1982

Robert B. Vance v. Paul V. Fordham : Appellant's Reply Brief

Utah Supreme Court

M. Richard Walker; Walker, Kintze & Washburn; Attorneys for Appellants;
Steven J. Schwendiman; Attorney for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

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ROBERT B. VANCE, D.O. Appellant and Plaintiff, vs. PAUL T. FORDHAM, Director of the Department of Registration, DEPARTMENT OF REGISTRATION and THE OSTEOPATHIC COMMITTEE, Respondents and Defendants.	)	No. 18176

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APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE CHRISTINE M. DURHAM, JUDGE
AFFIRMING THE ORDER OF
THE DEPARTMENT OF REGISTRATION

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Appellant's Reply Brief is submitted herewith only to answer new matters set forth in Respondent's brief as follows:

POINT I

RESPONDENT HAS TOTALLY MISCONSTRUED THE NATURE OF THE APPEAL.

In Respondent's brief, Point I, it is argued that Appellant is requesting a "De Novo Appeal", and to start anew. This is a total misconception of Appellant's brief and the prevailing law governing appeal procedures in license revocation cases.

In Appellant's brief at p. 46 it is pointed out that recourse to the Courts on this matter, is authorized under Utah Code Annotated 1953 §58-1-36 which provides:

> Any ... holder of a license ... or any person directly affected and aggrieved by any ruling of the Department of Registration, may within thirty days after notice of such ruling INSTITUTE AN ACTION in the District Court of the County ... against the director in his official, capacity setting and his right to complain. In his answer the director may set out any matter in justification; AND THE COURT SHALL DETERMINE ISSUES ON BOTH QUESTIONS OF LAW AND FACT, and may affirm, set aside or modify the ruling complained of. (Emphasis added)

This Court in the case of Withers v. Golding, 100 Utah 179, 111 P2d 550 (1949), discussed at length what was the intent of the legislature in Section 36 and concluded:

> "the Legislature intended to change the nature of the proceedings theretofore established under the decision in Baker v. Department of Registration."
>
> "This action is instituted against the director...
>
> The director may then answer and if he desires set up 'any matter in justification' of the proceedings and decision rendered before the department. The statute then provides 'and the Court shall determine the issues and both questions of law and fact.' What issues? Certainly not the issues raised before the Department of Registration, but the issues raised by the pleadings before the COURT. The proceeding in the the District Court is in the nature of an ORIGINAL ACTION. These grievances may be ... any one or all of various objections to the procedure and action of the department."
>
> "The issues raised by the pleadings before the Court may or may not be the same as those raised in the hearing before the department."
>
> "... the Court should determine on an appeal in equity whether the findings of the committee are contrary to the clear preponderance of the evidence adduced BEFORE IT, rather than to determine merely whether there is any substantial evidence to support such findings." (Emphasis added)

This Court has clearly defined the procedure for this "action". It is not a "de novo appeal" as alleged by Respondent,

but a "new action" in which the District Court should have not only considered the evidence adduced before the department, but allowed the Appellant to introduce such further evidence to support its position, and then, decide the case based upon the clear preponderance of the evidence adduced BEFORE IT.

In the instant matter the District Court failed to follow the required procedures or to apply the preponderance of evidence standard. The Court treated the appeal only as a review of the Departments hearing, and then wrongfully made its decision based on the improper evidentiary standard of "substantial evidence" instead of the "preponderance of the evidence."

The District Court's ruling was improper, arbitrary and capricious and should be reversed.

POINT II

THE RESPONDENTS OSTEOPATHIC COMMITTEE VIOLATED DUE PROCESS OF LAW AS THE ONLY COMPETENT EXPERT TESTIMONY WAS BASED ON THE EXPERTISE OF THE BOARD MEMBERS AND NOT ON COMPETENT EXPERT TESTIMONY.

In the entire hearing before the Osteopathic Committee, only one witness produced by the Respondent namely Dr. Alan J. Concors, testified regarding the standard of care "as it is taught and as it should be practiced in the State of Utah." See Appellant's Brief p. 17-18.

