

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH )  
BOARD OF OSTEOPATHIC MEDICINE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 02-4826PL  
 )  
ARTHUR T. MAGRANN, III, D.O., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on February 27 and 28, 2003, in Sarasota, Florida, before Carolyn S. Holifield, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bruce A. Campbell, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C65  
Tallahassee, Florida 32399-3265

For Respondent: Paul Watson Lambert, Esquire  
1203 Governor's Square Boulevard  
Magnolia Centre, Suite 102  
Tallahassee, Florida 32311-2960

STATEMENT OF THE ISSUES

The issues are: (1) Whether Respondent exercised influence within a physician-patient relationship for the purpose of engaging a patient in sexual activity in violation of

Subsection 459.015 (1)(1), Florida Statutes; (2) Whether Respondent engaged a patient in sexual activity outside the scope of practice or the scope of generally accepted examination and treatment of the patient in violation of Section 459.0141, Florida Statutes; and (3) If so, what disciplinary action should be taken against his license to practice as an osteopathic physician.

PRELIMINARY STATEMENT

On or about October 26, 2001, Petitioner, the Department of Health, Board of Osteopathic Medicine, issued a two-count Administrative Complaint which alleged that Respondent, a licensed osteopathic physician, violated provisions of Chapter 459, Florida Statutes, between August 1999 and October 1999, and that, as a result thereof, his license as an osteopathic physician should be disciplined. Count One alleges that Respondent violated Subsection 459.015(1)(1), Florida Statutes, by exercising influence within a physician-patient relationship for the purpose of engaging a patient in sexual activity. Count Two alleges that Respondent violated Section 459.0141, Florida Statutes, by using the osteopathic physician-patient relationship to engage Patient K.C. in sexual activity outside the scope of practice or the scope of generally accepted examination and treatment of the patient, while he was treating Patient K.C.

Respondent challenged the allegations and timely requested a formal hearing. On or about February 25, 2002, the matter was forwarded to the Division of Administrative Hearings (Division) and was assigned Case No. 02-0837. The case was assigned to Administrative Law Judge Daniel Manry. The final hearing was initially scheduled for May 22 and 23, 2002, but was continued until the June 5 and 6, 2002, at the request of Respondent. However, the Division's file was closed without a final hearing after the parties filed a Joint Motion to Relinquish Jurisdiction for the Purpose of Additional Discovery. The Order Closing File provided that either party could later request that the Division reopen the case.

On or about December 9, 2002, the Department of Health resubmitted the Administrative Complaint and Respondent's Election of Rights form to the Division. The new case number assigned to the matter was Case No. 02-4826. By Notice issued January 8, 2003, the final hearing was scheduled for February 18, 2003, but was subsequently rescheduled for February 27 and 28, 2003.

Prior to the final hearing, the parties filed a Pre-hearing Stipulation in which they stipulated to certain facts that required no proof at hearing. At the final hearing, Petitioner presented the testimony of five witnesses. Petitioner's Exhibits numbered 1 through 6, 8, and 9, which included the

deposition testimony of Charles F. Blake, Paul Kenneth Michaels, M.D., and Respondent, were received into evidence. Respondent testified on his own behalf and presented the testimony of six witnesses. Respondent's Exhibits 1 through 5, which included the deposition testimony of Andrew Synder and William Randolph Klein, were received into evidence. The record was left open to permit the late-filing of Respondent Exhibit numbered 5. To-date, that exhibit has not been filed.

The hearing Transcript was filed on March 17, 2003. At the conclusion of the hearing and at the request of the parties, the time for filing proposed recommended orders was set for 45 days from the filing of the Transcript. Prior to that time, at Respondent's request, the time to file proposed recommended orders was extended. The parties timely filed Proposed Recommended Orders under the extended time period which have been considered in preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner, the Department of Health, Board of Osteopathic Medicine, is the state agency charged with regulating the practice of osteopathic medicine pursuant to Chapters 455 and 459, Florida Statutes.

2. Respondent is and has been at all times material hereto a licensed osteopathic physician in the state of Florida, having been issued License No. OS-004450.

3. Respondent has a bachelor's degree and a master's degree in clinical psychology and experimental psychology from Temple University, was an assistant professor of psychology at a community college before studying osteopathic medicine, and taught as an assistant professor of psychiatry in family practice at Southeastern Osteopathic Medical School. Respondent completed a residency program at Southeastern Osteopathic Hospital in North Hollywood, Florida, and also completed a three-year family practice residency program. After completing his residency programs, Respondent moved to Sarasota, Florida, and began as a family practice physician.

