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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF YI,

Appellant,

-against-

NO. 50

NYS BPMC,

Respondent.

20 Eagle Street
Albany, New York
April 10, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Good afternoon. The first
2 matter on the calendar is Matter of Yi v. New York State
3 Board of MC.

4 MR. SCHER: Good afternoon. My name is Anthony
5 Scher. If it please the Court, I would like to reserve
6 three minutes of my time for rebuttal if necessary.

7 CHIEF JUDGE WILSON: Yes.

8 MR. SCHER: Thank you. I would start out by
9 saying this case involves primarily one significant issue.
10 It's a three judge - - - three judge majority in the
11 Appellate Division, two dissents. That's why we're here.
12 And Dr. Yi, the appellant, is a board certified radiation
13 oncologist who treats cancer patients with radiation. And
14 the case involves seven patients that he treated many years
15 ago between 2009 and 2012 or '13, so many of the cases are
16 ten, twelve, fifteen years old. And he had a hearing
17 before the State Medical Board where the only witness
18 against him was an expert witness called by the Office of
19 Professional Medical Conduct as the - - -

20 JUDGE GARCIA: Counsel, I'm sorry to interrupt
21 you, but he did have this hearing, and then he had a
22 proceeding before the Appellate Division, so what's our
23 standard of review of what's before us?

24 MR. SCHER: Well, in this case, the decision of
25 the - - - of the administrative agency would have to be

1 arbitrary and capricious, I believe, because it's been
2 reviewed on the facts by the Appellate Division had that
3 opportunity. But we think it's a legal issue here. Not
4 really - - - this is not a substantial evidence question or
5 - - - or case. It's a case involving whether the evidence
6 adduced against Doctor Yi was competent and sufficient as a
7 matter of law, and the evidence was solely from an expert
8 witness called by the OPMC - - -

9 JUDGE TROUTMAN: So when you say solely, was
10 there any record evidence offered with respect - - - like,
11 the patients records and information as to their course of
12 treatment?

13 MR. SCHER: Yes. The medical records are all in
14 evidence, and the expert for the OPMC commented on that - -
15 - those records. That's what his testimony was about. We
16 believe was the critical flaw about by - - - by the hearing
17 committee and by the - - -

18 JUDGE TROUTMAN: Are experts not allowed in such
19 hearings?

20 MR. SCHER: No, they are not only allowed, they
21 are usually required.

22 JUDGE TROUTMAN: So what's the problem with this
23 one?

24 MR. SCHER: The problem is, is that in order to -
25 - - to sustain a case of misconduct, there must be expert -

1 - - if it's an issue of expertise, there must be expert
2 testimony in the record to support that. We submit there
3 is no expert testimony in this record, because the
4 testimony given by the expert witness called on behalf of
5 the OPMC was not competent as a matter of law.

6 JUDGE SINGAS: And why is that? I mean, I read
7 this record, and we - - - there was an expert with thirty
8 years of medical experience interpreting guidelines,
9 interpreting medical records, coming to conclusions. Why
10 do you need more than that?

11 MR. SCHER: Well, we don't disagree with that is
12 - - - of his - - - in terms of his qualifications, what we
13 say is, is his testimony about what is the standard of
14 care, and the standard of care at a disciplinary proceeding
15 - - - according to the health department itself - - - their
16 own general counsel has issued a memorandum on the subject
17 - - - is the same as it would be in a malpractice case, the
18 only difference being that you don't need to prove actual
19 injury to a patient in a misconduct case, which you do need
20 in a - - - in a malpractice case.

21 JUDGE SINGAS: So are you saying that he didn't
22 articulate a standard of care? I thought your brief was
23 that he was relying too much on the standard of care - - -

24 MR. SCHER: No. He articulated a standard of
25 care, Your Honor. The problem was he didn't understand

1 what the standard of care is app - - - that's applicable to
2 a misconduct proceeding. The standard of care is the much
3 bigger departure from accepted standards of practice that's
4 commonly accepted in the medical community. That's not
5 what he said, though - - -

6 JUDGE TROUTMAN: But did he - - - could - - - are
7 you suggesting that he didn't articulate the standard of
8 care, also taking into account his own experience?

