

Nos. 24640 and 24641 -- State ex rel. Deleno H. Webb, M.D. v. West Virginia Board of Medicine

Workman, J., concurring, in part, and dissenting, in part:

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.<sup>1</sup>

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,

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<sup>1</sup>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.

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.<sup>2</sup> Here, however, the Board of Medicine

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<sup>2</sup>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., 703 A.2d 385 (N.J.Super. 1997) (Party cannot have benefit of laches if its own actions have caused

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, 555 N.E.2d 630 (Ohio 1990), even where the Board of Pharmacy did not act as expeditiously as possible upon receiving the complaint, 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).

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inequity or if it has contributed to or caused delay); Baylie v. Swift and Co., 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.)

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, 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.