4. In December 1998, Patient K.C. (K.C.) was 33 years old, married, and the mother of two children, six and two years old. Before getting married, K.C. had lived with her parents. She had attended community college for two years but did not obtain a degree. K.C. had been employed as a sales clerk and clerical staff person.

5. On or about December 29, 1998, K.C. first presented to Respondent suffering from migraine headaches and neck pain, chronic conditions she had suffered for approximately ten years.

6. From December 29, 1998, through or about October 1, 1999, Respondent provided osteopathic medical treatment for pain to K.C. During this period of time, Respondent treated K.C.'s

migraine headaches and neck pain with heat, osteopathic manipulation, and prescription medication.

7. Respondent also diagnosed anxiety and depression for K.C. and prescribed medication, Ativan, for this condition. Throughout the time Respondent saw K.C., he also prescribed up to six tablets per day of a sedative, Fioricet.

8. During the time that Respondent was treating K.C., he saw K.C. once or twice a month, except for April, August, and September 1999. Respondent's records reflect that he saw K.C. four times in April, three times in August, and six times in September.

9. There are several manipulation techniques used by Respondent in treating patients. One manipulation technique used by Respondent involves traction of the neck and movement of the patient's head while the patient is lying down on her back. Another technique, while the patient is lying on her back, involves Respondent's using his chest to exert pressure down on the patient's crossed arms and body through the spine to Respondent's hands located behind her neck and thoracic spine. Another technique has the patient roll over to the side with the leg up to the side while Respondent adjusts her pelvic bone. During this procedure, Respondent's hand and forearm are placed on the buttocks to effect a pushing or pulling of the pelvic bone. The last technique Respondent provides is for the

upper thoracic and lower neck area. For this, the patient places her hands on top of her head. Respondent then brings his hands around the torso from behind, placing them at the back of her neck. While the hands provide traction to the neck, Respondent pushes his chest against the spine of the patient to lift the thoracic vertebrae. It is not uncommon during this procedure for Respondent to brush his hands on the patient's breast.

10. Respondent's normal office procedure is to do manipulations on patients in his treatment room with the door closed and no other persons present for 10 to 15 minutes.

11. From December 1998 until August 12, 1999, Respondent provided adjustments to K.C. and prescribed medication and did not engage in any sexual activity or relationship with K.C.

12. Prior to August 12, 1999, during his treatments of K.C., Respondent sometimes engaged in "random conversations." For example, during one treatment Respondent asked what kind of car she drove and when she told him, Respondent asked K.C. if her husband cared about her. Respondent told K.C. that a sports utility vehicle (SUV) was a safe vehicle, especially for someone with her condition and indicated that his wife drove an SUV. Respondent then insinuated that if K.C.'s husband cared about her, he should or would buy her an SUV. During another treatment, Respondent told K.C. that she had a good body and

asked if she had been a cheerleader. During another treatment, Respondent, while engaging in conversation with K.C., made an unrelated statement about how many times per week the average married couple has sex. At another time, while treating K.C. at his office, Respondent mentioned that the sex life of people with chronic pain may be affected by their condition and asked if her sex life was so affected. Still, during another treatment, Respondent asked K.C. about her relationship with her husband, specifically inquiring as to how they related to one another.

13. In the summer of 1999, K.C. traveled by car to Canada to visit her husband's family. For K.C., the trip to Canada was stressful and while there, she was in a lot pain. Because of the pain she was experiencing, K.C. called Respondent's office while she was still out-of-town to schedule an appointment for an adjustment upon her return to Sarasota and to request that one of her prescriptions be refilled.

14. After K.C. returned from the trip to Canada, on the morning of August 13, 1999, she went to Respondent's office for her scheduled appointment for an adjustment. When K.C. arrived at Respondent's office, she was in a lot of pain and began to cry. K.C. told the nurse or medical assistant that she was in a lot of pain and had had a "bad trip to Canada." The nurse then escorted K.C. to an examination room. When Respondent came into



to examination room, K.C. was sobbing and could hardly talk. Respondent asked K.C. to explain why she was so upset. Respondent proceeded to do an adjustment and, again, asked K.C. why she was so upset. K.C. described her feelings to Respondent, who then told K.C. that he used to counsel with patients, that he had helped a girl just like her, and that he could help her if she were willing to come back to the office and talk with him. After K.C. agreed to come back and talk to Respondent, he asked K.C. how he could reach her. In response, K.C. gave Respondent her pager number.

15. After K.C.'s morning appointment on August 13, 1999, Respondent contacted K.C. on her pager and asked if she had made arrangements for her sons to be taken care of so that she could come back to the office to talk with him. K.C. told Respondent that she had made arrangements for her sons and agreed to return to Respondent's office that afternoon.

