

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000363-MR

ELMER C. MAGGARD

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 02-CI-00690

COMMONWEALTH OF KENTUCKY,
BOARD OF EXAMINERS OF PSYCHOLOGY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Elmer C. Maggard appeals from an order of the Franklin Circuit Court affirming a final order of the appellee, Kentucky State Board of Examiners of Psychology (Board), suspending Maggard's license for one year. For the reasons stated hereafter, we affirm.

The circuit court summarized the relevant facts as follows:

In the fall of 1998, an attorney requested Maggard to perform a psychological evaluation of a three (3) year old girl. The girl's parents had filed suit against a

dentist who had treated the girl when she was approximately seventeen (17) months old. Maggard met with the girl's parents in his office on two occasions. However, he only had contact with the girl for a brief period during one visit. Nonetheless, Maggard prepared a written Summary of Clinical Assessment in which he opined that the girl had suffered a permanent psychological injury as a result of the treatment she received from the dentist. Furthermore, he concluded the injury would have a long term effect on her social and emotional development. The dentist filed a complaint with the Board as allowed by 201 KAR 26:130 Section 2(1)-(3). The Board began an independent investigation per 201 KAR 26:130 Section 2(4). Subsequently, the Board filed its Formal Complaint against Maggard.

Ultimately, the Board found that Maggard rendered a formal, professional opinion about a minor child "without direct and substantial professional contact with, or a formal assessment of," that child in violation of KRS 319.082(1)(f) and 201 KAR 26:145 Section 3(5). Further, the Board found that Maggard committed an "unfair, false, and misleading act or practice," and "practiced psychology in a negligent manner" in violation of KRS 319.082(1)(c) and (d). The Board suspended Maggard's license to practice psychology for one year. However, it stayed the suspension and placed Maggard on probation which allowed him to practice psychology under supervision by the Board.

Maggard appealed the Board's decision to this Court. He claims that the Board's Findings of Fact and Conclusions of Law are not based upon substantial evidence in the record. Further, he argues that the sanction imposed was an abuse of the Board's discretion in violation of KRS Section 13B.150(2). This Court disagrees with Maggard and AFFIRMS the Board's Final Order.

This appeal followed.

Maggard first contends that the circuit court erred by failing to find that the evidence was insufficient to support the Board's order. We disagree.

The function of a reviewing court in an appeal from an administrative agency is to ensure that the agency's decision was based on substantial evidence of probative value,¹ and that the agency applied the correct rule of law. Evidence is substantial if "when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men."² The fact that inconsistent conclusions may be drawn from the evidence does not prevent the agency's findings from being supported by substantial evidence.³ The trier of fact may consider all of the evidence and then choose that evidence which it believes.⁴

Here, the record shows that substantial evidence was adduced to support the Hearing Panel's findings of fact as adopted by the Board, which included the following:

¹ *Kentucky Unemployment Insurance Comm'n v. King*, 657 S.W.2d 250 (Ky.App. 1983). See KRS 13B.150(2)(c).

² *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972), citing *Blankenship v. Lloyd Blankenship Coal Co.*, 463 S.W.2d 62 (Ky. 1970). See also *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

³ *Fuller*, 481 S.W.2d at 307, citing *Chesapeake and Ohio Railway Co. v. United States*, 298 F.Supp. 734 (D.C. 1968).

⁴ *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky.App. 1994), citing *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky.App. 1990).

4. During the course of the lawsuit, on or about October 8, 1998, Yancey White, the attorney for [L.W.] in the lawsuit against Dr. Emler, requested that . . . Dr. Maggard perform a consultative, forensic evaluation of [L.W.].

5. Dr. Maggard says he suggested that he treat the child because she was not in treatment at the time, that he prepare a summary of his clinical assessment rather than a forensic examination report, and that attorney White obtain a forensic assessment from another psychologist if Dr. Maggard's clinical assessment was insufficient. Dr. Maggard says attorney White agreed to this arrangement.

6. Dr. Maggard saw [L.W.] and her parents in his office on two dates, October 14 and 28, 1998.

7. Dr. Maggard did not have contact with [L.W.] on her first visit to his office, but instead, met with her mother. He observed [L.W.] only for a brief period of time during her second visit to his office.

8. [Maggard] sent the Summary of Clinical Assessment to attorney White on or about December 8, 1998.

9. In the Summary of Clinical Assessment, Dr. Maggard says, "The child's parents served as the sole informants about [L.W.'s] current functioning and history. Medical records from the office of Dr. Bernard T. Moynahan and dental records from the office of Dr. Kimberly Boling were available for review."

