

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001423-MR

KENTUCKY BOARD OF NURSING

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 99-CI-007629

MARLENE MARTIN WALL

APPELLEE

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: COMBS, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Kentucky Board of Nursing (Board) brings this appeal from a May 22, 2000, opinion and order of the Jefferson Circuit Court. We affirm.

Appellee, Marlene Martin Wall, worked as a licensed registered nurse. Kentucky Revised Statutes (KRS) Chapter 314. Wall became a licensed nurse in 1980. Pursuant to Ky. Admin. Regs. (KAR) 20:215, a nurse's license is issued for a two-year period with re-application at the end of each two-year period. The application requires, *inter alia*, that each licensee complete

thirty contact hours of continuing nursing education (CNE) within the two-year period.

On or about August 10, 1998, Wall submitted a licensure renewal application with the deadline being October 31, 1998. Part D of the application required Wall to certify she had already met or would meet the CNE requirement. Wall answered affirmatively. She subsequently completed a self-study CNE course and took an examination to demonstrate the completion of the course in late October 1998. It appears, however, Wall failed the examination and, thus, received no CNE credit.

In the fall of 1998, Wall was diagnosed with ovarian cancer. On March 13, 1999, she underwent surgery to remove a tumor and followed up with three months of chemotherapy. She was also treated for severe depression.

In February 1999, the Board conducted a routine audit of licensees. The Board sent Wall a letter requesting proof that the CNE requirement was met. Wall did not respond.¹ The Board sent Wall a second notice in May 1999. Again, Wall did not respond. On July 14, 1999, the Board served Wall a Notice of Hearing and Statement of Charges. The Board alleged that Wall violated both KRS 314.091(1)(a) and KRS 314.091(1)(i). A hearing was held before the Board on August 26, 1999, but Wall did not appear. On October 4, 1999, the Board entered a "Proposed Decision" against Wall, purporting to suspend her license for six months and fine her \$450.00. A copy of the Proposed Decision was

¹Wall did not regularly receive mail during her treatment and recovery. As a result, she did not learn of her failure until October 1999.

mailed to Wall on October 4, 1999. On November 4, 1999, Wall made her first response to the Board by letter explaining her serious illness during the past year. She stated that she had retaken her CNE test and was awaiting the results. She further expressed regret and indicated a willingness to cooperate with licensing requirements.

By letter dated November 9, 1999, Wall informed the Board she had successfully completed the required CNE hours. On December 2, 1999, Wall sent another letter again setting out her circumstances and indicating her willingness to cooperate.

On December 10, 1999, the Board issued its final order finding Wall guilty of violating KRS 314.091(1)(a) and KRS 314.091(1)(i). It ordered Wall's license suspended for at least six months and ordered her to pay a civil penalty of \$450.00 with costs. Wall filed a "Petition of Appeal and Complaint for Injunctive Relief" on December 22, 1999. KRS Chapter 13B and KRS 314.091. On December 30, 1999, the circuit court entered an order staying the Board's final order pending the outcome of the instant action.

On January 13, 2000, the Board made a motion to dissolve the stay, deny injunctive relief, and dismiss Wall's appeal. The circuit court overruled the motion on March 16, 2000. On May 22, 2000, the circuit court entered a final order. Therein, it determined that the Board's decision was arbitrary. The circuit court reversed the Board's final order and permanently enjoined the Board from suspending Wall's license. This appeal follows.

As an appellate court, we step into the shoes of the circuit court and review the Board's decision for arbitrariness. See American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). Arbitrariness has many facets; relevant to our review is whether the Board's decision was supported by substantial evidence and whether the Board misapplied the law.

The Board found Wall guilty of violating KRS 314.091(1)(a), which reads, in pertinent part:

- (1) The board shall have power to deny, limit, revoke, probate, or suspend any license to practice nursing issued by the board or applied for in accordance with this chapter, or to otherwise discipline a licensee, or to deny admission to the licensure examination, or to require evidence of evaluation and therapy upon proof that the person:
 -
 - (a) Is guilty of fraud or deceit in procuring or attempting to procure a license to practice nursing.

Specifically, the Board found Wall committed fraud by certifying on her application she had or would complete the required CNE credits by October 31, 1998. We are constrained to agree with the circuit court that the Board's decision was arbitrary.

Fraud consists of: (1) material misrepresentation; (2) known to be false or made recklessly; (3) made to induce action; (4) action in reliance thereon; and (5) resulting injury. See United Parcel Service Company v. Rickert, Ky., 996 S.W.2d 464 (1999). It is also well established fraud must relate to a present or pre-existing fact and ordinarily cannot be predicated

upon representations involving future acts. See Brooks v. Williams, Ky., 268 S.W.2d 650 (1954). In the case *sub judice*, it is uncontroverted that Wall certified her on renewal application that she did or would complete the thirty CNE hours by October 31, 1998. Wall had not at that time completed the CNE. Her certification thus constituted a representation predicated on a future event. As such, we conclude as a matter of law Wall could not have committed fraud.²

The Board also found Wall guilty of violating KRS 314.091(1) (i), which reads, in pertinent part:

- (1) The board shall have power to deny, limit, revoke, probate, or suspend any license to practice nursing issued by the board or applied for in accordance with this chapter, or to otherwise discipline a licensee, or to deny admission to the licensure examination, or to require evidence of evaluation and therapy upon proof that the person:

. . . .

- (i) Has willfully or repeatedly violated any of the provisions of this chapter or violated any lawful order or directive previously entered by the board, or any administrative regulation promulgated by the board.

Specifically, the Board found Wall guilty of willfully and repeatedly violating the statute, Board directive, or administrative regulation by failing to provide proof of the CNE as requested.

²The Board contends there was sufficient evidence to support its final decision of finding Wall guilty of fraud. Because we believe as a matter of law Wall could not have committed fraud, we perceive this issue moot.

A willful act means an intentional act, not one done accidentally or involuntarily, and done according to a purpose. See Turner v. Commonwealth, Ky., 328 S.W.2d 536 (1959). Wall contends her cancer surgery and subsequent chemotherapy prevented her from timely responding to the Board's requests. There is no evidence to the contrary. While Wall's failure might have been "negligent," we do not believe it rises to the level of willful within the meaning of KRS 314.091(1)(i). We believe Wall did not commit fraud, thus we cannot say she "repeatedly violated" any statute, directive, or administrative regulations as comprehended by KRS 314.091(1)(i).

The Board also contends that the circuit court erred in granting Wall a stay against the Board's decision. We believe the point is moot as a temporary injunction has now been replaced by a permanent injunction.

Finally, the Board argues that the circuit court erred in failing to address CR 11 sanctions.

Because Wall ultimately prevailed in circuit court and before us, we do not believe CR 11 sanctions are proper. In fact, we view this assignment of error as bordering on frivolity.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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