1983

Robert B. Vance v. Paul V. Fordham : Appellant's Petition for Rehearing

Utah Supreme Court

M. Richard Walker; Walker, Kintze & Washburn; Attorneys for Appellants;
Steven J. Schwendiman; Attorney for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

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ROBERT B. VANCE, D.O. Appellant and Plaintiff, vs. PAUL T. FORDHAM, Director of the Department of Registration, DEPARTMENT OF REGISTRATION and THE OSTEOPATHIC COMMITTEE, Respondents and Defendants.	)	No. 18176

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APPELLANTS PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT B. VANCE, D.O. Appellant and Plaintiff, vs. PAUL T. FORDHAM, Director of the Department of Registration, DEPARTMENT OF REGISTRATION and THE OSTEOPATHIC COMMITTEE, Respondent and Defendants.	PETITION FOR REHEARING No. 18176

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COMES NOW the Appellant, by and through his attorney of record, M. Richard Walker, and pursuant to Utah Rules of Civil Procedure, Rule 76(e), hereby petitions the Court for a rehearing in the above entitled matter, based upon the following points wherein it is alleged that this Court has erred:

POINT I. THE SUPREME COURT ERRED BY ALLOWING THE LICENSE OF AN OSTEOPATH TO BE REVOKED UNDER THE PROVISIONS OF THE MEDICAL PRACTICE ACT.

POINT II. THE SUPREME COURT ERRED BY AFFIRMING THE ERRONEOUS INTERPRETATION OF THE LAW REGARDING APPEALS FOR OSTEOPATHS.

POINT III. THE SUPREME COURT HAS ERRED IN APPLYING THE STANDARDS REQUIRED OF AN ADMINISTRATIVE BODY ACTING IN A "LEGISLATIVE", OR "ADMINISTRATIVE" FUNCTION, TO THE ADMINISTRATIVE BODY (OSTEOPATHIC COMMITTEE) WHICH WAS ACTING IN A "JUDICIAL" FUNCTION.

POINT IV. THE SUPREME COURT ERRED BY FAILING TO VERIFY THAT SUBSTANTIAL PORTIONS OF THE FINDINGS BY THE COMMITTEE WERE UNSUPPORTED BY ANY COMPETENT EVIDENCE.

POINT V. THE SUPREME COURT HAS ERRED BY FAILING AS A COURT OF EQUITY TO ASSURE THE GUARANTEES OF DUE PROCESS OF LAW TO WHICH APPELLANT IS GUARANTEED BY THE CONSTITUTION.

This petition is supported by appellant's brief of the authorities relied upon to sustain the points listed herein, with ten copies of said brief being filed herewith.

DATED this 12 day of September, 1983.

M. RICHARD WALKER
Attorney for Appellant, Plaintiff

I hereby certify that I personally delivered a true and correct copy of the foregoing Petition for Rehearing and two (2) copies of Appellant's Brief, to Steven Schwendiman, Assistant Utah Attorney General, Attorney for Respondent, Defendant, at 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid on this 12 day of September, 1983.

M. RICHARD WALKER
Attorney for Appellant, Plaintiff

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF THE CASE

This matter involves the revocation of the Appellant's professional license to practice as an OSTEOPATH. The Department of Registration, after hearing before a purported committee, revoked said license on February 2, 1981, for UNPROFESSIONAL CONDUCT, under the provisions of Utah Code Annotated 1953 Section 58-1-(7-9). The revocation was appealed to the Third Judicial District Court and that Court, construing the appeal to be under Section 58-12-35.1, of the Medical Practices Act, instructed the parties to file briefs and thereafter sustained the revocation by the Department of Registration.

The Appellant filed the appeal herein and on August 22, 1983, this Court issued it's opinion affirming the judgment of the District Court, revoking the Appellant's professional license.

RELIEF SOUGHT

The Appellant herein petitions the Court for rehearing, based upon the grounds that this Court has erred in several substantive areas, resulting in a totally wrongful revocation and permanent denial of Appellant's right constitutional rights afforded by due process of law, and has failed to distinguish the difference between the statutory requirements applicable to Osteopaths (DO's) as opposed to Medical Doctors (MD's). For these substantial errors the Appellant petitions this Court for rehearing to allow these and others hereafter enumerated errors to be corrected, before the Department of registration is allowed to totally destroy the Appellant's professional practice and ability to earn a living and support his family, and to provide critical medical care to the hundreds of patients who depend upon his treatments in preventative medical care.

