No. 31422

IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
RAKESH WAHI, M. D.,

Petitioner,

v.

THE WEST VIRGINIA BOARD OF MEDICINE, AND
JACK C. McCLUNG

Respondents.

MEMORANDUM OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

September 15, 2003

AMICUS CURIAE **MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION**

The Association of American Physicians and Surgeons, Inc. ("AAPS") submits this *amicus curiae* brief in support of Petitioner Rakesh Wahi, M.D. We respectfully urge this Court to issue a Writ of Prohibition barring the West Virginia Board of Medicine ("Board") from taking further action against Dr. Wahi on the pending charges.

INTEREST OF *AMICUS CURIAE*

The Association of American Physicians and Surgeons, Inc. ("AAPS") is a nonprofit, national organization of thousands of physicians in private practice, including many in West Virginia. Founded in 1943, AAPS has been vigilant in defending free enterprise and competition in medicine. AAPS is entirely membership-supported and does not depend on government or industry funding. AAPS consistently files briefs before the Supreme Court and appellate courts to vindicate private medicine. *See United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (accepting AAPS's brief and agreeing with its position in reversing the sentence of a physician); *see also United States v. Sell*, 282 F.3d 560 (8th Cir. 2002) (accepting *amicus* brief by AAPS), *cert. granted*, 123 S. Ct. 512 (2002) (granting *certiorari* as briefed by *Amicus* AAPS), 123 S. Ct. 2174 (2003) (ruling against the federal government as previously urged by *Amicus* AAPS).

AAPS is very concerned about the injustice to Dr. Rakesh Wahi here and more generally about the chilling effect on medical practice. Simply put, patients should be able to choose their doctor without undue interference by the medical board. Where, as

here, a doctor with exemplary academic and clinical qualifications and stellar results is repeatedly oppressed, judicial intervention is warranted to correct the injustice. This is perhaps even more important to future patients who need a doctor-of-last-resort.

FACTUAL BACKGROUND

Sometimes repeated review of a physician's practice by a medical board can become abusive and unjustified. We have such a case here. Dr. Wahi is a skilled and highly professional physician who has been investigated again, and again, and again by the medical board. Each time he has been completely cleared of any wrongdoing in his practice.

Dr. Rakesh Wahi has superb credentials. He spent one year performing experimental surgery at McGill University, known to be the top medical school in Canada. Petitioner's Exh. G, at 1. He was honored by a request to present his research work before the American College of Surgeons in 1978, and subsequently placed first in the Royal College of Canada examination in cardiovascular surgery. *Id.* His other tremendous achievements include very high scores on the difficult Federation Licensing Examination (FLEX) and the world-renowned Mayo Clinic training exam; teaching cardiac surgery at Loyola University; and even participating in a heart and lung transplant program. *Id.* at 1-2. If we had a family member with a severe heart problem, Dr. Wahi is precisely the type of physician we would hope to see.

Dr. Wahi put his extraordinary skills to their best use. He accepted patients considered too risky by establishment medicine. These were patients with life-

threatening heart problems, who were told by doctors at Charleston Area Medical Center (CAMC) that they were beyond hope. *Id.* at 2. Left to die, these patients found a doctor willing to try to save them. Dr. Wahi called upon his remarkable training and expertise to save these patients. Despite their high risk, Dr. Wahi operated on and rescued every single one of them. His success rate far exceeded the national average. *Id.*

Apparently Dr. Wahi's hospital was not as thrilled with him as his patients. When a hospital tells a patient that he is too sick to be helped, it does not appreciate being proven wrong by a new doctor in the town. Dr. Wahi's innovations were viewed negatively by older colleagues, who carped that he "[e]xperiments with his patients too much" and "[d]oes weird things." Petitioner's Exh. A, CAMC Letter dated Dec. 11, 1995, at 7. Unfortunately, it has become "unorthodox" to preserve a patient's life. *Id.* at 8. The local media sensationalized an incident where Dr. Wahi saved a patient's life when there was inadequate time for anaesthesia. The patient was thrilled, but that did not matter to those determined to run the good doctor out of town.

The Board complains that Dr. Wahi performed "[h]igh risk surgical procedures, having [a] projected mortality rate of 7% or higher by national standards," which the Board says is "prohibited" by the hospital. Petitioner's Exh. F, Count I ¶ 4(cc) (Amended Complaint p. 10). But Dr. Wahi was helping those patients considered too hopeless to spend time on. Is this the type of surgeon who should be disciplined by the Board? Is it now considered improper to help patients when "national standards" predict they will more likely die?

