IN THE SUPREME COURT OF MISSISSIPPI

GINNY WATKINS — APPELLANT

VS. — CAUSE NO. 2010-IA-00093-SCT

MISSISSIPPI BOARD OF NURSING — APPELLEE

INTERLOCUTORY APPEAL FROM
THE CHANCERY COURT OF
RANKIN COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

PARTIES:

1. Ginny Watkins, Appellant
2. Mississippi Board of Nursing, Appellee

ATTORNEYS OF RECORD

1. Stephen L. Beach, III, Esq., Attorney for Appellant
2. Brett B. Thompson, Esq., Attorney for Appellee
3. J.D. Woodcock, Esq., Attorney for Appellee
4. Honorable John Grant, Chancery Court Judge, Rankin County

Respectfully Submitted,

Brett B. Thompson

Brett B. Thompson, Attorney for Appellee

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STATEMENT OF THE CASE

On April 18, 2007, The Mississippi Board of Nursing, by and through its Executive Director, issued an Administrative Denial to Appellant, Ginny Watkins, denying licensure as a registered nurse. RE 65. The denial was based upon the fact Appellant had received two (2) DUI-1st convictions (two (2) different jurisdictions) in 2002, a conviction of resisting arrest and DUI-2nd in 2004 and a 2006 felony DUI conviction. RE 65. [The Appellant was sentenced to five (5) years custody with the Mississippi Department of Corrections, with the last four (4) years stayed with a probation term of five (5) years. Appellant was sentenced to house Arrest for one (1) year]. RE 78-83

Appellant appealed the decision of the Executive Director's Denial pursuant to section 73-15-31 of the Mississippi Code Annotated, as amended, 1972, to the Mississippi Board of Nursing Panel, and a hearing ensued on or about July 26, 2007. RE 68. The Board Panel, consisting of three (3) Board members, upheld the Administrative Denial and denied Appellant licensure as a registered nurse. RE 139. A transcript of the hearing was made and all exhibits introduced by Appellant and Appellee during the hearing were included in the transcript.

Appellant appealed the decision of the Board Panel to the Full Membership of the Board of Nursing, comprising all thirteen (13) members (Appellee). RE 217. On April 4, 2008, the Full Board (Appellee) reversed the decision of the Board Panel and granted Appellant a restricted license for sixty (60) months conditioned upon Appellant meeting certain stipulations and conditions. RE 393. The full board (Appellee) rendered its decision by reviewing the official transcript and record of the July 2007, hearing along with respective briefs by counsel. *Id.* Counsel for Appellant and Appellee stipulated to waive oral argument and to admit all proposed exhibits for the full board's (Appellee) review. RE 260, 263 and 265-66.

Subsequent to the Full Board's (Appellee) decision, counsel for Appellant filed several motions requesting the proceedings be "suspended," resulting in Appellee issuing an amendment to its Final Order clarifying the language regarding Appellant's relief. RE 424. The Amended Order provided that Appellant "shall be and is hereby granted the aforementioned relief" which amended the previous Order which stated Appellant "is hereby granted relief requested in her Appeal." *Id.* The Amended Final Order was executed on or about May 12, 2008. *Id.*

Subsequent to the Amended Final Order, counsel for Appellant filed with Appellee on May 29, 2008 a Motion to Reconsider Amended Final Order and To Reopen Record. RE 435. Appellee denied Appellant's Motion for Reconsideration and to Reopen the Record finding said motion improper and referencing the Nurse Practice Act and Rules and Regulations as the guiding procedure for exhausting administrative remedies and appeals. RE 447. An Order *Nunc Pro Tunc* reflects said Motion by Appellee on or about December 5, 2008. *Id.*

Appellant appealed the decision of the Full Membership of the Full Board (Appellee) pursuant to section 73-15-31 of the Mississippi Code to the Chancery Court of Rankin County. RE 8. Notice of said Appeal was filed April 1, 2009. *Id.* Appellant then filed an Amendment to designation of Record on May 20, 2009. RE 13. Appellant sought to include in the Record an Exhibit "A" which was a document dated May 18, 2009 pertaining to Appellant's probation arising from Appellant's felony DUI. RE 15.

