

**IN THE COURT OF APPEALS 06/18/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CC-00626 COA**

**WILLIAM D. OWEN, M.D.**

**APPELLANT**

**v.**

**T. STEVE PARVIN, M. D. AND THE MISSISSIPPI STATE BOARD OF MEDICAL  
LICENSURE**

**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. STUART ROBINSON

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

THOMAS E. ROYALS

ATTORNEY FOR APPELLEES:

T. HUNT COLE, JR.

NATURE OF THE CASE: STATE BOARDS AND AGENCIES

TRIAL COURT DISPOSITION: PETITION FOR MEDICAL LICENSE REINSTATEMENT  
DENIED

BEFORE THOMAS, P.J., McMILLIN, AND SOUTHWICK, JJ.

McMILLIN, J., FOR THE COURT:

This case is an appeal from a decision of the Mississippi State Board of Medical Licensure ("the

Licensing Board") refusing the request of the appellant, William D. Owen, M.D., to have the Licensing Board remove certain practice restrictions placed on his medical license. The restrictions were placed pursuant to an earlier agreement between Owen and the Board resolving a potential disciplinary proceeding by the Licensing Board. Pursuant to the statutory scheme governing such appeals, Owen originally appealed to the Chancery Court of Hinds County. That court affirmed the action of the Licensing Board, and this appeal followed. Owen alleges, as he did before the chancellor, that the decision of the Licensing Board denying him the requested relief was a manifest abuse of discretion, entitling him to an adjudication from this Court that the restrictions should be removed. We conclude that the argument advanced by Owen is without merit and, therefore, we affirm the action of the Licensing Board.

## I.

### The Facts

Prior to 1984, Owen was a practicing physician in the Town of Raleigh. Though not a board-certified surgeon, Owen had an active surgical practice. Apparently, beginning as early as 1979, Owen's work as a provider of surgical services under the federal government's Medicare program came under scrutiny by that agency. Additionally, the State's Medicaid authorities apparently became involved in a parallel inquiry, and on May 26, 1983, Owen voluntarily terminated his participation as a surgeon under the Medicaid program. During this same period, and apparently as an outgrowth of the Medicare investigation, the Licensing Board began to look into allegations concerning Owen's competency to perform surgical procedures. Faced with the possibility of further investigation and a proceeding under section 73-25-27 of the Mississippi Code of 1972 that could affect his license to practice medicine, Owen agreed to the placement of a partial restriction on his Mississippi license to practice. Essentially, the terms of the agreement between the Licensing Board and Owen were that he would voluntarily cease to perform further major surgical procedures until such time as he could present the Licensing Board with evidence that he had successfully completed an American Medical Association approved surgical residency program. In exchange, the Licensing Board agreed, at least by implication, that it would terminate its inquiry. This agreement was dated July 6, 1984. The Medicare disciplinary proceeding was not complete at the time of Owen's agreement with the Licensing Board. Over one year later, Owen was suspended from participation in the Medicare program for a period of twenty years based upon certain adverse findings regarding Owen's level of performance as a surgeon. Dissatisfied with the Medicare suspension, Owen pursued his federal administrative appeal rights to have the matter reviewed by a federal administrative law judge. On November 17, 1993, a federal administrative law judge entered a lengthy order that concluded, among other things, that the allegations of unnecessary surgery used to justify Owen's Medicare suspension were without merit. The judge found that Owen had, nevertheless, failed to meet minimum professional standards in another practice area by inadequately charting patient histories, and concluded that this was "a serious program violation" warranting a five-year suspension from Medicare participation. Since five years had already passed from the original suspension date, the practical effect of the order was to immediately restore Owen's eligibility to participate in the Medicare program.

Relying primarily upon this partially favorable outcome of his appeal from the original Medicare twenty-year suspension, Owen filed a petition with the Licensing Board seeking removal of the

surgery restriction on his license.

It is undisputed that Owen had not completed the surgery residency contemplated in the 1984 agreement when he filed his most recent reinstatement petition.

The Licensing Board denied his request on several grounds, including his failure to comply with the agreement by completing the contemplated surgical residency. The Licensing Board also received evidence of certain matters that had transpired after the 1984 agreement which the Board concluded were germane to the issue of the propriety of restoring full privileges to Owen.

