

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002552-MR

DAVID P. SANGSTER, M.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 04-CI-001227

LLOYD VEST AND KENTUCKY
BOARD OF MEDICAL LICENSURE

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

COMBS, CHIEF JUDGE: This is a *pro se* appeal from an opinion and order of the Jefferson Circuit Court dismissing the complaint of David P. Sangster, M.D., against the Kentucky Board of Medical Licensure (the Board) and its general counsel, Lloyd Vest.

In 1994, the Board initiated an investigation of Dr. Sangster concerning allegations that he had engaged in a sexual relationship with a patient and that he had inappropriately (and/or excessively) prescribed controlled substances to his patients. Following an emergency hearing, the parties agreed to

resolve the case informally without conducting an evidentiary hearing. Represented by counsel, Dr. Sangster entered into an Agreed Order of Suspension/Probation, which was signed on October 16, 1997. The Order contained several Stipulated Conclusions of Law. Pertinent to this appeal are the following items:

3. Given the conflicting nature of the evidence anticipated at the administrative hearing, there would be sufficient evidence for the Hearing Panel to conclude that a violation had occurred or that a violation had not occurred.

4. The parties expressly agreed that there are sufficient legal grounds for the Hearing Panel to impose an indefinite restriction upon his Kentucky medical license, pursuant to KRS 311.595 and 311.597.

5. While the licensee disagrees with the ultimate conclusion, he agrees that the Board could present sufficient evidence during a hearing for a Hearing Panel to conclude that he had engaged in predatory practices in his medical practice. The licensee understands that such a finding would support revocation of or an indefinite restriction upon his Kentucky medical license. Rather than risk revocation of his license, the licensee agrees to an indefinite restriction under the terms set out below.

The terms governing the indefinite restriction included placing the license of Dr. Sangster on probation through March 8, 2002. Dr. Sangster also agreed not to re-apply for his Drug Enforcement Administration permit until he had

successfully completed a mini-residency on "The Use and Prescribing of Controlled Substances."

Shortly after signing the Agreed Order, Dr. Sangster began to challenge its validity repeatedly on a variety of grounds. In March 1999, he filed a petition to correct errors relating to the opinions of Board consultant Dr. Orson Smith. He requested that the Board consider the possibility that Dr. Smith's testimony was false and that he had engaged in willful misconduct. The Board refused to consider the petition. In July 2001, Dr. Sangster filed a grievance against Dr. E.C. Seeley relating to his conduct as a consultant on the case. The Board again refused to entertain the grievance, commenting, "We will not re-litigate your challenges to the testimony presented in your disciplinary action[.]" Dr. Sangster next filed a complaint against Dr. Seeley and the Board itself in Jefferson Circuit Court. The Jefferson Circuit Court granted Dr. Seeley's motion to dismiss the complaint; that order was affirmed by this Court in an opinion rendered on March 26, 2004 (2002-CA-001970-MR).

Dr. Sangster then filed a second complaint in Jefferson Circuit Court, once again naming Dr. Seeley as a defendant -- but now naming the Governor of Kentucky as a defendant as well. The defendants' motion to dismiss was granted on December 27, 2002. This Court affirmed the ruling of

the circuit court in an opinion rendered on May 14, 2004 (2003-CA-000201-MR).

On December 25, 2002, Dr. Sangster filed a third complaint, naming as defendants the former Chief of the Jefferson County Police Department, William Carcara, and a former investigator for the Board, Jose Aponte. This complaint focused on the narcotics investigation by the police which led to the disciplinary action undertaken by the Board against Dr. Sangster. The circuit court granted the defendants' motion to dismiss.

