

FILED

DEC 22 2021

**BOARD OF MASSAGE
AND BODYWORK THERAPY**

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
BOARD OF MASSAGE AND BODYWORK
THERAPY

IN THE MATTER OF THE LICENSE OF

**ASMAR R. BERRY, LMBT
LICENSE NO. 18KT00973200**

TO PRACTICE MASSAGE AND BODYWORK
THERAPY IN THE STATE OF NEW JERSEY

Administrative Action

FINAL ORDER

Overview

This matter was opened before the New Jersey State Board of Massage and Bodywork Therapy ("Board") on May 6, 2021, upon the filing of a two-count Verified Complaint ("Complaint") and a Notice of a Motion to Proceed Summarily ("Motion"), alleging that Asmar R. Berry, LMBT, ("Respondent") inappropriately touched a client, J.S.¹, while performing a massage at Renewed Spa in Pennington, New Jersey on September 11, 2018. The Verified Complaint sought revocation or suspension of Respondent's license to practice

¹ J.S. is identified in the Verified Complaint by her initials only, in order to protect confidentiality. J.S.'s identity is known to Respondent.

massage and bodywork therapy in New Jersey, as well as attorneys' fees and costs.²

The allegations in the Complaint are based upon a prior criminal proceeding, during which Respondent's then-legal counsel, Mark G. Davis, Esq., stated in his opening and closing statements that Respondent engaged in consensual sexual contact with J.S. Specifically, Mr. Davis admitted that Respondent massaged J.S.'s breasts, removed her underwear, and digitally penetrated her during the massage. Mr. Davis also stated that Respondent violated his duty as a massage therapist. Respondent was subsequently acquitted on all charges.

After a review of the evidence presented, we find that during a massage on September 11, 2018, Respondent inappropriately left J.S. exposed, inappropriately touched her breasts and vagina, made statements of a sexual nature to her, and digitally penetrated her. In reaching our determination we first find that Respondent is judicially estopped from taking a position contrary to the position he successfully took in the prior criminal matter. We

² As discussed in greater detail below, this matter initially opened to the Board upon receipt of information that on or about October 4, 2018, Respondent was arrested by the Pennington Police Department and charged with multiple violations of N.J.S.A. 2C:14-2(c)(1) through (4). On or about November 5, 2018, Respondent and the Board entered into a Consent Order, wherein Respondent agreed to voluntarily surrender his license, to be deemed a temporary suspension. The temporary suspension was to remain in effect until conclusion of all criminal proceedings and until further Order of the Board.

further find that Respondent is bound by the formal admissions made by Mr. Davis during the opening and closing statements of the prior criminal proceeding, and cannot now argue that he did not have any sexual contact with J.S. We conclude that Respondent's actions during the September 11, 2018, massage fully support and warrant the permanent revocation of Respondent's license to practice massage and bodywork therapy in the State of New Jersey, and that good cause exists to assess the attorneys' fees and investigation costs which were incurred in bringing this action against Respondent.

We set forth below a summary of the history of this matter, a summation of the arguments made and evidence presented at the hearing held before this Board on September 28, 2021, and the legal analysis and rationale for the determinations we herein make.

Prior Criminal Court Proceedings³

On or about October 3, 2018, a criminal Complaint-Summons was issued alleging that on or about September 11, 2018, Respondent committed an act of sexual penetration upon J.S. by inserting his finger into her vagina, in violation of N.J.S.A. 2C:14-2(c)(1) (Sexual Assault), a second degree crime. The Complaint-Summons further alleged that Respondent committed criminal sexual

³ This section is based Exhibits P-1, P-3, and P-4, consisting of documentation from Respondent's criminal matter, which were entered into evidence at the hearing held on September 28, 2021, without objection.

contact by committing an act of sexual contact with J.S. under one of the circumstances set forth in N.J.S.A. 2C:14-2(c)(1) through (4), specifically by touching J.S.'s buttocks, breast, pelvic area, and vagina with his hands, in violation of N.J.S.A. 2C:14-3(b) (Criminal Sexual Contact), a fourth degree crime.