9 MR. SCHER: What I'm saying is, if you look at
10 his cross-examination that we cite in our brief, what he -
11 - -

12 JUDGE TROUTMAN: But are we to sup - - - simply
13 look at the cross-examination or the entirety of his test -
14 - -

15 MR. SCHER: You can look at the entire record.
16 He's - - - his direct testimony - - - he gave testimony
17 about departures from the accepted standard of care. That
18 he clearly did. The trouble is, on cross-examination, what
19 he did was he said that all of my testimony on direct,
20 including the testimony cited by the Appellate Division
21 majority, including the testimony cited by Mr. Hu for the
22 Attorney General's Office, he said all of that testimony
23 was based upon the fact that there was a violation of these
24 published guidelines, and the DA's case makes clear that a
25 violation of published guidelines is not in and of itself -

1 - -

2 JUDGE CANNATARO: Counsel, even if that's exactly
3 what he said on cross-examination, since it's cross-
4 examination tending to go to his credibility of his direct,
5 would that not just be some evidence that the factfinder
6 would use to determine the credibility of his opinion?

7 MR. SCHER: I don't think so.

8 JUDGE CANNATARO: Why not?

9 MR. SCHER: The reason is, is that it wasn't
10 merely an issue of credibility. It was an issue of him
11 articulating an incorrect standard of care. And he said
12 all this testimony that he gave - - - all of it - - -
13 referred to that standard of care. In other words, a
14 violation of the published guidelines.

15 JUDGE CANNATARO: Yeah. But counsel, would you -
16 - - would you agree with me that during his direct
17 testimony, he - - - he explained the standard of care as
18 something more than just the guidelines?

19 MR. SCHER: No, I would say a fair reading of his
20 testimony is - - -

21 JUDGE RIVERA: Well, didn't he depend on his
22 clinical exp - - - over here, sir - - - - didn't he depend
23 on his decades of clinical experience?

24 MR. SCHER: Well, I'm sure that he used his
25 knowledge as a doctor and - - - and experience to

1 articulate his - - - his understanding of the medical
2 records. I have no doubt he did that. The problem is, is
3 that when he gave his testimony and explained that all of
4 the things he just said on his direct - - -

5 JUDGE RIVERA: So you're - - - you're saying you
6 don't think that - - - that he, in his testimony, relied in
7 part on his clinical experience to draw his ultimate
8 opinion.

9 MR. SCHER: What I think is he used his clinical
10 experience and his knowledge and - - - and background - - -

11 JUDGE RIVERA: To read records as opposed to what
12 - - -

13 MR. SCHER: - - - and - - -

14 JUDGE RIVERA: - - - what one would draw - - -
15 meaning - - - what meaning one would draw from those
16 records.

17 MR. SCHER: What he said was that all of that
18 testimony - - -

19 JUDGE RIVERA: Yes.

20 MR. SCHER: - - - was based upon that this
21 treatment care that was rendered by Dr. Yi, the appellant
22 in this case, all of that testimony was on the basis that
23 he had violated the so-called standard of care. So when he
24 was asked what he understood the standard of care to mean,
25 he said, that's a violation of the guidelines put out by

1 the American College of Radiology - - - American - - -

2 JUDGE SINGAS: Well, I - - - I think he said
3 things like - - - I'm quoting - - - "This is a curative
4 dose that I can't conceive of ever being used for a
5 metastatic lesion." He says, "The treatment philosophy
6 from both the radiation perspective and the oncology
7 perspective for someone in this position concluding that
8 the treatment was unwarranted." He's not saying that. I
9 mean, here, I think he's certainly looking at guidelines -
10 - - and I think you're - - - you're saying that that's okay
11 - - - and then interpreting them through the eyes of a
12 thirty-year practitioner and - - - and then applying that.

13 MR. SCHER: Right. The problem with the
14 guidelines, though, is that - - - when he said on cross
15 that all of my testimony is based upon a violation of these
16 guidelines - - - that the doctor's treatment that he saw in
17 the records violated the guidelines - - - when he said
18 that, the - - - if you look at the actual guidelines
19 themselves, when - - - they're not in evidence, by the way,
20 the OPCM never put them in evidence. But these guidelines
21 - - -

22 CHIEF JUDGE WILSON: Does that matter?

23 MR. SCHER: Well, I think it does. I mean, we
24 have a - - - you have a finding that somebody violated
25 guidelines that - - -



1 JUDGE TROUTMAN: Was there an object - - - were
2 they referenced during testimony - - - the guidelines?

3 MR. SCHER: Well, he - - - yes, he - - - he said
4 that there were guidelines put out by the American College
5 of Radiology.