STATEMENT OF FACTS

The Appellant Dr. Robert B. Vance, is an Osteopathic physician and surgeon, licensed to practice as an OSTEOPATH (commonly referred to as a "DO"), under the provisions of Utah Code Annotated 1953 Section 58-12-7 which in 1981 was amended to the present Utah Code Annotated 1953 Section 58-12-(1-7), the "Osteopathic Medical Licensing Act". In Contrast however, Medical Doctors (commonly referred to as "MD's" are licensed under the provisions of the "UTAH MEDICAL PRACTICE ACT" Utah Code Annotated 1953 Section 58-12-(26-40), which act specifically "does not apply to the regulation of the other healing arts," (Utah Code Annotated 1953 Section 58-12-38, only to regulation of MD's).

The original complaint against the Appellant, charged that the Department had power to suspend or revoke pursuant to the terms of Section 58-1-25(1) Utah Code Annotated 1953 [Record p.173], although wrongfully then referring to Utah Code Annotated 1953 Section 58-12-36(15) for its definition of "unprofessional conduct" (which applies to MD's), rather than to Section 58-12-18 which applies to Osteopaths.

After the hearing the Osteopathic committee, wrongfully concluded:

> "The Respondent Robert B. Vance is subject to the provisions of Section 58-12-36(15) Utah Code Annotated . . . ." [Record p.172]

Based upon said findings and conclusions the Department of Registration issued its order of revocation on February 6, 1981. [Record p. 169]

It is true that Appellant's former counsel filed its notice of appeal in the District Court referring to it as an appeal under Section 58-12-35.1 of the "Medical Practice Act", because the revocation order was wrongfully designated to be under that act.

However, the Appellant was charged under Section 58-1-25(1) being the general regulating provisions of the licensing of professionals for OSTEOPATHS, and the only recourse to the Courts in that applicable chapter is under Section 58-1-36. No erroneous reference made by the Department of Registration or Appellant's prior attorney, can alter the statutory mandate.

Nevertheless, the error has been allowed to stand uncorrected by the Courts.

The Third District Court construed the matter to be only an appeal under the MD's Medical Practice Act, instructed the parties to file briefs and then made its affirming decision, overlooking all of the constitutional safeguards provided for OSTEOPATHS by the laws of this State.

ARGUMENT

POINT I.

THE SUPREME COURT ERRED BY ALLOWING THE LICENSE OF AN OSTEOPATH TO BE REVOKED UNDER THE PROVISIONS OF THE MEDICAL PRACTICE ACT, WHICH APPLIES ONLY TO MD's.

It is apparent from the published opinion that this honorable Court has failed to distinguish that an OSTEOPATH is involved in a different branch of the healing arts, than MD's. The Osteopath is trained in different colleges, different modes of practice and is licensed with a completely different license than an MD. The provisions of Utah Code Annotated 1953 Section 58-12-7 provide specifically for the licensing of Osteopathic Physician and Surgeons wherein it is provided:

> "OSTEOPATHS--As Physician and Surgeon. An applicant desiring to practice as an osteopathic physician and surgeon must be a graduate of an osteopathic college reputable and in good standing at the time of his graduation, requiring as a prerequisite to

> graduation a four year residence course of instruction over a period of four school years, . . ." etc.

The act then goes on to list qualifications for obstetrics, treatment without drugs or surgery and in Section 58-12-14 provides for applicants in "any school or system of treating human ailments without the use of drugs or medicines and without operative surgery . . . ", the act specifically footnoting such other professions as chiropractors, masseurs, domestic or family remedies, optometrists or others.

With relationships to those branchses of the healing arts, unprofessional conduct is defined in Section 58-12-18.