On or about March 6, 2019, Respondent was charged in five counts, specifically for two violations of N.J.S.A. 2C:14-2(c)(1) for allegedly committing an act of sexual penetration upon J.S., by inserting his fingers into her vagina, by using physical force or coercion, though not causing J.S. to sustain severe personal injury (counts one and three); two violations of N.J.S.A. 2C:14-3(b) for allegedly committing an act of sexual contact with J.S., by touching J.S.'s genital area, for the purpose of sexually arousing or sexually gratifying himself and/or to humiliate or degrade J.S. by using physical force or coercion, though not causing J.S. to sustain severe personal injury (counts two and four); and a violation of N.J.S.A. 2C:14-3(b) for allegedly committing an act of sexual contact with J.S., by touching J.S.'s breasts, for the purpose of sexually arousing or sexually gratifying himself and/or to humiliate or degrade J.S. by using physical force or coercion, though not causing J.S. to sustain severe personal injury (count five).

The criminal matter then proceeded to a jury trial on October 8 and 9, 2019, before the Honorable Thomas M. Brown, J.S.C., in

Superior Court of New Jersey, Criminal Division, Mercer County, with Respondent represented by Mr. Davis. In his opening statement, Mr. Davis submitted that the following occurred during the massage and bodywork session on September 11, 2018:

Was Asmar Berry unprofessional? You will hear yes, there was an unprofessional massage. Okay, nobody is denying that. You're not going to hear when you try to argue otherwise. He had professional standards that he had to adhere to. You're not going to hear that he adhered to them. He crossed the line.

. . . .

And again, you will hear that Asmar talked to her throughout the entire massage, asked her -- telling her what he's about to do . . . I might touch your groin area, is that okay? They're talking. They're vibing. Okay, yeah, I don't know at what point the line, decided in their minds to be crossed, but obviously, it did.

. . . .

She rolls over, and she's lying there, and ladies and gentlemen, that is the turning point of this massage. . . . It becomes more of a sensual massage. . . . It was a sensual, bordering erotic massage at that point, because he's rubbing her stomach, breasts exposed. She's enjoying it, and he starts slowing moving up towards her breasts. He doesn't just go from one extreme to the other. It's a gradual process. It's a massage that she's enjoying. It's a gentle massage. She's having her breasts massaged.

. . . .

So he's massaging her thighs. And he begins to move towards her underwear. Her underwear are on. It's not a slip of the hand from the thigh

into her vagina. He's got to go in to and under, or down, whatever she may tell you, her underwear.

. . . .

And you're going to hear that at that point that he begins to finger her. okay. I'm going to call it what it is, penetrating her, fingering her. It's a sexual act by consent. And the massage doesn't continue on a normal basis at that point while she's face down. It goes right back into where they left off. She's massaged again by him fingering her.

Similarly, in his closing statement, Mr. Davis reiterated what occurred during the massage on September 11, 2018, as follows:

It was a gradual build, culminated into the intimate act that occurred with consent, implied, apparent, whatever you want to call it. It was consent.

. . . .

Asmar is asking everything, or asking her permission to do everything. Can I stretch you? can I uncover this? And he's completing the massage face up, face down, half mast, she agrees to it. Prior to that, I may touch your groin area, is that okay?

. . . .

She turns over. There's no draping. she's fully exposed.

. . . .

So he starts with her stomach, moves to her breasts. He's massaging her breasts.

. . . .

So she's being rubbed. No draping from the waist up. He starts to move down to the thigh.

. . . .

The massage is continuing. It's becoming an erotic massage. Against professional standards, yes.

. . . .

From the thighs, she has underwear on, and she told you that he starts moving towards her underwear. Again, you don't just -- and I hate to be so graphic and descriptive, but I have to be so we can recreate the picture in our minds. The testimony is not that he just then took it upon himself and forced his hand in her underwear, or finger inside of her. He continued to massage. Even while his finger is inside of her, he's massaging her.

. . . .

And then she turns herself over, no draping, nothing on her body, completely naked on the table, for the massage to continue.

Respondent did not testify during the trial. On October 9, 2019, the jury found Respondent "not guilty" on all counts.

