

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES S. TATE, JR., M.D.,
Appellant,
vs.
THE STATE OF NEVADA, BOARD OF
MEDICAL EXAMINERS,
Respondent.

No. 61283

FILED

DEC 19 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malse
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from the district court's denial of a petition for judicial review of the Board of Medical Examiners' decision. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

I.

Minor "Patient A" sustained severe road burns after being struck by an automobile. He was admitted to University Medical Center's (UMC) trauma center, where he was seen by trauma surgeon James S. Tate, Jr., M.D. Dr. Tate released Patient A after two days with instructions to return to UMC's outpatient burn center the next morning. Patient A's father, Michael Moore, and Moore's mother, Nancy Shoeps, brought Patient A to UMC the next morning. Shortly after their arrival, the resident doctor on duty came to see Patient A, accompanied by Dr. Tate. Moore made it known to Dr. Tate and the staff that he wanted a burn specialist, not Dr. Tate, to resume care of Patient A.

After some heated discussion, Dr. Tate told the family that if they wanted a burn specialist, then they could go ask the nurses for a burn specialist. As Dr. Tate was departing, Shoeps stated that she would report his "unconscionable behavior." Dr. Tate retorted, "Fine. You go ahead and

do that. And make sure you spell my name right, T-a-t-e." He then left the room.

Moore yelled down the hall after Dr. Tate, "Okay, leave, like you did yesterday," and called him an "asshole." Dr. Tate replied either that Shoeps was a "bitch" or that she was a "fucking asshole." At this comment, Moore brought Shoeps out of the room and yelled, "Here's my mother. Say it to her face." Moore, followed by Shoeps, went down the hall to confront Dr. Tate.

The three parties came together, with Moore and Dr. Tate standing chest-to-chest and Dr. Tate telling Moore to "back off." It is disputed what next occurred. Moore claimed that Dr. Tate "had his dukes up," and Shoeps claimed that she tried to hold Moore back as Dr. Tate poked her chest with his finger. Other witnesses contradicted these allegations. At some point, a staff member intervened and told Dr. Tate to leave, which he did.

The Investigative Committee of the Nevada State Board of Medical Examiners (Committee) filed a complaint against Dr. Tate. The complaint contained two counts: (1) that Dr. Tate violated NRS 630.301(6) by engaging in disruptive behavior that negatively interfered with Patient A's care, and (2) that Dr. Tate violated NRS 630.301(9) because his actions brought the medical profession into disrepute.

After Dr. Tate answered, he filed a complaint in district court challenging NRS 630.301(9)'s constitutionality, which indefinitely deferred the agency action. Nevertheless, the Committee scheduled a prehearing conference. Dr. Tate filed a motion for summary judgment before the conference. The hearing officer recommended that the Nevada State Board of Medical Examiners (Board) dismiss count one, but allow count

two to proceed to hearing. After the hearing officer denied Dr. Tate's emergency motion for reconsideration, Tate filed an emergency petition for writ of prohibition with this court, which also was denied. The Committee eventually dismissed count one.

So, at the hearing before the hearing officer, the only issue was whether Dr. Tate's actions brought the medical profession into disrepute per NRS 630.301(9). In his findings and conclusions, the hearing officer found that the evidence did not support Moore's claim that Dr. Tate "had his dukes up," and neither did it support Shoep's claim that Dr. Tate pushed her with his finger. He also noted that Moore and Shoeps said Dr. Tate's conduct did not bring the medical profession into disrepute in their eyes, but rather only lowered their opinion of Dr. Tate. The hearing officer also noted that the medical staff who observed the incident admitted that upsetting, heated exchanges between doctors and families were not uncommon in emergency and trauma settings. Thus, the hearing officer found that Moore and Shoeps acted inappropriately by creating and escalating the situation, but also found that Dr. Tate's inappropriate response escalated the situation. The hearing officer concluded that under the totality of the circumstances, Dr. Tate's response would not support a finding that he had violated the statute by bringing the profession into disrepute. The hearing officer did not reach Dr. Tate's previous challenge to NRS 630.301(9)'s constitutionality, but suggested that the Board consider adopting an ethics code to clarify "disrepute."

