

Johnny K. Richardson and Jamie J. Cox of Brydon, Swearingen & England, PC, represented DeCastro. The matter became ready for our decision on January 25, 2013, when the Committee filed its final written argument.

At the hearing, we took two objections with the case. The first is whether to admit testimony regarding the protected health information of VS without her consent. The Committee offered this evidence regarding a former patient of DeCastro's without the patient's consent. The Committee is a covered entity under 45 CFR § 164.512(d) that is able to disclose such information without the patient's consent in a licensure or disciplinary activity. Therefore, we overrule DeCastro's objection and admit testimony regarding VS.

The second objection taken with the case was also made by DeCastro. DeCastro actually made two objections to the admission of Petitioner's Exhibits 1, 2, 3, 4, and 5. His first was that these exhibits contain information beyond the scope of the time period within the Committee's amended complaint. We overrule this objection because these exhibits also contain relevant information. We will simply not use information from these exhibits beyond the scope of the amended complaint. DeCastro's second objection to these exhibits is that they are the property of Wingspan Group, and were improperly obtained by DeCastro's former wife, Terre Greninger, before being provided to the Committee. Wingspan Group is the business entity where DeCastro provided counseling services. Greninger was once an employee of Wingspan Group, but was no longer an employee at the time she provided these exhibits to the Committee. The Court of Appeals has held that, "[t]he exclusionary rule requires that illegally obtained evidence cannot be used in a criminal proceeding against the victim of an unlawful search and seizure. ... The exclusionary rule does not apply to such civil proceedings."¹ We therefore overrule DeCastro's

¹ *Arch v. Director of Revenue*, 186 S.W.3d 477, 479 n.2 (Mo. App. ED 2006) (internal citations omitted).

second objection as to Petitioner's Exhibits 1, 2, 3, 4, and 5 and admit these exhibits into evidence.

Findings of Fact

1. DeCastro was licensed by the Committee as an LPC at all times relevant to these findings.

2. DeCastro was married to Greninger from 1994 to 2007. They were married at all relevant times.

3. Between February 3, 2005 and February 23, 2005, DeCastro provided psychotherapy to VS to improve her marriage with RK. Initially, both spouses were treated by DeCastro. RK attended two sessions and discontinued his therapy under DeCastro.

4. On the evening of October 4, 2006, DeCastro, Greninger, and VS went to a restaurant for dinner. During dinner, both DeCastro and VS consumed alcohol and were both extremely intoxicated, to the point neither could drive. Greninger consumed one alcoholic beverage and drove the three to DeCastro and Greninger's house.

5. Greninger left DeCastro and VS at the house and went for a drive.

6. Greninger returned to the house in approximately 30 to 45 minutes. Upon her return, VS was lying on a couch with breasts and genitals exposed while DeCastro stood in the same room with his genitals exposed and erect. Greninger ordered both to leave the house, which they immediately did.

7. After leaving the house, DeCastro and VS checked into a motel room where they were later discovered by police and DeCastro was questioned about the night's events.

Conclusions of Law

We have jurisdiction to hear this complaint.² The Committee has the burden of proving by a preponderance of the credible evidence that DeCastro committed an act for which the law allows discipline.³ “‘Preponderance of the evidence’ means that degree of evidence that ‘is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.’”⁴

The Committee argues there is cause for discipline under § 337.525.2:⁵

The committee may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any license required by sections 337.500 to 337.540 or any person who has failed to renew or has surrendered his license for any one or any combination of the following causes:

* * *

(5) Incompetency, misconduct, fraud, misrepresentation or dishonesty in the performance of the functions or duties of a professional counselor;

(6) Violation of, or assisting or enabling any person to violate, any provision of sections 337.500 to 337.540, or of any lawful rule or regulation adopted pursuant to sections 337.500 to 337.540;

* * *

(13) Violation of any professional trust or confidence;

* * *

(15) Being guilty of unethical conduct as defined in the ethical standards for counselors adopted by the division and filed with the secretary of state.

²Section 621.045. Statutory references are to RSMo. Supp. 2012 unless otherwise noted.

³*Missouri Real Estate Comm’n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

⁴*State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

⁵RSMo 2000.

Credibility

This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness.⁶ When there is a direct conflict in the testimony, we must make a choice between the conflicting testimony.⁷ Here, there is direct conflict in the testimony. When reviewing this testimony, we found DeCastro's and VS's version of events not credible.

Upon Greninger's return to the house, both DeCastro and VS left. They testified that they drove to look for VS's house and were unable to find it. While driving, they claimed VS vomited on her blouse. Then they claimed they returned to DeCastro and Greninger's house but after seeing police vehicles and VS's husband present, they left and went to a hospital to treat VS for consumption of excessive alcohol and controlled substances. However, once at the hospital, VS claims she no longer wanted to go into the hospital. Therefore, the two claimed they decided to check into a motel so VS could call her boyfriend for a ride. The police then discovered DeCastro and VS in this motel room where they questioned DeCastro. The police questioning of DeCastro is documented and true.⁸ However, the remainder of this story, especially the alleged reason for checking into the motel, is absurd. Therefore, we side with Greninger's version of events when there is a direct conflict in testimony.