On July 10, 2009, counsel for Appellee received a telephone call from the Rankin County Chancery Clerk's office advising that all transcripts in this matter had not been filed or received by the clerk. However, it was subsequently determined that because the transcripts of both hearing proceedings had been combined into one that the clerk's office did in fact have all transcripts in this action. Counsel for Appellee did inform the clerk to keep copies of all

transcripts previously delivered so that Counsel for Appellant might review same to conclude that the record was complete.

A Response to Designation of Record and Objections was filed by counsel of Appellee on July 10, 2009. RE 16.

Counsel for Appellant filed Attorney's Examination and Proposed Corrections to Record on July 30, 2009 and submitted a Memorandum brief in support thereof on September 10, 2009. RE 19, 465. Motion to Adopt Attorney's Examination of Record and Proposed Corrections to record was filed December 15, 2009. RE 493. A hearing was held on this motion, and the Chancellor issued an order restricting the record to the transcripts, documents and exhibits related to the evidentiary hearings held July 26, 2007 and April 4, 2008, respectively. RE 497.

Counsel for Appellant filed a Petition for Permission to file an Interlocutory Appeal on or about January 20, 2010. This Honorable Court granted the petition by order on February 17, 2010. RE 499.

SUMMARY OF THE ARGUMENT

This appeal is an effort to circumvent well-settled law and procedural policy as it pertains to administrative appellate processes and review and the official records thereof.

The standard of review when applied to administrative decisions is long well established. The appellate judge must review only the record and agency's findings and will not upset an agency's decision unless (1) it is not supported by substantial evidence (2) is arbitrary or capricious (3) is beyond the scope or power granted to the agency or (4) violates one's constitutional rights.

Rule 10 of the Mississippi Rules of Appellate Procedure states that the record shall include transcripts, excerpts and exhibits from the trial court. Exhibits and transcripts of the trial court proceedings provide an accurate record, give a complete account of what occurred and provide the basis of appeal. Rule 10 prohibits supplementing the transcript with additional evidence if no error or omission is alleged regarding the exhibits and transcripts from the trial court proceedings.

The Mississippi Nurse Practice Act codified in section 73-15-1, *et. seq.* outlines the appellate procedure an aggrieved nurse applicant should follow. The rules are clear as to how to perfect appeal and allows a nurse applicant to exhaust administrative remedies as far as the Mississippi Supreme Court within this State.

Appellant has done nothing more than try and confuse very clear procedures endorsed by this court. The appeal before this court is an effort to "back door" documents into the record that are extraneous to and memorialize events that occurred post-hearing. **Appellant never offered or submitted the documents in question within the hearing proceedings.**

Appellant waived oral argument in her appeal to the full board and stipulated to all exhibits the full board would review. Appellant attempted to file a post-hearing Motion to Amend Final Order in an effort to reopen the record and introduce post-hearing evidence. Appellant's tactic was improper and not allowed by Appellee. Now, in this interlocutory appeal, Appellant seeks to do the same through the appeal process.

Appellate review of an administrative decision is not de novo. Judicial economy would not be served and well established policies and procedures or appellate review would have to be overturned should this court allow Appellant's request.

The administrative appeal procedure is clear in the Nursing Practice Act, clear in the appellate rules of court and clear in pertinent case law. Should this court find otherwise, Appellee respectfully reserves the right to object to any post-hearing extraneous documents from being considered by the Chancellor on appeal.

ARGUMENT

I. Appellate Standard of Review for Administrative Decisions

An Appellate Court's review of an administrative agency's findings and decision is limited and the standard of review is well determined. "We will not disturb the conclusions of an administrative agency unless that agency's order (1) is not supported by substantial evidence (2) is arbitrary or capricious (3) is beyond the scope or power granted to the agency or (4) violates one's constitutional rights." *Spears v. Miss. Dept. of Wildlife, Fisheries and Parks*, 997 So.2d 946, 949 (Miss. Ct. App. 2008), citing *Hemba v. Miss. Dept. of Corr.*, 848 So.2d 909, 914 (Miss. Ct. App. 2003) and *Miss. Dept. of Corr. v. Harris*, 831, So.2d 1190, 1192 (Miss. Ct. App. 2002). See Also *Miss. Real Estate App. Licensing and Cert. Brd v. Schroeder*, 980 So.2d 275 (Miss. Ct. App. 2007), *Pub. Employees' Ret. Sys. v. Howard*, 905 So.2d 1270, 1284 (Miss. 2005) and *Pub. Employees' Ret. Sys. v. Marquez*, 774 So.2d 421, 425 (Miss. 2000).