6 JUDGE TROUTMAN: And were there objections to
7 discussion with respect to said guidelines?

8 MR. SCHER: There was never any objection to that
9 because the OP - - - they never offered it - - -

10 CHIEF JUDGE WILSON: And can experts - - - can
11 experts base their opinion - - - sorry - - - right in front
12 of you - - - can experts base their professional opinions
13 on materials that are not in the record - - - if those are
14 things that people in the field - - -

15 MR. SCHER: I think they can.

16 CHIEF JUDGE WILSON: Okay.

17 MR. SCHER: But the problem here is, though, when
18 somebody - - - when an expert makes it clear, expressly
19 states that the - - - that the care that we - - - that he
20 saw in these treatment records and he analyzed and gave
21 testimony about was a violation of the standards put out -
22 - - or the guidelines put out by the American College of
23 Radiology. When you look at their actual guidelines and
24 when you look at their statement, they say you should not
25 use these guidelines.

1 CHIEF JUDGE WILSON: Well, that sounds like good
2 cross-examination.

3 MR. SCHER: Well, and - - - and he - - - and that
4 was used. My point is you can't use the guideline - - -
5 that's what the Diaz case says. The Diaz case says that
6 guidelines are not, in and of themselves, the standard of
7 care.

8 Now, the - - - Dr. Aral, when asked on cross-
9 examination, also said he was aware of many doctors who
10 violate the standards of care. And so I asked him, well,
11 how many of them did you report to the OPMC? Because the
12 State law requires that if a doctor learns of another
13 doctor's misconduct, you have to report it, otherwise
14 you're guilty of misconduct yourself. He said he never
15 reported anybody. And so when he was asked why he didn't
16 report anybody, it's because he did - - - he showed that he
17 differentiated state standards versus the guidelines. So
18 he - - - when he referred to people violating standard of
19 care, he was saying they violated published guidelines.

20 Part of the problem with these guidelines is, for
21 example, they - - - they presuppose certain things. For
22 example, in many cases, the first line of treatment for a
23 cancer patient, in many cases, is chemotherapy. Several of
24 these patients declined chemotherapy. And so therefore,
25 the radiation treatment changes. But the guidelines don't

1 account for that. That's why the guidelines expressly
2 state that the guidelines are not to be used in litigation
3 involving the judgment of a doctor, involving the care of a
4 patient. They're just - - -

5 JUDGE TROUTMAN: So with respect to determining
6 whether or not the treatment deviated, what was offered in
7 opposition to show that what the expert offered by the - -
8 - the medical licensing - - -

9 MR. SCHER: Uh-huh.

10 JUDGE TROUTMAN: - -- board was wrong?

11 MR. SCHER: Well, there were two - - - two - - -
12 two pieces of evidence, both testimonial in nature. But I
13 didn't argue that point here because generally speaking,
14 that kind of issue is left to the hearing committee. But
15 we had an expert witness of our own who said there - - -
16 there was no violation of standard of care. In many cases,
17 he said, there is no standard - - -

18 JUDGE TROUTMAN: And so the fact finder decides
19 which to credit and which to not?

20 MR. SCHER: And if - - - if that was - - - if
21 that were purely the issue, I wouldn't be here. If this
22 was simply a case of a battle of experts disagreeing upon
23 the care that was rendered and having different opinions, I
24 recognize - - - I've done enough of these cases to know
25 that's really for the - - - the administrative agency to

1 find. I - - - I have no quarrel with that. The problem
2 here is, though, that's not a prop - - - it's not
3 appropriate when the expert says the standard of care is to
4 not violate the guidelines put out by our society.

5 JUDGE TROUTMAN: And you're suggest - - - your
6 argument is that is all that was offered with respect to
7 the standard of care.

8 MR. SCHER: If you read the dissenting opinion on
9 our brief, you'll see, he says that's exactly what it - - -
10 but would be hard for an expert to say - - -

11 JUDGE SINGAS: But if you read the record, he
12 says other things, and he says a doctor shouldn't give
13 treatment that won't alter the course of the - - - court - -
14 -

15 MR. SCHER: Right.

16 JUDGE SINGAS: - - - right - - - the course of
17 disease. That wasn't coming out of the guidelines. That's
18 what he, based on his own experience and his clinical
19 experience, says one would reasonably expect a positive
20 response. I mean, I - - - I think you're painting with a
21 little bit of a broad brush by saying that's all he did,
22 because I think the record is replete with evidence that
23 that's not all he did.