However with regard to MD's, the MEDICAL PRACTICE ACT of 1969 was passed by the legislature as:

> An act relating to the practice of medicine; and prescribing the basis for the obtaining of a license to practice medicine; providing a definition for "unprofessional conduct" as it relates to the practice of medicine; EXCEPTING members of OTHER HEALING ARTS and PROFESSIONS." (Emphasis Added) See footnote to Utah Code Annotated 1953 Section 58-12-26.

The Medical Practice Act specifically provides for the licensing and regulating of MD's, and as provided in:

> "58-12-38, MEDICAL PRACTICE ACT--SCOPE OF ACT--THE UTAH MEDICAL PRACTICES ACT is designed solely for the regulation of the practice of medicine . . . AND DOES NOT APPLY to the regulation of the other healing arts, to the extent authorized by the practitioners license . . . and this act shall not change or limit the rights of persons lawfully practicing the other healing arts with respect to the practice of their professions AS PRESENTLY AUTHORIZED BY LAW . . . ." (Emphasis Added).

A cursory reading of the Medical Practice Act makes clear that it applies to licensing and regulation of MD's ands excludes the "other healing arts," including OSTEOPATHS,

NATUROPATHS, PSYCHOLOGISTS, CHIROPRACTORS, because they are regulated elsewhere.

The legislature made this abundantly clear when in 1981 upon the demise of the Osteopath Licensing provisions by virtue of the Sunset Laws, passed the "Utah Osteopathic Medicine Licensing Act" as Utah Code Annotated 1953 Section 58-12-(1-7) replacing the prior licensing provisions and redefining "unprofessional conduct" for Osteopaths.

At no time have OSTEOPATHS ever been licensed, regulated or censured under the MD's, Medical Practice Act, until the instant case. It is wrong, it is error, and it is a total violation of the Appellant's right of due process, to charge him with revocation under the provisions of Section 58-1-25 applicable to the "other healing arts," and then revoke his license under the Medical Practice Act," which applies only to MD's, and determine that his right of review by the Courts is governed thereby.

The Appellant is entitled to know that the laws defining unprofessional conduct for Osteopaths and the other healing arts, namely Section 58-12-18 (which was the law at the date of the hearing), is the standard required of him, unless other or additional standards have been published by the Department of Registration, upon recommendation of the Osteopathic committee as required by Section 58-1-13.

Respondent's own memorandum in support of revocation, dated October 20, 1981, acknowledges the committee acted under Section 58-1-7, 8 and a held the hearing under Section 58-1-26 [Record p. 152], but the Department then found unprofessional conduct, under the provisions of a totally different act, ie. "The Medical Practice Act", which applies to MD's, not to OSTEOPATHS.

POINT II.

The Supreme Court ERRED by affirming the erroneous interpretation of the law regarding appeals for OSTEOPATHS.

The action by the Department of Registration was clearly erroneous. Had the Appellant, an Osteopath been subject to the Medical Practices Act, then he should have been charged under Section 58-12-35.1, which clearly defines the procedures for the "BOARD", ie. the MD's licensing board, to conduct hearings. However, this was not done because the board referred to in Section 58-12-35.1 is a board of MD's, and further the hearing required by Section 58-12-35.1 is to be:

" . . . before the director and the board."

This clearly was not done. Appellant was not charged under the "Medical Practices Act", but under Section 58-1-(25-27) and the hearing was conducted before the purported committee, as provided by Title 58 Chapter 1. Chapter 1 thereafter designates the ONLY recourse to the Courts for OSTEOPATHS and the other healing arts as:

> 58-1-36. **RECOURSE TO THE COURTS.**--Any applicant for or holder of a license, certificate, permit, student or apprentice card or any person directly affected and aggrieved by any ruling of the department of registration, may within thirty days after notice of such ruling institute an action in the district court of the county at the seat of government, or in the county of the aggrieved person's residence, against the director in his official capacity setting out his grievance and his right to complain. In his answer the director may set out any matter in justification; and the court shall determine the issues on both questions of law and fact and may affirm, set aside or modify the ruling complained of.

