507** of RCW 18.43.110 and WAC 196–27–010(4). Thus, the Board had jurisdiction at the outset of this proceeding.

We next address whether the Board lost jurisdiction when, on October 15, 1999, Nims chose not to renew his license. The answer is no. Nothing in RCW 18.43.110 or WAC 196–27–010(4) addresses this question expressly. The case upon which Nims relies, *Stern v. Connecticut Medical Examining Board,* is obviously distinguishable.[16] As the Department correctly points out, cases from other jurisdictions reject Nims' position.[17] ****56** Agreeing with those cases, we hold that once a professional disciplinary tribunal lawfully acquires jurisdiction over a proceeding, its jurisdiction continues until the proceeding is concluded. Here then, the Board's jurisdiction did not terminate merely because Nims chose not to renew his license.

***508** B.

Nims claims that the Board erred by entertaining charges based on RCW 18.43.105. He asserts that an individual (as opposed to a corporation or limited liability company) can be charged only under RCW 18.43.110, and thus that he is entitled to the dismissal of all charges based on RCW 18.43.105. He bases this claim on a statutory construction argument that is too convoluted to fully describe here. The Board responds that his statutory construction argument is wrong, and that it "has authority to discipline an individual professional engineer under both RCW 18.43.105 and RCW 18.43.110."[18] Holding that Nims' statutory construction argument is wholly without merit, and that the Board has authority to discipline under RCW 18.43.105, we reject this claim.

C.

[4] Nims next argues that a two year statute of limitations applies to this proceeding. He alternatively argues that even if a two year statute of limitations does not apply to this proceeding, the Board is *collaterally estopped from denying* that it does. As a result, he says, the Board was barred from addressing any charge "based on alleged conduct that was discovered by the Board more than two years before the statement of charges was filed."[19]

The first argument fails. The courts uniformly hold that statutes of limitation do not apply in disciplinary proceedings.[20] Adhering to this view, the Washington Supreme Court held long ago that Washington's catchall ***509** statute of limitations, RCW 4.16.130, does not apply in a medical disciplinary proceeding.[21] Laches may or may not apply,[22] but that is not an issue here. None of the charges against Nims were subject to a two-year statute of limitations.

[5] Nims bases his alternative argument on a superior court judgment that was entered in a case not related to this one, but in which the Board was a party. In that judgment, which was not appealed, the superior court held that disciplinary proceedings against a land surveyor are subject to the two year statute of limitations set forth in RCW 4.16.100(2).[23] As a matter of public ****57** policy, collateral estoppel prevents the relitigation of an issue on which all parties have had a full and fair opportunity to present a case.[24] Also as a matter of public policy, however, collateral estoppel does not foreclose a higher court from relitigating the decision of a lower court on an important issue of law.[25] One such issue is whether statutes of limitation apply in disciplinary proceedings, and thus we decline to be bound by the superior court judgment in issue here.

***510** D.

[6] Nims claims that the Board can entertain charges based on the sworn complaint of a private citizen, but not charges based on the sworn complaint of an employee of the Department of Licensing. He states in his brief:

> The Board tried to amend RCW 18.43.110 in the 1997 legislative session to include a provision that the Board itself could initiate on its own motion an investigation against registrants. The Board failed.... An independent written complaint is thus required.[26]

One of the charges against him was based only on the sworn complaint of an employee of the Department of Licensing, so he concludes that charge must be dismissed.[27]

Nims' claim is inconsistent with the legislation that was actually enacted. Now codified in RCW 18.43.110, that legislation states:

> *Any person* may prefer a complaint alleging fraud, deceit, gross negligence, incompetency, or misconduct against any registrant and the complaint shall be in writing and shall be sworn to in writing by the person making the allegation.

Based on the plain terms of this legislation, we hold that *any person*—including an employee of the Department of Licensing—may prefer and swear to the required written complaint.

E.

Nims claims that the Board failed to "immediately inform" him of the charges against him. He relies on RCW 18.43.110, which provides in part that "[a] registrant ***511** against whom a complaint was made must be immediately informed of such complaint by the board." He asserts that he was informed of a charge filed on June 30, 1998 by letter dated July 7, 1998; of a charge filed on August 18, 1998 by letter dated August 24, 1998; and of a charge filed on August 24, 1998, by letter dated August 31, 1998. Particularly since no hearings were held until 2000, we hold that he was "immediately informed" within the meaning of RCW 18.43.110.

Summarizing, we hold that the Board must reconsider using the proper burden of persuasion, but that otherwise it did not err. We reverse and remand to the Board for application of the proper burden of persuasion, but we affirm in all other respects.

We concur: ARMSTRONG, J., and HUNT, C.J.

All Citations

113 Wash.App. 499, 53 P.3d 52

Footnotes

1 *See* chapter 18.43 RCW.

2 Administrative Record (AR) at 1114.

3 *See, e.g.,* AR 1107.

4 Clerk's Papers (CP) at 33.

5 *Nguyen v. Dep't of Health, Med. Quality Assurance Comm'n,* 144 Wash.2d 516, 29 P.3d 689 (2001), *cert. denied,* 535 U.S. 904, 122 S.Ct. 1203, 152 L.Ed.2d 141 (2002).

6 *Eidson v. Dep't of Licensing,* 108 Wash.App. 712, 32 P.3d 1039 (2001). *Eidson* was decided October 15, 2001.

7 *See Eidson,* 108 Wash.App. at 718–20, 32 P.3d 1039.

8 *Eidson,* 108 Wash.App. at 720, 32 P.3d 1039 ("unlike physicians, appraisers are not forced to spend countless hours and large sums of money pursuing a degree").

9 *See Eidson,* 108 Wash.App. at 720, 32 P.3d 1039.

10 *Eidson,* 108 Wash.App. at 718, 32 P.3d 1039.

11 *Eaves v. Bd. of Med. Exam'rs,* 467 N.W.2d 234, 237 (Iowa 1991); *In re Grimm,* 138 N.H. 42, 635 A.2d 456, 462 (1993); *In re Revocation of License of Polk,* 90 N.J. 550, 449 A.2d 7, 17 (1982); *Gandhi v. State Med. Examining Bd.,* 168 Wis.2d 299, 483 N.W.2d 295, *review denied,* 490 N.W.2d 23 (1992).

12 *Eidson,* 108 Wash.App. at 719, 32 P.3d 1039.

13 *Eidson,* 108 Wash.App. at 719–20, 32 P.3d 1039.

14 We do not address whether the Board's membership would have to be the same as before in order for it to make new findings from the record already in existence. Nor do we address whether a Board member who did not participate before this appeal may participate after remand. *See* RCW 34.05.461(6) (pertaining to substitute decision makers).

15 *Stern v. Connecticut Med. Examining Bd.,* 208 Conn. 492, 545 A.2d 1080 (1988).

16 Stern was a doctor. His license expired in January 1980. The medical disciplinary board commenced proceedings against him in November 1983, almost four years later. The court held that the board never had jurisdiction. The court did not consider whether a board that acquires jurisdiction before a license expires may retain that jurisdiction until the proceeding ends. *Stern,* 208 Conn. at 492, 545 A.2d 1080.

17 Courts generally have held that a disciplinary board may complete a proceeding that it commenced while the licensee held his or her license. *Patel v. Kan. State Bd. of Healing Arts,* 22 Kan.App.2d 712, 920 P.2d 477 (1996); *Wang v. Bd. of Registration in Medicine,* 405 Mass. 15, 537 N.E.2d 1216 (1989); *Cross v. Colo. State Bd. of Dental Exam'rs,* 37 Colo.App. 504, 552 P.2d 38 (1976); *La. State Bar Ass'n v. Powell,* 250 La. 313, 195 So.2d 280 (1967); *Petersen v. State Bar of Cal.,* 21 Cal.2d 866, 136 P.2d 561 (1943); *Grievance Adm'r v. Attorney Discipline Bd.,* 447 Mich. 411, 522 N.W.2d 868 (1994). Compare cases in which courts have held that a disciplinary board may not commence a proceeding more than a reasonable time after expiration of the licensee's license. *Haggerty v. Dep't of Bus. & Prof'l Regulation,* 716 So.2d 873 (Fla.App.1998); *Boedy v. Dep't of Prof'l Regulation,* 433 So.2d 544 (Fla.App.1983). Washington courts have applied similar principles in other contexts. *See State v. Hultman,* 92 Wash.2d 736, 741, 600 P.2d 1291 (1979) (court can revoke probation, even if it holds hearing after termination of the probationary period, so long as petition for revocation is filed within the probationary period and hearing is held within reasonable time thereafter)

superceded on other grounds by statute, recognized by 51 Wash.App. 450, 754 P.2d 128; *State v. Beer,* 93 Wash.App. 539, 541, 969 P.2d 506 (1999) (court has jurisdiction to revoke SSOSA sentence after community supervision expires, if petition for revocation is filed during supervision period); RCW 9.95.230 (probation may be revoked not just during period of supervision, but "at any time prior to the entry of an order terminating probation").

18 Br. of Resp't at 14.

19 Br. of Appellant at 24.

20 Noralyn O. Harlow, J.D., Annotation, *Applicability of Statute of Limitations or Doctrine of Laches to Proceeding to Revoke or Suspend License to Practice Medicine,* 51 A.L.R.4th 1147, 1151, 1987 WL 419465 (1987) ("courts have held without exception that, in the absence of a statute which applies specifically to medical license revocation proceedings, statutes of limitations do not apply to such disciplinary proceedings"). *See, e.g., Shea v. Bd. of Med. Exam'rs,* 81 Cal.App.3d 564, 146 Cal.Rptr. 653 (1978); *Colo. State Bd. of Med. Exam'rs v. Jorgensen,* 198 Colo. 275, 599 P.2d 869 (1979); *Farzad v. Dep't of Prof'l Regulation,* 443 So.2d 373 (Fla.App.1983); *Chock v. Bitterman,* 5 Hawaii App. 59, 678 P.2d 576 (1984); *Latreille v. Mich. State Bd. of Chiropractic Exam'rs,* 357 Mich. 440, 98 N.W.2d 611 (1959); *Blumberg v. State Bd. of Med. Exam'rs,* 96 N.J.L. 331, 115 A. 439 (1921); *Corines v. State Bd. for Prof'l Med. Conduct,* 267 A.D.2d 796, 700 N.Y.S.2d 303 (1999); *Spray v. Bd. of Med. Exam'rs,* 50 Or.App. 311, 624 P.2d 125 (1981); *State Med. Examining Bd. v. Stewart,* 46 Wash. 79, 89 P. 475 (1907); *State v. Josefsberg,* 275 Wis. 142, 81 N.W.2d 735 (1957). *See also* 2 Am.Jur.2d *Administrative Law* § 272 (1994).

21 *Stewart,* 46 Wash. at 83, 89 P. 475.