10. In the Summary of Clinical Assessment, Dr. Maggard makes the following statements:

a. The child has been emotionally and developmentally injured by the trauma she experienced during dental treatment to extract two of her front teeth.

b. In addition to her anxiety she exhibits aggression and anger consistent with the nature of the injury as it was described by her mother.

c. This type of early trauma causes permanent psychological injury and can have pervasive consequences for subsequent social and emotional development.

d. For a child [L.W.'s] age, the effects of such trauma can even affect character structure.

e. Ongoing treatment with [L.W.] and her family, possibly over a number of years, probably will be necessary to manage the generalized behavioral and emotional consequences of the child's psychological injury. She could require professional help into her mid-to-late adolescence.

11. There is no indication in Dr. Maggard's Summary of Clinical Assessment that he questioned whether [L.W.'s] mother's statements concerning her daughter were motivated by secondary gain or by her own anxiety, or whether the child's statements to her mother, if she made them, had been influenced by her mother's statements to her.

12. Further, in the Summary of Clinical Assessment Dr. Maggard says, "Though over two years have elapsed since the injury, there is sufficient memory and focused emotional reactivity to enable the child to benefit from desensitization and deconditioning of her anxiety and anger

responses to dental offices and practitioners." Dr. Maggard did not indicate in his Summary of Clinical Assessment or his testimony the basis for his conclusion that [L.W.] possessed her own memories of events that occurred two years previously when she was 18 months old.

13. Dr. Maggard did not have direct and substantial professional contact with, and did not make a formal assessment of, [L.W.] during her two visits to his office.

14. Thus, Dr. Maggard's statements in the Summary of Clinical Assessment were not supported by direct and substantial professional contact with [L.W.].

. . . .

16. Dr. Maggard's [L.W.'s] office notes and records were obtained, entered into the record, and reviewed by the Hearing Panel. Dr. Maggard's office notes and records do not contain any credible evidence that he had direct and substantial professional contact with [L.W.] during her two office visits. Dr. Maggard's notes and records contain a written summary that he prepared on June 25, 2001, of his examination of [L.W.] on October 29, 1998. This record indicates contact with [L.W.] on that date.

17. The Hearing Panel does not find the June 25, 2001, record credible. Besides the fact that it was written almost three years after the office visit, it also was written after the completion of the first three days of the hearing and immediately prior to the Hearing Panel, by orders of the Hearing Officer, obtaining Dr. Maggard's notes and records. At the time this record was prepared, Dr. Maggard knew the Hearing Panel was concerned with the extent of his contact with [L.W.]. This record is the only evidence in Dr. Maggard's notes and records that indicates he had direct and substantial

professional contact with [L.W.] on either visit to his office. The contact documented in the June 25, 2001, record is not reflected in any other contemporaneous office note or record prepared by Dr. Maggard. None of the contacts with [L.W.] recited in the June 25, 2001, record are reflected in the Summary of Clinical Assessment. Thus, the circumstances of the preparation of the record, and the lack of any other corroborating evidence, make the June [25], 2001, record untrustworthy.

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19. The Hearing Panel's finding regarding Dr. Maggard's lack of direct and substantial professional contact with [L.W.] during her visits to his office on October 14 and 28, 1998, remained unchanged after its review of Dr. Maggard's office notes and records concerning [L.W.].

20. Although Dr. Maggard characterized his report as a Summary of Clinical Assessment, he knew or should have known it would be used as a forensic assessment report. According to Dr. Maggard's own testimony, he accepted the [L.W.] referral from her attorney, an attorney from whom he had accepted numerous prior referrals to provide a forensic assessment report. He was initially contacted to provide a forensic assessment report, and he knew about the pending litigation with Dr. Emler. For all these reasons, Dr. Maggard knew or should have known how his report was going to be used by [L.W.'s] attorney.

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22. Dr. Maggard's statements in the Summary of Clinical Assessment about permanent or long-term injury to [L.W.], and his statements about the treatment that [L.W.'s] condition required, are false and misleading because he did not have direct

and substantial professional contact with [L.W.] and did not formally assess her, because his statements are unsupported by peer-review psychological literature, because Dr. Maggard did not question [L.W.'s] mother's motivation in providing information to him, and because he knew or should have known how his report was going to be used by [L.W.'s] attorney.

23. Dr. Maggard's statements in the Summary of Clinical Assessment about permanent or long-term injury to [L.W.], and his statements about the treatment that [L.W.'s] condition required, are unfair to Dr. Emler and to her insurance company, both of whom would have reviewed Dr. Maggard's Summary of Clinical Assessment in evaluating whether to settle the suit against Dr. Emler, and unfair to [L.W.], whose future mental health could be affected by Dr. Maggard's treatment recommendations.

