MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MARY LUSCOMBE

APPELLANT,

v.

MISSOURI STATE BOARD OF NURSING

RESPONDENT.

DOCKET NUMBER WD75049

DATE: January 8, 2013

Appeal From:

Cole County Circuit Court
The Honorable Byron L. Kinder, Judge

Appellate Judges:

Division Three: Alok Ahuja, Presiding Judge, Victor C. Howard, Judge and Cynthia L. Martin, Judge

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Attorneys:

Mariam A. Decker and Julia S. Grus, Columbia, MO, for appellant.

Margaret K. Landwehr, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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APPELLANT,

v.

MISSOURI STATE BOARD OF NURSING,

RESPONDENT.

No. WD75049 Cole County

Before Division Three: Alok Ahuja, Presiding Judge, Victor C. Howard, Judge and Cynthia L. Martin, Judge

Mary Luscombe ("Luscombe") appeals the Administrative Hearing Commission's ("AHC's") decision that found cause for disciplining Luscombe and the Missouri State Board of Nursing's ("Board") decision that terminated her nursing license in connection with Luscombe's employment as a nurse with two different employers. First, Luscombe argues that the AHC erred in concluding that expert testimony was not required to establish the standard of care, an essential element of gross negligence, by which a neonatal intensive care unit ("NICU") nurse must adhere, a claim of error relating to Luscombe's employment with a hospital. Second, Luscombe contends that the AHC erred in refusing to admit affidavits from two patients into evidence and that the AHC erred in concluding that expert testimony was not required to determine that Luscombe's failure to submit records constituted incompetency and misconduct, claims of error relating to Luscombe's employment with a home health company. Third, Luscombe claims that the Board erred in suspending her license because the evidence presented at the disciplinary hearing was not refuted.

AFFIRM IN PART AND REVERSE IN PART. REMAND TO BOARD FOR RECONSIDERATION OF SANCTION.

Division Three holds:

(1) In the context of professional licensing, gross negligence requires an act or course of conduct that demonstrates a conscious indifference to a professional duty. When a case concerns complex issues like the appropriate medical care for patients, expert testimony is required to establish the professional standard, also known as the standard of care, by which the professional must adhere. The professional standard is the degree of care, skill, and proficiency that is commonly exercised by an ordinarily careful, skillful, and prudent professional in same or similar circumstances. In addition, expert testimony is necessary to determine whether the professional standard of care was met in the particular circumstances of the case. No expert testimony regarding the professional standard by which a NICU nurse must adhere or whether Luscombe met that professional standard was presented at the AHC hearing. The AHC erred in

concluding that Luscombe acted grossly negligent in connection with her employment as a NICU nurse at a hospital.

(2) Luscombe's second point relied on presents two claims of error, which violates 84.04(d) and preserves nothing for appellate review. Despite the second point's flaw, we have elected to exercise our discretion to *ex gratia* address the issues raised.

The decision to exclude patients' affidavits from evidence is a matter of the AHC's discretion, which we review for abuse of discretion. Section 536.070(12) allows for the admission of affidavits over an objection during an AHC hearing if there is an applicable hearsay exception. Luscombe has not argued that a hearsay exception applied to allow the affidavits to be admitted into evidence over the Board's objection. The AHC did not abuse its discretion in sustaining the Board's objection. Even if we were to find the AHC abused its discretion, the exclusion of the affidavits would not constitute prejudicial error because admitting the affidavits from two patients would not have changed the handwriting expert's opinion that it was "highly probable" that all of the involved patients did not sign the documents in question. If the affidavits were admitted, and accepted as truthful, the AHC would still have found that Luscombe forged the signatures of two other patients, neither of whom testified or created an affidavit.

Misconduct is defined as the willful performance of an act with a wrongful intention. Nothing in the definition of misconduct suggests the need to establish professional standards through expert testimony. Incompetency is a professional's inability or unwillingness to function properly in the profession. Where, as here, proper function relates to the generation, creation, or submission of records merely to permit proper compensation of the licensed professional and proper reimbursement of the licensed professional's employer (not to enhance or promote patient care), expert testimony is not required because a standard of care for the performance of a professional duty is not at issue. Expert testimony was not required to establish that Luscombe's failure to submit records constituted incompetency and misconduct.

The AHC did not err in concluding that there was a basis to discipline Luscombe in connection with her employment at a home health care company.

(3) In light of our conclusion that expert testimony was required to establish that Luscombe was grossly negligent as a NICU nurse in connection with her hospital employment we are required to remand for reconsideration of sanction. We need not reach Luscombe's third point relied on which questioned the Board's decision to suspend her license.

Opinion by Cynthia L. Martin, Judge January 8, 2013

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