22 Noralyn O. Harlow, J.D., Annotation, *Applicability of Statute of Limitations or Doctrine of Laches to Proceeding to Revoke or Suspend License to Practice Medicine,* 51 A.L.R.4th § 5 at 1157, 1987 WL 419465.

23 RCW 4.16.100(2) provides, "Actions limited to two years [for] ... [a]n action upon a statute for a forfeiture or penalty to the state."

24 *In re Estate of Tolson,* 89 Wash.App. 21, 34, 947 P.2d 1242 (1997) (quoting *In re Marriage of Mudgett,* 41 Wash.App. 337, 342, 704 P.2d 169 (1985)).

25 *Kennedy v. City of Seattle,* 94 Wash.2d 376, 379, 617 P.2d 713 (1980); *see also, Southcenter Joint Venture v. Nat'l Democratic Policy Comm.,* 113 Wash.2d 413, 419, 780 P.2d 1282 (1989).

26 Br. of Appellant at 45, n. 68.

27 Nims actually contends that two of the charges against him must be dismissed. He refers to those charges as the Reynolds charge and the Williams charge. The Reynolds charge was dismissed by the Board and is now moot. The Williams charge, also called the Snack Shack charge, was not based on the complaint of a private citizen, but was based on the sworn complaint of Alan E. Rathbun, Assistant Director of the Business and Professions Division of the Department of Licensing. CP at 1201, 1203; AR at 1114.

51 Ohio St.3d 143
Supreme Court of Ohio.

OHIO STATE BOARD OF PHARMACY, Appellee,
v.
FRANTZ et al., Appellants.

No. 89–339.
|
Submitted Feb. 13, 1990.
|
Decided May 30, 1990.

Synopsis

The State Board of Pharmacy revoked license to practice pharmacy and terminal distributor license and imposed fines. Judicial review was sought. The Court of Common Pleas, Hancock County, affirmed. Appeal was taken. The Court of Appeals affirmed. Motion was made to certify the record. The Supreme Court, Moyer, C.J., held that: (1) mandatory language of administrative procedure statute did not provide for prehearing discovery depositions by party to adjudication hearing; (2) the Board was not estopped from its duty to protect the public welfare because it did not bring disciplinary action as expeditiously as possible; and (3) the Board was not barred by the doctrine of laches from revoking the licenses.

Affirmed.

West Headnotes (9)

[1] **Statutes**
Intent

In construing statute court was required to look to the statute itself to determine the intent of the General Assembly.

11 Cases that cite this headnote

[2] **Statutes**
Intent
Statutes
Purpose and intent; unambiguously expressed intent

If the General Assembly's intent is clearly expressed in statute, statute may not be enlarged or abridged.

6 Cases that cite this headnote

[3] **Administrative Law and Procedure**
Constitutional and Statutory Provisions in General

Administrative procedure statute governing attendance of witnesses and production of books, records, and papers for adjudication hearing is free from ambiguity and is not subject to judicial modification under the guise of interpretation. R.C. § 119.09.

7 Cases that cite this headnote

[4] **Administrative Law and Procedure**
Discovery

Mandatory language in administrative procedure statute pertained to securing attendance of witnesses and production of books, records, or papers at request of party for purpose of conducting adjudication hearing; it did not provide for prehearing discovery depositions by party to adjudication hearing. R.C. § 119.09.

8 Cases that cite this headnote

[5] **Estoppel**
Nature and Application of Estoppel in Pais

Purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice; it is available only in defense of legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud, or injustice.

73 Cases that cite this headnote

[6] **Estoppel**
Relying and acting on representations

Party claiming estoppel must have relied on conduct of adversary in such manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading.

48 Cases that cite this headnote

[7] **Estoppel**
State government, officers, and agencies in general

As general rule, principle of estoppel does not apply against state or its agencies in the exercise of governmental function.

62 Cases that cite this headnote

[8] **Estoppel**
Particular state officers, agencies or proceedings

State Board of Pharmacy could not be estopped from its duty to protect the public welfare because it did not bring disciplinary action against registered pharmacist and holder of terminal distributor license as expeditiously as possible.

24 Cases that cite this headnote

[9] **Health**
Disciplinary Proceedings

The State Board of Pharmacy was not barred, under the doctrine of laches, from revoking license of registered pharmacist and terminal distributor license by its conduct in bringing the disciplinary actions more than six years after the investigation was initiated; in the absence of statute to the contrary, laches is generally no defense to suit by government to enforce public right or protect public interest.

21 Cases that cite this headnote

****631** *Syllabus by the Court*

***143** 1. The mandatory language of R.C. 119.09 pertains to securing attendance of witnesses and production of books, records, or papers at the request of a party for the purpose of conducting an adjudication hearing; it does not provide for prehearing discovery depositions by a party to an adjudication hearing.

2. The government cannot be estopped from its duty to protect public welfare because public officials failed to act as expeditiously as possible.

3. Laches is generally no defense to a suit by the government to enforce a public right or to protect a public interest.

On March 3, 1979, plaintiff-appellee, Ohio State Board of Pharmacy ("board"), initiated an investigation of defendant-appellant, James Michael Frantz, a registered pharmacist in practice in Findlay, Ohio. The investigation was prompted by a complaint from a pharmacist in Findlay, alleging that Frantz had been dispensing "improper" medication to customers. Subsequent to the initiation of its investigation, the board became aware of an FBI investigation of Frantz and his billing practices at

the defendant-appellant, The Medicine Shoppe, a pharmacy located in Findlay. Pursuant to an agreement with the FBI, the board halted its investigation pending the outcome of the FBI investigation.

The FBI investigation resulted in a federal grand jury indictment of Frantz in 1983. He pled no contest to ten counts of a fifty-count indictment, and was convicted by the United States District Court of the Northern District of Ohio of Medicaid fraud. He was fined $42,500, spent four months in a halfway house and was placed on probation for five years.

On October 25, 1985, the board sent a letter to Frantz notifying him of allegations brought against him in his capacity as a registered pharmacist. A similar letter was also sent to him in his capacity as the holder of a terminal distributor license issued to The Medicine Shoppe. Both letters advised Frantz of his rights to a hearing before the board on the alleged infractions and the possible penalties therefor. Frantz requested that the board hold a hearing on the matter and also apparently requested that it issue a subpoena ***144** for prehearing discovery of certain witnesses scheduled to testify at the hearing. The request for prehearing discovery was denied by the board.

Pursuant to Frantz's request, the board conducted a hearing on the allegations against Frantz and The Medicine Shoppe. Frantz's motions to dismiss for laches, estoppel and lack of discovery were denied by the board. The board's order found that Frantz's conduct as a pharmacist in his operation of The Medicine Shoppe constituted "gross immorality," "dishonesty and unprofessional conduct," and that his actions violated R.C. Chapters 2925, 3715, 3719 and 4729. Pursuant to R.C. 4729.16 and 4729.57, respectively, the board revoked Frantz's license to practice pharmacy and fined him $5,000, and revoked The Medicine Shoppe's terminal distributor license and fined it $10,000.

Defendants appealed to the Court of Common Pleas of Hancock County, raising the laches, estoppel and lack of discovery arguments made at the board's proceedings. The court rejected the arguments and affirmed the board's orders.

The court of appeals held that R.C. 119.09 does not require administrative agencies to issue a subpoena for discovery depositions. The court further held that defendants failed to demonstrate any real prejudice as a result of their inability to take depositions and that defendant Frantz's conduct violated R.C. 4729.16 and was illegal. The court concluded that "defendants' assertion of equitable estoppel * * * is clearly an attempt to escape the penalties imposed by R.C. 4729.16, and thereby allow the defendants to continue as a licensed pharmacist and a licensed distributor, despite the overwhelming proof of Frantz' numerous infractions of the law. The doctrine of estoppel is not available for this purpose * * *." The court further indicated that laches cannot be imputed to the state.

****632** The cause is now before this court pursuant to the allowance of a motion to certify the record.

Attorneys and Law Firms

Anthony J. Celebrezze, Jr., Atty. Gen., Steven P. Dlott and Lauren Ross, Columbus, for appellee.

Emens, Hurd, Kegler & Ritter, William J. Brown, R. Kevin Kerns and Gene W. Holliker, Columbus, for appellants.

Opinion

MOYER, Chief Justice.

Defendants-appellants first contend that R.C. 119.09 requires the State Board of Pharmacy to issue subpoenas for depositions of witnesses when a party to an adjudication hearing requests a deposition.

The relevant portion of R.C. 119.09 provides:

"For the *purpose* of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency *may* require the *attendance of such witnesses* and the *production of such books, records, and papers* as it desires, and it *may* take the *depositions* of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas, *and for that purpose* the agency may, and upon the request of any party receiving notice of said hearing as required by section 119.07 of the Revised Code, shall, issue a *subpoena for any witness or a subpoena duces tecum* to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. * * * " (Emphasis added.)

Defendants contend that the second ***145** use of the word "purpose" in R.C. 119.09 refers to the taking of depositions and not to the conduct of an adjudication

hearing.

[1] [2] [3] In construing the above provision of R.C. 119.09, we are required to look to the statute itself to determine the intent of the General Assembly, and if such intent is clearly expressed therein, the statute may not be enlarged or abridged. *State, ex rel. City Iron Works, Inc., v. Indus. Comm.* (1977), 52 Ohio St.2d 1, 4, 6 O.O.3d 37, 38, 368 N.E.2d 291, 293. R.C. 119.09 is free from ambiguity and is not subject to judicial modification under the guise of interpretation. *Ohio Motor Vehicle Dealers Bd. v. Remlinger* (1983), 8 Ohio St.3d 26, 8 OBR 337, 457 N.E.2d 309.

The purpose of the portion of R.C. 119.09 in issue as stated therein is to empower an agency in its conduct of an adjudication hearing to require, if it desires, the attendance of witnesses, production of books, records and papers and the deposition of witnesses. And for the same purpose, the agency is required to issue subpoenas for witnesses or subpoenas *duces tecum* for the production of books, records or papers at the request of any party who is notified of the hearing pursuant to R.C. 119.07.

[4] The General Assembly's use of the word "purpose" twice in the same paragraph is presumed to bear the same meaning. The second use of the word "purpose" in the mandatory portion of R.C. 119.09 refers to the first use, which gives the agency certain powers when an adjudication hearing is held. See *Schuholz v. Walker* (1924), 111 Ohio St. 308, 325, 145 N.E. 537, 542. The mandatory language pertains to securing attendance of witnesses and the production of books, records or papers at the request of a party for the purpose of conducting an adjudication hearing. It does not require a board to order the taking of prehearing discovery depositions by a party to an adjudication hearing.

