

SUPREME COURT OF MISSOURI

Tendai v. Missouri State Board of Registration for the Healing Arts

161 S.W.3d 358 (Mo. banc 2005) · No. SC 86110 · Decided April 5, 2005

SUMMARY

The Supreme Court of Missouri reversed disciplinary findings against Dr. Mark Tendai arising from his treatment of a pregnant patient whose fetus had intrauterine growth retardation and a two-vessel umbilical cord. The Court held that the record did not contain substantial evidence supporting findings of gross negligence, repeated negligence, incompetence, or conduct harmful to a patient. The Court also addressed the evidentiary treatment of post-investigation “sticky notes” documenting alleged referrals to a perinatologist.

CASE DETAILS

COURT	Supreme Court of Missouri
WRITING FOR THE COURT	Michael A. Wolff; William Ray Price Jr.; Laura Denvir Stith; Limbaugh; Russell; Ronnie L. White; Richard B. Teitelman
JURISDICTION	Missouri
DECIDED	April 5, 2005
DOCKET	SC 86110
DISPOSITION	reversed
PROCEDURAL POSTURE	Physician appealed a Cole County Circuit Court judgment affirming an Administrative Hearing Commission finding that cause existed to discipline him and affirming disciplinary sanctions imposed by the Missouri State Board of Registration for the Healing Arts.
STANDARD OF REVIEW	The Court reviews the Administrative Hearing Commission and Board decisions rather than the circuit court's judgment. Factual findings are reviewed for support by competent and substantial evidence in the record as a whole, viewed in the light most favorable to the agency's findings. Legal interpretations and the application of facts to law are reviewed de novo.
PRECEDENTIAL VALUE	Published en banc opinion of the Supreme Court of Missouri; precedential.
PARTIES	Mark M. Tendai, M.D. v. Missouri State Board of Registration for the Healing Arts

TOPICS

medical licensing judicial review of agency action standard of review hearsay

PRACTICE AREAS

health law medical licensing administrative law evidence statutory interpretation

QUESTIONS PRESENTED

1. Whether substantial evidence supported the Commission's finding that Tendai committed gross negligence under section 334.100.2(5), RSMo.
2. Whether substantial evidence supported a finding of repeated negligence based on Tendai's conduct during multiple visits with the same patient.
3. Whether substantial evidence supported a finding that Tendai was incompetent under section 334.100.2(5).
4. Whether substantial evidence established that Tendai's conduct was harmful to the patient's health by causing or contributing to cause the fetal death.
5. Whether the sticky notes were admissible business records supporting Tendai's claim that he referred S.G. to a perinatologist.

HOLDINGS

1. The sticky notes were not proper medical records or admissible business records because they were not made as part of the regular medical record for use by other health-care providers; they were hearsay and were properly excluded.
2. A deviation from the professional standard of care is not gross negligence unless the evidence shows conscious indifference to professional duty or a gross deviation from the applicable standard of care. The record did not contain substantial evidence of gross negligence.
3. The record did not support a finding of repeated negligence because Tendai's failure to refer S.G. or arrange testing arose from one treatment decision, and his later visits merely adhered to that decision rather than constituting separate negligent acts.
4. A single negligent act does not establish incompetence. Incompetence requires a general lack of present ability or disposition to perform the relevant professional duty, and the record did not contain substantial evidence that Tendai was incapable of practicing medicine or lacked the qualifications necessary to do so.
5. To sustain a finding that conduct was harmful to a patient's health under section 334.100.2(5), the Board had to prove that the conduct caused or contributed to cause the asserted injury. The Board failed to prove that Tendai's conduct caused or contributed to cause the fetal death.