That Section defines the only recourse to the Courts for a member of the "other healing arts". It is not a matter of

choice, and the fact that, (1) the Department of Registration wrongfully referred to the revocation as being under Section 58-12-36 or (2) the former attorneys for Appellant referred to their appeal as being under Section 58-12-35.1; the law is clear and provides that the "Medical Practices Act" regulates MD's, and excludes the other healing arts. Osteopaths and other members of the healing arts were at that time charged with unprofessional conduct standards, as defined in Section 58-12-18, subject to revocation proceedings under Section 58-1-25 and entitled to recourse to the Courts under Section 58-1-36.

To rule otherwise is not only erroneous be denies the Appellant the kind of judicial review required by statute and guaranteed by due process.

POINT III.

The Supreme Court has erred in applying the standards required of an administrative body acting in a "legislative", or "administrative" function, to the administrative body (Osteopathic Committee) which was acting in a "judicial" function.

The law applicable to administrative bodies is clear that such tribunal is a creature of statute and therefore can only be vested with the power specifically granted by the act creating it. In re Whitmer, in and for Salt Lake County, 515 P2d 617, 30 Utah 2d 206(1973). Accordingly such administrative bodies MUST find within the creating statute, warrant for the exercise of any authority they claim. The Osteopathic Committee is created under Section 58-1-6 with its specific authority detailed in the provisions of Title 58, Chapter 1. It is NOT created under the "Medical Practice Act", the body created there is the (MD's) Medical Licensing Board. The Osteopathic Committee cannot exercise powers enumerated under the "Medical Practice Act".

> "Official powers cannot be merely assumed nor can they be created by the Court in the proper exercise of their judicial functions."
> 1 Am Jur 2d Section 70 at page 867.

The Supreme Court in its August 22, 1983 opinion, at page 9, cited the case of Hussey v. Smith, 99 US 20, 24(1878), upholding the principle of, authority vesting in a de facto officer, and quoting Freeman on Judgments Sect. 148 to conclude:

> "The acts of such officers are held to be valid because the public good requires it. THE PRINCIPLE WRONGS NO ONE. A different rule would be a source of serious and lasting evils." (Emphasis Added)

However, that very citation differentiates the usual administrative tribunals which act in legislative or administrative functions, or such as existed in the case of In re Thompson's Estate, 72 Utah 17, 87 P 103(1927), wherein a fully qualified District Judge was deemed to be qualified, DE FACTO, to sit on the Supreme Court. There the principle wrongs no one. However, in the instant case the principle CLEARLY wrongs the very person whose professional life is at stake.

The Appellant, by the provisions of the statutory safeguards, was assured that if revocation proceedings were instituted, he was guaranteed to have a hearing before a committee of three Osteopaths,

> "EACH MEMBER of a committee MUST have had a license to practice in this State for a period of FIVE YEARS immediately prior to his appointment . . . ." Utah Code Annotated 1953 Section 58-1-6

This Court's opinion acknowledges the defect but errs, in inferring that it really doesn't matter because that five year requirement has since been omitted. (Footnote 2 to Supreme Court's opinion.)

The clear purpose of the five year requirement was to assure those whose professional life is at stake, that their

judges (the committee) will all have been practicing in this State for at least five years to become knowledgeable with regard to the standards of practice in this State. This Court's opinion ignores that most critical due process requirement.

This Courts decision cites numerous cases, most of which involve administrative agencies in the exercise of legislative or administrative powers. However,

> Where a statute enpowers an agency to revoke a license for non-compliance with or violation of agency regulations the administrative act is of a JUDICIAL nature since it depends upon the ascertainment of the existence of certain part or present facts upon which a decision is to be made and rights and liabilities determined.
> 1 Am Jur 2d Section 181, p. 983

While this Courts decision cites the rules of disqualification for conflict of interest, lack of appointment etc., all intended as a rule of necessity, to carry out the legislative intent. However, in this case, the legislature had clearly mandated that no such person (without five years of practice in this State) could serve as a member of the committee, and the legislature clearly empowered the Department of Regulation to appoint members within those strict requirements, but the decision of this Court would uphold an act of the department which violates the clear mandate of the legislature, and violates the safeguards of due process to which Appellant is entitled, when it is his very professional life at the mercy of a wrongful appointment by the Director of the Department of Registration, and an improper committee acting in a judicial capacity in violation of the legislative requirements.