Board of Massage and Bodywork Therapy Procedural History

This matter initially opened to the Board upon receipt of information that on or about October 4, 2018, Respondent was arrested by the Pennington Police Department and charged with violations of N.J.S.A. 2C:14-2(c)(1) and N.J.S.A. 2C:14-3(b), based on multiple violations of N.J.S.A. 2C:14-2(c)(1) through (4), for allegedly inserting his fingers into J.S.'s vagina, and

for allegedly touching J.S.'s buttocks, breast, pelvic area, and vagina.

On or about November 5, 2018, Respondent and the Board entered into a Consent Order, wherein Respondent agreed to voluntarily surrender his license, to be deemed a temporary suspension. The temporary suspension was to remain in effect until conclusion of all criminal proceedings and until further Order of the Board. The November 5, 2018, Consent Order specifically provided that prior to the modification of said Order, Respondent was required to appear before the Board to discuss his readiness to resume the practice of massage and bodywork therapy, and to demonstrate to the satisfaction of the Board that he was fit and capable of discharging the functions of a licensee in a manner consistent with the public's health, safety, and welfare.

On or about October 27, 2020, Respondent appeared, pro se, before the Board for an investigative inquiry regarding the reinstatement of his license to practice massage and bodywork therapy. Respondent denied engaging in any inappropriate conduct during the September 11, 2018, massage, and specifically denied: that J.S.'s breasts were exposed during the massage; that he massaged J.S.'s stomach and breasts; that he asked J.S. how long she had been "pierced down there,"; and that he touched or placed his fingers inside of J.S.'s vagina. When questioned whether he was happy with the legal representation he received during the

criminal trial, Respondent replied in the affirmative, stating "Absolutely." When then asked, however, regarding Mr. Davis' statements regarding Respondent's touching of J.S.'s breasts, vagina, and digital penetrating of J.S.'s vagina, as well as his statements regarding Respondent acting unprofessionally, Respondent indicated that he disagreed with the statements, and advised that he spoke with Mr. Davis after the conclusion of the criminal trial.

On or about May 6, 2021, the Attorney General of New Jersey filed a two-count Complaint seeking, among other things, the suspension or revocation of Respondent's license to practice massage and bodywork therapy in the State of New Jersey. The allegations made by the Attorney General are based upon the testimony provided by J.S. during the Mercer County Superior Court proceeding and statements made by Mr. Davis during the same trial. Specifically, the Attorney General alleged that Respondent's actions in exposing J.S.'s body, touching her breasts and vagina, digitally penetrating her, and asking J.S. about her genital piercing were in violation of N.J.S.A. 45:1-21(c) (engaged in gross negligence, gross malpractice or gross incompetence); N.J.S.A. 45:1-21(e) (engaged in professional or occupational misconduct); and 45:1-21(h) (violated or failed to comply with the Board's statute and/or regulations), based upon a violation of N.J.A.C. 13:37-3.5(c), (d), (e), and (h); and provided a basis for

disciplinary action against Respondent's license to practice massage and bodywork therapy. The Complaint further alleged that Respondent's actions constituted a violation of N.J.S.A. 45:1-21(f) (engaging in any offense involving moral turpitude or relating adversely to the activity regulated by the Board).⁴

Concurrent with the filing of the Complaint, the Attorney General filed a Motion, pursuant to Court Rule 4:67-2(b).⁵ In its Motion, the Attorney General requested that the Board schedule the summary proceeding for its next scheduled Board meeting, or as soon as the matter may be heard. The Attorney General further

⁴ On May 11, 2021, Governor Murphy signed into law P.L. 2021, c. 81, amending N.J.S.A. 45:1-21(f). Among other things, chapter 81 changes the standard that professional licensing boards have to use to assess licensees and applicants for licensure who have criminal convictions. Rather than determining whether an applicant or licensee had been "convicted of, or engaged in acts constituting, any crime or offense involving moral turpitude or relating adversely to the activity regulated by the board," a professional licensing board must now determine whether the applicant or licensee was "convicted of, or engaged in acts constituting, any crime or offense that has a direct or substantial relationship to the activity regulated by the board or is of a nature such that certification, registration or licensure of the person would be inconsistent with the public's health, safety, or welfare." N.J.S.A. 45:1-21(f).