The Appellate Court may only review the record and the agency's findings. *Miss. Brd on Law Enforcement Officer Standards and Training v. Clark*, 964 So.2d 570, 573 (Miss. Ct. App. 2007), (quoting *Bd. on Law Enforcement Officer Standards & Training v. Voyles*, 732 So.2d 216, 218 (Miss. 1999)). Therefore, the official transcripts of the hearings and documents related to Appellee's decision regarding licensure of Appellant are the only filings which should be part of the appeal record. Any and all extraneous documents post-dated or memorializing events which occurred subsequent to Appellee's decision and not presented by Appellant for Apellee's review in its deliberations and decision are outside the scope of review by the Chancellor and should be barred from the appeal record. *Clark*, 964 So.2d at 573.

Should the Chancellor review post-hearing extraneous documents or other evidence not considered by the Appellee when rendering its decision, the Chancellor would be exceeding

appellate authority. *Clark*, 964 So.2d at 573. Case law is clear that the Chancellor and other appellate review courts are charged with the duty to only conduct appellate review based on the four (4) specified principles as set for in *Spears*. *Spears*, 997 So.2d at 949.

The Chancellor is also additionally charged to not reweigh the facts of the case or insert personal judgment for that of the agency when there is substantial evidence to support the finding. *Miss. Dept. of Employment Sec. v. Good Samaritan Personnel Services*, 996 So.2d 809 (Miss. Ct. App. 2008), (quoting *Miss. Pub. Serv. Comm'n v. Merchs. Truck Line, Inc.*, 598 So.2d 778, 782 (Miss. 1992)). The Chancellor must determine whether or not Appellee acted arbitrarily or capriciously in its decisions and whether or not Appellee based its decisions on substantial evidence. *Id.* Because of the expertise and the faith vested in a government agency, the Supreme Court limits its scope of judicial review of an agency's decision. *Public Employees' Retirement System v. Howard*, 905 So.2d 1279 (Miss. 2005); *Davis-Everett v. Dale*, 926 So.2d 279 (Miss. Ct. App. 2006); *Hill Bros. Const. & Engineering Co., Inc. v. Mississippi Transp. Com'n*, 909 So.2d 58 (Miss. 2005).

The Chancellor has only the duty to determine the validity of an agency's decision. *Spears*, 997 So.2d at 949. The Chancellor and other appellate review judges have a prescribed criteria endorsed by this court which appellate judges must employ when reviewing agency decisions on appeal. *Id.* Chancellors and other appellate review judges must not stray from the well-established standard of review. To do so would be contrary to well-settled case law, policies and procedures and compromise all future decisions of all state agencies.

Certainly, administrative decisions must be constitutional and not violate one's constitutional rights. *Spears*, 997 So.2d at 949. The Court has recognized that while an administrative agency has a rebuttable presumption in its favor, the burden can shift to the challenging party who aims to prove such presumption should be overturned. *Good Samaritan*,

996 So.2d 809 (Miss. Ct. App. 2008). However, this appeal does not involve a constitutional issue. This appeal appears to be an effort by Appellant to "back door" the admission of documents that were never part of existing transcripts of the record.

II. Content of the Record on Appeal

Rule 10 of the Mississippi Rules of Appellate Procedure is the rule for determining content of the record on appeal. Rule 10 (f) specifically limits the authority to add or subtract from the record. Rule 10(f) expressly states "[n]othing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal." M.R.A.P. Rule 10. The comment to Rule 10(f) extrapolates that this rule is not intended "to permit a party to augment the record with matters entered exparte." M.R.A.P. 10(f) cmt.