The Appellant's challenge of the committee is a challenge to JURISDICTION. Whether a tribunal has jurisdiction of a cause is of such primary and fundamental importance that, an overwhelming majority of Courts, have ruled that a challenge to jurisdiction may be raised at ANY TIME.

Schuler-Knox Co. v. Smith, 144 P 2d 47 63 C.A. 2d 86 (1944); Tuebelhorn v. Turyanski, 370 P2d 757, 149 Colo 558 (1962); Board of Sup'rs of Maricopa County v. Woodall, 586 P2d 640, 120 Ariz. 391 (1978); In Interest of Wellard, 541 P2d 621, 97 Idaho 197 (1975); Memhold v. Clark County School District Board of School Trustees, 506 P2d 420, 89 Nev 56, Cert denied 94 S. Ct. 247, 414 U. S. 943, 38 L. Ed. 2d 167, (1973); Hunter v. Department of Labor and Industries, 576 P2d 69, 19 Wash App 473 (1978).

The Osteopathic Committee was never duly constituted and therefore could not acquire jurisdiction over the subject matter or the person and any action by this purported committee should be held to be void.

POINT IV.

The SUPREME COURT ERRED by failing to verify that substantial portions of the FINDINGS by the COMMITTEE were unsupported by ANY competent evidence.

The Findings and Conclusions of the Osteopathic Committee were adopted by the Department as a basis for revocation.

Paragraph 3 of the Findings provide:

> "Inasmuch as Chelation Therapy is not accepted among medical standards as a proper treatment for Atherosclerosis in the United States, it should not be prescribed as such by a physician in general practice."

Not a single witness gave competent testimony that Chelation Therapy is not accepted among practitioners in the United States. Only Dr. Alan J. Concors D.O. (a one month Utah practitioner) testified in the most blatant hearsay testimony as follows:

> "Yes, that the position of the Chairman of the Department of Ethics for the Osteopathic General Practitioners College, is that as far as he was concerned, and the majority of the profession is, that they would stand behind any denouncing of this type of treatment and management." [Record p. 802]

However Dr. Concors, in regard to Chelation Therapy, after testifying disqualified himself as an expert on Chelation stating:

> "As far as its treatment in the use of every day general practice, and especially on an out patient basis, I HAVE just never read anywhere in the literature. I have never read any text on it. And I have never come across it in any medical journals, either DO or MD. I've never heard it discussed at any medical conventions. And I know for a fact that its not taught at any medical schools or osteopathic medical schools.: [Record p. 804]

Yet after admission of his lack of knowledge or expertise regarding Chelation Therapy, concluded its administration could be dangerous to the health of an individual. [Record p. 804 Line 11].

Contrary to Dr. Concor's biased and unqualified testimony, three eminently qualified physicians Dr. Halstead, Dr. Gordon and Dr. Gerber, testified that Dr. Vance's methodology and treatments were totally acceptable within the standards of practice, that Dr. Vance is highly qualified, a diplomate in the American Society of Medical Preventics which teaches and certifies the use of Chelation Therapy (as used by Dr. Vance) among several hundred Dr.'s both MD and DO throughout the United States. [Record - Dr. Gordon p. 623; Dr. Halstead p. 1110-1174; Dr. Gerber p. 1007-1104]

Dr. Concors was the only Dr. who testified that Chelation Therapy was not an acceptable mode of treatment. His hearsay was never corroborated by any evidence or other testimony. Therefore, by the evidentiary standard announced by the administrative law Judge, Dr. Concors hearsay testimony cannot sustain a finding.