24 MR. SCHER: Well, on his direct testimony - - -
25 what you're referring to - - - on his direct testimony, he

1 gave his opinions about different kinds of treatment, but
2 he qualified that on cross. He - - - what he said was all
3 of my testimony that I've previously given - - - all of it
4 - - - is dependent on the fact that the standard of care
5 was violated because the guidelines were violated. So yes,
6 he gave a lot of testimony about individual cases, but I
7 believe all of that is nullified and negated by an
8 admission on cross-examination that, basically speaking, he
9 stood for the proposition that if you violate guidelines
10 put out by the American College of Radiology, you are
11 guilty of a violation of the standard of care.

12 JUDGE CANNATARO: Counsel, why - - - why is it
13 nullified and negated? That - - - that - - - that's the
14 place where I get stuck. He said one thing on direct. He
15 alluded to his training and years of experience, clinical
16 experience, and then he said something different, I grant
17 you, in response to a question on cross-examination. What
18 is the power of that answer on cross to negate what he said
19 on direct?

20 MR. SCHER: Well, if he simply had a different -
21 - - some differences up from - - - between direct and
22 cross, I would say still within the credibility of the - -
23 - of the hearing panel. But that's not really what he
24 said. What he said was, all of my testimony was based upon
25 the fact that he violated the standard of care of the - - -

1 put out by the guidelines by the American College of
2 Radiology. That was his - - - the premise of his case.
3 That's the base of it.

4 JUDGE HALLIGAN: Couldn't the panel have decided
5 that they would evaluate the statement on cross in light of
6 what he said on direct and - - - and reach some conclusion
7 about how to - - - how to think about them together?

8 MR. SCHER: I think once the - - - once the
9 answers were given on cross - - - as it's set forth in our
10 brief, which I'm sure - - - I know you all have read - - -
11 once those answers were given, when he made it made it
12 clear that's what he was talking about when he gave his
13 testimony - - - it was not a matter for the hearing panel
14 to decide what to - - - how to weigh the testimony. It was
15 a matter of a matter of law the testimony is no longer
16 competent.

17 And that's what the two judge - - - judges on the
18 dissent decided in the Appellate Division. This testimony
19 was not competent, did not constitute substantial evidence,
20 and cannot be relied upon when an expert gives testimony
21 directly contrary to the case law in the Diaz case, and
22 directly contrary to the very guidelines that he cited,
23 which put out that you can't rely upon these guidelines.
24 They're meant as educational tools only, and they should
25 not be used as a standard of care under any circumstances.

1 CHIEF JUDGE WILSON: Thank you.

2 MR. SCHER: They said - - - thank you. I'll - -
3 - so I'll save my three minutes - - - three minutes
4 rebuttal time. Thank you.

5 MR. HU: Good afternoon, Your Honors. Kevin Hu
6 on behalf of the State Board. So the central - - -

7 JUDGE TROUTMAN: Can you pick up on the
8 guidelines and how they're used or not - - - the proper use
9 of them?

10 MR. HU: Absolutely, Your Honor. Which - - -
11 which is really the critical issue in this proceeding. So
12 if we could start with this court's decision in the matter
13 of Diaz versus New York State Downstate Hospital, this
14 court made clear that a reliance solely on guidelines
15 promulgated by professional organizations cannot establish
16 a standard of care. So what this court was concerned about
17 were litigants taking a shortcut, essentially saying, look,
18 that professional organization has set forth certain rules,
19 so the entire industry must think that. The court said
20 that is an improper inference. But however, the court left
21 open the possibility that you could show something more.
22 So there could be an instance in which guidelines alone
23 could satisfy the standard of care. But even that is not
24 what we have here.

25 Dr. Aral merely relied on four different sets of

1 guidelines as one of three different factors that he - - -
2 that he evaluated to determine the proper standard of care
3 and what the proper course of treatment should have been
4 for each of the seven patients at issue here, and we can
5 see that in his direct testimony.

