COURT OF APPEALS DECISION DATED AND FILED

May 3, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2005AP1158

Cir. Ct. No. 2004CV1871

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

SHIRLEY Y. GODIWALLA, M.D.,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN MEDICAL EXAMINING BOARD AND DEPARTMENT OF REGULATION & LICENSING DIVISION OF LAW ENFORCEMENT,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Shirley Y. Godiwalla, M.D., appeals from a circuit court order affirming a decision of the State of Wisconsin Medical Examining

Board indefinitely limiting her medical license and prohibiting her from practicing pediatric urology after the Board determined that she misdiagnosed three patients and performed unnecessary surgical procedures upon them. We conclude that Dr. Godiwalla waived her probable cause challenge and that substantial evidence supports the Board's decision. We affirm.

¶2 We first address Dr. Godiwalla's claim that the Board never made a probable cause finding for its complaint against her.[1] The Board, drawing an analogy to probable cause determinations in criminal cases, responds that Dr. Godiwalla waived this argument by not raising it until the circuit court reviewed the Board's decision. Dr. Godiwalla replies that she could not have known that the Board failed to make a probable cause finding until the record was filed in the circuit court for its review.

¶3 The Board's analogy to probable cause determinations in criminal proceedings is apt. If a defendant does not claim a lack of probable cause, the claim is waived. ***Wold v. State***, 57 Wis. 2d 344, 346, 204 N.W.2d 482 (1973). A probable cause determination assures that there is a substantial basis for further proceedings against a defendant. ***Id.*** at 346 n.1. Therefore, raising a probable cause challenge after the administrative proceeding has concluded and substantial evidence has been adduced does not assist the target of the complaint.

[1] Upon "receiving an allegation of unprofessional conduct … [t]he Board must first investigate the allegation and, upon a finding of probable cause to believe that a person is guilty of such conduct, conduct a hearing before the Board prior to any action which may be taken concerning reprimand, suspension, etc." ***Gilbert v. Medical Examining Bd.***, 119 Wis. 2d 168, 190, 349 N.W.2d 68 (1984) (emphasis omitted).

¶4 Doctor Godiwalla waived her probable cause challenge. And, we are unpersuaded that Dr. Godiwalla could not have known that the probable cause finding was not made until the record was filed for circuit court review of the Board's decision. Had Dr. Godiwalla wished to challenge probable cause, she could have done so during the proceeding before the Board.

¶5 Doctor Godiwalla next argues that the Board did not cite substantial evidence in support of its finding that she did not meet the minimum standards of treatment, one of the elements which must be shown to uphold the Board's decision. ***Gimenez v. State Medical Examining Bd.***, 203 Wis. 2d 349, 355, 552 N.W.2d 863 (Ct. App. 1996). We disagree with Dr. Godiwalla, and we conclude that there is substantial evidence to support the Board's findings and decision.

¶6 We review the decision of the Board, not the circuit court. ***Id.*** at 353. An agency's findings of fact will be affirmed if they are supported by substantial evidence. ***Hamilton v. DILHR***, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980).

¶7 In reaching its decision, the Board consulted with the administrative law judge as to her opinion on the credibility of the witnesses, particularly as it related to the Board's additional findings and the testimony of the medical experts. The administrative law judge informed the Board that while both experts were well qualified and credible, she found Dr. Timothy Kennedy more informative and she gave his testimony greater weight. Doctor Kennedy is a board certified urologic surgeon whose practice is thirty percent pediatric urology cases.

¶8 Doctor Godiwalla contends that the expert upon whom the Board relied, Dr. Kennedy, never testified as to the minimum standard of treatment for the three patients. Doctor Godiwalla's argument amounts to a requirement that

Dr. Kennedy invoke "magic words" in expressing his opinion. Doctor Kennedy assessed Dr. Godiwalla's performance employing standards of competency. Doctor Kennedy opined that Dr. Godiwalla misdiagnosed three patients and that her subsequent treatment of the patients, including unnecessary and unwarranted surgical procedures, arose from the misdiagnoses. Doctor Godiwalla does not dispute the Board's other findings about her misdiagnosis and treatment.