Rule 10(f) reinforces that the "record" of trial court proceedings and in this instance administrative hearings leading to a final order or other appealable orders, refers only to the evidence, documents and transcripts comprising the basis of the final judgment. M.R.A.P. Rule 10(f). Any extraneous documents or evidence memorializing events occurring subsequent to final judgments of the trial court or administrative agencies cannot be considered part of the record. M.R.A.P. 10(f) cmt. In the case at hand, all exhibits which include any and all prehearing motions and to which are all part of the complete official transcripts of record of two (2) administrative hearings involving Appellant and Appellee have been submitted to the chancellor for review.

Appellant does not challenge or dispute that the transcripts of record and the contents therein contain errors or omissions. If some aspect of the record contained errors or omissions, Appellant should raise specific prejudice to an appellant's substantive rights and demonstrate the

error or missing portion of the record. *Watts v. State*, 717 So.2d 314, 318 (Miss. 1998). If there is newly discovered evidence, Appellant must bring that evidence to the trial court's attention through a Rule 60 motion and not as an "addition" to a record for purposes of appeal. M.R.A.P. 10(f) cmt.

Rule 10 provides that each attorney has the absolute right to have included in the record all relevant trial court proceedings and evidentiary materials. M.R.A.P. Rule 10. Any differences between the parties questioning whether or not the record truly discloses what occurred in the trial court, are to be submitted to the trial court for final settlement. *Id.* The duty to perfect the record pursuant to Rule 10(c) remains with the Appellant. *Id.* An appellate complaint about missing documents or parts of the transcript is likely to be viewed as harmless error unless some aspect of the missing materials is relevant to a substantial issue properly raised. *Watts*, 717 So.2d at 317 (Miss. 1998).

In *Watts*, the defendant was convicted of murder and armed robbery, and there was an issue as to missing portions of the trial proceedings. *Watts*, 717 So.2d at 315-17. The court held *Watts* failed to comply with Rule 10(c) and supplement the record by following the procedure outlined by the rule. "[I]t is the duty of the appellant to see that the record of the trial proceedings wherein error is claim[ed] is brought before this Court." *Watts*, 717 So.2d at 317 (quoting *Jackson v. State*, 684 So.2d 1213 (Miss. 1996)). The defendant in *Watts* claimed he was entitled to a new trial because the transcript of the trial proceedings was not accurate and complete. *Id.* The Court concluded reversal was not required when the defendant in *Watts* never claimed error from the transcript or proceedings, i.e. exhibits, testimony of witnesses, etc. *Id.* The Court additionally held reversal was not proper because the defendant could not provide specific proof as to prejudice. *Id.*

An appellate court may not consider information outside the record, and if a party believes that the record does not accurately reflect what occurred in the trial court, the party must follow the procedure outlined in the appellate rule for correcting or modifying the record. M.R.A.P. Rule 10(e); *Davis v. Christian Broth. Homes of Jackson, Mississippi, Inc.*, 957 So.2d 390 (Miss. Ct. App. 2007). Appellant is asking this court to include documents as part of the record for the chancellor's review which are documents memorializing events occurring subsequent to Appellee's deliberations and issuance of a final judgment. The Appellant is arguing these documents should be part of the record for review, but **Appellant does not raise any issue or dispute regarding the contents of the official transcripts of record from the administrative hearings.**

Appellant is seeking to include what Rule 10 prohibits. As a result, Appellant is procedurally barred from adding documents which were not offered or submitted in the administrative hearing proceedings. M.R.A.P. Rule 10(c). These additional documents are not omissions or newly discovered evidence. These additional documents do not reflect the accurate, and complete account of what transpired in the administrative hearings and do not represent issues that are the basis of appeal.

III. Mississippi Nursing Practice Law

The Mississippi Nursing Practice Law is codified in Section 73-15-1, *et. seq.* of the Mississippi Code Annotated, (1972, as amended). The Mississippi Nursing Practice Law provides for the establishment of a thirteen (13) member board charged with the duty to regulate nursing practice through licensure. MISS. CODE ANN. § 73-15-1, *et.seq.* (1972, as amended).

Section 73-15-29 of the Mississippi Code Annotated, (1972, as amended), provides "[t]he board shall have the power to revoke, suspend or refuse to renew any license issued by the board . . . or to deny an application for a license . . . place on probation and/or discipline a licensee."