Defendants' contention would require us to impermissibly extend the statute to facts not before us. *Cornell v. Bailey* (1955), 163 Ohio St. 50, 58, 56 O.O. 50, 53, 125 N.E.2d 323, 327. See, also, *Scott v. Dept. of Comm. & Community Affairs* (1981), 84 Ill.2d 42, 48 Ill.Dec. 560, 416 N.E.2d 1082. Furthermore, defendants have not shown that they suffered any prejudice as a result of their inability to conduct prehearing discovery depositions.

We next consider whether the board is estopped from revoking Frantz's license and terminating defendant Medicine ****633** Shoppe's terminal distributor license, because it continued to renew the license for several years after having knowledge of the violations upon which the revocations were based.

[5] [6] The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud, or injustice. *Heckler v. Community Health Services* (1984), 467 U.S. 51, 59, 104 S.Ct. 2218, 2223, 81 L.Ed.2d 42; *Lex Mayers Chevrolet Co. v. Buckeye Finance Co.* (1958), 107 Ohio App. 235, 237, 8 O.O.2d 171, 173, 153 N.E.2d 454, 456, affirmed (1959), 169 Ohio St. 181, 8 O.O.2d 154, 158 N.E.2d 360. The party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading. *Heckler, supra*, 467 U.S. at 59, 104 S.Ct. at 2223.

[7] It is well-settled that, as a general ***146** rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function. *Sekerak v. Fairhill Mental Health Ctr.* (1986), 25 Ohio St.3d 38, 39, 25 OBR 64, 65, 495 N.E.2d 14, 15; see, also, *Besl Corp. v. Pub. Util. Comm.* (1976), 45 Ohio St.2d 146, 150, 74 O.O.2d 262, 265, 341 N.E.2d 835, 838.

Defendants argue that manifest injustice will result from revocations of their licenses because they spent money improving their pharmacy business after the board became aware of the violations. In essence, they contend that had the board initiated the disciplinary actions much sooner than it did, they would not have expended their resources improving their business.

[8] The board cannot be estopped from its duty to protect the public welfare because it did not bring a disciplinary action as expeditiously as possible. See *Sekerak, supra*, 25 Ohio St.3d at 39, 25 OBR at 65, 495 N.E.2d at 15; *State, ex rel. Cartwright, v. Dunbar* (Okla.1980), 618 P.2d 900, 911. If a government agency is not permitted to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of all citizens in obedience to the rule of law is undermined. *Heckler, supra*, 467 U.S. at 60, 104 S.Ct. at 2224. To hold otherwise would be to grant defendants a right to violate the law. See *Thagard v. Brock* (1968), 282 Ala. 262, 210 So.2d 821.

[9] Finally, defendants contend that the board is barred by the doctrine of laches from revoking the licenses.

We note *ab initio* that there is no time fixed by the statutes in question for bringing the disciplinary actions against defendants. Thus, the question is whether bringing

the actions more than six years after the investigation was initiated is barred by the equitable doctrine of laches.

It is well-settled that in the absence of a statute to the contrary, laches is generally no defense to a suit by the government to enforce a public right or protect a public interest. *Ohio Dept. of Transp. v. Sullivan* (1988), 38 Ohio St.3d 137, 139, 527 N.E.2d 798, 799; *Heckler, supra,* 467 U.S. at 67, 104 S.Ct. at 2227 (Rehnquist, J., concurring in judgment); see, also, *Immigration & Naturalization Service v. Miranda* (1982), 459 U.S. 14, 103 S.Ct. 281, 74 L.Ed.2d 12. The principle that laches is not imputable to the government is based upon the public policy in enforcement of the law and protection of the public interest. *Lee v. Sturges* (1889), 46 Ohio St. 153, 176, 19 N.E. 560, 571; *Ackerman v. Tri–City Geriatric & Health Care, Inc.* (1978), 55 Ohio St.2d 51, 54, 9 O.O.3d 62, 64, 378 N.E.2d 145, 147, fn. 3. To impute laches to the government would be to erroneously impede it in the exercise of its duty to enforce the law and protect the public interest. We therefore reject the defendants' arguments.

For the foregoing reasons, the judgment of the court of appeals is affirmed.

Judgment affirmed.

****634** SWEENEY, HOLMES, DOUGLAS, WRIGHT, HERBERT R. BROWN and RESNICK, JJ., concur.

All Citations

51 Ohio St.3d 143, 555 N.E.2d 630

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225 Ariz. 424
Court of Appeals of Arizona,
Division 1, Department E.

Holly PORTER, a married woman,
Plaintiff/Appellant,
v.
Arona M. SPADER, Defendant/Appellee.

No. 1 CA–CV 09–0678.
|
Sept. 21, 2010.

Synopsis
Background: Injured plaintiff brought action to recover for injuries sustained in motor vehicle collision. The Superior Court, Navajo County, Thomas L. Wing, J., entered summary judgment in defendant's favor on limitations grounds, and plaintiff appealed.

Holdings: The Court of Appeals, Winthrop, J., held that:

[1] alleged excusable neglect by staff for plaintiff's attorney to ensure that complaint was filed before limitations period expired was not permissible basis for or extraordinary circumstance warranting equitable tolling or suspension of limitations period, and

[2] rule authorizing relief from judgment due to mistake, inadvertence, surprise or excusable neglect was not permissible remedy for dismissal of complaint on limitations grounds.

Affirmed.

West Headnotes (10)

[1] **Limitation of Actions**
Suspension or stay in general; equitable tolling

Alleged excusable neglect by staff for injured plaintiff's attorney to ensure that complaint was filed before two-limitations period governing plaintiff's personal injury suit expired after complaint, which was originally mailed to court for filing, was returned for insufficient postage, was not permissible basis for or extraordinary circumstance warranting equitable tolling or suspension of limitations period. A.R.S. § 12–542.

4 Cases that cite this headnote

[2] **Limitation of Actions**
Nature of statutory limitation

The plain purpose of statutes of limitations is to identify the outer limits of the period of time within which an action may be brought to seek redress or to otherwise enforce legal rights created by the legislature or at common law.

2 Cases that cite this headnote

[3] **Limitation of Actions**
Nature of statutory limitation

The legitimate purposes of statutes of limitations are threefold:(1) to protect defendants from stale claims; (2) to protect defendants from insecurity-economic, psychological, or both; and (3) to protect courts from the burden of stale claims.

2 Cases that cite this headnote

[4] **Limitation of Actions**
Limitation as affected by nature or form of remedy in general
Limitation of Actions
Causes of action in general

To determine whether a claim is time-barred, the court examines four factors: (1) when the plaintiff's cause of action accrued; (2) which statute of limitations period applied; (3) when the plaintiff filed his or her claim; and (4) whether the running of the limitations period was suspended or tolled for any reason.

5 Cases that cite this headnote

[5] **Limitation of Actions**
Suspension or stay in general; equitable tolling

The doctrine of equitable tolling of a statute of limitations is a concept rooted in the common law.

5 Cases that cite this headnote

[6] **Judgment**
Negligence of counsel

Rule authorizing relief from judgment due to mistake, inadvertence, surprise, or excusable neglect was not permissible remedy for dismissal on summary judgment of complaint on limitations grounds due to alleged excusable neglect by staff for plaintiff's attorney. 16 A.R.S. Rules Civ.Proc., Rule 60(c)(1).

Cases that cite this headnote

[7] **Limitation of Actions**
Suspension or stay in general; equitable tolling

"Excusable neglect" does not justify relief from the applicable statute of limitations.

Cases that cite this headnote

[8] **Judgment**
Mistake, surprise, or excusable neglect in general
Judgment
Mistake, Inadvertence, Surprise, Excusable Neglect, Casualty, or Misfortune
Pretrial Procedure
Disobedience to order of court or other misconduct

The purpose of the rule authorizing relief from a final judgment due to excusable neglect is to allow a trial court discretion to relieve a party's failure to comply with court-established or mandated rules, e.g., the failure to file a timely answer, resulting in the entry of default and a default judgment, or the failure to meet court-imposed deadlines for the prosecution of an otherwise timely action, resulting in dismissal of the action. 16 A.R.S. Rules Civ.Proc., Rule 60(c)(1).

1 Cases that cite this headnote

[9] **Limitation of Actions**
Concealment of Cause of Action
Limitation of Actions
Suspension or stay in general; equitable tolling

The trial court does not have the discretion to apply the rule authorizing relief from a final judgment to resurrect or otherwise allow the untimely filing of a complaint; rather, the only courses of action available to the plaintiff are to seek, if applicable, statutorily based relief founded on the suspension or legal tolling of the statute of limitations or equitable relief founded on the defendants' or their agents' affirmative concealment of the cause of action or other actions causing the plaintiff to delay seeking legal redress. 16 A.R.S. Rules Civ.Proc., Rule 60(c)(1).

10 Cases that cite this headnote

[10] **Limitation of Actions**
Suspension or stay in general; equitable tolling

Procedural requirements established by the legislature for gaining access to the courts are not to be disregarded by courts out of a vague sympathy for particular litigants; in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Cases that cite this headnote

Attorneys and Law Firms

****745** Riggs Ellsworth & Porter, P.L.C. by Matthew L. Riggs, Mesa, Attorney for Plaintiff/Appellant.

The Ledbetter Law Firm, P.L.C. by James E. Ledbetter, Brett R. Rigg, Cottonwood, Attorneys for Defendant/Appellee.

***426 OPINION**

WINTHROP, Judge.

¶ 1 Holly Porter ("Plaintiff") appeals the trial court's judgment dismissing her complaint because it was untimely filed under the applicable statute of limitations. We hold that Rule 60(c)(1), Ariz. R. Civ. P., does not allow relief from a judgment entered based on a statute of limitations.

BACKGROUND

¶ 2 Plaintiff suffered personal injuries in an automobile collision on September 25, 2006. She secured the services of counsel, who prepared a civil complaint seeking compensation for those injuries. The complaint was mailed to the Navajo County Superior Court on September 19, 2008, six days before the statutory two-year limitations period for such actions, see Ariz.Rev.Stat. ("A.R.S.") § 12–542 (2003), was to expire. The envelope was returned for insufficient postage and received by the law office on September 24, one day before the limitations period would expire. Upon seeing the insufficient postage designation on the returned envelope, law office staff, without consulting the attorney or other staff responsible for handling the matter, and without reviewing the contents, simply placed the contents in another envelope with additional postage and re-mailed it to the court. Upon receipt, the clerk of the court filed the complaint on September 26; unfortunately for Plaintiff, this was one day after the limitations period had expired.