Owen alleges on appeal that his exoneration by Medicare regarding his surgical record must be seen as removing the initial basis for the agreement between him and the Licensing Board. Since there was no basis in fact for the suspension of his surgical privileges in the first place, he argues, the continued imposition of any conditions to the restoration of his full privileges is an arbitrary and capricious act by the Licensing Board.

## II.

### Scope of Review

In an appeal from an administrative licensing authority, this Court has only limited review authority. Our standard of review has been defined by the supreme court as follows:

On judicial review, the Chancery Court does not proceed *de novo*, nor does this Court. Rather, the disciplinary agency's decision is insulated from judicial disturbance where it is supported by substantial evidence and is neither arbitrary nor capricious.

*Riddle v. Mississippi State Bd. of Pharmacy*, 592 So. 2d 37, 41 (Miss. 1991).

## III.

### Preliminary Discussion

Prior to a discussion regarding whether the Licensing Board's decision was supported by substantial evidence, we need to dispose of certain alleged errors of law raised by Owen. Initially, he claims that the Licensing Board applied the wrong statutory standards in deciding his petition. The Licensing Board proceeded under section 73-25-27 of the Mississippi Code of 1972, which permits disciplinary action for a wide variety of offenses. A petition seeking removal of disciplinary sanctions imposed under this section mandates the Licensing Board to consider "all activities of the petitioner since the disciplinary action was taken against him, the offense for which he was disciplined, his activity during the time his certificate was in good standing, [and] his general reputation for truth, professional ability and good character. . . ." Miss. Code Ann. § 73-25-32 (1972). Owen claims that, because he voluntarily consented to the entry of the surgery restriction, the applicable section was 75-25-65, which applies a different, somewhat more lenient, standard regarding removal of practice restrictions.

Owen is clearly in error in this assertion. Section 73-25-65 is an integral part of a series of sections of the Mississippi Code entitled "Disabled Physicians." These provisions were intended to deal with the

very limited area of medical practitioners suffering from mental and physical illnesses or alcohol or chemical abuse problems. Section 73-25-59, relating to voluntary imposition of a restriction has the evident purpose of encouraging physicians suffering from such impairments to voluntarily submit to appropriate restrictions during the period of their incapacity without the necessity of an adversarial proceeding. Section 73-25-65 simply cannot be pulled out of context and applied to a proceeding under the general disciplinary provisions governing the medical profession on the basis that the physician agreed to a proposed discipline rather than contesting its imposition. Owen also asserts that the statutes relied upon by the Licensing Board for the earlier disciplinary action do not contemplate a partial restriction such as was imposed by agreement in this case, since the language of section 73-25-27 states that the Licensing Board is authorized to "suspend or revoke" a person's medical license for the causes named therein. Miss. Code Ann. § 75-25-27 (1972). We also reject this argument. In an administrative disciplinary proceeding where the ultimate sanction is a complete suspension of practice privileges, we think it clear by implication that the disciplining agency must have the option available of imposing some lesser restriction designed to address the problems discovered during the proceeding. To suggest that the statutory language compels an "all or nothing" result in every disciplinary proceeding appears, in itself, to be arbitrary and capricious. We conclude that the statute grants to the Licensing Board the discretion to fashion a disciplinary sanction involving a partial suspension of medical privileges even though this authority is not specifically set out in the enactment.< /P>

#### IV.

##### Discussion of the Merits

Owen's argument on the merits seems to be that the Licensing Board, in its latest action, acted arbitrarily and capriciously in continuing the sanctions imposed against him in the face of evidence that the basis for the initial investigation had subsequently been shown to be without foundation. Specifically, he points to the conclusion of the administrative law judge in the Medicare suspension proceeding that "the provider [Owen] did not render any unnecessary services in any of the charts introduced into evidence." The Licensing Board, on the other hand, argues that, since its sanctions were imposed by agreement rather than as the result of any actual findings of misconduct on the part of Owen, it was not within the Licensing Board's duty, nor within this Court's prerogative, to look behind the agreement imposing the restriction, but that the Licensing Board was entitled to simply insist on compliance with the terms of the agreement -- terms which Owen admits he has not met. The Licensing Board contends that it is neither arbitrary nor capricious to insist upon compliance with a voluntary agreement entered into by Owen for the evident purpose of avoiding a full-scale investigation of his surgical performance and a possible disciplinary proceeding having the potential for even more stringent disciplinary sanctions.

