

FILED

July 19, 2000

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

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Davis, J., dissenting:

Because the majority opinion affirms a circuit court order that was improperly based upon a legal theory, *res judicata*, that had been waived by Dr. Shafer, and because the West Virginia Board of Medicine (hereinafter “Board” or “West Virginia Board”) had a sufficient ground for revoking Dr. Shafer’s license notwithstanding the application of *res judicata*, I respectfully dissent.

The Circuit Court of Mingo County reversed the Board’s order revoking Dr. Shafer’s license based primarily on the doctrine of *res judicata*. *Res Judicata* is an affirmative defense, which is waived if it is not properly raised. *See generally*, 2 Am. Jur. 2d *Administrative Law* § 381, at 382 (1994) (“*Res judicata* must be pleaded as an affirmative defense, and the failure to so plead constitutes a waiver.” (footnotes omitted)). *See, e.g.*, W. Va. R. Civ. P. 8(c) (“In pleading to a preceding pleading, a party *shall* set forth affirmatively . . . *res judicata*.” (emphasis added)). In the present case, Dr. Shafer failed to raise the defense of *res judicata* in response to the Board’s complaint against her.¹

¹In fact, Shafer never specifically raised the defense of *res judicata* in her pleadings to the circuit court.

In administrative proceedings such as the one at bar, the circuit court is sitting in the capacity of an appellate court. In such circumstances, it is improper for that court to consider an issue that was not initially raised below. In fact, the West Virginia Administrative Procedures Act specifically directs that a circuit court's review of an administrative proceeding

shall be conducted by the court without a jury and *shall be upon the record made before the agency*, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.

W. Va. Code § 29A-5-4(f) (1998) (Repl. Vol. 1998) (Emphasis added).

Here, Dr. Shafer failed to raise the affirmative defense of res judicata in her initial pleading, or at any other time, before the Board. Therefore, she waived the defense. Furthermore, there was nothing in the record submitted to the circuit court on the issue of res judicata. Therefore, the circuit court erred, and exceeded the proper scope of its review, when it considered an issue that had not been addressed by the Board in the first instance.

Notwithstanding the application of res judicata, however, the Board nevertheless had sufficient grounds for revoking Dr. Shafer's license. Pursuant to the Regulations promulgated by the Board,² it may

²The Board promulgated these rules under the authority of W. Va. Code § 30-
(continued...)

revoke any license heretofore or hereafter issued by the Board, upon satisfactory proof that the licensee has:

. . . .

g. Had his or her license to practice medicine . . . in any other state, territory, jurisdiction or foreign nation revoked, suspended, restricted or limited, or otherwise acted against, or has been subjected to any other disciplinary action by the licensing authority thereof, or has been denied licensure in any other state, territory, jurisdiction, or foreign nation.

11 CSR 1A-12.1(g) (1994). It is undisputed that Dr. Shafer's license to practice medicine in the State of Kentucky was revoked by the Kentucky Board of Medical Licensure on April 21, 1994. Dr. Shafer appealed the revocation to the Jefferson Circuit Court, Kentucky, where the revocation was affirmed on August 21, 1995. Thereafter, in December 1996, the decision of the circuit court was upheld by the Kentucky Court of Appeals.

The 1993 disciplinary proceedings initiated by the West Virginia Board of Medicine against Dr. Shafer were commenced on July 15, 1993, when the Board filed its complaint. These proceedings concluded with the revocation of Dr. Shafer's medical license on November 9, 1993,³ which was not only prior to the ultimate revocation of her Kentucky license to practice medicine, but also preceded even the filing of the complaint that resulted

²(...continued)
3-7(a)(1) (1980) (Repl. Vol. 1998).

³As noted in the majority opinion, this revocation by the Board was stayed pending Dr. Shafer's appeal of her Kentucky felony conviction, and, when that conviction was overturned, Dr. Shafer's West Virginia medical license was reinstated.

in the revocation of her medical license by the Kentucky Board of Medical Licensure. Clearly, the West Virginia Board could not have addressed the revocation of Dr. Shafer's license to practice medicine in Kentucky in connection with the 1993 disciplinary proceedings against her.

Although the revocation of Dr. Shafer's medical license at issue in this appeal was based upon three separate charges, the Board made clear in its order that "revocation of Respondent Shafer's license is a valid, permissible, and adequate sanction under the [West Virginia Medical Practices Act] for her commission of *any one of the alleged violations*." For the aforementioned reasons, I would reverse the Circuit Court of Mingo County, and uphold the Board's revocation of Dr. Shafer's medical license.