Dr. Concors gave the sole testimony regarding Utah Standards of Practice although he had only practiced for one (1) month in Utah, and then, by totally unsupported hearsay, testified regarding the position of the chairman of the Department of Ethics for the Osteopathic General Practitioners College, in an apparent attempt to establish a national standard. No other expert testimony was introduced by Respondent's regarding the standard of care or professionalism in Utah or throughout the country, although three medical experts in the same field of practice testified in support of Appellant and concluded that his methods of practice were not only professional but totally within the acceptable standards of practice among the hundreds of Doctors who practice preventative medicine.

Nevertheless the members of the Osteopathic Committee relied on their own expertise as pointed out in Respondent's brief at p. 28, to rule on "unprofessional conduct". In the leading case of William E. Farney M.D. v. Joan G. Anderson, Director of Department of Registration et al, 56 Ill App 3d 677 (1978), the Illinois Appellate Court held that a hearing by the medical disciplinary board in which the board relied on their own expertise to determine that the Appellant's conduct was a violation of due process of law. The Court there concluded at p. 682:

> "The underlying but perhaps unspoken reason for requiring expert evidence by the

> Department is the existence of judicial review of the decisions of the Medicial Disciplinary Board .... while it may seem idle and foolish to a board composed of physicians to present elementary questions of medicine to them by way of testimony of one of their own brethren, yet it is far from idle to a Court, not trained in medicine, which is called upon to determine the manifest weight of the evidence."

In the instant case, the Appellant's experts testified that Appellant's methods of practice although "not used in the mainstream of M.D.'s in practice today, are clearly accepted methods of treatment and widely used throughout the United States today by hundreds of Doctors who are involved in preventative medicine [Record p. 623-793, p. 1110-1174, p. 1007-1104]. Although clearly establishing that Appellant's methods of practice are recognized by hundreds of Doctors practicing throughout the United States, not one expert introduced by the Respondents testified regarding the standard of care or methods of practice among the Appellant's peers or field of practice, and the uncorroborated testimony of Dr. Alan Concors, a one (1) month resident of Utah, stands alone as the sole expert testimony to evidence that Appellant's conduct was "unprofessional", "as it is taught and as it should be practiced in the State of Utah."

A summary of the questions of expert testimony and opinion as evidence before administrative tribunals is given in Section 353 of McCormick's Handbook of the Law of Evidence (2d 3d 1972) by Edward W. Cleary, as follows:

> "... Courts now recognize legislative intention to establish expert agencies. Therefore, agency decisions which rely on the agency's own expertness are upheld when Respondent offers no contrary expert testimony, or when expert testimony offerred by staff members and outside experts conflicts. ... an agency seeking to rely on its expertise must present expert testimony subject to cross examination on the record or give Respondent fair notification that official notice will be taken of such 'facts'."

In this case, the Respondent Committee heard no expert evidence whatsoever to refute the Appellant's experts and their testimony stands alone, unrefuted as to the acceptability of Appellants professionalism in his field of practice, and if Respondent's revocation is allowed to stand, then it must be based upon the committee's own personal expertise as to what they believe, and condemn Appellant's privilege of practicing medicine because he is not in the mainstream of practice determined by some unexpressed views of the two committee members and one disqualified member thereof.

On p. 32 of the Respondent's brief; it is stated that "the act of Appellant (ie promising recovery from terminal diseases, using absurd "quackery" procedures such as Kirlian photography, hand pressure diagnosis, taking images of thumprints, etc.) reflect on his competence, professionalism and in essence, his fitness to practice," emphasizes the very arbitrariness of the Respondent's revocation.

No expert testimony was introduced regarding these alleged "quackery" procedures. Dr. Concors testified with regard to Kirlian Photography (Corongram) that he'd never heard of it. [Record p. 804]. Regarding hand pressure diagnosis (applied Kinesiology) Dr. Concors [Record p. 806] testified there was "no medical theory that even purports to that type of diagnostic procedure." And yet three experts testifying for Appellant all sustained the efficacy of applied Kinesiology as a valuable diagnostic technique.

Although Respondent's argue in their brief at p. 32-34, that the term "unprofessional conduct" was adequate notice of the standard of required and it was unneccessary for a statute to emmunerate the specific acts which constitute unprofessional conduct.

