No. 30032- Deleno H. Webb, III, M.D. v. West Virginia Board of Medicine

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OF WEST VIRGINIA

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Mazzone, Judge, dissenting:

The facts of this case are troubling. A psychiatrist admits to having had sexual relations over a six year period with a disturbed teenage patient who he was treating and counseling, yet excuses his activities with defenses of: 1) there exist no ethical guidelines which prevent one from having sexual relations with a purported "former" patient, and 2) there existed no physician-patient relationship at the time of the sexual incidents. Despite an overwhelming record, relatively undisputed findings of fact of the Hearing Examiner, an admission by the psychiatrist, and findings of *prima facie* misconduct by this Court in *State ex rel. Deleno H. Webb, M.D. v. West Virginia Board of Medicine*, 203 W.Va. 234, 506 S.E.2d 830 (1998), the majority adopts these erroneous defenses in rendering an opinion that may very well create a double standard in which a physician can be held liable for malpractice as result of a relationship, but yet cannot be disciplined for conduct that also arises out of the same physician-patient relationship. Because I believe the decision of the Board of Medicine was neither clearly wrong nor otherwise prejudicial to the substantial rights of the Appellee, I must respectfully dissent.

I.

Reversal Only Warranted Where Clear Error Exists

The central issue in this case is whether or not a physician-patient relationship existed at the time Dr. Webb had sexual relations with Ms. D. "Generally, it is axiomatic that unless such a relationship is established a legal duty cannot exist between the parties." *Gooch v. West Virginia Dep't of Pub. Safety*, 195 W.Va. 357, 366, 465 S.E.2d 628, 637 (1995). Indeed, the primary basis for the circuit court's reversal of the Board of Medicine's sanctions is that there existed no physician-patient relationship at the time of the sexual encounters.

The law that guides a circuit court's review of an appealed administrative order is the same standard that guides this Court's review. *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995) ("This Court reviews decisions of the circuit under the same standard as that by which the circuit [court] reviews the decision of the ALJ . . . . We review *de novo* the conclusions of law and application of law to the facts."). Hence, in consideration of an appealed administrative ruling, this Court has held:

> " ' "Upon judicial review of a contested case under the West Virginia Administrative Procedure[s] Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are '(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures;

> or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.' "Syl. Pt. 2, *Shepherdstown Volunteer Fire Department v. Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). 'Syllabus Point 1, *St. Mary's Hospital v. State Health Planning and Development Agency*, 178 W.Va. 792, 364 S.E.2d 805 (1987)." *Syllabus Point 1, HCCRA v. Boone Memorial Hospital*, 196 W.Va. 326, 472 S.E.2d 411 (1996).

Syl. Pt. 1, *Clark v. West Virginia Bd. of Med.*, 203 W.Va. 394, 508 S.E.2d 111 (1998). *See also Healy v. West Virginia Bd. of Med.*, 203 W.Va. 52, 506 S.E.2d 89 (1998); *Modi v. West Virginia Bd. of Med.*, 195 W.Va. 230, 465 S.E.2d 230 (1995).

In the case *sub judice*, the circuit court, sitting as an appellate court, determined that the order of the Board of Medicine was clearly wrong in view of the reliable, probative and substantial evidence on the whole record. "In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

A.

Findings of Fact Support Conclusions of Law

In recognition of this standard of review and having reviewed the order of the circuit court contemporaneously with the Hearing Examiner's Findings of Fact and Conclusions of Law, I believe the circuit court abused its discretion in reversing the Appellee's sanction. The findings of fact in this case are largely unrefuted. The Appellee admits that he engaged in sexual relations with a troubled teenager that he had been treating. He admits that he began sexual relations with the teenager in July 1977. However, he maintains that he "transferred" the teenage patient to his partner by letter in March 1977. Thereafter, the Appellee admits that he did treat her during a hospital stay in February 1978. According to the record, this treatment included personal visits and checks in the hospital, prescription ordering, and general patient assessment. Following this hospitalization, the Appellee admits to additional sexual encounters. Additionally, the record in this case demonstrates many more findings of fact buttressing an overall conclusion that the Appellee violated the then-ethical guidelines. In discounting this finding, the circuit court concluded that it was unsupported in the record. As recognized by the majority, the record does include the depositional testimony of an employee of the Appellee's that the "transfer" letter in March 1977 was a response to her concern about an existing sexual relationship between the Appellee and Ms. D.