> "The rules here do specifically permit hearsay evidence, but they adopt what's called the residuim rule, which means that hearsay evidence alone can't be used to substantiate a finding of fact. In other words there must be some competent evidence which corroborates the hearsay in order for the board to reach a finding." [Record p. 4]

No other testimony was introduced, except the Appellant's 3 expert witnesses who testified as to its great benefit, efficacy and beneficial use among hundreds of doctors in the United States, both MD and DO. Accordingly, finding no. 3 regarding Chelation Therapy cannot be substantiated. In accordance with the ruling in the case of State v. Rogers 371 South 2nd 1037 (1979) the Florida Supreme Court in refusing to allow the medical board to restrict the use of Chelation Therapy stated:

> ". . . in that regard it is relevant to note that neither BCMA, the hearing officer, nor the Board has made any findings that Chelation Therapy is in any respect harmful or hazardous to the patient. Rather, the Board's decision appears to have been based upon the Hearing Officer's administrative determination that Chelation Therapy is a 'quackery under the guise of scientific medicine . . . .'"
>
> ". . . We hold that under that provision of the Constitution, in the absence of a demonstration of unlawfulness, harm, fraud, coercion or misrepresentation, Respondents Board is without authority to deprive Petitioner's patients of their voluntary election to receive Chelation Therapy simply because that mode of treatment has not received the endorsement of a majority of the medical profession. It necessarily follows that under such circumstances Respondents Board is without authority to prohibit Petitioner from administering Chelation Therapy."

That is the very circumstances involved here. The Committee did not find, as required by the statute that Chelation Therapy might constitute a danger to the health, welfare or safety of the patient or public, nor did the committee have one expert

testify that it was contrary to the recognized standards of ETHICS of the medical profession, with the single exception of the uncorroborated hearsay testimony of Dr. Concors, who attempted to establish a nationwide standard on a subject he knew nothing about and based on hearsay. Accordingly, the finding no. 3 of the committee that "Chelation Therapy is not accepted among medical standards" is totally erroneous arbitrary and capricious and not a basis for revocation, even had there been such evidence presented. The committee has simply made a determination based on their own opinion, to reject Chelation Therapy beyond the guidelines of the statutory mandate.

Finding number 4, concludes that "Laetrile (Amygdalin B-17) should not be prescribed in lieu of standard accepted medical treatment for a patient suffering from cancer". That finding is totally arbitrary and capricious and devoid of any supporting evidence whatsoever, and raises the most serious question of what constitutional authority does the State of Utah have to prohibit a non-harmful mode of medical treatment by a licensed physician, upon the election by the patient to receive the same? Such a finding by the committee is not only without any supportive evidence, but contrary to the testimony of three unrefuted experts, the fact that it has been specifically sanctioned for treatment of cancer patients in 24 States, and in the decision of the U.S. District Court for the Western District of Oklahoma, (cited in the Record at p. 241-248). Its efficacy and use have not only been validated and approved, but a permanent restraining order issued against any restriction of its shipment in interstate commerce. That Court with regard to the use of Laetrile in the treatment of terminally ill cancer patients concluded:

> "The Appellate Court found the term 'safe' to have no rational application to a person considered terminally ill. (Rutherford v. United States, 582

F2d 1234, 1237 10th Circuit 1978) The Supreme Court thereafter provided guidance on the vitality of the term as it applies to terminally ill patients." United States v. Rutherford, 442 U.S. 544 (1979)

That Court reasoned:

". . . the concept of safety under Section 201 (p)(1) is not without meaning for terminal patients. Few if any drugs are completely safe in the sense that they may be taken by all persons in all circumstances without risk. For the terminally ill, as for anyone else, a drug is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit."
442 U.S. at 555-556

Regarding the proper interpretation of the term "effectiveness" the Court found:

". . . 'effectiveness' does not necessarily denote capacity to cure. In the treatment of any illness, terminal or otherwise, a drug is effective if it fulfills, by objective indices, its sponsor's claims of prolonged life, improved physical condition, or reduced pain." See Fed Reg 39776-39786 (1977) 442 U.S. at 555.

That Court then found that after hearing extensive evidence and testimony from experts, that the National Cancer Institute, the FDA itself, and the Mayo Clinic have consistently stated that laetrile is a very safe substance, and concluded:

"Based upon this and other evidence adduced at the recent hearings, this Court finds that the safety of laetrile or amygdalin is OVERWHELMING when compared with conventional anticancer drugs heretofore approved by the FDA for 'safety'". [Record 241-248]

The committee finding is not only unsupported by any evidence or expert testimony, but it is totally refuted by the experts who did testify and the rulings of the various Federal Court rulings which have directly affirmed that laetrile is a "safe" drug for use in the treatment of cancer patients.