6 He first stated that he relied on his own
7 practice experience, which covers thirty years. I believe
8 the phrase he used was, you see the standard of care by
9 convention, treating these patients Monday through Friday.
10 He then said the next source he consults are textbooks
11 because they are authorities in the field, and they tend to
12 compare and contrast different treatment regimes, and so
13 that is a helpful source.

14 The third category he then cited to is then the
15 guidelines. There are two sets of guidelines that gover -
16 - - that provide prescriptive recommendations for different
17 types of cancer. And so those are the - - - the ACR
18 guidelines, the NCCN. He noted that the NCCN guidelines
19 are particularly persuasive because the who's who in the
20 field of radiology participate in that organization.

21 JUDGE RIVERA: Did - - - did he explain how - - -
22 or what he drew from the thirty years of practice and the
23 textbooks - - - I understand the testimony on the
24 guidelines - - - what he drew from those two sources that
25 informed his analysis? Or is it general that he - - - that



1 he just said he was relying on these three things?

2 MR. HU: So the portion of his direct testimony
3 that I'm referring to, which begins on page 2 - - - 2876
4 and continues through 28 - - - 2880 of respondent's
5 appendix. Dr. Aral was explaining, as a general matter,
6 how he understands the standard of care to be derived in
7 the - - - in the field of radiation oncology, generally.

8 JUDGE RIVERA: Uh-huh.

9 MR. HU: But then with respect to each patient,
10 he then explained how - - - what is required in that
11 particular instance. And it's worth emphasizing that he
12 not - - - in addition to citing those three sources for
13 each patient, he then explained the scientific and medical
14 principles underlying the standard, and so therefore, the -
15 - - the board was able to make an independent evaluation as
16 to whether his testimony was ultimately persuasive or not.
17 He - - - he simply did not rely solely on the guidelines in
18 the manner that petitioner seeks to characterize his
19 testimony - - -

20 JUDGE SINGAS: And what do you think the standard
21 of review is here?

22 MR. HU: Your Honor, I - - -

23 JUDGE SINGAS: It's been a popular question this
24 week.

25 MR. HU: I - - - I believe the standard of review

1 is substantial evidence, and it's precisely because he did
2 have a full hearing, had the opportunity to present
3 evidence. And so quite frankly, it should be substantial
4 evidence. And that standard even applies to this dispute
5 as to whether Dr. Aral sufficiently established the
6 standard of care, because as this court is - - - is well
7 aware, he - - - he said one thing on direct, which was
8 quite frankly, more comprehensive, more fulsome. He said
9 something much more ambiguous on cross-examination. To the
10 extent there was a conflict, that was something for the
11 State Board to weigh.

12 JUDGE HALLIGAN: Can I ask - - -

13 JUDGE CANNATARO: So how would you - - - oh, I'm
14 sorry.

15 JUDGE HALLIGAN: Go ahead.

16 JUDGE CANNATARO: I was just wondering, how would
17 you characterize the statement made on cross? Was it a
18 misstatement? Was it a condensation of something he said
19 earlier during direct. How should we view that? Because
20 clearly, your adversary views it as an admission that
21 negates the statement made on direct.

22 MR. HU: Your Honor, if that statement on cross-
23 examination were viewed in isolation, if it were the only
24 thing Dr. Aral had said, this would be a substantially
25 tougher case. But we understand his statement to be

1 informed by what he said on direct examination, because on
2 direct examination he cited to three to four different
3 sources and then on cross-examination merely emphasized one
4 of them. His testimony is - - - is conceptually consistent
5 because ultimately, when he was reviewing all four sources,
6 they converged on the same principle. And so when he
7 merely reemphasized one, the guidelines, on cross-
8 examination, there's no inherent tension there.

9 But ultimately, to the extent that the State
10 Board could have found some tension, they could have - - -
11 they could have used that as a reason to discredit his
12 testimony, but instead they found it to be more
13 comprehensive and more persuasive. And quite frankly, it's
14 unsurprising that they did so.

15 For each patient, Dr. Aral first explained what
16 he saw in the medical records. He then explained what he
17 believed to be the standard of care and explained the
18 medical and scientific principles and then applied that to
19 explaining how each patient was not served in that manner
20 by - - - by petitioner.