Although counsel for the Appellee strenuously asserts that the Board of Medicine's findings of fact are rubber-stamped findings of the hearing examiner, the result nonetheless remains that the findings of fact must be given some deference. Indeed, appellate

courts reviewing the facts may very well disagree as to their inferences or their conclusions, as has been done in the case *sub judice*. However, in consideration of whether an administrative ruling should be disturbed on appeal, this Court has observed that:

> [t]his standard does not entitle a reviewing court to reverse the finder of fact simply because it may have decided the case differently. *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). " 'In applying the clearly erroneous standard to the findings of a [lower tribunal] sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' " 470 U.S. at 573, 105 S.Ct. at 1571, 84 L.Ed.2d at 528, quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129, 148 (1969). Indeed, if the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact. 470 U.S. at 573-74, 105 S.Ct. at 1511, 84 L.Ed.2d at 528. Moreover, we must afford the lower tribunal's findings great weight in this case because the factual determinations largely are based on witness credibility.

Board of Educ. of County of Mercer v. Wirt, 192 W.Va. 568, 578, 453 S.E.2d 402, 412 (1994). Similarly,

> Under the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences.

Syl. Pt. 3, *Stephen L.H. v. Sherry L.H.*, 195 W.Va. 384, 465 S.E.2d 841 (1995).

The circuit court, majority, and I clearly have differing inferences and application

of the facts to the law. However, despite my disagreement with the legal analysis of the majority, the record in this case supports the findings of fact and should not be so readily cast aside. As with many cases, especially those involving purported he-said/she-said evidence, the appellate court must rely upon the lower tribunal's factual determinations as the fact finder is in the best situation to make credibility assessments.

B.

The Purported "Termination" is Nothing More Than a Straw House

Because the linchpin of the circuit court's reversal is that all of the admitted sexual activity occurred after the Appellee "transferred" Ms. D. to his partner, I feel compelled to address the merits of this attempted ceasation of the physician-patient relationship by transferring the patient over to a partner in the same medical practice. Any determination as to the existence of a physician-patient relationship falls upon an evaluation of the facts of an individual case. While our common law has derived certain definitional requirements for the creation of a relationship, the determination as to when a physician-patient relationship is terminated is more elusive and cryptic to define.[1] Other jurisdictions

[1] Syl. Pt. 1, *State ex rel. Kitzmiller v. Henning*, 190 W.Va. 142, 437 S.E.2d 452 (1993) ("A fiduciary relationship exists between a physician and a patient."); *Rand v. Miller*, 185 W.Va. 705, 408 S.E.2d 655 (1991) ("A physician who undertakes to evaluate a prospective employee's medical records for the employer lacks a sufficient professional relationship with the employee to support a malpractice action.")

and commentators have briefly approached the issue, but no concrete guidance can be derived.[2] Determination of the existence of a relationship is resolved on a case-by-case basis.

Notwithstanding this, I do not believe the facts of this case support a finding that the relationship between Dr. Webb and Ms. D. was terminated by the letter transfer. First, Ms. D.'s, perception as to the existence of the relationship should be given greater weight and consideration. According to the evidence, the Appellee unilaterally dictated a letter "transferring" Ms. D. from his care and placed her in the care of his partner in the same office. The record does not reflect that any discussion took place between the Appellee and Ms. D. wherein he informed her that the relationship needed to terminate. While such a conversation

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[2] *See generally* Tanya J. Dobash, Note, *Physician-Patient Sexual Conduct: The Battle Between the State and the Medical Profession*, 50 Wash. & Lee L. Rev. 172 (1993); Catherine S. Leffler, Note, *Sexual Conduct Within the Physician-Patient Relationship: A Statutory Framework for Disciplining this Breach of Fiduciary Duty*, 1 Widener L. Symp. J. 501 (1996); Molly E. Slaughter, Note, *Misuse of the Psychotherapist-Patient Privilege in Weisbeck v. Hess: A Step Backward in the Prohibition of Sexual Exploitation of a Patient by a Psychotherapist*, 41 S.D. L. Rev. 574 (1996).