⁵ Pursuant to R. 4:67-2(b), if the Board is satisfied that the matter may be completely disposed of on the record, which may be supplemented by interrogatories, depositions, and demands for admissions or on minimal testimony the Board may grant a motion to proceed summarily. The usual standard is that if it appears that the matter may be disposed in less than one day, then the motion to proceed summarily may be granted. See R. 4:46-3, and Comment 1 thereon, and R. 4:67-5.

requested that upon a finding of liability, the matter immediately proceed to hearing on penalty. On or about September 13, 2021, Respondent filed an Answer to the Verified Complaint, generally denying the allegations.

The matter was then set down for hearing before the Board on August 4, 2021.⁶ Respondent was advised, prior to the hearing date, that should the motion be granted, the Board would then immediately proceed to conduct a hearing on Respondent's liability and that, should liability be found, a hearing on penalty (at which hearing Respondent would be afforded an opportunity to present evidence in mitigation of penalty) would be held.

Hearing on September 28, 2021

On September 28, 2021, a hearing on the Attorney General's application was held remotely before the full Board. Deputy Attorney General Michelle Mikelberg presented the case on behalf of the Attorney General. Mr. Williamson appeared on behalf of Respondent.

The Board began the hearing by considering the Attorney General's motion to proceed summarily pursuant to R. 4:67-2(b), which was unopposed. The Board was satisfied that the matter could

⁶ The matter was then adjourned to September 28, 2021, at the request of Respondent's legal counsel, Dwaine Williamson, Esq.

be completely disposed of in less than one day, and therefore granted the motion.

Hearing on Liability

The matter then proceeded to the liability phase of the proceeding. The Attorney General supported its case with documentary evidence, to include the transcripts from October 8 and 9, 2019, Mercer County Superior Court proceeding (P-4).⁷ DAG Mikelberg began by arguing that the evidence submitted, particularly the aforementioned Mercer County transcripts, clearly established that Respondent made sexual contact with J.S. in violation of the Board's sexual misconduct regulations.

DAG Mikelberg continued by arguing that Respondent flagrantly and repeatedly violated the Board's sexual misconduct regulations when he "sexually violated" J.S. on September 11, 2018, by improperly draping J.S., thereby exposing her intimate body parts, and then rubbing her buttocks, breasts, and vaginal area; and thereafter proceeded to remove her underwear and place his finger in J.S.'s vagina on two occasions. DAG Mikelberg pointed out what happened during the September 11, 2018, massage is known to the Board because during Respondent's criminal trial, Mr. Davis described the aforementioned massage as a sensual and erotic

⁷ A full list of all documents entered into evidence by both parties is appended hereto.

massage, and admitted that Respondent touched J.S.'s private areas and had acted unprofessionally.

DAG Mikelberg pointed out that statements made by Mr. Davis may be used as Respondent's adoptive admissions, pursuant to N.J.R.E. 803(b)(4), and were now admissible in the current proceeding for use as factual statements that could be attributed to Respondent. For support DAG Mikelberg cited to United States v. McKeon, 738 F.2d 26, 30 (2nd Cir. 1984), a criminal matter where an attorney's opening statement was admissible as a party admission in a later proceeding, which was, according to DAG Mikelberg, the precisely same situation that was now before the Board.

DAG Mikelberg specifically noted that Mr. Davis repeatedly admitted that Respondent engaged in sexual contact with J.S. and openly acknowledged that by doing so Respondent violated this Board's regulations. According to DAG Mikelberg, Mr. Davis admitted that Respondent was unprofessional and had crossed a line with J.S. DAG Mikelberg noted that Mr. Davis, as an attorney, had an obligation and a professional responsibility to be honest. DAG Mikelberg argued that Mr. Davis, whom Mr. Williamson referred to as an "excellent attorney," was not simply acting as a zealous advocate, as zealous advocacy does not allow you to make up facts, and that statements made by Mr. Davis during the trial had to have a basis in fact and law.