¶ 3 Defendant moved for summary judgment based on the statute of limitations. In response, Plaintiff conceded her complaint was filed after limitations had run, but she argued that under Rule 60(c)(1), even if summary judgment were granted, the judgment should immediately be set aside based on the excusable neglect of the law office staff. Following briefing and without argument, the trial court granted the defense motion for summary judgment and concomitantly denied Plaintiff's Rule 60(c)(1) motion on the basis that she had not met her burden of showing excusable neglect.[1]

¶ 4 This timely appeal followed. We have jurisdiction pursuant to A.R.S. § 12–2101(B) (2003). *See also* A.R.S. § 12–2101(C); *Schwab v. Ames Constr.*, 207 Ariz. 56, 58–59, ¶¶ 9–12, 83 P.3d 56, 58–59 (2004) (recognizing that technical procedural defects generally do not deprive this court of jurisdiction).

ANALYSIS

¶ 5 We review *de novo* the trial court's interpretation of A.R.S. § 12–542 and the reach of Rule 60(c)(1). *See Owens v. City of Phoenix*, 180 Ariz. 402, 405, 884 P.2d 1100, 1103 (App.1994); *Libra Group, Inc. v. State*, 167 Ariz. 176, 179, 805 P.2d 409, 412 (App.1991). To the extent that we review whether there is a sufficient factual basis on which to apply Rule 60(c)(1) to set aside a judgment, we apply an abuse of discretion standard. *See Staffco, Inc. v. Maricopa Trading Co.*, 122 Ariz. 353, 356,

595 P.2d 31, 34 (1979).

I. The Applicable Statute of Limitations Was Not Extended or Tolled.

[1] ¶ 6 In interpreting and applying statutes, Arizona courts have previously recognized ***427 **746** that the most compelling evidence of the legislature's intent is the language it has chosen to use in the statute. *See, e.g., Zamora v. Reinstein,* 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996); *In re Estate of Jung,* 210 Ariz. 202, 204, ¶ 12, 109 P.3d 97, 99 (App.2005). Here, A.R.S. § 12–542 provides in pertinent part as follows:

> Except as provided in § 12–551 [the statute of limitations regarding product liability] there shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:
>
> 1. For injuries done to the person of another....

[2] [3] ¶ 7 The plain purpose of statutes of limitations is to identify the outer limits of the period of time within which an action may be brought to seek redress or to otherwise enforce legal rights created by the legislature or at common law. *See In re Estate of Travers,* 192 Ariz. 333, 336, ¶ 21, 965 P.2d 67, 70 (App.1998) ("A statute of limitations is a legislative enactment which sets maximum time periods during which certain actions can be brought." (citing Black's Law Dictionary 927 (6th ed.1990))).[2] As a matter of public policy, our legislature has determined that claims must be brought within an identifiable period of time, and claims brought thereafter are, absent certain circumstances, too stale to be enforceable.

> The legitimate purposes of statutes of limitations are threefold: (1) to protect defendants from stale claims, *see Brooks v. Southern Pacific Co.,* 105 Ariz. 442, 444, 466 P.2d 736, 738 (1970) (pursuit of a claim after an unreasonable amount of time may be thwarted when evidence may have been lost or witnesses' memories have faded); (2) to protect defendants from insecurity—economic, psychological, or both, Comment, *Developments in the Law: Statutes of Limitations,* 63 HARV.L.REV. 1177, 1185 (1950) ("there comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations"); and (3) to protect courts from the burden of stale claims. *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945).
>
> *Ritchie v. Grand Canyon Scenic Rides,* 165 Ariz. 460, 464, 799 P.2d 801, 805 (1990); *accord Jackson,* 23 Ariz.App. at 203, 531 P.2d at 936 ("The underlying purpose of statutes of limitations is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution." (quoting Wood at 8–9)).

[4] ¶ 8 To determine whether a claim is time-barred, we examine four factors: "(1) when did the plaintiff's cause of action accrue; (2) what is the applicable statute of limitations period; (3) when did the plaintiff file his [or her] claim; and (4) was the running of the limitations period suspended or tolled for any reason?" *Taylor v. State Farm Mut. Auto. Ins. Co.,* 182 Ariz. 39, 41, 893 P.2d 39, 41 (App.1994) (citing *Roldan v. Allstate Ins. Co.,* 149 A.D.2d 20, 544 N.Y.S.2d 359, 362 (1989)), *vacated in part on other grounds,* 185 Ariz. 174, 913 P.2d 1092 (1996).

¶ 9 There is no issue here concerning accrual or discovery of the cause of action, and Plaintiff acknowledges that she filed her complaint one day late; thus, we address whether the limitations period was suspended or tolled.

¶ 10 Our legislature has provided for the suspension or tolling of a limitations period only in very limited and specified situations. *See, e.g.,* A.R.S. §§ 12–501 (2003) (providing that the absence of a defendant from the state at the time the cause of action accrues or during the limitations period extends the limitations period); 12–502 (2003) (providing that minors and persons of "unsound mind" are considered "disabled" as a matter of law, ***428 **747** and the limitations period is tolled until the disability is removed); 12–508 (2003) (providing that a cause of action may be tolled by a written agreement signed by the party to be charged); 14–3802 (2005) (providing for limited suspension of statutes of limitations for certain claims in probate cases); 43–722 (2006) (providing for suspension of the running of the statute of limitations on the making of assessments by the department of revenue in cases involving bankruptcy or receivership). We have found no statutory exception that applies to suspend or legally toll the limitations period in this matter.

[5] ¶ 11 Further, the doctrine of equitable tolling, a concept rooted in the common law, *see Hosogai v. Kadota,* 145 Ariz. 227, 231, 700 P.2d 1327, 1331 (1985),[3] is not applicable here. In instances involving equitable tolling, courts have recognized that, as a matter of equity, a defendant whose affirmative acts of fraud or concealment have misled a person from either recognizing a legal

wrong or seeking timely legal redress may not be entitled to assert the protection of a statute of limitations.[4] *See, e.g., Walk v. Ring,* 202 Ariz. 310, 319, ¶¶ 34–37, 44 P.3d 990, 999 (2002); *Certainteed Corp. v. United Pac. Ins. Co.,* 158 Ariz. 273, 277, 762 P.2d 560, 564 (App.1988) (stating that a defendant insurer will be estopped from asserting the defense of the statute of limitations if by its conduct the insurer induces its insured (the plaintiff) to forego litigation by leading the insured to believe a settlement will be effected without the necessity of commencing litigation).

¶ 12 In this case, there is no contention that the actions of Defendant, or her agents or representatives, served to conceal the cause of action, misled Plaintiff in any fashion, or caused Plaintiff to delay filing her complaint in a timely manner. Additionally, Plaintiff alleges no facts presenting the "extraordinary circumstances" contemplated by this court in *McCloud. See* 217 Ariz. at 87–89, ¶¶ 11–20, 170 P.3d at 696–98. Accordingly, we conclude that the limitations period established by § 12–542 was not equitably suspended or tolled. Plaintiff's complaint was untimely filed as a matter of law.

II. Rule 60(c)(1) Relief Is Not Available When A Complaint Is Untimely Filed.

[6] ¶ 13 Rule 60(c)(1) provides that a party or a party's legal representative may be relieved from a final judgment upon a showing of "mistake, inadvertence, surprise or excusable neglect." In the proceedings below, Plaintiff contended that the actions of the law office staff constituted "excusable neglect," and she maintains the trial court should consequently have granted her motion to set aside the judgment. It appears the trial court assumed that Rule 60(c)(1) relief was theoretically available, but denied relief because it found that the actions of the law office staff were, in the final analysis, not excusable. On appeal, Plaintiff contends that the failure of her attorney's staff to review the contents of the returned mail constitutes "the type of mistake, inadvertence [ ] or excusable neglect" contemplated by Rule 60(c)(1), thereby entitling her to relief from the judgment dismissing her complaint. We disagree.

¶ 14 Plaintiff cites to no authority, and we have found none, expressly holding that, pursuant to Rule 60(c)(1), a plaintiff's "mistake, inadvertence, surprise or excusable neglect" justifies the untimely filing of a complaint. Instead, she relies on cases recognizing, or expressly holding, that secretarial or clerical errors resulting in missed deadlines *in pending, timely instituted cases* amount to conduct warranting Rule 60(c) relief from default judgments. *See* ***429 **748** *Daou v. Harris,* 139 Ariz. 353, 360, 678 P.2d 934, 941 (1984) (defendant's failure to timely answer a complaint resulted in a default judgment); *Cook v. Indus. Comm'n,* 133 Ariz. 310, 312, 651 P.2d 365, 367 (1982) (untimely request for review in an administrative action); *Wilshire Mortgage Corp. v. Elmer Shelton Concrete Contractor, Inc.,* 97 Ariz. 65, 67, 397 P.2d 50, 51 (1964) (untimely answer leading to a default judgment); *Coconino Pulp & Paper Co. v. Marvin,* 83 Ariz. 117, 121, 317 P.2d 550, 552 (1957) (same); *Kohlbeck v. Handley,* 3 Ariz.App. 469, 472, 415 P.2d 483, 486 (1966) (same); *see also Andrew v. Indus. Comm'n,* 118 Ariz. 275, 277, 576 P.2d 134, 136 (App.1977) (untimely request for a hearing after the denial of a workmen's compensation claim); *Trull v. Indus. Comm'n,* 21 Ariz.App. 511, 513, 520 P.2d 1188, 1190 (1974) (same).

[7] ¶ 15 Even if we assume without deciding that the failure to timely file the complaint in this case is properly attributed to "excusable neglect" as contemplated by Rule 60(c)(1), we conclude that, absent more, "excusable neglect" does not justify relief from the applicable statute of limitations.

> We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. *Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 151, 104 S.Ct. 1723, 1725, 80 L.Ed.2d 196 (1984)....
>
> ... [T]he principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect.

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (footnotes omitted); *accord McCloud,* 217 Ariz. at 88–89, ¶¶ 16–20, 170 P.3d at 697–98 (citing *Irwin* and concluding that counsel's extensive series of personal and family health issues was insufficient to warrant finding that the trial court abused its discretion in failing to find the level of excusable neglect necessary to support equitable tolling). Plaintiff cannot use the excusable neglect standard of Rule 60(c)(1) to circumvent the standard required for equitable tolling.

[8] ¶ 16 Simply stated, the provisions of Rule 60(c)(1) do

not apply in this setting. To hold otherwise would make statutes of limitations meaningless. The purpose of Rule 60(c) is to allow a trial court discretion to relieve a party's failure to comply with court-established or mandated rules; e.g., the failure to file a timely answer, resulting in the entry of default and a default judgment, *see, e.g., Daou,* 139 Ariz. at 356, 678 P.2d at 937, or the failure to meet court-imposed deadlines for the prosecution of an otherwise timely action, resulting in dismissal of the action. *See Copeland v. Ariz. Veterans Mem'l Coliseum & Expo. Ctr.*, 176 Ariz. 86, 87, 859 P.2d 196, 197 (App.1993); *Resolution Trust Corp. v. Maricopa County,* 176 Ariz. 631, 632, 863 P.2d 923, 924 (Tax 1993). *See also* A.R.S. § 12–504 (2003) ("savings statute" that extends discretion to the trial court to allow reinstatement of an action previously timely commenced that has been dismissed for failure to prosecute).