The Board met to review the hearing officer's determination. The meeting chair stated that discussion was open on count two only. Board member Donna Ruthe stated that she found Dr. Tate's actions unprofessional, and that they negatively impacted Patient A's care. The

meeting chair reminded the Board that the only issue before them was count two concerning disrepute. Dr. Tate's counsel attempted to interject, but was told he could only offer a comment and recommendation during the penalty phase. Ruthe moved that the Board find that Dr. Tate violated NRS 630.301(9) as alleged in count two because of his "unprofessional actions and loss of control toward the patient's father and grandmother which had a negative impact on the quality of care that Dr. Tate rendered to the patient." Without discussion, all Board members agreed and passed the motion.

The Board moved to the penalty phase, and allowed Dr. Tate's counsel to comment regarding the penalty. After discussing possible penalties, the Board's majority agreed to fine Dr. Tate \$1,000, impose a public reprimand, and require him to take certain continuing medical education credits. The Board's subsequently filed written order found that Moore and Shoeps insulted Dr. Tate with profanities. It further found Dr. Tate "ended up in a yelling match" with Shoeps and Moore, directed insults and profanities at them, and had touched Shoeps with his finger. The Board thus found "by reliable, probative and substantial evidence that [Dr. Tate] violated NRS 630.301(9) when he engaged in conduct that brought the medical profession into disrepute by participating in the ongoing verbal altercation with Patient A's father and grandmother."

Dr. Tate petitioned for judicial review, claiming that the Board violated constitutional and statutory provisions and acted in a clearly erroneous manner in light of the evidence. He also asked the court to find NRS 630.301(9) unconstitutional as applied. The district court denied his petition. Dr. Tate now appeals.

II.

A.

This court reviews administrative decisions under the same standard as the district court. *State, Dep't of Motor Vehicles v. Taylor-Caldwell*, 126 Nev. ___, ___, 229 P.3d 471, 472 (2010). This court may not substitute its judgment for the Board's in reviewing the decision. NRS 233B.135(3). But, we may overturn the Board's decision if it was clearly erroneous in light of the substantial evidence on record. NRS 233B.135(3)(e). Substantial evidence is evidence that a reasonable person could find adequate to support a decision. *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. ___, ___, 302 P.3d 1108, 1112 (2013).

B.

The Board found that Dr. Tate violated NRS 630.301(9), which provides that a doctor may be disciplined for “engaging in conduct that brings the medical profession into disrepute.” No statute or administrative regulation defines “disrepute.”

This court may turn to dictionary definitions to discern what disrepute means.¹ 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:7 (7th ed. 2007). *Black's Law Dictionary* defines disrepute as a “loss of reputation; dishonor.” *Id.* (9th ed. 2009); see also *Merriam-Webster's Collegiate Dictionary* 362 (11th ed.

¹Other courts have looked to dictionaries to determine what disrepute means as used in professional codes of conduct. See *In re Worthen*, 926 P.2d 853, 871 (Utah 1996) (judicial code of conduct); *In re Smith*, 687 A.2d 1229, 1239 (Pa. Ct. Jud. Disc. 1996) (judicial code of conduct); *Bird v. Cnty. of Allen*, 639 N.E.2d 320, 332 (Ind. Ct. App. 1994) (law enforcement code of conduct).

2007) (defining disrepute as a “lack or decline of good reputation”). Reputation means “[t]he esteem in which a person is held by others.” *Black’s Law Dictionary* 1419 (9th ed. 2009); see also *Merriam-Webster’s Collegiate Dictionary* 1058 (11th ed. 2007) (defining reputation as “overall quality or character as seen or judged by people in general” and “a place in public esteem or regard”). And esteem is “the regard in which one is held.” *Merriam-Webster’s Collegiate Dictionary* 427 (11th ed. 2007). Thus, conduct that brings the medical profession into disrepute is conduct that results in a loss of the public’s regard for the medical profession.