As is not uncommon, we conclude that the correct resolution of this matter involves the application of principles lying somewhere between the polar positions of the parties.

While this was an administrative disciplinary proceeding rather than a judicial proceeding, nevertheless, the process takes on the substantial flavor of a judicial proceeding, and we find that principles applicable to a court action would be useful in assessing the rights and obligations of the parties in this matter. Thus, by way of analogy, the agreement in this case restricting Owen's license

appears essentially the same as a consent judgment. Though at first blush it seems logical that a consent decree should not be subject to subsequent attack by either party, nevertheless, the law recognizes that there are certain exceptions to such a rule. Our supreme court has said that, in general, a "consent decree is presumed valid and enforceable, and can only be attacked on the grounds of fraud, accident, mistake or surprise which must have been the controlling factors in the effectuation of the decree." *Hinds County Bd. of Supervisors v. Common Cause of Miss.*, 551 So. 2d 107, 118 (Miss. 1989) (citations omitted). The mistake element mentioned in the *Common Cause* case must be mutual and not unilateral. *Bornaschella v. Orcutt*, 418 So. 2d 768, 773-74 (Miss. 1982)

Owen's argument in support of a finding of error in the Licensing Board's refusal to remove the restrictions on his license seems most closely related to a claim of mutual mistake in the original agreement. Cast in the light most favorable to Owen, the proposition would be that the Licensing Board only had cause to believe that Owen *might* be deficient in his surgical skills based upon the Medicare inquiries. However, Owen's argues that subsequent events (his partial vindication in his Medicare disqualification appeal) have shown the inaccuracy of this earlier perception on the part of the Licensing Board, so that it was a mistake to impose the sanctions in the first place.

This argument, in the eyes of this Court, seems based upon several logical inconsistencies. First, Owen's argument begins on a false premise, thus destroying the persuasiveness of any logical conclusions drawn from the argument. The false premise, as we see it, is the proposition that the Licensing Board, in agreeing with Owen to the practice limitations contained in the agreement, was relying upon the Medicare investigation for the Licensing Board's findings of fact. Upon learning that the Licensing Board was considering its own investigation, Owen had the right to insist upon a full evidentiary hearing before the Licensing Board and to require the Licensing Board to make its own investigation, conduct its own hearing, make its own findings of fact, and make an independent determination of what disciplinary sanctions were appropriate in light of its own findings. There is nothing in this record to suggest that the Licensing Board relied upon any conclusions of the Medicare investigation, tentative or otherwise, in agreeing to halt its own investigation, or that the imposition of the restrictions on Owen's practice were contingent upon an ultimate conclusion of the Medicare proceeding adverse to Owen. To the contrary, the agreement merely recites in its preamble:

WHEREAS, there is now pending before the Inspector General, Office of Health, Financing and Integrity, Department of Health, a recommendation from the Mississippi Foundation for Medical Care, Inc., the designated Professional Standards Review Organization (PSRO) for the State of Mississippi, for permanent removal of Dr. William D. Owen as a provider for Medicare.

Elsewhere in the agreement, it is specifically stated as follows:

Recognizing his right to notice of charges specified against him, to have such charges adjudicated pursuant to Section 73-25-27, to be represented therein by legal counsel of his choice and to a final decision rendered upon written findings of fact and conclusions of law, Dr. William D. Owen, nonetheless hereby waives his right to notice and formal adjudication of charges . . . .