DAG Mikelberg continued, arguing that the doctrine of judicial estoppel similarly prevented Respondent from now denying that he inappropriately touched J.S., because that denial would be at odds with his criminal defense. DAG Mikelberg noted that when a party successfully takes a particular position in a legal proceeding, that party cannot thereafter assume a different position because the party's interests had changed. And, according to DAG Mikelberg, that was what Respondent was attempting to do in the current proceeding, because he could not now use consent as a defense to the charges against him. According to DAG Mikelberg, while Respondent may have been found not guilty of the criminal charges because he had raised the defense that J.S. impliedly consented to the sexual contact, it was immaterial whether there was consent for these proceedings, because consent is not a defense under the Board's sexual misconduct regulations.

DAG Mikelberg concluded by arguing that Respondent's offensive acts toward J.S. firmly demonstrated that he was unfit to practice as a massage and bodywork therapist in New Jersey, and that his flagrant inappropriate touching of J.S. constituted gross negligence, gross malpractice, gross incompetence, and professional misconduct. DAG Mikelberg noted that through its regulations the Board recognized the great danger of sexual misconduct by a massage therapist and that Respondent's actions

were in clear violation of those regulations, and requested that the Board find Respondent liable for his actions.

In response, Mr. Williamson submitted that there was no proof before the Board that Respondent committed any violations of the Board's laws and regulations, as the doctrine of judicial estoppel could not be relied upon as proof of Respondent's misconduct. Mr. Williamson noted that the Attorney General needed to meet the high burden of proving its case by the preponderance of the evidence, and urged the Board to exercise its power cautiously, as its decision would impact Respondent's life, career, and reputation. Mr. Williamson continued, arguing that Mr. Berry had been falsely accused, and that there was no evidence before the Board to find that Mr. Berry engaged in misconduct.

According to Mr. Williamson, Mr. Davis, who Mr. Williamson noted multiple times was an excellent trial attorney and was only acting as a zealous advocate for his client, was simply putting forward legal theories, which ultimately led a jury of Respondent's peers to acquit him of all criminal charges. Mr. Williamson advised that Respondent was simply following the advice of his legal counsel, and accepted his attorney presenting a theory to the jury. Mr. Williamson argued that when someone is facing twenty years imprisonment, you are not in a position to tell your attorney what to say. Mr. Williamson further argued that someone in Respondent's position would not advise their attorney to not say something

because of a possible loss of a professional license. According to Mr. Williamson, Respondent was facing likely rape and violence in a state penitentiary, and for that reason did not correct his attorney.

Mr. Williamson continued, arguing that the none of the nineteen cases cited to by the Attorney General show that statements made by a defense attorney in a criminal matter could thereafter be used in an administrative matter. Mr. Williamson went through each case individually, distinguishing them from the present matter.

As part of his argument, Mr. Williamson specifically distinguished Dep't of Law & Pub. Safety, Div. of Gaming Enforcement v. Gonzalez, 273 N.J. Super. 239 (App. Div. 1994), a case where a casino worker had pled guilty in a criminal matter, and was thereafter judicially estopped from taking a contrary position in a subsequent matter. According to Mr. Williamson, Gonzalez was not applicable in the present matter, because the defendant in that matter had pled guilty, thereby making a statement of his guilt, while Respondent was acquitted.

As part of his argument, Mr. Williamson cast doubt on J.S.'s credibility, noting that she was an unknown woman out of Ohio. Mr. Williamson noted that as a father to two daughters, he deferred to victims of sexual assault, but people lie. Mr. Williamson advised that Respondent testified before the Board that the massage was

uneventful, and the J.S. tipped him at the conclusion. He further noted that Respondent did not have any prior complaints filed against him, and that a jury of Respondent's peers threw out the case.

In closing, Mr. Williamson argued that the United States is a nation of laws and evidence, and what Mr. Davis had argued during trial was not evidence. He advised that Respondent had been falsely accused and urged the Board to do the right thing and reinstate Respondent's license.

After reviewing all of the evidence and deliberating in executive session, we found, as discussed further below, that the Attorney General had proven that there was a basis to impose discipline on Respondent's license to practice massage and bodywork therapy in New Jersey.

Hearing on Penalty

Having found a basis for discipline of Respondent's license, the Board moved immediately to consider the discipline to be imposed on Respondent. Mr. Williamson did not present any evidence or testimony, and reiterated that Respondent had not done anything wrong. He further advised that if the Board had any doubts regarding Respondent's conduct, to take that into account before reaching its determination on penalty.