Subdivisions (6) and (15) – Violation of Regulations and Ethical Standards

The Committee asserts DeCastro is subject to discipline under § 337.525.2(6) and (15) because he violated the following provisions of 20 CSR 2095-3.010, which also provides the ethical standards for counselors:

⁶ *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992).

⁷ *Id.*

⁸ We use these facts to demonstrate the lack of credibility evidenced by DeCastro and VS. We do not use them as a basis for discipline because they were not alleged in the Committee's amended complaint.

20 CSR 2095-3.010 Scope of Coverage

(9) For the purpose of these ethical standards for counselors, an exploitive relationship shall be defined as any relationship between the registered supervisor and counselor-in-training or provisional licensed professional counselor, or counselor and client that may exploit or cause harm to the counselor-in-training, provisional licensed professional counselor or client.

(A) For the purpose of these standards, to exploit means to take unfair advantage of the client, counselor-in-training, or provisional licensed professional counselor.

* * *

(12) While providing psychotherapy or professional counseling or within the twenty-four (24) months following completion or termination of psychotherapy or professional counseling a counselor shall not engage in the following:

(A) Sexual intercourse, defined as any genital contact with the client including, but not limited to, vaginal intercourse, sodomy, oral and/or anal copulation, or any penetration of the anal or vaginal opening by any body part or object;

(B) Kissing with the mouth, lips, or tongue;

(C) Touching or caressing of the client's breasts, genitals, or buttocks;

(D) Touching or caressing the other body parts of a client in an exploitive manner;

(E) Exposing one's breast, genitals or buttocks in an exploitive manner or encouraging another to expose him/herself for the purpose of the counselor's sexual gratification; and

(F) Deliberate or repeated comments or gestures of an exploitive nature.

Regulation 20 CSR 2095-3.010(9) is a definition of exploitative relationship and is not a regulation that can be violated. There is no evidence that touching occurred between DeCastro and VS on or before February 23, 2007, which marks 24 months after the termination of their

counselor-patient relationship. Therefore, we do not find DeCastro violated 20 CSR 2095-3.010(12)(A), (B), (C), or (D).

While the evidence does not clearly show whether DeCastro encouraged VS to expose her breasts and genitals to him, DeCastro did expose his erect genitals to VS within 24 months of termination of their counselor-patient relationship. Furthermore, this was performed while VS was extremely intoxicated, which we find to be exploitative. Therefore, we find DeCastro in violation of 20 CSR 2095-3.010(12)(E).

In its amended complaint, the Committee alleged the findings we made regarding the night of October 4, 2006 in its Count I. In its Count IV, the Committee alleged an ongoing relationship between DeCastro and VS. However, at the hearing, the phone records that the Committee intended to introduce as evidence of this ongoing relationship reflect calls that occurred beyond the 24 month mark required by 20 CSR 2095-3.010(9). Therefore, the Committee did not offer these records or provide any other evidence of deliberate, repeated comments or gestures by DeCastro towards VS. Therefore, we do not find DeCastro violated 20 CSR 2095-3.010(12)(F).

DeCastro is subject to discipline under § 337.525.2(6) and (15) for violation of 20 CSR 2095-3.010(E).

Subdivision (5) – Functions or Duties of the Profession

In its amended complaint, the Committee limits its allegations under this subdivision to misconduct under Counts I and IV. Therefore, we limit our analysis under this subdivision to this issue.

Misconduct means “the willful doing of an act with a wrongful intention[;] intentional wrongdoing.”⁹ DeCastro willfully engaged in a social relationship with a former patient, VS, by

⁹*Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm'n Nov. 15, 1985) at 125, *aff'd*, 744 S.W.2d 524 (Mo. App., E.D. 1988).

going to dinner and through mutual nudity. It would have been helpful if the Committee provided expert testimony to demonstrate that a health care practitioner, especially one in the field of mental health, such as a psychiatrist, psychologist, or counselor should not engage in social relationships with patients or former patients. However, without such expert evidence, we rely solely on 20 CSR 2095-3.010(12)(E) to determine that DeCastro's action of exposing his erect genitals in an exploitative manner was wrongful for a health care practitioner.

Furthermore, this action was willful. By committing this act, DeCastro committed misconduct.

DeCastro is subject to discipline under § 337.525.2(5) for misconduct.

Subdivision (13) – Professional Trust – Subdivision

Professional trust is the reliance on the special knowledge and skills that professional licensure evidences.¹⁰ It may exist not only between the professional and his clients, but also between the professional and his employer and colleagues.¹¹ Patients seeking psychotherapy should trust that their counselor will not violate the ethical standards for counselors. When DeCastro did this with VS, he violated a professional trust. He is therefore subject to discipline under § 337.525.2(13).

Summary

DeCastro is subject to discipline under § 337.525.2(5), (6), (13), and (15).

SO ORDERED on May 13, 2013.

\s\ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner

¹⁰*Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

¹¹*Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App., E.D. 1989).