MISS. CODE ANN. § 73-15-29 (1), (1972, as amended). Section 73-15-29 of the Mississippi Code Annotated, (1972, as amended), outlines the specific grounds the board may utilize to deny licensure. Appellant was denied licensure based upon two (2) DUI-1st convictions in two (2) different jurisdictions in 2002, a 2004 conviction of resisting arrest, a 2004 DUI-2nd offense conviction and a 2006 felony DUI conviction whereby the Appellant was sentenced to five (5) years custody with the Mississippi Department of Corrections, with the last four (4) years stayed with a probation term of five (5) years. RE 78-83. Appellant was sentenced to house arrest for one (1) year. *Id.*

At the hearing of the board panel, Appellant was afforded the right to produce witnesses and evidence on her behalf, to cross-examine witnesses and to have subpoenas issued by the board as allowed by Mississippi Code Annotated § 73-15-33 (4), (1972, as amended). Upon issuance of a final judgment, the board panel must also adhere to the following:

> "All disciplinary hearings or appeals before the board and the Attorney General, and/or a designee thereof, shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of its proceedings, but the determination shall be based upon sufficient legal evidence to sustain it. A final decision by the hearing panel and by the board on appeal shall include findings of fact and conclusions of law, separately stated, of which the accused shall receive a copy."
>
> MISS. CODE ANN. § 73-15-33 (4), (1972, as amended).

Appellant stipulated with Appellee to all exhibits to be submitted for review to the full board and waived oral arguments. RE 260, 263 and 265-66. The full board reviewed the transcript of record and stipulated exhibits and reversed the board panel's decision, granting Appellant a restrictive license. RE 424. The Final Order of the full board afforded Appellant the right to appeal its decision pursuant to Mississippi Code Annotated § 73-15-33 (10), (1972, as amended). *Id.*

The right to appeal from the action of the full board **shall** be to the chancery court of the county of the residence of the licensee on the record made. MISS. CODE ANN. § 73-15-33 (10), (1972, as amended). The appeal must include the transcript of hearing and must be taken within thirty (30) days after notice of the action of the full board. *Id.* The appeal is perfected upon filing notice of the appeal, together with a bond in the sum of One Hundred Dollars ($100.00) with two (2) sureties. *Id.*

Appellant had already exhausted all administrative remedies when Appellant filed a Motion to Reconsider Final Order and To Reopen Record. Appellant was noticed on the motion and was placed on Appellee's agenda for its business meeting. RE 442-444. Appellee went into executive session to consider the motion and determined the motion to be improper. RE 447.

Appellant thereafter filed her appeal to the Rankin County Chancery Court. RE 8. The Chancellor is charged with the duty to review the transcripts of record, apply the standard of review and determine if the full board's decision to grant Appellant a restrictive license is arbitrary or capricious. *Spears*, 997 So.2d at 949. Appellant was granted every right to appeal each and every decision of the Executive Director of the board, the hearing panel and the full board. Appellant has not claimed error exists within the hearing proceedings or transcripts.

Appellant's tactics to circumvent the appeal procedure by filing a Motion to Reconsider Amended Final Order and To Reopen Record is nothing more than Appellant's attempt to get another bite at the apple and to submit additional extraneous documents never offered or admitted within the respective hearing proceedings. The court found in *Watts* that a reversal was not required when the defendant failed to follow proper procedure in Rule 10(c) regarding any errors or omissions within trial proceedings or transcripts and further failed to show how those errors or omissions were prejudicial. *Watts*, 717 So.2d at 317.

Conclusion

This appeal is nothing more than efforts by Appellant to include extraneous documents memorializing events post-hearing into the record. Appellant never offered or submitted the documents in question within the hearing proceedings. Appellant did not claim that errors or omissions existed as to the transcripts and exhibits within the hearing proceedings.

Appellate review standards and procedures are well-established and clear. Thus, this honorable court should affirm the Chancellor's decision for the record to include only those transcripts, documents and exhibits relating to hearing proceedings.

CERTIFICATE OF SERVICE

I, Brett B. Thompson, Attorney of Record for the Mississippi Board of Nursing, Appellee, do hereby certify that I have this date mailed, by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing Brief of the Appellee to the following persons:

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This the 3rd day of September, 2010.

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