In response, DAG Mikelberg advised that Respondent's conduct warranted significant discipline. DAG Mikelberg also requested

that the Board impose attorney's fees and investigative costs in the amount of \$9,176.44. As part of her presentation, DAG Mikelberg submitted into evidence Exhibits P-6 through P-9, her Certification of Costs, without objection. She did not call any witnesses.

Discussion and Conclusion on Liability

We have considered the application before us, and find that it wholly supports a finding that the imposition of discipline on Respondent's license to practice massage and bodywork therapy in New Jersey is warranted and necessary. Specifically, we find that during a massage on September 11, 2018, Respondent inappropriately left J.S. exposed, inappropriately touched her breasts and vagina, made statements of a sexual nature to her, and digitally penetrated her.

Our finding is based upon evidence presented before us at the September 28, 2021, hearing that, during an October 8 and 9, 2019, Superior Court criminal proceeding based on the same allegations that are before us now, Respondent, via his then-legal counsel Mark Davis, Esq., admitted that he engaged in consensual sexual contact with J.S. as described above. Specifically, while making opening and closing statements during the criminal proceeding, Mr. Davis described how Respondent acted in an "unprofessional" manner, and how Respondent engaged J.S. in "sensual, bordering erotic massage," by massaging J.S.'s breasts and abdomen, removing

J.S.'s underwear, and digitally penetrating her on at least two separate occasions during the massage. Respondent was ultimately acquitted of all criminal charges. We accept Mr. Davis' statements, and the position taken by Respondent during the prior criminal proceeding, as evidence of Respondent's inappropriate conduct on the basis of two legal theories proffered by the Attorney General, one, the doctrine of judicial estoppel and, two, statements made by a party-opponent, as provided in N.J.R.E. 803(b)(4).

Doctrine of Judicial Estoppel

In reaching our determination, we first find that Respondent is judicially estopped from taking a position contrary to the position he successfully took in his criminal matter. The doctrine of judicial estoppel precludes a party that has successfully taken a litigation position before a court or other tribunal from asserting an inconsistent position in the same or any subsequent proceeding. See *Bhagat v. Bhagat*, 217 N.J. 22, 36 (2014); see also *Ali v. Rutgers*, 166 N.J. 280, 288-89 (2000); *Kimball Int'l, Inc. v. Northfield Metal Prods.*, 334 N.J. Super. 596, 606-07 (App. Div. 2000), certif. denied, 167 N.J. 88, 769 A.2d 1051 (2001). "The doctrine prevents litigants from 'playing fast and loose' with, or otherwise manipulating, the judicial process." *State v. Jenkins*, 178 N.J. 347, 359 (2004) (quoting *Gonzalez*, 142 N.J. 618). "Central to that concern is the principle that a litigant should not be allowed to mislead courts by having one tribunal rely on his or

her initial position while a subsequent body is led in a different direction." Id. "The principle is that if you prevail in Suit # 1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." Kimball, 334 N.J. Super. at 607 (quoting Eagle Found., Inc. v. Dole, 813 F.2d 798, 810 (7th Cir.1987)).

Judicial estoppel is an extraordinary remedy. Kimball, 334 N.J. Super. at 608. It should be invoked only to prevent a miscarriage of justice. Id. The New Jersey Supreme Court, however, has not hesitated to apply judicial estoppel when warranted, as it did, for example, in Gonzalez, where "a casino employee facing revocation of his license due to a criminal conviction was barred from disavowing in the license revocation proceeding the factual basis of his guilty plea." Bhagat, 217 N.J. at 37 (referencing Gonzalez, 142 N.J. at 632).

"Although the doctrine of judicial estoppel is most frequently invoked in judicial proceedings, it is also applicable in the administrative process." Bray v. Cape May City Zoning Bd. of Adjustment, 378 N.J. Super. 160, 166 (App. Div. 2005); see Gonzalez, 142 N.J. at 632; Ramer v. N.J. Transit Bus Operations, Inc., 335 N.J. Super. 304, 311-12 n. 2, (App. Div. 2000); Ensslin v. Bd. of Trs., Police & Firemen's Ret. Sys., 311 N.J. Super. 333, 336 (App. Div. 1998); see also Morton Int'l, Inc. v. Gen'l Accident Ins. Co. of Am., 134 N.J. 1, 75-76, (1993), cert. denied, 512 U.S.