Significantly, not one finding of the committee with regard to the Appellant's treatment of patients, determined that any conduct or practice of the Appellant "does or might

constitute a danger to the health, welfare or safety of the patient or the public, nor did the committee find any conduct, practice or condition which does or might impair the ability safely and skillfully to practice medicine as required by Section 58-12-36(15) used by the committee as the standard. Therefore the revocation must be for the only other provision of subparagraph (15) [although 58-12-36(15) is not applicable to OSTEOPATHS], which is:

> "Any conduct or practice contrary to the recognized STANDARDS OF ETHICS of the medical profession." (Emphasis Added)

Only one Osteopath, Dr. Alan Concors who had moved to Utah one month prior to the hearing, and was not even a member of the Utah Osteopathic Association, testified regarding the professional standards of the profession, although Dr. Concors admitted he knew nothing about Appellants mode of practice, had never read, nor heard of Chelation Therapy, he was willing to totally condemn Appellant. It seems very significant that Dr. Concors practices with a group of MD's in a family practice, not "preventative medicine" as the Appellant. Dr. Concors testimony was the sole basis for the committee's finding number 5 as follows:

> "We find that Robert B. Vance diagnosed hypoglycemia too often without adequately ruling out other diseases or body dysfunctions."

However, reading of the transcript makes clear that at no time, did Dr. Concors, as the sole witness to this finding, testify that Dr. Vance diagnosed hypoglycemia too often. The testimony was as follows:

> "Question. And do you have any opinion as an expert, as to whether or not there is a proper procedure to have many, many, many---thousands, in fact in six years---2,000 patients who have been diagnosed as hypoglycemic?

> Answer. I think its an over-diagnosed problem.
> Question. Some people do have the problem, but it sounds---with 2,000 patients being diagnosed, in the last six years sounds--
> Answer. I would say that in the course of 16 years of a busy, active practice, and being associated with some of the higher centers of medical learning like the University of Miami, and Miami Heart Institute, and my association with other colleagues of both the M.D. and D.O. profession that I HAVE RUN INTO VERY FEW TRUE CASES OF HYPOGLYCEMIA." [Record 478] (Emphasis Added)

His only conclusion, as an expert, was that he thinks its an over diagnosed problem. At no time did he testify that the Appellant over diagnosed hypoglycemia. Only the innuendos from the questions by the Departments attorney, inferred that Appellants 2,000 cases in six years was "many-many-many---thousands." [Record 478] No other testimony was introduced to support such a finding.

ONLY in the case of FIVE patients was the diagnosis of hypoglycemia challenged.

1. Jan Stevens, [Record p. 750]. There Dr. Rosenburg, the expert, testified from the wrong patients hypoglycemia test, and admitted he was not an expert on hypoglycemia.

2. Milo Adams [Record 841]. The committee found all charges sustained, without any expert evidence, except as to a glucose tolerance test by Dr. Barker, four months after Appellant's treatments, in which he noted a 4 hour low sugar, but did not conclude that Appellant had wrongfully diagnosed Mr. Adams.

3. Lois Carter [Record 930]. Only one Dr. Pace, testified that two years after treatment by Appellant he tested for hypoglycemia and found it to be negative.

4. Ruby Riddle [Record p. 176]. No professional testimony was even offered to refute her hypoglycemia diagnosis.

5. Mary Katsenavis [Record p. 423]. The States Medical expert, Dr. Robert Maddock testified that the patient did have a form of reactive hypoglycemia; alimentary type. The committee further concluded, that Appellant used IRIDOLOGY, "an unproven and unaccepted method of diagnosis". However, the State's own expert, Dr. Concors, testified that:

> "I know you can diagnose arteriosclerosis with the use of the opthalmascope. They can be graded and looked at. Somebody that has training in that, which most general practitioners do . . . ."

Thus recognizing the use of iridology as a diagnostic method.

It is almost unbelievable that based on this total lack of evidence, that one of the findings for revocation could be that Appellant "diagnosed hypoglycemia too often," that is comparable to concluding that a heart specialist diagnoses heart problems too often, without considering the fact that patients seek the Appellant's treatments because he has expertise and success in the treatemnt of low blood sugar (hypoglycemia) problems.