24. Dr. Maggard's statements in the Summary of Clinical Assessment about permanent or long-term injury to [L.W.], and his statements about the treatment that [L.W.'s] condition required, were negligent because they were not supported by direct and substantial professional contact with [L.W.] or by formal assessment of her, and because they were false and misleading.

25. Dr. Maggard's statements in the Summary of Clinical Assessment about permanent or long-term injury to [L.W.], and his statements about the treatment that [L.W.'s] condition required, constitute formal professional opinions which he rendered without direct and substantial professional contact with, or a formal assessment of, [L.W.].

Based on those findings, the Board concluded that "in preparing the Summary of Clinical Assessment and providing it to [L.W.'s]

attorneys in the Dr. Emler case," Maggard violated KRS 319.082(1)(c), (d) and (f) by "committing an unfair, false, and misleading act or practice," by "practicing psychology in a negligent manner," and by "rendering a formal professional opinion without direct and substantial professional contact with or a formal assessment of [L.W.], in violation of 201 KAR 26:145 §3(5)."

Our review of the record shows, contrary to Maggard's contention, that substantial evidence supports the Board's findings that Maggard provided formal opinions about the child without having direct and substantial professional contact with her, and without conducting a formal assessment of her. We cannot say that the circuit court erred in reaching its conclusions after reviewing the conflicting evidence.

Next, Maggard contends that the circuit court erred by finding that he was not entitled to conduct further discovery or to try his issues in front of a jury. He relies on KRS 13B.150(1), which states in pertinent part that judicial review of a final administrative hearing

shall be conducted by the court without a jury and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter.

There is simply no support for Maggard's contention that the court erred by failing to conduct a jury trial herein,

as a judicial review of an administrative proceeding does not involve the fact finding function which is an inherent function of an initial administrative or trial court proceeding.

Instead, the court may only review the record and affirm the agency's final order, or reverse and remand that order for further proceedings after finding that it meets one of the conditions set out in KRS 13B.150(2). Such conditions exist when constitutional or statutory provisions are violated, or when the agency's statutory authority is exceeded.⁵ Such conditions may also exist when the order is unsupported by substantial evidence, when it is "arbitrary, capricious, or characterized by abuse of discretion[,]" when it is based on prejudicial ex parte communications, when it is affected by the hearing officer's failure to be disqualified as required by statute, or when it is "[d]eficient as otherwise provided by law."⁶ No such conditions were satisfied here.

Further, there is no merit to Maggard's contention that he was entitled to conduct additional discovery regarding allegations of fraud or misconduct relating to the administrative proceeding. CR 9.02 specifies that allegations of fraud must be pled with particularity. Although Kentucky's

⁵ KRS 13B.150(2)(a) and (b).

⁶ KRS 13B.150(2)(c), (d), (e), (f) and (g).

highest court stated in *Scott v. Farmers State Bank*⁷ that the complaint need not “attain such detail as to recite each minute detail[,]” *Scott* confirmed that the complaint should state “the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud.”⁸ Here, Maggard’s complaint did not include the necessary level of specificity regarding the alleged fraud, and we cannot agree that the circuit court erred by denying discovery as to the allegations.

Next, Maggard contends that the circuit court erred by failing to find that he was entitled to absolute immunity from liability relating to the child’s proceeding against the dentist, as any misconduct occurred within the judicial process while he served as a witness. However, we agree with the circuit court that the immunity from civil monetary damages which is afforded to court-appointed experts⁹ is not applicable here, as Maggard was neither court-appointed nor an integral part of the judicial process. Moreover, the proceeding now before us was one seeking to discipline Maggard for violating KRS Chapter 319 pertaining to the practice of psychology and the

⁷ 410 S.W.2d 717, 722 (Ky. 1966).

⁸ *Id.* at 722.

⁹ See *Rogers v. Luttrell*, 144 S.W.3d 841 (Ky.App. 2004); *Stone v. Glass*, 35 S.W.3d 827 (Ky.App. 2000).

licensing of psychologists, rather than one seeking damages against him pertaining to the alleged misconduct. Further, given the fact that Maggard is not employed by any “accredited institutions of higher education,”¹⁰ there is no merit to any contention that he is entitled to be exempted from the application of KRS Chapter 319 by virtue of the exemption set out for such persons in KRS 319.015(2).

Finally, to borrow the words of the circuit court, Maggard has included “a melting pot of other arguments” on appeal. As we fail to find any merit in those arguments, they are rejected on appeal.

The court’s order is affirmed.

ALL CONCUR.

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¹⁰ KRS 319.015(2).