16. When K.C. returned to Respondent's office on the afternoon of August 13, 1999, Beverly Carrington (Beverly), a medical assistant in Respondent's office, was vacuuming the office. At Respondent's direction, Beverly took K.C. to an examination room. Several minutes later Respondent came into the examination room and told K.C. that he had to make some calls and that he would be back in a few minutes. Respondent gave K.C. a sandwich that he said he had left over from lunch.

After Respondent gave K.C. the sandwich, he left the examination room, closing the door behind him.

17. Respondent eventually returned to the examination room and sat in a chair next to the chair in which K.C. was sitting. Respondent began asking K.C. questions about herself, similar to questions that she had been asked by counselors or psychologists. While Respondent was talking to K.C., Beverly knocked on the door of the examination room and told Respondent that she had finished vacuuming the office. Respondent indicated to Beverly that she could go home and soon thereafter, Petitioner heard Beverly leave the building.<sup>1</sup>

18. After Beverly left the office, Respondent continued to ask K.C. questions for the next 15 or 20 minutes. Respondent then asked K.C. to get up from her chair, face the mirror in the room, and look in the mirror. K.C. felt uncomfortable looking in the mirror, so she kept her head down. Respondent then put his hands on K.C.'s face and held her face up so that she was looking in the mirror. While doing this, Respondent asked K.C., "Don't you know you're beautiful?" Respondent placed his hands on K.C.'s shoulders and brushed his lips against her neck. Respondent began rubbing or massaging K.C.'s neck and while doing so told K.C. that she was "real tight in [her] neck" and that he would like to work on her neck again and see if he could loosen it up and help her relax. Respondent then led her to the

examination table and "proceeded to rub [her] neck and then he started to take off [her] clothes."

19. While on the examination table, Respondent helped K.C. take off her shirt, shorts, bra, and shoes and the only remaining clothing that she had on was her underwear. After her clothes were removed, K.C. presumed Respondent would cover her with a towel or give her a robe, but he did not provide K.C. with any covering. Instead, Respondent sat behind K.C., massaged her neck, and talked to her "soothingly" for about ten minutes. Respondent then took his hands and rubbed her arms and then moved his hands to her breasts, and then down to her waist and towards her panties. When Respondent moved toward K.C.'s panties, she would "tense up" and then Respondent would "start rubbing up the top part of her again." Respondent's hands again went toward her underwear and he "put his hand to go under [K.C.'s] underwear." K.C. was nervous about what was going on and told Respondent that she was uncomfortable.

20. After K.C. told Respondent that she was uncomfortable, he acknowledged that she seemed uncomfortable. Respondent then handed K.C. her clothes, assisted her in sitting up on the examination table, and sat on the table while K.C. dressed herself. After talking to Respondent for about five minutes, K.C. left the doctor's office with a worse headache, feeling distraught.

21. K.C. next saw Respondent a few days later, on a Monday or Tuesday, for an adjustment for a headache and pain.

Respondent performed an adjustment on K.C. that day. During this appointment, Respondent, again, told K.C. that he wanted to help and counsel her. He told K.C. about an upcoming gun show and stated that they could talk while driving to the gun show.

22. Later that week, Respondent paged K.C. and asked her to come to his office. In response to Respondent's request, K.C. went to Respondent's office. Once there, Respondent took K.C. to an examination room and talked to her again about the gun show. Respondent again told her that he would like for her to go to the gun show with him so that they could have time to talk. K.C. was in Respondent's office that day about ten minutes and did not receive a treatment.

23. A few days later, on Saturday, K.C. met Respondent at his office to go the gun show. When she got there, Respondent recommended that she leave her car at the office and ride in his Toyota 4-Runner so that they could talk. Respondent stated that he and K.C. were going somewhere in Palmetto, Florida, but they actually ended up at the Manatee Civic Center. While Respondent was driving to the gun show, he told K.C. that he hoped that he was not mistaken as to the dates of the gun show. In fact, when Respondent and K.C. arrived at the Manatee Civic Center, there was no one there. Nevertheless, Respondent pulled his car into

a space in the parking lot on the side of the building. Respondent left the car running and took off his seat belt as he talked to K.C. At some point, Respondent kicked his shoes off and loosened his pants and/or pulled them down, reached over toward K.C., took off her seat belt, told K.C. to get more comfortable, and adjusted her power seat in his Toyota 4-Runner to lean back more. Respondent then touched K.C.'s genitals and proceeded to get on top of her and have intercourse. While on top of her, Respondent pointed out that there were police cars in the back of the parking lot. Once Respondent pointed out the police cars, K.C. observed two or four police cars in the parking lot. Even though there were no policemen in the cars, K.C. expressed concern about the police cars to Respondent. Respondent told K.C. that she should not worry because the windows in his vehicle were tinted. Respondent and K.C. were in the parking lot about 20 minutes, although the intercourse was only three to five minutes. After the intercourse, Respondent put his clothes back on or pulled his pants up and drove back to his office. This was the first time that Respondent and K.C. had intercourse.