The Oregon State Court in Board of Medical Examiners v. Mintz, 233 or 441, 378 P3d 945 (1963) concluded:

> "The fact that it is impossible to catalogue all of the types of professional misconduct is the very reason for setting up in broad terms and delegating to the Board the function of evaluating the conduct in each case."

However the Utah legislature required more in passing Utah Code Annotated 1953 §58-12-36(15) in defining "unprofessional conduct" as

> "(15) any conduct or practice contrary to the recognized standards of ethics of the medical profession, or any conduct or practice which does or might constitute a damage to the health, welfare or safety of the patient or the public, or any conduct, practice or condition which does or might impair the ability, safety and skillfully to practice medicine."

Yet strangely, with the Osteopathic Physicians and Surgeons who practice in the State of Utah, who have organized the Utah Osteopathic Physicians Association, not one member of the Association was called by the Respondents to testify as to the standards of practice and professionalism in the Community, and only called upon Dr. Concors, a general practioner, one (1) month resident of Utah, who has practiced general practice in a clinic with M.D.'s to establish said standards. No expert who practices in the field of preventative medicine was called by Respondents.

Nevertheless the legislature in 1976 amended the provisions of the Medical Practice Act to provide that unprofessional conduct was also:

> "(17) Violation of any rule or regulation of the physicians licensing board, establishing a standard of professional conduct."

In mandatory language the legislature also reqired in Utah Code Annotated 1953 §58-1-13 upon action of the representation committee the Department of Registration "shall" perform the function of

> "(7) Promulgating and enforcing such rules and regulations as may be advocated by the representative committee ... for the protection or best interest of the public...".

It is clear that the Department and the Committee were derelict in their duties. Although the Department spent years in accumulating case data, hiring dupes to go to Appellant as patients and lie about their symptoms to obtain chelation and other forms of treatments, they failed to follow the legislative mandate, to publish rules and regulations and standards by which a practitioner may be informed that his methods of practice, although recognized amoung hundreds of practitioners across the United States, would be unprofessional conduct for one practicing in Utah.

It is clear from the decisions of this Court that the standards of practice and care required of a physician are not to practice as all others do or even as the majority may do, but in the case of Dickinson v. Mason, 18 Utah 2d 383, 423 P2d 663 (1967) this Court concluded:

> "The law does not impose upon a physician or surgeon the duty of guaranteeing that his treatment will achieve good results, but on the contrary, the law imposes upon him the duty to employ that care and skill required of men of similar calling, and under similar circumstances."

Further in Swan v. Lamb 584 P2d 814 (Utah 1978) this Court held that the standard of care for a doctor who professes expertise in a field of medicine should be held to the standard of care exercised by experts IN THE SAME FIELD, in cities of comparable size and throughout the medical profession.

Not one expert IN THE SAME FIELD of "preventative medicine" testified against the Appellant. Much to the contrary the Board concluded its decision based on the unexpressed opinions of the board members, even though the Respondents were well aware that hundreds of Doctors, both M.D. and D.O., throughout the Unites States use the modes of practice employed by Appellant herein.

CONCLUSION

The Appellant's brief represents a rude attempt by the office of the Attorney General to justify a statutorily disqualified committee, and by ignoring the clear cases cited by this Court to protect the procedural safeguards of license revocation proceedings, justify the revocation of the license of an eminently qualified osteopathic physician and surgeon, because his practice does not fit the mold of "the majority" of medical practitioners as represented by one osteopathic newcomer to Utah and the untestified opinion of committee members.

The Appellant respectfully submits that the Respondent's revocation of Appellant's license cannot be sustained either procedurally or by the preponderance of the evidence adduced, and constitutes an arbitrary and capricious decision by the Department of Business Regulations as well as the District Court, and Appellant respectfully requests the Court to reverse the revocation and allow Appellant to continue his medical practice to provide care to the hundreds of patients who rely on Appellant for their medical needs.

RESPECTFULLY SUBMITTED this 30th day of July, 1982.

M. RICHARD WALKER
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I ~~mailed~~ delivered a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to STEVEN G. SCHWENDIMAN, Attorney for Respondent, at 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid on this 2nd day of ~~July~~ August, 1982.