1245 (1994); Zoning Bd. of Adjustment of Green Brook v. Datchko, 142 N.J. Super. 501, 508-09 (App. Div. 1976).

Mr. Williamson's argument that Gonzalez is not applicable to the current matter is without merit. Mr. Williamson argues that Gonzalez was not applicable here, because the defendant in Gonzalez pled guilty, thereby making a statement of his guilt, while Respondent did not. In making that argument, however, defense counsel seemingly misses the point of judicial estoppel. At best, it appears that he is conflating the theories of judicial estoppel and party admissions. The doctrine of collateral estoppel "bar[s] a party to a legal proceeding from arguing a position inconsistent with one previously asserted." Gonzalez, 142 N.J. at 632. Whether Gonzalez and Respondent testified in their respective criminal matters is irrelevant. What is relevant is the position they took in the prior cases. The position Respondent took is that he engaged in consensual sexual contact with J.S.

Thus, we conclude that the doctrine of judicial estoppel is fully applicable to the current matter. After successfully arguing during his criminal proceeding that he engaged in consensual sexual contact with J.S., Respondent cannot now argue that sexual contact between him and J.S. did not take place. While consent may be a defense to the criminal allegations Respondent was charged with, and ultimately acquitted of; under our regulations, N.J.A.C. 13:37A-3.5(k) specifically, consent is not a defense to an

allegation of sexual misconduct. That is because engaging in sexual contact with a client is inimical to the practice of massage and bodywork therapy, and is therefore specifically precluded.

Respondent prevailed in his criminal proceeding, suit #1, by representing that J.S. consented to sexual contact. Respondent is now "stuck", for lack of a better term, with that representation for "all later litigation growing out of the same events," including the current matter. Kimball, 334 N.J. Super. at 607. Accordingly, we find that Respondent engaged in sexual contact with J.S.

N.J.R.E. 803(b)(4): Statements by Party-Opponent

The Board separately finds that Respondent is bound by the formal admissions made by his legal counsel, Mr. Davis, during the opening and closing statements of the prior criminal proceeding, and similarly cannot now argue that he did not have any sexual contact with J.S.

N.J.R.E. 803(b) provides for the admissibility, as an exception to the hearsay exclusionary rule, any statement made by a person who is a party to an action if the statement is offered against the party-opponent in that action. The statements may be oral or written. See State v. Irving, 114 N.J. 427, 437 (1989).

N.J.R.E. 803(b)(4) renders admissible statements made by an agent, when agency existed at the time of the statement, and the statement concerns a matter within the scope of the agency. Griffin

v. City of East Orange, 225 N.J. 400, 419-420 (2016). Specifically, a party is bound by the formal admissions of an attorney, e.g., in pleading, stipulations, and opening statements. Howard Sav. Bank v. Liberty Mut. Ins. Co., 285 N.J. Super. 491, 497 (App. Div. 1995); see also Hartford Fire Ins. Co. v. Riefolo Constr. Co., 81 N.J. 514, 523 (1980) (noting that an appellate court is bound by the parties' factual stipulations); Muller Fuel Oil Co. v. Insurance Co. of N. Am., 95 N.J. Super. 564, 573 (1967) (affirming dismissal of complaint based on statements regarding proofs made by plaintiff's attorney during his opening statement at trial).

Presented to us, without objection, at the September 28, 2021, hearing, were transcripts from an earlier criminal proceeding, where during opening and closing statements, Mr. Davis, Respondent's legal counsel at the time, described how during the September 11, 2018, massage, Respondent engaged J.S. in "sensual, bordering erotic massage," by massaging J.S.'s breasts and abdomen, removed J.S.'s underwear, and digitally penetrated her on at least two separate occasions during the massage. Pursuant to N.J.R.E. 803(b)(4), those statements are now admissible as evidence of Respondent's conduct during the September 11, 2018, massage. Howard Sav. Bank, 285 N.J. Super. at 497.