24. A few days later, K.C. and Respondent engaged in sexual activity in Respondent's vehicle during lunch while they drove to Marina Jack's. Respondent picked up lunch at the hospital and then returned to the parking lot of his office,

where K.C. met him. K.C. left her car in the parking lot and got in Respondent's Toyota 4-Runner. Respondent gave K.C. her lunch and then "fingered" her while she ate her lunch as he drove to Marina Jack's.

25. During the period between August and October 1999, K.C. went to Respondent's house on Siesta Key. The house was in a gated community, and in order to gain entry, K.C. told the guard at the gate that she was going to Respondent's house and would give the guard her name or another name that Respondent had told her to use. At other times, K.C. would follow Respondent through the gate in her car. Some of these visits were on weekdays during Respondent's lunch break. During some of those visits, K.C. and Respondent would talk and have intercourse. K.C. and Respondent had intercourse at Respondent's house about ten times.

26. One Saturday between August and October 1999, K.C. went to Respondent's house after he invited her to come out and talk to him and go to the beach. That day Respondent met K.C. somewhere in town and drove her to his house. When they arrived at Respondent's house, K.C. took out a bathing suit and went upstairs to change. It is unclear whether K.C. and Respondent had intercourse or engaged in any sexual activity on this day.

27. K.C. contemporaneously reported the sexual relationship with Respondent to her husband and to a minister

who had known and counseled her before she met Respondent. K.C. told her minister that the sexual activities with Respondent had occurred in Respondent's office, vehicle, and home.

28. K.C. and Respondent had intercourse a couple of times at the home of a friend of Respondent's, Carole, that was on Tangerine Street and at the home of one of Respondent's friends, Jack Kentish.

29. One Sunday morning in late September, K.C. went to Respondent's office.<sup>2</sup> While there, she went into an examination room to change clothes so that she would have attire appropriate to accompany Respondent to a gun show. About that time, K.C.'s husband showed up at Respondent's office, knocked on the office door, expressed his displeasure at the fact K.C. was there, and had a verbal confrontation with Respondent. K.C.'s husband stopped at Respondent's office after he saw his wife's car parked there.

30. The incident described in paragraph 29, led to Respondent sending a letter dated September 28, 1999, to K.C., advising her that his professional relationship with her would terminate within 30 days. The reason for the 30 days was to allow K.C. time to find another physician.

31. In October 2000, K.C. was admitted to Sarasota Memorial Hospital suffering from major depression, Fioricet dependence, and chronic pain. At or near the time of her

admission and at this proceeding, K.C. acknowledged that she had some loss of memory surrounding the events related to the three-month period in which Respondent engaged in improper sexual conduct with her.<sup>3</sup>

#### CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction of the parties and the subject matter pursuant to Sections 120.569 and 120.57, Florida Statutes.

33. Pursuant to Subsection 459.015(2), Florida Statutes, the Board of Osteopathy is empowered to revoke, suspend or otherwise discipline the license of an osteopathic physician for violating the following provisions of Subsection 459.015(1)(1), Florida Statutes:

Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. . . .

34. Section 459.0141, Florida Statutes, provides:

The osteopathic physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of osteopathic medicine means violation of the osteopathic physician-patient relationship through which the osteopathic physician uses said relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of osteopathic medicine is prohibited.



35. Subsection 459.015(1)(bb), Florida Statutes (1999), now Subsection 459.015(1)(pp), Florida Statutes, provides that a licensed osteopathic physician shall be disciplined for "[v]iolating any provision of this chapter. . . ."

36. Disciplinary licensing proceedings are penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973). Thus, the burden of proof is on Petitioner to prove the allegations in the Administrative Complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1st DCA 1987); Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996).

37. The "clear and convincing" standard requires:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). The findings in this case were made based on the Ferris standard.