The appeal now before us relates to a fourth complaint that was filed by Dr. Sangster on January 17, 2004, against the Board and its general counsel, Lloyd Vest. In this complaint, Dr. Sangster alleged that various witnesses had committed perjury against him, that the Board had suborned perjury, and that the Board even coerced them into testifying against him. He also alleged that by allowing a copy of the Agreed Order of Suspension/Probation to be published on its website, the Board violated his right to confidentiality conferred by KRS¹ 61.810(j), a portion of the Open Records Act. Finally, he claimed that the action of the Board had violated his constitutional right to equal protection. On November 8, 2004, the circuit court entered an order granting the defendants'

¹ Kentucky Revised Statutes.

motion to dismiss on the basis of the statute of limitations, *res judicata*, and lack of a right to confidentiality.

On appeal, Dr. Sangster contends that the Board defamed him in publishing the Agreed Order of Suspension/ Probation on the Board's website by rendering it available to the general public. Although the allegations contained in the order were never proven, he claims that they have been published as if they were true.

Our review of the record reveals a claim of defamation was never raised in the pleadings before the circuit court.

"The Court of Appeals is without authority to review issues not raised in or decided by the trial court." Regional Jail Authority v. Tackett, 770 S.W.2d 225, 228 (Ky. 1989). We are not at liberty to address this newly raised allegation.

Dr. Sangster also argues that the availability of the Order on the Board's website contravenes provisions of the Kentucky Open Records Act. The Board argues that the Agreed Order is a public record as that term is defined in KRS 61.870(2):

"Public record" means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation owned, used, in the possession of or retained by a public agency. "Public record" shall not include any records owned or maintained by or for a body referred to in subsection (1)(h) of this section that are not related to functions, activities,

programs, or operations funded by state or local authority.

Dr. Sangster nonetheless contends that the Board violated KRS 61.810(j), which provides that public scrutiny need not be extended to:

[d]eliberations of judicial or quasi-judicial bodies regarding individual adjudications or appointments, at which neither the person involved, his representatives, nor any other individual not a member of the agency's governing body or staff is present[.]

He believes that when the Agreed Order was made available to the public, this statutory provision was violated because the results of the Board's deliberations were involved. His argument is based on a fundamental misunderstanding of the statute. KRS 61.810 pertains to actual public access to and attendance at meetings -- not the documents generated as a result of those meetings. In short, he has erroneously relied on the term *deliberations* and has lifted it out of context in a manner that affords him neither relevance nor relief.

Dr. Sangster also contends that the publication of the order violates his right to equal protection because other regulatory agencies (such as the Kentucky Bar Association and the Kentucky Board of Nursing) maintain the confidentiality of accused members who are exonerated. He bases this argument on the mistaken premise that he **was** indeed exonerated; *i.e.*, that

he was found not guilty of the allegations against him. However, Dr. Sangster expressly agreed that there **were sufficient grounds** for the Hearing Panel to revoke his medical license. Rather than risking an adverse outcome, he accepted the terms offered in a manner analogous to entry of an Alford plea by a criminal defendant in order to obtain a more lenient sentence. See North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1977). Dr. Sangster was not exonerated and had expressly admitted that the charges against him might be proven. His case is wholly unique and distinguishable from the examples that he cites from disciplinary matters before the Kentucky Bar Association and the Kentucky Board of Nursing.

The appellees argue that Dr. Sangster's claims are barred under the doctrine of *res judicata*, which provides that:

[a] final judgment precludes subsequent litigation not only of those issues upon which the court was required to form an opinion and pronounce judgment but also of matters included within those issues and matters that, with the exercise of reasonable diligence, might have been raised at the time.

Whittaker v. Cecil, 69 S.W.3d 69, 72 (Ky. 2002), citing Newman v. Newman, 451 S.W.2d 417, 419 (Ky. 1970). We agree. Dr.

Sangster has provided no explanation as to why the issues raised in this appeal could not have been raised in one of his numerous prior actions.

We affirm the opinion and order of the Jefferson
Circuit Court dismissing Dr. Sangster's claims.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

David P. Sangster, M.D.
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BRIEF FOR APPELLEES:

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