[9] ¶ 17 The trial court does not have the discretion to apply Rule 60(c)(1) to resurrect or otherwise allow the untimely filing of a complaint. In the instance of an untimely filed complaint, the only courses of action available to the plaintiff are, as previously discussed, to seek, if applicable, statutorily based relief founded on the suspension or legal tolling of the statute of limitations or equitable relief founded on the defendants' or their agents' affirmative concealment of the cause of action or other actions causing the plaintiff to delay seeking legal redress.

¶ 18 Although we recognize that courts generally disfavor a statute of limitations defense, *see, e.g., Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 590, 898 P.2d 964, 968 (1995), we further recognize that, generally, "claims that are clearly brought outside the relevant limitations period are conclusively barred." *Montano v. Browning*, 202 Ariz. 544, 546, ¶ 4, 48 P.3d 494, 496 (App.2002) (citing ***430 **749** *Hall v. Romero,* 141 Ariz. 120, 685 P.2d 757 (App.1984); *Gregory v. Porterfield*, 26 Ariz.App. 353, 548 P.2d 847 (1976)). Here, Plaintiff clearly brought her claim outside the applicable two-year statute of limitations.

[10] ¶ 19 Given the unique facts of this case, we express sympathy for Plaintiff and, to some extent, her counsel. However, as the United States Supreme Court recognized in considering a statute of limitations issue,

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532 (1980), "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

Baldwin County Welcome Ctr., 466 U.S. at 152, 104 S.Ct. 1723.

CONCLUSION

¶ 20 For the foregoing reasons, we hold that the trial court did not err in determining that Rule 60(c)(1) could not afford Plaintiff relief from the judgment dismissing her untimely filed complaint. Accordingly, we affirm the trial court's judgment summarily dismissing Plaintiff's complaint and denying Plaintiff's motion for Rule 60(c)(1) relief.

CONCURRING: DIANE M. JOHNSEN, Presiding Judge and PHILIP HALL, Judge.

All Citations

225 Ariz. 424, 239 P.3d 743, 591 Ariz. Adv. Rep. 13

Footnotes

1 The parties' briefing required the trial court to consider matters outside the pleadings, including affidavits. Consequently, the court's ruling dismissing the case is properly characterized as the grant of a motion for summary judgment. *See* Ariz. R. Civ. P. 12(b); *Frey v. Stoneman,* 150 Ariz. 106, 108–09, 722 P.2d 274, 276–77 (1986).

2 *See also City of Bisbee v. Cochise County,* 52 Ariz. 1, 6–8, 78 P.2d 982, 984 (1938) (examining some "fundamental principles" behind statutes of limitations); *Jackson v. Am. Credit Bureau, Inc.,* 23 Ariz.App. 199, 203, 531 P.2d 932, 936 (1975) ("The statute of limitations is a statute of repose, enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation be presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof." (quoting 1 Wood on Limitations ("Wood"), 8–9 (4th

ed.1916))).

3 *Superseded by statute on other grounds as recognized in Jepson v. New,* 164 Ariz. 265, 271, 792 P.2d 728, 734 (1990).

4 Additionally, this court has previously recognized that other extraordinary circumstances, such as attorney illness in limited situations, could warrant equitable tolling of the statute of limitations. *See McCloud v. State,* 217 Ariz. 82, 87–89, ¶¶ 11–19, 170 P.3d 691, 696–98 (App.2007) (acknowledging that "[m]any courts have taken the position that equitable tolling is not appropriate in such situations," but nonetheless concluding that equitable tolling based on an attorney's illness could be applied "sparingly" to "certain rare cases," such as when an attorney has "suffered a significant incapacitating disability").

End of Document

537 N.W.2d 674
Supreme Court of Iowa.

Saheb SAHU, Appellant,
v.
IOWA BOARD OF MEDICAL EXAMINERS,
Appellee.

No. 94-399.
|
Sept. 20, 1995.

Synopsis
Board of Medical Examiners instituted disciplinary proceedings against physician for allegedly knowingly and willfully making misleading, deceptive, or untrue representations in Medicaid claims. The Board imposed a 30-day suspension of physician's license to practice medicine, a five-year probation, and civil penalty of $1,000 and the District Court, Polk County, Jack D. Levin, J., affirmed. Physician appealed. The Supreme Court, Andreasen, J., held that: (1) general statute of limitations did not apply to disciplinary proceedings by the Board; (2) doctrine of laches did not bar disciplinary proceedings; and (3) substantial evidence did not support finding that physician knowingly or willfully made misleading, deceptive, or untrue representations in Medicaid claims.

Reversed and remanded.

Harris, J., dissented.

West Headnotes (13)

[1] **Administrative Law and Procedure**
Scope
Administrative Law and Procedure
Law Questions in General

Judicial review of a contested proceeding both in district court and appellate court is to correct errors at law. I.C.A. § 17A.19.

3 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Time for Hearing; Continuance

Courts usually apply general statutes of limitation to administrative proceedings in the absence of a specifically applicable provision.

Cases that cite this headnote

[3] **Administrative Law and Procedure**
Time for Hearing; Continuance
Health
Disciplinary Proceedings

If an administrative proceeding is in the public interest, such as disciplinary proceedings against a medical professional, courts will not apply general statute of limitations.

1 Cases that cite this headnote

[4] **Health**
Disciplinary Proceedings

General statute of limitations does not apply to disciplinary proceedings by the Board of Medical Examiners. I.C.A. § 614.1.

Cases that cite this headnote

[5] **Health**
Disciplinary Proceedings

Disciplinary complaint against physician filed seven years after alleged inaccurate Medicaid billings was not barred by doctrine of laches; Board of Medical Examiners properly delayed filing complaint during pendency of federal criminal charges, disciplinary proceeding was commenced within reasonable time after

conclusion of criminal trial, and there was no evidence that physician was prejudiced by delay.

4 Cases that cite this headnote

[6] **Administrative Law and Procedure**
Substantial Evidence

The Supreme Court defers to an agency's factfinding if supported by substantial evidence. I.C.A. § 17A.19, subd. 8, par. f.

Cases that cite this headnote

[7] **Administrative Law and Procedure**
Substantial Evidence

On review of agency decision, the question is whether there is substantial evidence to support the finding actually made, not whether evidence might support a different finding. I.C.A. § 17A.19, subd. 8, par. f.

5 Cases that cite this headnote

[8] **Administrative Law and Procedure**
Weight of Evidence

Burden of proof in determining whether an agency decision is supported by substantial evidence is preponderance of the evidence. I.C.A. § 17A.19, subd. 8, par f.

1 Cases that cite this headnote

[9] **Administrative Law and Procedure**
Substantial Evidence

Evidence is not substantial to support an agency decision when a reasonable mind would find the evidence inadequate to reach the conclusion reached by the agency. I.C.A. § 17A.19, subd. 8, par. f.

5 Cases that cite this headnote

[10] **Administrative Law and Procedure**
Fact Questions

The Supreme Court is bound by agency's factual findings unless a contrary result is demanded as a matter of law.

7 Cases that cite this headnote

[11] **Health**
Advertising or Fraud; Dishonesty

Substantial evidence did not support finding of Board of Medical Examiners that physician knowingly or willfully made misleading, deceptive, or untrue representations by submitting Medicaid claims containing inaccurate dates of service or mistaken claims for services or committed dishonest act; misdated billing for histories and physicals was a common practice for billing Medicaid patients in the hospital, physician actually provided to Medicaid patients services he claimed, and incorrect post-discharge and transfer billings were mistakes. I.C.A. § 147.55 subd. 3; Code 1989, § 148.6, subd. 1, par. a.

1 Cases that cite this headnote

[12] **Health**
Advertising or Fraud; Dishonesty

Delegation of paperwork associated with billing neither relieves a physician of duty to provide true information nor negates the significance of physician's certification that information submitted is true, accurate and complete.

Cases that cite this headnote

[13] **Health**
Grounds in General

Physician's honest mistake or understandable mistake warranting discipline is not a dishonest act. Code 1989, § 148.6, subd. 1, par. g.

Cases that cite this headnote

Attorneys and Law Firms

***675** John R. Sandre of Coppola, Sandre & McConville, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Theresa O'Connell Weeg, Assistant Attorney General, for appellee.

Carlton G. Salmons of Austin, Gaudineer, Austin, Salmons & Swanson, Des Moines, for amicus curiae Wesley Riggs Bagan.

Considered by HARRIS, P.J., and LARSON, SNELL, ANDREASEN, and TERNUS, JJ.

Opinion

ANDREASEN, Justice.

The petitioner seeks judicial review of a disciplinary action taken against him by the medical licensing board for incorrect billing in his medical practice. The district court affirmed the board's decision. On appeal, we reverse and remand.

I. *Background.*
The petitioner, Dr. Sahed Sahu, is a board-certified neonatologist and pediatrician, licensed to practice medicine and surgery in the State of Iowa. He is the controlling shareholder of Newborn & Pediatric Specialists, P.C. He established the billing system used by the corporation and supervised the office manager who prepared the medical claim forms. The corporation has participated in the Medicaid program in the State of Iowa since its incorporation in 1982. After completion of a thirty-three month audit of the corporation, the auditors concluded in 1985 that the corporation had submitted inaccurate Medicaid claims. The inaccuracies included misdated billings for histories and physicals, billings for services after patients were discharged, and billings for services after patients were transferred to the care of another doctor.

Sahu was indicted on federal criminal charges in a seventy-five count indictment for his inaccurate billings under the Medicaid program. In September 1989 he was acquitted of these charges after a jury trial. The Board of Medical Examiners (Board) delayed initiating disciplinary proceedings while the criminal charges were pending.

On January 17, 1991 the Board filed a complaint and statement of charges against Sahu for incorrect billing practices in 1984. These administrative disciplinary proceedings involve sixteen of the seventy-five alleged false claims for which he was indicted. After a hearing, a panel consisting of three members of the Board issued a proposed decision and order. The panel found Sahu had knowingly and willfully made misleading, deceptive, or untrue representations in Medicaid claims signed by him in 1984. The panel proposed a thirty-day suspension of his license to practice medicine, a five-year probation, and a civil penalty of $1000. The panel also recommended he complete continuing education regarding billing procedures.

On appeal to the full Board, the Board adopted and incorporated the proposed decision as its final decision. After Sahu petitioned the district court for judicial review, ***676** the court affirmed the Board's decision. Sahu appeals.