It is only though a disregard of Dr. Wahi's basic rights that the Board could revive discredited and dismissed charges against him. AAPS urges that this Court enforce basic standards of due process – res judicata, statute of limitations, and avoidance of arbitrary and capricious procedures.

ARGUMENT

The Board's resuscitation of old charges constitutes an unjust harassment of an exemplary physician. Well-established principles of res judicata and statute of limitations preclude this abuse of process by the Board. Issuance of a Writ of Prohibition is warranted here.

1. Res Judicata Bars Board Action on These Claims.

On July 9, 2001, the Board dismissed the second complaint against Dr. Wahi, as it had earlier dismissed the first complaint on November 4, 1996. Petitioner's Appendix, Exh. D (second dismissal); *id.* Exh. B (first dismissal). In its second dismissal, the Board found that "specifically there is insufficient evidence at this time showing that there is a violation of any provision of the Medical Practice Act or rule of the Board." Petitioner's Appendix, Exh. D, at 3 ¶ 2. The second complaint had utterly no basis: the Board did not even initiate a proceeding for a hearing within two years of its filing. *Id.* at 3 ¶ 3. The Board properly concluded, "No probable cause exists to substantiate disqualification from the practice of medicine or to restrict the license to practice medicine and surgery of Dr. Wahi." *Id.* ¶ 4.

Case closed as of July 9, 2001, at least according to all acceptable norms of legal process. But unwilling to accept that just result, the Board simply refiled its charges two months later, on September 10, 2001. Petitoner's Exh. E. The complaint merely regurgitates vague allegations

from long ago. Nothing new is asserted, and it was all disposed of two months earlier.

The Board's claims are pretextual, reflecting a misguided determination to drive this medical innovator out of town. For example, the complaint cites "diminished trust between Dr. Wahi and the professional administrative and support staffs of the hospital." Exh. E, at 2 ¶ 4. This is not a valid reason for the Board to take action against a physician's license. Hospitals enjoy enormous power to expel physicians they dislike, and unfortunately the hospital in this case exercised such power. If another hospital welcomes Dr. Wahi and the skills he brings, the Board should not interfere with that arrangement.

The Board's other charges are likewise specious. It repeats a self-serving allegation by the hospital of "lack of adequate documentation to support the need for surgical intervention." *Id.* It is undoubtedly true that the hospital disliked Dr. Wahi's surgery on patients abandoned by others as too risky. But Dr. Wahi was successful with these patients! Unable to complain about poor outcomes, the hospital complained about poor documentation instead. This animosity by the hospital towards Dr. Wahi is no reason to suspend or revoke his license.

The Board's amendments to the complaint do nothing to resolve these deficiencies. It simply lists picayune issues dating back nearly ten years, none of which justify disciplinary action. They include unimpressive allegations like "[f]ailure to report incorrect needle count in surgery" (which occurred on 3/20/95), "[d]iscrepancies in Dr. Wahi's application pertaining to 1990 to 1992" (now over ten years old), and "[q]uestionable emergency surgery requiring a second surgical team to be called on a weekend" (1994 and 1995). Exh. F, Count I ¶ 3(a), (g), (i) (Amended Complaint p. 6). Nothing in the Board's particularized list could justify disciplinary action, particularly after the prior dismissal of charges arising from the same incidents.

At bottom, the third complaint is nothing more than a rehash of the summary suspension of Dr. Wahi, **which occurred on July 30, 1999**. The hospital's files about Dr. Wahi would have been fully available to the Board for nearly two years prior to its dismissal of the second complaint against Dr. Wahi on July 9, 2001. The Board had every opportunity to examine those files and develop its case prior to the dismissal. Res judicata bars reasserting those charges now.

It is axiomatic that res judicata bars multiple bites at the same apple, as attempted by the Respondents here. "The Board's action in attempting to revisit and relitigate ... is vexatious, and violates the public policy grounds relating to the doctrine of res judicata." *West Virginia Bd. of Medicine v. Shafer*, 207 W. Va. 636, 637-38, 535 S.E.2d 480, 481-82 (W. Va. 2000). Res judicata guards against relitigation of the same subject matter, which is exactly what Respondents seek to do now. "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigation as incident thereto and coming within the legitimate purview of the subject-matter of the action." *Shafer*, 207 W. Va. at 638, 535 S.E.2d at 482. This Court should conclude, as did the *Shafer* court, that "this [is] a case of vexatious and repeated litigation based on stale and repetitive charges that could have been but were not brought in the Board's first proceeding." *Id*.