21 JUDGE HALLIGAN: It's - - - I realize the
22 principal question in front of us is - - - is the reliance
23 on the guidelines and the extent to which we weigh the
24 statement on cross. But in looking at the specific
25 patients, it seemed that there were a couple that present

1 maybe a little bit more challenging set of facts. I think
2 there were two that had declined conventional treatment of
3 chemotherapy, I believe, and one that was seeking what
4 appeared to be characterized as unconventional treatment.
5 And it occurs to me that maybe the course that a physician
6 takes when faced with a patient in those circumstances,
7 that might be, you know, a challenging question. Do we
8 have to - - - to pronounce on that at all or get into that?
9 Is that really before us in your view?

10 MR. HU: It is before this court to the extent
11 that petitioner has raised it as one of his many
12 substantial evidence challenges. But ultimately, the issue
13 really is a clash between expert witnesses.

14 Dr. Aral opined that even in circumstances when a
15 patient has declined chemotherapy, which admittedly
16 presents a - - - a difficult case, a doctor still has to
17 adhere to the standard of care, which might involve telling
18 patients radiation therapy simply is not an option. In
19 other words, when a patient turns down the optimal form of
20 treatment, chemotherapy, a doctor's - - - the standard of
21 care requires the doctor to turn down offering radiation
22 therapy as an alternative. And that's because, by nature,
23 radiation therapy simply is not consequence free. It is
24 effective at killing cancer cells, but it does the same
25 thing to healthy cells.

1 And so Dr. Aral testified that the guiding
2 principle radiologists on - - - radiation oncologists must
3 adhere to is to have a reasonable belief that there is
4 going to be some therapeutic benefit that outweighs the
5 negative side effects.

6 And so for those three particular patients you
7 cited, Judge Halligan, Dr. Aral opined that that balance
8 simply was not met.

9 JUDGE RIVERA: Regardless if the - - - the
10 provider explains that to the patient and the patient says,
11 I'd rather take that risk.

12 MR. HU: Yes, Your Honor. That - - - that - - -
13 that was the continuation of doctor - - - Dr. Aral's
14 explanation of the standard of care. It - - - it is
15 certainly well settled that a patient's own desires do not
16 set the standard of care. It - - - it still must be what
17 the profession as a whole decides. And so even - - - even
18 in that instance where a patient, I suppose, gives informed
19 consent for substandard treatment, it could have two
20 negative effects.

21 First of all, if there's no reasonable
22 expectation of therapeutic benefit, it is essentially
23 inflicting side effects for no good reason. And you're - -
24 - and it is - - - it is depriving these patients of time
25 that is better spent without suffering from side effects.

1 And the second potential flaw is that by offering
2 a treatment that has no therapeutic benefit, you could
3 harden their resolve in not seeking what would be the
4 better treatment and - - - and certainly delay them from
5 doing so.

6 JUDGE TROUTMAN: So are what you suggesting is
7 you could have a patient, they could, by right, decline to
8 take the traditional care, but just because they want to
9 take another route, if it's not accepted within the
10 community, a doctor can't administer it.

11 MR. HU: That - - - that is correct, Your Honor.
12 The - - - Dr. Aral testified that in a - - - in a difficult
13 circumstance like that, the answer would still be no. In
14 the case of individual - - -

15 JUDGE RIVERA: Or they can at their peril.
16 Unless it's criminal. Unless it's criminal.

17 MR. HU: That - - - that is correct, Your Honor.
18 And it's worth emphasizing petitioner's contention now that
19 Dr. Aral didn't set the standard of care doesn't quite
20 match his own testimony. With respect to many of the
21 patients, he expressed remorse with the benefit of
22 hindsight and acknowledged that his treatment was very
23 aggressive.

24 JUDGE HALLIGAN: Just - - - just to go back to a
25 second for this - - - to this exchange if we can. It seems



1 to me that you're making some sort of broad statements
2 about what physicians can or cannot do with respect to
3 patients who might decline conventional treatment. I mean,
4 isn't - - - isn't what's before us more narrowly, whether
5 there's substantial evidence on this record with respect to
6 this physician's decisions for these patients as opposed to
7 broad, you know, broad propositions about what physicians
8 can or can't do across all cases.

9 MR. HU: That is correct, Your Honor. But it - -
10 - Dr. Aral's articulation of what the standard is that
11 would apply to many cases, then informed his analysis of
12 the patient's - - - patient-specific circumstances. And so
13 in - - - in that way, there really does seem to be no
14 dispute as to what the normal standard treatment would be.
15 It - - - it was a dispute between the expert as to whether
16 the particular circumstances of these patients justify
17 doing something different. And that is - - - that is
18 ultimately where the expert witnesses clashed, and that was
19 a - - - that was a conflict that the State Board was in - -
20 - permissibly resolved against petitioner.