POINT V

The Supreme Court has erred by failing as a Court of Equity to assure the guarantees of due process of law to which Appellant is guaranteed by the constitution.

At no time has Appellant been determined to have commited any act or practice that has harmed the public or any individual patient. The Supreme Court in Arizona Board of Medical Examiners v. Clark, 97 Ariz 205, 214, 398 P2d 908, 915 (1965), stated:

> "As applied in the licensing and revocation cases 'unprofessional conduct' has been construed to include serious offense, such as intentional

violations of law or recognized professional standards. . . .

"There must be a 'conscious and culpable act amounting to a willful design to do that which is denounced as an unlawful professional practice."

This case has found no such circumstances. In this Court's August 22, 1983, decision it was stated that in respect to patient care the committee may set standards on a case-by-case basis. However, in this case the committee beyond patient treatment standards, chose to set standards, without prior notice, as to modes of practice which had been known by the Department for many years, and are in use by hundreds of DO's and MD's throughout the nation, including Chelation Therapy, laetrile, hypoglycemia, iridology. It is likened to a medical committee calling in a heart specialist who performs open heart surgery, now recognized to be 70% ineffective, and revoke that physicians license for using that mode of treatment. Appellant is here told that his professional life and right to earn a livlihood, and serve his hundreds of patients, is at an end because his mode of practice is not accepted by the mainstream medical profession, and because of some debateable circumstances involving treatment of eight patients, 8-12 years prior, is not acceptable to one Dr. Alan Concors, and a committee chairman (Dr. Greenwood) whom the statutory requirements barred from serving.

This is clearly a ruling that would revoke the license of Pasteur, Freud, or any other who dared to pursue their medical talents in the face of mainstream medical theory opposition.

The Supreme Court of Florida in the case of Rogers v. State Board of Medical Examiners, 371 So. 2d 1037 (1979), reasoned:

"History teaches us that virtually all progress in science and medicine has been accomplished as the result of the courageous efforts of those members of the profession willing to pursue their theories in

the face of tremendous odds despite the criticisms of fellow practitioners. Copernicus was thought to be a heretic when he theorized that the Earth was not the center of the Universe. Banishment and prison was the reward four Pasteur was ridiculed for his theory that unseen organisms caused infections. Freud met only resistance and derision in pioneering the field of psychiatry. In our own era chiropractic treatment has been slow in receiving the approval of the other professions of the healing arts. We can only wonder what would have been the condition of the World today in the field of medicine in particular had those in the midstream of their profession been permitted to prohibit continued treatment and thereby impede progress in those and other fields of science and the healing arts . . . ."

CONCLUSION

The Appellant hereby petitions the honorable members of this Court, to grant a rehearing, to reconsider, this matter as to its constitutional impact on the lives of the public and the Appellant. No patient or member of the public has been endangered or harmed. Had proper standards been established as required by statute, and the Courts afforded a kind of judicial review afforded, with procedural and evidentiary safeguards to which he is entitled, then those minor problems involving methodology of handling patients could properly be handled by direction, instruction or even reprimand or probation, and not by a total revocation off the Appellants right to practice his profession because he is not in "the mainstream" of the profession. Because Appellent did not receive the kind of judicial review in the District Court as required by statute, but was tried based upon uncorroborated hearsay and innuendo, the revocation of Appellant's license is unconstitutional and clearly contrary to the statutes of this state. If the legislature has created uncertainty by creating conflicting laws, (ie. Osteopaths Licensing, vs. Medical Practice Act), why must Appellant and his patients be caused to pay the penalty.

This Court is duty bound to assure the constitutional safeguards of due process, regardless of what uninformed committees, Department of Registration, or prior counsel may have construed the law to be.

Respectfully submitted this 12 day of September, 1983.

M. Richard Walker

M. RICHARD WALKER
Attorney for Appellant
Petitioner

I hereby certify that I mailed a true and correct copy of the foregoing Appellant's Petition for Rehearing, to Steven G. Schwendiman, Attorney for Respondent, at 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid on this 12 day of September, 1983.

M. Richard Walker