Respondents implicitly seek the power to relitigate, without limitation, complaints ***after*** their dismissal. This is contrary to fundamental notions of justice and is incompatible with professional licensure. The Board is not empowered to act arbitrarily against physicians, free to reopen dismissed charges and destroy their careers at any time. Quite the contrary, the West Virginia legislature has clearly expressed the requirement of

finality by requiring that "the board shall expunge information in an individual's historical record unless it has initiated a proceeding for a hearing upon such information within two years of the placing of information into the historical record." W. Va. Code § 30-3-9(f). The Board itself has recognized the requirement of finality: "If the investigative or complaint file is closed on the basis that the individual physician or podiatrist concerned is not guilty of any misconduct or wrongdoing, **the Board shall remove all information relating to that investigation from his or her historical file**." 11 CSR 3-10.17 (emphasis added). Reopening matters after disposition directly contravenes this statute and regulation.

Physicians – and their patients – need finality in decisions by medical boards. One cannot practice innovative medicine in constant fear of a medical board reopening a complaint that was ostensibly resolved. A clean bill of health from dismissal should be exactly that - without chance of it being arbitrarily reconsidered and reversed years later. A procedure that contemplates contradictory judgments on the same claims is in violation of "[a] fundamental precept of common-law adjudication ... that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ...." *See Montana v. United States*, 440 U.S. 147, 153 (1979). This "fundamental precept" should be honored by issuing a Writ of Prohibition against the Board.

2. The Statute of Limitations Precludes Board Action on These Claims.

The two-year statute of limitations protects physicians against the type of abusive process

proposed by the Board. "[A]ny complaint filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, the existence of grounds for the complaint, shall be dismissed." W. Va. Code § 30-3-14(e). All the charges against Dr. Wahi here are older than two years from the date of filing, and thus must be dismissed. The Board filed the pending complaint on September 10, 2001, asserting charges that predate September 1999, typically by many years. Not only does the statute of limitations bar prosecution, but so does the equitable doctrine of laches.

There is clear precedent for restraining the Board in these circumstances. *See State ex rel Webb v. West Virginia Board of Medicine*, 203 W.Va. 235, 506 S.E.2d 830 (1998). There the Kanawha County Circuit Court granted a writ of prohibition against the Board, ordering it to determine whether the passage of time and the doctrine of laches barred further investigation into a complaint. Physicians, after all, are greatly prejudiced in their defense when the Board tries to revive outdated allegations. "The privilege to practice medicine is a valuable one. To have that privilege threatened in a proceeding where one is severely prejudiced by an unreasonable delay not of one's own making could be very unfair." 203 W.Va. at 237, 506 S.E.2d at 833.

Though the hearing examiner for the Board decided that the doctrine of laches should bar one of the two charges, the Board simply rejected his judgment and proceeded to schedule a hearing for the prosecution of both charges. Further judicial intervention was necessary, as the court subsequently prohibited the Board from proceeding with the precluded charge. The Justices concluded that "we cannot accept the Board's generic conclusion that there was no delay-related prejudice to Dr. Webb in the M. matter." 203 W.Va. at 239, 506 S.E.2d at 835. A similar issuance of a Writ of Prohibition is warranted here.

In sum, the Board is attempting an end run around the closure mandated by the statute of limitations, the expungement statute, and the doctrine of laches. A Florida appellate court ruled against its medical board in an analogous situation. *Gessler v. Department of Bus. and Prof. Reg.*, 627 So. 2d 501 (Fla. Ct. App. 5th Dist. 1993), *appeal dismissed*, 624 So. 2d 624 (Fla. 1994). That court reversed the suspension of the physician because the medical board had failed to comply with its obligations to compile and index its prior decisions. This deprived the physician of operation of stare decisis, much as the Board here seeks to deprive Dr. Wahi of res judicata and statutory protections. "The concept of stare decisis, by treating like cases alike and following decisions rendered previously involving similar circumstances, is a core principle of our system of justice." *Id.* at 504. Declaring that "[t]he issue presented is straightforward," the court reversed the disciplinary sanctions against the physician.

When a doctor is a danger to patients, it is easy to recognize. Patients complain and mistreatment is evident. Often substance abuse can be identified. None of this exists here. Dr. Wahi is a champion of patients. His foes are his competitors and a hospital opposed to innovation, but they should not be able to destroy him through misuse of the board of medicine. Endless repetition of dismissed charges against Dr. Wahi should not be allowed.

CONCLUSION

The Board's charges against Dr. Wahi amount to nothing more than an attempt to revive its prior dismissed complaints. This is barred by res judicata and the statute

of limitations, and fundamental principles of due process.

AAPS respectfully requests that the Court issue a Writ of Prohibition barring the Board from taking further action on its amended complaint against Dr. Wahi.