Owen's argument depends therefore, for its force, upon the proposition that the Licensing Board would, in its separate proceeding, unquestionably have reached the same conclusions that the federal administrative law judge did regarding Owen's level of competency as a practicing physician. That proposition cannot be supported. It does not appear in the least bit certain that the Licensing Board would have reached the same result as the federal administrative judge had Owen insisted upon his full statutory rights. A thorough reading of the federal judge's lengthy opinion demonstrates quite clearly that the judge placed substantial reliance in after-the-fact unverifiable explanations from Owen for what other physicians found were facially questionable situations. Whether the Licensing Board, sitting as finder of fact, would have placed the same trust in Owen's credibility is a question this Court cannot answer. Secondly, there is no certainty that the Licensing Board would have even considered the same evidence. The Medicare inquiry was restricted to a small number of Medicare cases, and the judge's finding explicitly limits his conclusions to those specific cases. Had the Licensing Board launched a full investigation of Owen's medical practice, it is not beyond question that it could have discovered evidence relating to his qualifications that was not uncovered in, or was beyond the scope of, the Medicare investigation. These potential additional avenues of inquiry are issues that were left unanswered by Owen's agreement to a voluntary restriction, and, due to the passage of time, they may now be essentially unanswerable.

A further problem in logically analyzing Owen's argument is our inability to discover wherein the mutuality of any mistake lies. Assuming for argument's sake, that the Licensing Board was mistaken in believing that there existed proper grounds to limit Owen's right to practice, we can still discover no mistake on the part of Owen leading to his agreement to enter into the agreement. At oral argument, Owen appeared to attempt to substitute an allegation of duress as an excuse for his entering into the agreement. Such an argument was not advanced before the Licensing Board, nor before the chancellor who initially considered this appeal, and it is procedurally improper for this Court to permit the issue to be raised for the first time before us. *Scordino v. Hopeman Bros.*, 662 So. 2d 640, 646 (Miss. 1995). Notwithstanding the procedural bar, we cannot help but note that there is absolutely no evidence in the record to support a claim of threat, intimidation, or duress by any official of the Licensing Board to induce or compel Owen in 1984 to enter into what was clearly a purely consensual resolution of a potential disciplinary proceeding.

Our task on appeal was rendered somewhat more difficult by the Licensing Board's initial order denying Owen relief, when it concluded that "Licensee [Owen] now presents a persuasive argument that the basis for the original Consent Agreement no longer exists." This finding, considered in isolation, and capable as it is of different interpretations, could have been seen as indicating that the Licensing Board was, in fact, contemplating that the Medicare inquiry would be adverse to Owen when it insisted upon Owen's surrender of his right to perform surgical procedures. Had that been the case, then Owen's argument that the continued imposition of the restrictions was arbitrary and capricious would have some merit. *See Boring v. Mississippi State Bd. of Dental Examiners*, 300 So. 2d 135 (Miss. 1974). Nevertheless, the statement does not unequivocally so indicate, and, in total context, the more logical interpretation of the statement was that it was merely an observation that the proposition, though persuasive, simply did not carry the day. Out of an abundance of caution, this Court requested supplemental findings by the Licensing Board to clarify exactly what impact Owen's

subsequent partial vindication in the Medicare proceeding had on its consideration of the matter. The Licensing Board, in its supplemental findings issued as a result of this Court's order, found in part that "[t]he Licensing Board does not adopt the Administrative Law Judge's determination, if in fact, made, that Dr. Owen 'did not provide harmful, inadequate or substandard surgical care.'" This position does not appear inconsistent with the prior order of the Licensing Board, nor does it appear to be arbitrary or capricious, and this Court, is therefore, without authority to disturb the conclusion.

Having agreed to a voluntary imposition of limited restrictions on his right to practice medicine, Owen foreclosed the necessity of an independent inquiry and investigation by the Licensing Board. It is impossible to determine what the result of such a proceeding would have been. Nothing that has happened in the intervening period points to any impropriety on the Licensing Board in consenting to the mutually agreeable resolution of the matter at the time, or suggests that subsequent events have shown unequivocally that Owen was guilty of no practice irregularities. On this record, we conclude that it was within the sound discretion of the Licensing Board to insist upon compliance with the terms of the earlier agreement as a prerequisite to considering removal of the agreed-upon restrictions. Having so concluded, we are convinced that the law quite clearly compels this Court to affirm the action of the Licensing Board.

**THE JUDGMENT OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY AFFIRMING THE ORDER OF THE MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. COLEMAN, J., NOT PARTICIPATING.**