For an annotated listing of cases on this issue, see Michael R. Flaherty, Annotation, *Improper Sexually Related Conduct Toward Patient as Ground for Disciplinary Action Against Physician, Dentist, or Other Licensed Healer*, 59 A.L.R. 4th 1104 (1988), and James L. Rigelhaupt, Jr., Annotation, *What Constitutes Physician-Patient Relationship for Malpractice Purposes*, 17 A.L.R. 4th 132 (1982). *See* Sexual conduct within the Physician-Patient Relationship: A statutory framework for disciplining this breach of fiduciary duty, 1 Widener L. Symp. J. 501(1996); Misuse of the Psychotherapist-Patient privilege in Weisbeck v. Hess: A step backward in the prohibition of sexual exploitation of a patient by a psychotherapist, 41 S.D.L. Rev. 574 (1996); Physician-patient sexual conduct: the battle between the state and the medical profession, 50 Wash.& Lee L. Rev. 1725 (1993).

is presumed, the record is not clear as to whether Dr. Webb actually advised Ms. D. that she needed to seek another therapist outside of his practice group. To be clear, I am not suggesting that a physician needs approval from the patient prior to termination of the relationship. Rather, a conscientious physician who desires to avoid the legal pitfalls associated with "abandonment" of a patient or malpractice should desire to clearly express the termination of their relationship.

Further, the record does not support a finding that Ms. D. was even aware of the termination of the relationship.[3] After the "transfer," she remained in the same practice group

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[3] See *Pundy v. Department of Professional Regulation*, 570 N.E.2d 458 (Ill. App. 1991), in which the Appellate Court of Illinois upheld a six-month suspension of a psychiatrist's medical license. One of the central issues involved was whether or not the relationship had terminated at the time sexual relations began. In reference to the Department of Professional Regulation's Findings of Fact, the Court noted that:

> Dr. Staunton testified that while the Physician's Code of Ethics did not address the issue of sexual relations with a former patient, each case must be decided according to whether this behavior could have a deleterious effect on the former patient. Similarly, Dr. Schoener testified that such cases should be resolved on the basis of whether there was an exploitation of the therapeutic relationship. Dr. Schoener also testified that if the former patient still remains a tie to the therapist or still relates to the doctor as a therapist it is not clear that therapy ended. Moreover, he stated that it was entirely the physician's responsibility to prevent sexual relations from occurring between the psychiatrist and his patient.

Pundy, 570 N.E.2d. at 464. In addition, the Illinois Appellate Court further cited the conclusion of the Board which is very applicable to the case *sub judice*:

of therapists. When the Appellee's partner was away or unavailable, the Appellee took over her treatment.[4] This is reflected by the February 1978 hospitalization. Aside from any argument that a relationship could be imputed upon the Appellee under an Agency theory, the Appellee did not take an active affirmative step to clearly terminate the relationship. Rather, he allowed himself to be placed in situations where he would be called upon to treat and care for Ms. D. in non-emergency situations.

Given the factual record in this case and consideration being given to the delicate mental state of a troubled teenaged girl who is having sexual relations with her "former" therapist, it is a logical conclusion that a reasonable person in the shoes of Ms. D. would

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> "What is right is that a patient should not be harmed by a doctor. That principle applies whether formal termination has occurred or not. An obligation attaches once he or she comes under the care of a physician that does not disappear until there has been a proper ending to that relationship.
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> "As has been noted above, a special measure of dependence arises, indeed may even be encouraged in many cases, from the psychiatrist/patient relationship--no matter how brief or supportive-- that finds its genesis in the emotional vulnerability of the patient. At best, Dr. Pundy was not fully conscious of this patient's vulnerability, and this insensitivity to her condition led in ways clearly detrimental to her welfare."