38. Count One of the Administrative Complaint alleged that during the period of August 1999 through October 1999, Respondent violated Subsection 459.015(1)(1), Florida Statutes, by exercising influence within a physician-patient relationship for purposes of engaging K.C. in sexual activity. The evidence established that Respondent, in addition to providing treatment for K.C.'s physical condition, repeatedly offered to help her with her emotional problems. The evidence established that Respondent offered to provide this help by talking and counseling with K.C., typically after office hours, at lunch time, or on the week-end, with such "talk" sessions occurring at his office, in his vehicle, or at his home. Petitioner has established that during some of these times, Respondent engaged in sexual activity with K.C. The evidence has established by clear and convincing evidence that Respondent exercised influence within a physician-patient relationship for purposes of engaging K.C. in sexual activity.

39. Count Two alleges that Respondent violated Section 459.0141, Florida Statutes, by engaging in a sexual activity outside the scope of practice or the scope of generally accepted examination or treatment during the period of August 1999 through October 1999, while treating K.C. The evidence established that Respondent engaged in a relationship with K.C. from August 1999 through or about October 1, 1999, and

that during this period of time, he was treating K.C. The evidence established that on or about August 13, 1999, Respondent engaged in a sexual activity with K.C. in his office and that on at least two other occasions, Respondent engaged in sexual activity with K.C. in his vehicle. The evidence established by clear and convincing evidence that during the time in question, Respondent violated Section 459.0141, Florida Statutes.

40. The foregoing violations constitute grounds for disciplinary action pursuant to Subsection 459.015 (1) (bb), Florida Statutes (1999), which allows discipline to be imposed for violating any provision of Chapter 459, Florida Statutes.

41. The range of penalties for a violation of Subsection 459.015(1)(1), Florida Statutes, are from a one-year probation to revocation and an administrative fine up to \$5,000.00. Rule 64B15-19.002(13), Florida Administrative Code (as amended February 2, 1998).

42. The range of penalties for a violation of Subsection 459.015(1)(bb), Florida Statutes (1999), now Subsection 459.015(1)(pp), Florida Statutes, are from probation to revocation and an administrative fine up to \$5,000.00. Rule 64B15-19.002(29), Florida Administrative Code (as amended February 2, 1998).

43. Here, Petitioner has recommended a penalty of a one-year suspension and an administrative fine of \$2,000.00. This recommended penalty is within the prescribed range of penalties for the violations prescribed by Rule 64B15-19.002, Florida Administrative Code.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Department of Health, Board of Osteopathic Medicine, enter a final order finding that Respondent violated Subsection 450.015(1)(1) and Section 459.0141, Florida Statutes, and Subsection 459.015(1)(bb), Florida Statutes (1999), now 459.015(1)(pp), Florida Statutes, and suspending his license to practice osteopathic medicine in the State of Florida for one year and imposing an administrative fine of \$2,000.00.

DONE AND ENTERED this 5th day of August, 2003, in  
Tallahassee, Leon County, Florida.

*Carolyn S. Holifield*

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CAROLYN S. HOLIFIELD  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of August, 2003.

ENDNOTES

1/ Beverly Carrington, Respondent's medical assistant for eight years, testified that she worked part-time and was not always in the office to see patients. However, she did not specify which days and hours she worked in Respondent's office.

2/ There was conflicting testimony as to whether K.C. "happened by" Respondent's office or was invited there by Respondent. K.C. testified that she went to Respondent's office after he paged her that Sunday while she was in church. When she contacted him, he told her that he had a friend at his office and invited her to go to a gun show with them. Respondent testified that K.C. "happened by the office" and, upon learning Respondent and his friend were going to a gun show, asked if she could go.

3/ K.C.'s memory may have been affected by some of the medication she was taking, the amount of time that has elapsed since the events occurred, the frequency of the sexual activities, and the number of locations these activities occurred. For example, K.C. could not recall when she last had intercourse with Respondent, that is whether it was before or after Respondent discharged her as a patient. K.C. testified

that she and Respondent had intercourse in an upstairs room and on the balcony of the home of Respondent's friend, Jack Kentish. In fact, Mr. Kentish's house is a one-story house and does not have a balcony. K.C. testified that she and Respondent had intercourse at the house of Respondent's friend, Carole, which was located on Tangerine Street in Sarasota, Florida. However, when K.C.'s husband investigated the matter, he found that the house on Tangerine Street that had been identified by K.C. as Carole's house, was actually owned by Andrew Synder, who has lived in that house for more than eight years and does not know Carole. No evidence was presented as to how much time elapsed between the sexual activities of Respondent with K.C. and the time K.C. apparently showed her husband the house she believed belonged to Respondent's friend, Carole. However, K.C.'s unwavering credible testimony was that she and Respondent had intercourse at a house on Tangerine Street.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.