II. *Scope of Review.*
[1] Judicial review of a contested proceeding both in the district court and the appellate courts is to correct errors at law. Iowa Code § 17A.19 (1993); *Fisher v. Board of Optometry Examiners,* 510 N.W.2d 873, 875 (Iowa 1994). We must determine whether the agency decision is supported by substantial evidence when reviewing the record as a whole. Iowa Code § 17A.19(8)(f).

of time." The party asserting the defense carries the burden of establishing the essential elements by clear, convincing, and satisfactory evidence.

Committee on Professional Ethics & Conduct v. Wunschel, 461 N.W.2d 840, 846 (Iowa 1990) (citations omitted). *See also State v. Moret,* 504 N.W.2d 452, 453 (Iowa 1993) (laches defense considered in a civil habitual violator proceeding).

Here, the Board properly delayed filing the complaint during the pendency of the federal criminal charges. The disciplinary proceeding was commenced within a reasonable time after the conclusion of the criminal trial. There is no evidence that Sahu was prejudiced by the delay. He has failed to establish a laches defense.

III. *Statute of Limitations and Laches.*

Sahu argues that because the Board did not initiate the complaint against him until seven years after the alleged inaccurate billings, the complaint is barred by the statute of limitations and laches. Since there is no statute of limitations for administrative proceedings, he argues the general statute of limitations applicable to civil cases should apply. *See* Iowa Code § 614.1.

[2] [3] [4] Courts usually apply general statutes of limitation to administrative proceedings "in the absence of a specifically applicable provision." 2 Am.Jur.2d *Administrative Law* § 272, at 289 (1994); Noralyn O. Harlow, Annotation, *Applicability of Statute of Limitations or Doctrine of Laches to Proceeding to Revoke or Suspend License to Practice Medicine,* 51 A.L.R.4th 1147, 1151 (1987) (hereinafter Harlow). However, if an administrative proceeding is in the public interest, such as disciplinary proceedings against a medical professional, courts will not apply the general statute of limitations. Harlow, 51 A.L.R.4th at 1151. Therefore, "courts have held without exception that, in the absence of a statute which applies specifically to medical license revocation proceedings, statutes of limitations do not apply to such disciplinary proceedings." *Id.* We conclude the general statute of limitations in Iowa Code section 614.1 does not apply to disciplinary proceedings by the Board.

[5] Likewise, courts may apply a similar rationale with respect to the doctrine of laches as a bar to disciplinary proceedings. *Id.* at 1151-52. Although the mere passage of time is insufficient to bar the proceedings, several courts allow the defense of laches if the licensee is prejudiced by an unreasonable delay. *Id.* at 1152. In Iowa, the Board has adopted an administrative rule which provides: "Timely filing is required to ensure the availability of witnesses and to avoid initiation of an investigation under conditions which may have been significantly altered during the period of delay." 653 Iowa Admin.Code 12.50(4) (1991). This regulation incorporates the concept expressed by the laches defense.

We considered the laches defense in a lawyer disciplinary proceeding where we stated:

> Laches is an "equitable doctrine premised on unreasonable delay in asserting a right, which causes disadvantage or prejudice to another." To establish the affirmative defense of laches, prejudice must be shown. Prejudice "cannot be inferred merely from the passage

IV. *Substantial Evidence.*

[6] [7] [8] [9] [10] Sahu urges the Board's findings are not supported by substantial evidence. Because Iowa Code chapter 17A delegates fact finding to agencies, "we defer to an agency's fact finding if supported by substantial evidence." *Glowacki v. Board of Medical Examiners,* 516 N.W.2d 881, 884 (Iowa 1994). The question is whether there is substantial evidence to support the finding actually ***677** made, not whether evidence might support a different finding. *Eaves v. Board of Medical Examiners,* 467 N.W.2d 234, 237 (Iowa 1991). The burden of proof is a preponderance of the evidence. *Id.* Evidence is not substantial "when a reasonable mind would find the evidence inadequate to reach" the conclusion reached by the agency. *Fisher,* 510 N.W.2d at 877. We are bound by the agency's factual findings "unless a contrary result is demanded as a matter of law." *Eaves,* 467 N.W.2d at 237.

[11] The complaint and statement of charges filed by the executive director of the Board identified sixteen Medicaid claims filed in 1984 by the corporation and verified by Sahu as the basis for disciplinary action. All of these claims relate to services provided to patients at Mercy Hospital, Des Moines, Iowa. Nine were misdated claims for history and physical services, four were claims for services after the patient was discharged from the hospital, and three were claims for services after the patient was transferred to another physician. Sahu was charged with knowingly making misleading, deceptive, untrue, or fraudulent representations in the practice of the profession, a violation of Iowa Code sections 147.55(3) and 148.6(1)(a) (1989); with willful or repeated violations of the statutes or rules or regulations, a violation of Iowa Code sections 147.55(8) and

a dishonest act, a violation of Iowa Code section 148.6(1)(g); and with the violation of specific regulations adopted by the Board.

In response to the charge of improper billing of history and physical services, Sahu argued that the services billed were in fact performed and that his method of billing was similar to that followed by other physicians in Des Moines. He recognized and admitted that the seven incorrect billings for services after the discharge or transfer of the patient were mistakes.

In explanation as to how the mistake occurred, Sahu testified that the billing procedure used when the corporation was established required proposed billings to be submitted to the office manager. Because he and his associate were the only doctors engaged in neonatology practice serving three Des Moines hospitals, one of them was on call every weekend. As a result, billings were delayed. Both Sahu and the office manager relied on Mercy Hospital records, including the census cards and the admission and discharge reports, when preparing Medicaid claim forms. If there was a conflict between the proposed bill and the hospital census report, the claim was prepared on the basis of the dates shown on the census report. Other physicians at that time mistakenly billed for services which were not performed because they relied on Mercy Hospital census records to reflect correctly the date of the patient's admission and discharge.

The Board found Sahu guilty of knowingly making misleading, deceptive, and untrue representations, committing acts contrary to honesty, and willfully and repeatedly submitting claims for misdated history and physical services, for post-discharge services, and for post-transfer services. The Board did not find Sahu guilty of making fraudulent representations.

In its findings of fact the Board found the corporation occasionally relied on Mercy Hospital admission notices and patient listings when preparing claims for submission to Medicaid during the period of the audit, but abandoned its use of the listings after determining the information provided by the hospital was unreliable.

The Board recognized Mercy Hospital does not allow emergency room physicians to admit patients. The emergency room physicians are required to contact a physician and secure the physician's order to admit the patient. The admitting physician is required to perform a history and physical exam of the patient within twenty-four hours of the patient's admission. The Board found other physicians billed the Medicaid program for history and physicals on the date of admission even though the service actually was performed on the following date. The Board also found that Sahu did in fact perform the services but that the date of service was in error on nine patient billings. Although a federal investigator testified "they billed for two history and physicals," the Board refused to make a finding on this issue.

***678** [12] The Board concluded that although Sahu did perform the history and physical service for the nine patients, by misdating the date of the service he had knowingly made a false, deceptive, and untrue representation. The certification on the Medicaid claim form provided that information "submitted and which resulted in this claim payment is true, accurate and complete." By misdating the date of service, the Board found Sahu "knowingly" made false, deceptive, and untrue representations. The delegation of the paperwork associated with billing neither relieves the physician of the duty to provide true information nor negates the significance of the physician's certification. The Board found Sahu's conduct was both willful and knowingly made.

We have defined "willful" in a dental license suspension proceeding as meaning an intentional act. *Board of Dental Examiners v. Hufford*, 461 N.W.2d 194, 201 (Iowa 1990). *See also Committee of Professional Ethics & Conduct v. Crawford*, 351 N.W.2d 530, 532 (Iowa 1984) (attorney discipline case where failure to file tax return was held intentional and therefore willful).

[13] To act "knowingly" has been defined to mean that a person acted voluntarily and intentionally, and not because of mistake or accident or other innocent reason. *United States v. Enochs*, 857 F.2d 491, 493 (8th Cir.1988). Knowledge is defined in Iowa's uniform instructions to mean the defendant "had a conscious awareness" of the element requiring knowledge. 1 Iowa Criminal Jury Instructions 200.3 (1988). *See also* 1 Iowa Criminal Jury Instructions 910.4 and Iowa Code § 728.1(2) (knowingly "means being aware of the character of the matter"). An honest mistake or understandable mistake is not a dishonest act. Honesty requires that a person make representations in good faith and without a conscious knowledge of the falsity of the representations.

In our review of the record we find there is substantial evidence that the misdated billing for histories and physicals was a common practice for billing Medicaid patients in Mercy Hospital in 1984 and that Sahu actually provided to the Medicaid patients the services he claimed. There is substantial evidence that the seven incorrect post-discharge and transfer billings were mistakes. There

is no substantial evidence that Sahu knowingly or willfully made misleading, deceptive, or untrue representations by submitting Medicaid claims containing inaccurate dates of service or mistaken claims for services. Nor is there substantial evidence that Sahu committed a dishonest act or violated regulations adopted by the Board based upon the statutory violations.

V. *Disposition.*

We conclude a reasonable person would find the facts and circumstances presented in this proceeding to be inadequate to reach the conclusions reached by the Board. We therefore reverse the decision of the district court and remand to the Board for entry of an order dismissing the complaint. Because of this ruling we need not address the constitutional challenges of double jeopardy and due process raised by Sahu in his appeal.

REVERSED AND REMANDED.

All justices concur except HARRIS, J., who dissents.

All Citations

537 N.W.2d 674, Med & Med GD (CCH) P 43,675

203 W.Va. 234
Supreme Court of Appeals of
West Virginia.

STATE ex rel. Deleno H. WEBB, M.D., Petitioner below, Appellee,
v.
WEST VIRGINIA BOARD OF MEDICINE, Respondent below, Appellant (Two Cases).

Nos. 24640, 24641.
|
Submitted June 2, 1998.
|
Decided July 16, 1998.
|
Concurring and Dissenting Opinion of Justice Workman July 20, 1998.

Synopsis
After Board of Medicine filed charges alleging that psychiatrist engaged in sexual intercourse with two patients, psychiatrist applied for writ of prohibition against Board in both matters. The Circuit Court, Kanawha County, A. Andrew MacQueen, J., ruled that Board could not proceed with complaints. Board appealed. The Supreme Court of Appeals, Starcher, J., held that doctrine of laches precluded Board from proceeding with respect to one complaint, but not with other.

Affirmed in part, reversed in part, and remanded.

Workman, J., issued opinion concurring in part and dissenting in part.

West Headnotes (9)

[1] **Prohibition**
Appeal and Error

The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of prohibition is de novo.

Cases that cite this headnote

[2] **Equity**
Prejudice from Delay in General

The elements of "laches" consist of (1) unreasonable delay and (2) prejudice.

2 Cases that cite this headnote

[3] **Equity**
Application of Doctrine in General

Laches is an equitable defense, and its application depends upon the particular facts of each case.

Cases that cite this headnote

[4] **Equity**
Lapse of Time

Mere delay will not bar relief in equity on the ground of laches.