KEY QUOTATIONS

“There is a wide difference between “ordinary negligence” and “gross negligence.”” (367)

“The board, however, does not have authority to discipline for ordinary negligence; it may only do so for repeated negligence or gross negligence.” (368)

“Although the board's evidence may have been sufficient to support a finding that Dr. Tendai was negligent, a finding of a negligent act—by itself—is not enough to establish incompetency because a competent physician can commit a negligent act.” (370)

“Since the board did not prove causation, the commission's conclusion that Dr. Tendai committed conduct harmful to a patient is not supported by substantial evidence and must be reversed.” (371)

FACTUAL BACKGROUND

Tendai treated S.G., who was pregnant in 1992, and diagnosed intrauterine growth retardation and a two-vessel umbilical cord. The Commission found that he failed to refer S.G. to a perinatologist or arrange appropriate monitoring and testing, and that the sticky notes offered to support an alleged referral were not proper medical records. S.G. later delivered a stillborn child whose death was attributed in the autopsy to the combined effects of a tight umbilical cord, chronic villitis, and fetal growth retardation. The expert evidence established at most ordinary negligence and did not establish gross negligence, incompetence, or that Tendai's conduct caused the death.

PROCEDURAL HISTORY

The Administrative Hearing Commission found cause to discipline Tendai based on his treatment of S.G., concluding that his conduct constituted gross negligence, repeated negligence, incompetence, and conduct harmful to a patient. The Board imposed a public reprimand, a 60-day suspension, a prohibition on obstetrical practice, and a medical-documentation course requirement. The Cole County Circuit Court affirmed. An earlier appeal was dismissed for lack of a final judgment, and this Court later issued a writ of prohibition directing the circuit court to make factual findings on Tendai's equal-protection claim. After the circuit court entered those findings and again affirmed, Tendai appealed to the Supreme Court of Missouri.

DISPOSITION

reversed

CASES CITED

- Missouri Coalition for the Environment v. Herrmann, 142 S.W.3d 700, 701 (Mo. banc 2004)
- State Board of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146, 152, 159 (Mo. banc 2003)
- Bruemmer v. Missouri Department of Labor Relations, 997 S.W.2d 112, 115-16 (Mo. App. 1999)
- Mendelsohn v. State Board of Registration for the Healing Arts, 3 S.W.3d 783, 786-87 (Mo. banc 1999)
- Lagud v. Kansas City Board of Police Commissioners, 136 S.W.3d 786, 796 (Mo. banc 2004)
- Long v. St. John's Regional Health Center, Inc., 98 S.W.3d 601, 607 (Mo. App. 2003)
- Caples v. Earthgrains Co., 43 S.W.3d 444, 452 (Mo. App. 2001)
- Palmer v. Hoffman, 318 U.S. 109, 115 (1943)

- Kitchen v. Wilson, 335 S.W.2d 38, 43 (Mo. 1960)
- Asbury v. Lombardi, 846 S.W.2d 196, 201 (Mo. banc 1993)
- Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors, 744 S.W.2d 524, 532-33 (Mo. App. 1988)
- Haase v. Garfinkel, 418 S.W.2d 108, 113 (Mo. 1967)
- Swope v. Printz, 468 S.W.2d 34, 39 (Mo. 1971)
- Lopez v. Three Rivers Electric Cooperative, Inc., 26 S.W.3d 151, 158 (Mo. banc 2000)
- Meyer v. Lockard, 118 S.W.3d 245, 250 (Mo. App. 2003)
- Montgomery v. South County Radiologists, Inc., 49 S.W.3d 191, 194-95 (Mo. banc 2001)
- Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760, 762 (1943)
- Gott v. Director of Revenue, 5 S.W.3d 155, 158 (Mo. banc 1999)
- Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 861-63, 865 (Mo. banc 1993)
- 77 S.W.3d 1 (Mo. banc 2002)
- 121 S.W.3d 234 (Mo. banc 2003)
- Missouri Board of Registration for the Healing Arts v. Levine, 808 S.W.2d 440, 442 (Mo. App. 1991)
- Bhuket v. State Board of Registration for the Healing Arts, 787 S.W.2d 882, 885 (Mo. App. 1990)
- Bittiker v. State Board of Registration for the Healing Arts, 404 S.W.2d 402, 405 (Mo. App. 1966)
- Fritzshall v. Board of Police Commissioners, 886 S.W.2d 20, 28 (Mo. App. 1994)
- Fowler v. Park Corp., 673 S.W.2d 749 (Mo. banc 1984)
- Warner v. Southwestern Bell Telephone Co., 428 S.W.2d 596 (Mo. 1968)