21 So unless there are any further questions, we
22 would respectfully request that the court confirm the
23 determination. Thank you.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. SCHER: Take my three minutes if I could,



1 Your Honor. A couple of things. One is that when a
2 patient declines chemotherapy, the standard conventional
3 treatment - - - that is often the case in many of these
4 cases where there's systemic cancer - - - radiation
5 treatment is also often given as a supplement to that.
6 However, chemotherapy requires that the dose of radiation
7 oncology delivered is - - - is actually augmented by the
8 chemotherapy. So when you don't give chemotherapy, there
9 is no standard as to what the actual dose of radiation
10 should be, because the state - - -

11 JUDGE RIVERA: But isn't this exactly what an
12 expert can opine on? And the board can decide it's either
13 persuaded by it or not, as opposed to - - -

14 MR. SCHER: Yes, except they do - - -

15 JUDGE RIVERA: - - - this august body and my
16 colleagues trying to figure out what sounds to me very much
17 like a complex medical argument.

18 MR. SCHER: Well, there was no actual testimony
19 on how much radiation therapy you can give when a patient
20 declines chemotherapy. Dr. Aral's testimony during the
21 case was that you have to follow the traditional treatment
22 method, and if you don't do that, you can't give anything
23 because it's - - - that's - - - that's the first line of
24 treatment. However, these patients are - - - are
25 autonomous, and they oftentimes, in - - - I think three or

1 four of the cases - - - decline chemotherapy.

2 One of the reasons why the guidelines are so only
3 educational, as opposed to determinative, is that the
4 guidelines presuppose that the patient is going to receive
5 chemotherapy, and therefore the dosage of radiation is
6 dependent on that. The dosage completely changes if they
7 don't get chemotherapy. And that's why guidelines are only
8 informative and educational. They're not determinative of
9 what the standard should be. That's a doctor's judgment.
10 And what Dr. Aral was doing was he was saying that if you
11 violate these - - - these - - - these so-called standards
12 put out by the society, you, by definition, have committed
13 negligence and incompetence.

14 Although, in his testimony, if you look at his
15 testimony, he says that his view was that the standard of
16 care is different for what he called the state standard
17 versus the standard applied when there's just violating
18 guidelines. And he did not think that violation of
19 guidelines was negligence or incompetence, which is the
20 definition of misconduct.

21 He says here, when he's asked, in order to
22 practice negligently or incompetently, one must violate the
23 standard of practice, correct? That's my question to him.
24 His answer is, that's a specific verbiage that I am not
25 familiar with. He's asked, well, your testimony here about

1 a violation of standards. I assume - - - maybe I was wrong
2 - - - but I assume that it was given in the context that is
3 what you were talking about. A violation of standards
4 means if a practitioner committed professional misconduct
5 by practicing negligently or incompetently. His answer is,
6 that was your assumption. I said, was I wrong? His answer
7 was, yes, you were wrong.

8 Clearly, he equates the violation of the
9 guidelines as a violation of standards. And that is not
10 the law, and it's not what the society puts out. And
11 that's why I say this is not a battle of the experts in
12 terms of the credibility of who's right and who's wrong.
13 It's a matter of his testimony is simply not legally
14 competent under Diaz and by virtue of the actual preamble
15 or the - - - the statement put out by the actual board that
16 puts out the - - - the guidelines. They made it clear
17 these guidelines are not to be used as standards of care,
18 and that's exactly the opposite of what they were done.

19 And the - - - I don't think it's an issue for the
20 State Board hearing committee because I don't think this is
21 a legal issue. It's not really a battle of experts. They
22 assumed that his knowledge and his testimony is correct
23 that it's a violation of standard. They haven't - - - they
24 wouldn't know about the Diaz case, and they did not know
25 about the - - - the guidelines specifically saying these

1 are not to be used for standards of care. And for that
2 reason, I think his testimony was not competent. And
3 therefore, without that testimony, there is no substantial
4 evidence.

5 CHIEF JUDGE WILSON: Thank you.

6 MR. SCHER: Thank you.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Yi v. NYS BPMC, No. 50 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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