Cases that cite this headnote

[5] **Equity**
Prejudice from Delay in General

"Laches" is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.

Cases that cite this headnote

[6] **Health**
Disciplinary Proceedings

The doctrine of laches may be applicable in physician discipline proceedings; however, in applying the doctrine in such proceedings, the interests of the state, the public and the medical profession must be given substantial consideration, and the doctrine should be applied narrowly and conservatively and in such a fashion as to not unfairly impair the Board's duty and responsibility to supervise and regulate the medical profession for the protection of the profession and the public. Code, 30-3-1 et seq.

2 Cases that cite this headnote

[7] **Health**
Disciplinary Proceedings

Doctrine of laches did not preclude Board of Medicine from going forward with complaint alleging that psychiatrist engaged in sexual intercourse with patient, even though complaint was not filed until 18 years after sexual relationship in question began and eight years after it ended; delay was at least in part psychiatrist's responsibility, as evidence showed that his psychological dominance over patient precluded her from fully appreciating both wrongfulness of his conduct and need to report his conduct, and psychiatrist failed to prove that he had been prejudiced by any delay. Code, 30-3-1 et seq.

Cases that cite this headnote

[8] **Health**
Scope of Review

Although the Board of Medicine is not required to accept automatically the recommendations of a hearing examiner in a physician discipline proceeding, the Board must present a reasoned, articulate decision for not doing so. Code, 30-3-1 et seq.

Cases that cite this headnote

[9] **Health**
Disciplinary Proceedings

Doctrine of laches precluded Board of Medicine from going forward with complaint alleging that psychiatrist engaged in sexual intercourse with patient; complaint arose from alleged incident that occurred some 13 years earlier, and there was no evidence showing that Board's unexplained delay in matter was reasonable. Code, 30-3-1 et seq.

Cases that cite this headnote

****831 *235** *Syllabus by the Court*

1. "Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right." Syllabus Point 2, *Bank of Marlinton v. McLaughlin*, 123 W.Va. 608, 17 S.E.2d 213 (1941).

2. The doctrine of laches may be applicable in proceedings by and before the West Virginia Board of Medicine pursuant to *W.Va.Code*, 30-3-1, *et seq.* However, in applying the doctrine of laches in such proceedings, the interests of the state, the public and the medical profession must be given substantial consideration, and the doctrine should be applied narrowly and conservatively and in such a fashion as to not unfairly impair the Board's duty and responsibility to supervise and regulate the medical profession for the protection of the profession and the public.

Attorneys and Law Firms

Rudolph L. DiTrapano, Esq., Sean P. McGinley, Esq., DiTrapano & Jackson Charleston, West Virginia, Attorneys for Appellee.

****832 *236** Deborah Lewis Rodecker, Esq., West

Virginia Board of Medicine, Charleston, West Virginia, Attorney for Appellant.

Opinion

STARCHER, Justice:

In the instant case we uphold in part and reverse in part a decision of the Circuit Court of Kanawha County. We determine that the West Virginia State Board of Medicine can go forward with one disciplinary proceeding against a psychiatrist charging him with having a sexual relationship with a patient; in another proceeding, charging the doctor with the same conduct with another patient, we determine that a complainant's delay in making a complaint bars further proceedings.

I.

Facts and Background

The appellant, the West Virginia Board of Medicine ("the Board"), established pursuant to *W.Va.Code,* 30-3-1, *et seq.,* filed charges against the appellee, Dr. Deleno H. Webb[1] ("Dr. Webb"), a Huntington, West Virginia psychiatrist, in two separate complaints-one filed in November 1993, the other in August 1994.

The first complaint alleged that Dr. Webb engaged in sexual intercourse with his patient, Ms. D.[2], beginning in 1975, when Ms. D. was 17, and continuing through 1985. The second complaint alleged that on one occasion in 1979, Dr. Webb engaged in sexual intercourse with a second patient, Ms. M.

Dr. Webb applied for a writ of prohibition against the Board in the Circuit Court of Kanawha County in both matters. On September 16, 1994, the circuit court ordered the Board to consider "what, if any, impact the doctrine of laches will have on the allegations" against Dr. Webb. The circuit court also ordered that "the Board shall assume that the doctrine of laches applies and make initial determinations in both cases as to what prejudice, if any, has occurred and whether these proceedings should be barred as a result." The circuit court's order further declared that any misconduct in which Dr. Webb engaged prior to the 1980 enactment of *W.Va.Code,* 30-3-1 *et seq.* should be governed by the disciplinary provisions of the law in place at the time of the alleged misconduct.

Accordingly, the Board excised its complaints and notices to meet the circuit court's directive. By order dated January 18, 1995, the Board scheduled a hearing before a Board-designated hearing examiner so the Board could "consider the evidence and make initial determinations as to what prejudice, if any, has occurred, and whether further proceedings should be barred as a result."

At this "laches" hearing, Webb presented one witness, an investigator, who testified as to difficulties in gaining access to witnesses and other information. The Board presented as witnesses its executive director, Ronald D. Walton; Nancy Hill, Ms. D.'s attorney; and John Adams, M.D., Ms. D.' s then-current treating psychiatrist. The Board also had testimony and evidence from a related civil proceeding against Dr. Webb filed by Ms. D.

After the filing of legal memoranda, the Board's hearing examiner, applying the doctrine of laches, recommended that the Board should be permitted to go forward in the D. matter, and that the Board should not be permitted to go forward in the M. matter.

In May 1995, the Board entered an order accepting the hearing examiner's recommendation as to the D. matter, and modifying the recommendation in the M. matter. The Board asserted in the order that it had carried out the circuit court's directive, even though the Board believed that the circuit court's direction to assume that the doctrine of laches applied constituted an error of law.

The Board next scheduled a hearing on the merits of the two complaints. Dr. Webb again applied to the Circuit Court of Kanawha County for a writ of prohibition against the Board's holding a hearing on the merits ****833 *237** of the charges. With no ruling forthcoming from the circuit court, in August 1996, the Board applied to this Court for the issuance of a writ of mandamus requiring the circuit court to rule on Dr. Webb's request for a writ of prohibition. We issued the writ. In April 1997, the circuit court ruled that the Board was not permitted to hold a hearing on the merits of the complaints against Dr. Webb.

From this ruling by the Circuit Court of Kanawha County, the Board appeals.

II.

Standard of Review

[1] "The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of prohibition is de novo." Syllabus Point 1, *Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W.Va. 613, 486 S.E.2d 782 (W.Va.1997).

III.

Discussion

A.

Is the Doctrine of Laches Applicable in Board of Medicine Proceedings?

[2] This Court's customary brief formulation of the doctrine of laches was stated in *Province v. Province*, 196 W.Va. 473, 483, 473 S.E.2d 894, 904 (1996): "The elements of laches consist of (1) unreasonable delay and (2) prejudice."

[3] [4] [5] We have also stated:

> Laches is an equitable defense, and its application depends upon the particular facts of each case. There are some general principles, however, which a court should be mindful of when determining whether the doctrine of laches is applicable. For instance, "[m]ere delay will not bar relief in equity on the ground of laches. 'Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.' "

State ex rel. West Virginia Dept. of Health and Human Resources, Child Advocate Office, on Behalf of Jason Gavin S. by Diann E.S. v. Carl Lee H., 196 W.Va. 369, 374, 472 S.E.2d 815, 820 (1996) (citations omitted).

A substantial number of jurisdictions have held or assumed for decisional purposes that some form of the doctrine of laches may be applicable in disciplinary proceedings against physicians. Annotation, *Applicability of statute of limitations or doctrine of laches to revoke or suspend license to practice medicine*, 51 A.L.R.4th 1147.

The argument that there should be a place for the doctrine of laches in physician discipline cases rests on fundamental fairness. The privilege (*W.Va.Code*, 30-3-1 [1980]) to practice medicine is a valuable one. To have that privilege threatened in a proceeding where one is severely prejudiced by an unreasonable delay not of one's own making could be very unfair.

However, it is also important to recognize that physician discipline proceedings are not the sort of traditional, common-law adversarial civil proceedings in which doctrines like laches evolved, to balance the rights and interests of purely private parties. In a physician discipline proceeding, the interests of the state, the general public and the medical profession are the primary concern.

Thus, there may be circumstances in a physician discipline proceeding when even a substantial degree of prejudice to a physician that is caused by an unreasonable delay not of the physician's making might nevertheless be outweighed by the strong interests of the state, the public and the profession in fully addressing allegations of serious professional misconduct-so as to tip the equitable balance in favor of continuing with a proceeding.

[6] For the foregoing reasons, we hold that the doctrine of laches may be applicable in proceedings by and before the West Virginia Board of Medicine pursuant to *W.Va.Code*, 30-3-1, *et seq.* However, in applying the doctrine of laches in such proceedings, the interests of the state, the public and the medical profession must be given substantial consideration, and the doctrine should be applied narrowly and conservatively and in ****834 *238** such a fashion as to not unfairly impair the Board's duty and responsibility to supervise and regulate the medical profession for the protection of the profession and the public.[3]

To the extent that the holding in Syllabus Point 7 of *State v. Sponaugle*, 45 W.Va. 415, 32 S.E. 283 (W.Va.1898) (laches is not imputable to the state) suggests that as a state-sponsored entity, the Board is not subject to laches, the holding of that case is hereby modified.

B.

The Application of the Doctrine of Laches in the Instant Case

As previously stated, the circuit court's first order instructed the Board to consider the application of the doctrine of laches to the proceedings involving Dr. Webb. While the circuit court's second order prohibiting further proceedings questioned whether the Board had applied the doctrine in good faith, the record shows that the Board and its hearing examiner both applied the doctrine-although the Board did so under protest.

Both the examiner and the Board concluded that laches should not bar proceeding on the D. matter. However, the examiner and the Board differed on the M. matter. The examiner recommended that laches should bar proceedings on the M. matter; the Board disagreed and ruled that laches should not be a bar.

The circuit court concluded that the Board had erred as a matter of law in its application of laches to both matters, and granted a writ of prohibition barring further proceedings on both. It is this determination by the circuit court that we review, *de novo.*

[7] The hearing examiner's recommendation in the D. matter was based, *inter alia,* upon the examiner's findings, adopted by the Board, that (1) any delay had been proven to be at least in part Dr. Webb's responsibility and therefore was not unreasonable; and (2) that Dr. Webb had not proven that he had been prejudiced by any delay.

If upheld, these findings are dispositive on the laches issue in the D. matter. Our review of the record as a whole shows that there was substantial-indeed overwhelming-evidence that supported these findings.[4]

The Board thus permissibly found that laches did not bar going forward with the D. matter, and the circuit court erred in effectively reversing that finding by granting a writ of prohibition against further proceedings in that matter.