As one court has held, “areas of the law in which public perception plays a pivotal part” provide guidance as to how disreputable conduct may be shown. *In re Smith*, 687 A.2d 1229, 1239 (Pa. Ct. Jud. Disc. 1996). For example, in defamation cases “a necessary element is that the publication tends to blacken a person’s reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession.” *Id.*; *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385, 213 P.3d 496, 503 (2009) (the elements of defamation are “(1) a false and defamatory statement . . . ; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.” (internal quotations omitted)). Thus, the defamation plaintiff must prove that the plaintiff suffered harm from the defamatory statement’s publication. *Id.* Similarly, to support a finding of disreputable conduct, there at least must be some evidence from which to infer a decline in the public’s perception of the profession. See *In re Carney*, ___ A.3d ___, ___, No. 32 WAP 2011, 2013 WL 5814363, at *7 (Pa. Oct. 30, 2013) (“[D]isrepute necessarily includes consideration of whether the public’s perception of the [profession] as a whole has been

affected by the alleged misconduct.”); *In re Smith*, 687 A.2d at 1238 (holding the judicial disciplinary board was required to show conduct that resulted “in a decline of public esteem for the judicial office” to demonstrate disrepute).

Here, the Board summarily found that Dr. Tate’s altercation with Moore and Shoeps brought the medical profession into disrepute. However, it pointed to no evidence that supported an inference that Dr. Tate’s actions lowered the public’s regard of the medical profession as a whole. None of the witnesses testified that Dr. Tate’s actions reflected poorly on medical professionals generally. And, there was uncontroverted testimony that Dr. Tate’s actions were not uncommon in the high-stress setting of a trauma center. Additionally, Moore and Shoeps, who engaged in the altercation with Dr. Tate, specifically testified that while this incident lowered their view of Dr. Tate, it did not lower their view of the entire medical profession. Thus, the record fails to support that Dr. Tate’s actions brought the medical profession into disrepute. *See In re Smith*, 687 A.2d at 1239 (“Even if a judicial officer’s actions could reasonably result in a lessening of respect for that judge, it cannot be assumed that the same actions would necessarily bring the judicial office itself into disrepute.”).

Further, the hearing officer’s initial findings of fact and recommendations found that substantial evidence did not demonstrate that Dr. Tate’s actions brought the medical profession into disrepute. We have held, “in those cases where a hearing officer is appointed to hear the case and the evidence is conflicting or credibility is a determining factor, the Board is required to seek the recommendation of the hearing officer.” *Molnar v. State ex. rel. Bd. of Med. Exam’rs*, 105 Nev. 213, 216, 773 P.2d

726, 728 (1989); *see also* NRS 630.352(1) (“[T]he Board shall consider any findings of fact and conclusions of law submitted after the hearing.”); NAC 630.470(8) (the hearing officer shall submit a synopsis of the hearing testimony to the Board, and make a recommendation to the Board on the witnesses’ veracity “if there is conflicting evidence or the credibility of witnesses is a determining factor”). While the Board is not required to follow a hearing officer’s recommendation, here the Board did not identify evidence before the hearing officer that would justify it going the other way. Nor did the Board receive any additional evidence demonstrating Dr. Tate’s actions would have lowered the public’s regard of the medical profession other than the evidence gathered by the hearing officer. And this court can discern no such evidence.

In light of the lack of evidence in the record that Dr. Tate’s actions lowered the medical profession’s reputation in general, substantial evidence does not support that Dr. Tate’s actions brought the medical profession into disrepute. Thus, the Board’s decision finding a violation of NRS 630.301(9) was clearly erroneous.²

²We therefore do not reach Dr. Tate’s remaining arguments.

We therefore

ORDER the judgment of the district court REVERSED AND
REMAND this matter to the district court for proceedings consistent with
this order.

Pickering, C.J.
Pickering

Gibbons J.
Gibbons

Hardesty J.
Hardesty

Parraguirre J.
Parraguirre

Douglas J.
Douglas

Cherry J.
Cherry

Saitta J.
Saitta

cc: Second Judicial District Court Dept. 8
James Georgeson, Settlement Judge
HafterLaw
Michael K. Naethe
Bradley O. Van Ry
Washoe District Court Clerk