Id.

[4] See *Ishler v. Miller*, 384 N.E.2d 296 (Ohio 1978), in which the Supreme Court of Ohio held that although the doctor referred the patient to a specialist for further treatment, the doctor-patient relationship did not end at that time since the defendant doctor continued to treat the patient on occasion and to prescribe medication.

believe that a physician-patient relationship still existed after the alleged transfer, assuming that the letter "transfer" was in and of itself enough.

Hence, remand back to the Board of Medicine for further consideration with regard to these factual issues would be a reasoned approach. The record in this case supports the notion that a factual issue existed with regard to whether the Appellee terminated their physician-patient relationship. In the case *sub judice*, the hearing examiner was the trier of fact and determined that the relationship had not terminated. These findings of the Hearing examiner, as the trier of fact, must be given deference. The conclusion of the circuit court that the sexual relationship began after the termination of the relationship was in error and constituted an abuse of discretion that warrants this Court's reversal and re-institution of the Board's recommended sanctions.

II.

The Physician-Patient Relationship

Having reviewed the circuit court's order, and the Appellee's admissions of a six-year sexual relationship with his "former" teenage patient, I am strained to understand how the majority adopts the proposition that there existed no physician-patient relationship in view of this Court's holding in Syllabus Point 1, *Weaver v. Union Carbide Corporation*, 180 W.Va. 556, 378 S.E.2d 105 (1989):

> It is generally recognized that sexual intimacy with a patient, induced by a marriage or other counselor, is a form of malpractice permitting recovery of damages for emotional distress and other harm resulting from the malpractice. The basis of the malpractice is the trust relationship that arises from such counseling services which are designed to improve the mental and emotional well being of the patient. In such a situation, it is recognized that the patient may become emotionally dependent on the counselor and be easily manipulated by an unscrupulous counselor.

Indeed, the factual findings of this case clearly support the conclusion that a trust relationship existed between the Appellee and Ms. D.

> Whether a trust relationship exists in therapist counseling depends on two primary factors, together with any other relevant circumstances. First, the therapy must have been conducted over a sufficient period of time to establish a trust relationship. Second, there must be some reasonable semblance of actual therapy sessions.

Syl. Pt. 4, *Sisson v. Seneca Mental Health/Mental Retardation Council, Inc.*, 185 W.Va. 33, 404 S.E.2d 425 (1991).

Not surprisingly, recognition of this liability even appears in this Court's first opinion in this case. In footnote 4 of *State ex rel. Deleno H. Webb, M.D. v. West Virginia Board of Medicine*, 203 W.Va. at 238, 506 S.E.2d at 834, the majority astutely noted:

> 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.
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> ***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 Ms. 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.
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> 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.

(Emphasis Added).

In four years, the factual findings of the hearing examiner have borne out further support for the above proposition. However, this proposition is now being silenced by the majority's belief that no physician-patient relationship existed. Today's majority may very well set a precedent where one may be liable for malpractice, yet free of any discipline. Should this Court recognize a relationship for purposes of civil malpractice, but find no relationship for disciplinary action? The result of today's majority opinion may be interpreted to mean that a physician who has sexual relations with a patient, while still involved in a trust relationship with that the patient, can not be disciplined for ethical violations, despite the fact

that he/she can be held liable for medical malpractice as a result of this same trust relationship.

Finally, it must not be forgotten that the standard of review in this case is *de novo* with respect to conclusions of law and application of law to the facts. Because I believe the Board's conclusions of law are properly supported by the facts of this case, as well as established case law, the administrative ruling and sanctions of the Board of Medicine should have been upheld.

For all the forgoing reasons, I respectfully dissent. I am authorized to state that Chief Justice Davis joins me in this dissenting opinion.