In the M. matter, the hearing examiner found that Dr. Webb had shown that (1) there was an unexplained and unreasonable delay; and (2) that there was prejudice to Dr. Webb from such a delay.

[8] If these findings by the examiner control, then laches might bar going forward in ****835 *239** the M. matter, as the essential prerequisites of unreasonable delay and prejudice are present. However, the Board modified these recommended findings by the ALJ, as it is entitled to do. "Although the Board is not required to accept automatically the recommendations of a hearing examiner, the Board must present 'a reasoned, articulate decision [for not doing so].' " *Berlow v. West Virginia Bd. of Medicine,* 193 W.Va. 666, 670, 458 S.E.2d 469, 473 (1995).

[9] In the instant case, we cannot accept the Board's generic conclusion that there was no delay-related prejudice to Dr. Webb in the M. matter. As the hearing examiner said, "[a] single alleged incident, said to occur some 13 years ago, is much more difficult to prove in the negative. The recall of events does blur over time."

Additionally, the examiner recommended that laches should bar further proceedings in the M. matter, not just because of prejudice, but also because the Board did not present any reason or explanation, other than speculation, for the delay by M. in making a complaint to the Board. That is, there was no evidence showing that the complainant's unexplained delay in the M. matter was reasonable.

The Board was thus acting without support in the record in modifying the examiner's finding of prejudice resulting from an unexplained delay of over 13 years in the M. matter. We conclude therefore that the examiner's findings should not have been modified by the Board in the M. matter.

It follows that if significant prejudice and unreasonable delay in bringing a complaint to the Board were established in the M. matter, laches could be applicable. However, that is not the end of the inquiry. Neither the hearing examiner or the Board explicitly balanced the public and the profession's interests against the prejudice to Dr. Webb resulting from an unexplained and unreasonable delay in the M. matter.

We understand the Board's reluctance to allow delay in the presentation of a complaint to bar the Board from performing its duties to the public and the profession. And as we have noted, the mere existence of prejudice to a physician from such an unreasonable delay, while enough

to invoke the possible application of the doctrine of laches, does not end the inquiry. A further balancing must occur, involving the interests of the public and the profession as well as those of the physician.

Although this Court could remand this issue to the Board for such a balancing, this case has clearly been too long already in getting to a hearing on the merits. We conclude that the hearing examiner implicitly performed such a balancing in determining that laches should bar further proceedings in the M. matter. The Board, having failed to offer any reason for the complainant's delay in the M. matter, is in a poor position to challenge the equity of the examiner's recommendation.

Consequently, we uphold the examiner's determination, ratified by the circuit court, that laches prohibits further Board proceedings on the M. matter.

IV.

Conclusion

The circuit court erred in granting a writ of prohibition that effectively reversed the Board's ruling that laches did not bar going forward with the D. matter and prohibited further proceedings in that matter. The circuit court did not err in granting a writ of prohibition preventing further proceedings in the M. matter. This case must be remanded to the Board for full proceedings before the Board on the merits of the D. matter.[5]

Affirmed, in part; reversed, in part; and remanded.

WORKMAN, J., dissents, in part, and concurs, in part.

****836 *240** MAYNARD, J., deeming himself disqualified, did not participate in the decision in this case.

GARY JOHNSON, Judge, siting by special assignment.

WORKMAN, Justice, concurring, in part, and dissenting, in part:

(Filed July 20, 1998)

I concur with the majority that the circuit court erroneously dismissed the Board of Medicine's complaint against Dr. Webb in connection with the charge involving Ms. D., but dissent in its affirmation of the circuit court's dismissal of the Board's charge involving Ms. M. Furthermore, while I do not disagree with the majority's only new syllabus point, which provides that the doctrine of laches may be applicable to proceedings by and before the West Virginia Board of Medicine, I object strenuously to its application where there was no delay on the part of the Board. Application of laches where there is no delay by the party against whom it is asserted is a substantial departure from existing law; yet the majority makes such departure without even placing that new law into a new syllabus point.[1]

In its discussion of the doctrine of laches, the majority is silent with respect to an important element of the affirmative defense of laches, one that is embedded into all of our law on this concept. As we said in *State ex rel. Smith v. Abbot,* 187 W.Va. 261, 418 S.E.2d 575 (1992), laches is an equitable, affirmative defense that is "sustainable only on proof of two elements: (1) lack of diligence *by the party against whom the defense is asserted,* and (2) prejudice to the party asserting the defense." 187 W.Va. at 264, 418 S.E.2d at 578 (citing *Mogavero v. McLucas,* 543 F.2d 1081 (4th Cir.1976)) (emphasis added).

In the instant case, although there was a substantial time delay between the charged conduct and the patient complaints, there is absolutely nothing in the record to demonstrate any delay on the part of the Board of Medicine, which is the complaining party here and the party against whom the lower court and the majority have permitted the assertion of the defense of laches.

Unfortunately, the lower court and the majority of this Court have treated this issue as if it is a claim by the complainant against the doctor. If that were the case, the doctrine of laches might very well apply.[2] Here, however, the Board of Medicine represents interests far more substantial than the rights of the two complainants. The Board's duty is to protect the general public from physicians who behave improperly or unethically toward

their patients. West Virginia Code § 30-3-1 (1980), concerning the Board of Medicine, states, in part: "As a matter of public policy, it is necessary to protect the public interest through enactment of this article and to regulate the granting of [medical] privileges and their use."

Particularly where the Board is not the entity causing the delay, laches should not be asserted against the Board. In *Ohio State Board of Pharmacy v. Frantz,* 51 Ohio St.3d 143, 555 N.E.2d 630 (Ohio 1990), even where the Board of Pharmacy did not act as expeditiously as possible upon receiving the complaint,, ****837 *241** the Ohio court held that laches was not a "defense to a suit by the government to enforce a public right or to protect a public interest." 555 N.E.2d at 633. "To impute laches to the government would be to erroneously impede it in the exercise of its duty to enforce the law and protect the public interest." *Id. See Perez v. Missouri State Board of Registration for the Healing Arts,* 803 S.W.2d 160 (Mo.App.1991); *Lyman v. Walls,* 660 S.W.2d 759 (Mo.App.1983).

In *Larocca v. State Board of Registration for the Healing Arts,* 897 S.W.2d 37 (Mo.App.1995), the Missouri Court held that a physician could invoke the doctrine of laches only if he could prove that the Board had knowledge of the facts giving rise to its proceedings to revoke his license and it delayed the proceedings to the extent that he suffered legal detriment. 897 S.W.2d at 45. In *Wang v. Board of Registration in Medicine,* 405 Mass. 15, 537 N.E.2d 1216 (Mass.1989), the Supreme Judicial Court of Massachusetts held that the Medical Board was not barred from instituting its disciplinary proceedings against a physician pursuant to the doctrine of laches based upon delay since laches was not applicable due to the fact that a public right was being enforced by the Board. 537 N.E.2d at 1220.

If we are to depart from the traditional principle holding that laches is not imputable against the State, we should do so under narrowly tailored circumstances. While jurisdictions have differed in their approaches to this issue, I believe the soundest reasoning involves a preliminary determination of the cause of the delay. If attributable to the Board, the laches argument may be forwarded; if attributable to the patient, however, with no lack of diligence on the part of the Board after receiving the complaint, laches may not be asserted against the Board. The duty of the Board of Medicine is, after all, not merely the advancement of the rights of private individuals, but the protection of the general public interest against incompetent and unethical doctors.

All Citations

203 W.Va. 234, 506 S.E.2d 830

Footnotes

1 In the circuit court's order in the proceedings below, Dr. Webb's first name was apparently misspelled "Delano."

2 Because this case involves sensitive matters, we use the initials of the last names of the two women who made complaints to the Board of Medicine.

3 In Board of Medicine proceedings, there are at least two junctures where we perceive that laches may be applicable: (1) when there is an issue of the timeliness of the making of a complaint to the Board; and (2) where there is an issue of the timeliness of actions taken by the Board.

4 The record contains Dr. Webb's deposition testimony in a civil suit brought by Ms. D. Dr. Webb admitted to having sex with Ms. D. for over 6 years, beginning when she was a depressed teenager with severe psychiatric problems requiring medication and hospitalization, and an apparent history of familial abuse.

Dr. Webb claimed that he began having sex with Ms. D., not in 1975 when she first became his patient, but in 1977, after he "transferred" her to another doctor in the same practice group. However, the record shows that over a several-year-long period after the alleged transfer, Dr. Webb prescribed medicine for Ms. D., gave orders at hospitals regarding her care, and otherwise took responsibility for her medical care. During this period of time, Dr. Webb admitted to having sex with Ms. D.

Given this strong *prima facie* evidence of misconduct, in the form of an admission by Dr. Webb, the examiner was clearly justified in finding that any prejudice from delay in the D. case was *de minimis. See generally, Pons v. Ohio State Medical Board,* 66 Ohio St.3d 619, 614 N.E.2d 748 (1993), for a case involving similar alleged physician misconduct.

As to Dr. Webb's role in causing any delay, Dr. Adams, Ms. D.'s treating physician in 1992 (when Ms. D. made her complaint to the Board about Dr. Webb), testified how Dr. Webb used his physician status to exercise psychological dominance in his relationship with Ms. D., and explained how this dominance precluded Ms. D. from fully appreciating both the wrongfulness of Dr. Webb's conduct and the need to report Dr. Webb's conduct to protect other vulnerable patients.

5 We add that further judicial intervention in and delay of the proceedings before the Board would be particularly inappropriate, given the substantial amount of time that the proceedings we review in the instant opinion have consumed.

1 It is also of great concern that the majority, in the body of its opinion, modifies an existing point in *State v. Sponaugle,* 45 W.Va. 415, 32 S.E. 283 (1898) without placing such modification into a new syllabus point. It is important to the coherent development of the case law that such modifications to existing law be reflected in syllabus points.

2 It seems especially ironic, however, to seize upon delay on the part of the patients in bringing the charges forth when they involve sexual misconduct on the part of a psychiatrist treating individuals with severe depression and emotional problems, one a juvenile and one actually suicidal. Who is in a better position to adversely impact the judgment and free will of such individuals than one in whose professional charge these emotional problems are placed? An element of the equitable defense of laches dictates that the defendant may not obtain the benefit of the defense where his own actions have created the inequity. Thus, where an individual asserting the doctrine of laches has caused or contributed to the delay, laches is inapplicable. *See C.R. v. J.G.,* 306 N.J.Super. 214, 703 A.2d 385 (N.J.Super.1997) (Party cannot have benefit of laches if its own actions have caused inequity or if it has contributed to or caused delay); *Baylie v. Swift and Co.,* 283 Ill.App.3d 421, 219 Ill.Dec. 94, 670 N.E.2d 772 (Ill.App.1996) (Adverse party may not take advantage of delay to which he has contributed, for purposes of determining whether laches bars action.)