¶9 With regard to eight-year-old M.M., the Board found that Dr. Godiwalla erroneously diagnosed M.M. as having posterior urethral valves, among other conditions. Doctor Godiwalla performed a surgical procedure to address the posterior urethral valves. In fact, M.M. did not have posterior urethral valves; rather, he had mini valves, a normal anatomical variant which did not require surgical intervention.

¶10 With regard to Dr. Godiwalla's diagnosis and treatment of M.M., Dr. Kennedy was asked "in what respects Dr. Godiwalla's conduct in the management of [M.M.'s] case fell below the minimum standards of competence accepted in the profession." Doctor Kennedy responded that "Dr. Godiwalla did not perform an acceptable diagnostic and therapeutic trial of behavioral and pharmacological management prior to subjecting [M.M.] to a general anesthetic procedure." Doctor Kennedy further stated that he also believed "that under that general anesthetic procedure Dr. Godiwalla made an incorrect diagnosis of posterior urethral valves which resulted in an unnecessary surgical event." Doctor Kennedy later described a minimally competent course of action with a patient such as M.M. as starting with behavior modification, moving to pharmacological agents and then cytoscopic evaluation, if necessary.

¶11 Doctor Kennedy expressed the minimum standard of treatment and clearly opined that Dr. Godiwalla did not employ that standard in her care of M.M. when she misdiagnosed him and performed unnecessary surgery upon him. The record contains substantial evidence to support the Board's minimum standard of treatment finding for M.M.

¶12 With regard to three-year-old L.S.G., the Board found that Dr. Godiwalla erroneously diagnosed L.S.G. with a left varicocele, a varicose vein in the testicle, and performed surgery to correct the misdiagnosed problem. Doctor Kennedy was asked if he had an opinion as to what respects of Dr. Godiwalla's management of L.S.G.'s case fell below the minimum standards of competence accepted in the profession. Doctor Kennedy opined that Dr. Godiwalla incorrectly diagnosed a varicocele, did not employ the correct approach to make such a diagnosis and, having incorrectly diagnosed this condition, proceeded with unnecessary surgery to address a nonexistent condition. The record contains substantial evidence supporting the Board's determination that Dr. Godiwalla's conduct fell below the minimum standard of treatment when she misdiagnosed L.S.G. and performed unnecessary surgery.

¶13 With regard to thirteen-year-old A.D., the Board found that Dr. Godiwalla performed unnecessary surgery upon him for a condition, bilateral retractile testes, that did not require surgical intervention. The Board's determination that Dr. Godiwalla's treatment deviated from the minimum standard because she failed to correctly diagnose retractile versus undescended testes and then performed unnecessary surgery is supported by substantial evidence in the record. Doctor Kennedy testified that in a patient with retractile, not undescended, testes, the practice is to observe the patient, not to intervene surgically. Doctor

Godiwalla failed to correctly diagnose A.D.'s retractile testes and performed unnecessary surgery upon him.

¶14 With regard to M.M., L.S.G. and A.D., Dr. Kennedy opined that Dr. Godiwalla's conduct fell below minimum standards of competence. She misdiagnosed these patients and subjected them to unnecessary surgery. It is beyond serious dispute that Dr. Godiwalla did not meet the minimum standards of treatment in each case, minimum standards which Dr. Kennedy described and which the administrative law judge and the Board found credible. The credibility of witnesses and the weight of the evidence are for the Board to determine. ***Currie v. DILHR***, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997).

¶15 The purpose behind WIS. STAT. ch. 448 (2003-04)[2] "is to protect the public by insuring that those licensed to practice medicine in the State of Wisconsin are competent to do so under standards which have become accepted in the profession." ***Gilbert v. Medical Examining Bd.***, 119 Wis. 2d 168, 189, 349 N.W.2d 68 (1984). Doctor Godiwalla did not conduct herself within the standards of her profession, and there is substantial evidence in the record before the Board to support this determination.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] All references to the Wisconsin Statutes are to the 2003-04 version.