In response, Mr. Williamson proffers as explanation for statements made by Mr. Davis, that Mr. Davis was only positing a legal theory to create doubt and was only acting as a zealous

advocate for his client. That argument simply does not hold any water. An attorney, and an "excellent attorney", as Mr. Williamson referred to Mr. Davis numerous times, would know that attorneys must be honest. Specifically, an attorney shall not knowingly "make a false statement of material fact or law to a tribunal," or "offer evidence that the lawyer knows to be false." R.P.C. 3.3(a)(1) and (4). Further, in "representing a client a lawyer shall not knowingly: (1) make a false statement of material fact or law to a third person." R.P.C. 4.1(a)(1). Finally, "it is professional misconduct" for an attorney "to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." R.P.C. 8.4(c)

There is no ambiguity in the statements made by Mr. Davis during the prior criminal proceeding. They were clear statements of fact regarding what occurred during the September 11, 2018, massage. That Respondent massaged J.S.'s breasts and vagina, removed her underwear, and digitally penetrated her during the massage. Yet, there is no representation or allegation before this Board that Mr. Davis made a false statement or was dishonest. In contrast, there are only multiple representations that Mr. Davis is an "excellent attorney." Accordingly, we find that Respondent engaged in sexual contact with J.S., as described by Mr. Davis during the October 8 and 9, 2019, Superior Court criminal proceeding.

Conclusion on Liability

We therefore conclude that Respondent's actions during the September 11, 2018, massage, provide a basis for disciplinary action against his New Jersey license to practice massage and bodywork therapy pursuant to N.J.S.A. 45:1-21(c), (e) and (h), which gives the Board authority to suspend or revoke any licensee who has engaged in gross negligence, malpractice, or incompetence, professional or occupational misconduct, and who has violated any of the Board's regulations, specifically N.J.A.C. 13:37-3.5(c), by engaging in sexual contact with J.S.; N.J.A.C. 13:37-3.5(d), by seeking or soliciting sexual contact with J.S.; N.J.A.C. 13:37-3.5(e), by engage in any discussion of an intimate sexual nature with J.S.; N.J.A.C. 13:37-3.5(f), by exposing J.S. body and failing to employ inappropriate draping measures; N.J.A.C. 13:37-3.5(h), by engaging in an activity which would lead a reasonable person to believe that the activity serves the licensee's personal prurient interests or which is for the sexual arousal, or sexual gratification, of the licensee or client.

Accordingly, we conclude that Respondent committed violations of N.J.S.A. 45:1-21(c) (engaged in gross negligence, gross malpractice or gross incompetence); N.J.S.A. 45:1-21(e) (engaged in professional or occupational misconduct); and N.J.S.A. 45:1-21(h) (violated or failed to comply with the Board's statute and/or

regulations), based upon multiple violations of N.J.A.C. 13:37-3.5.

We further conclude that Respondent committed an offense in violation of N.J.S.A. 45:1-21(f), both as it was pled and as it was recently revised.⁸ We must now, however, determine whether Respondent committed a violation of N.J.S.A. 45:1-21(f), as it currently reads, thus requiring a finding that Respondent engaged in acts constituting any offense that has a direct or substantial relationship to the activity regulated by this Board or is of a nature such that licensure of the person would be inconsistent with the public's health, safety, or welfare. In making such a determination, we must take into consideration the four factors enumerated in N.J.S.A. 45:1-21.5:

- (1) the nature and seriousness of the crime or offense and the passage of time since its commission;
- (2) the relationship of the crime or offense to the purposes of regulating the profession or occupation regulated by the entity;
- (3) any evidence of rehabilitation of the person in the period of time following the prior conviction that may be made available to the entity; and
- (4) the relationship of the crime or offense to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the profession or occupation regulated by the entity.

⁸ At the time of the filing of the Verified Complaint on May 6, 2021, to find that a violation of N.J.S.A. 45:1-21(f) occurred required a finding that a licensee engaged in any offense involving moral turpitude or relating adversely to the activity regulated by the Board.

Here, one, Respondent committed sexual misconduct during a massage, arguably the most serious offense a massage and bodywork therapist may commit while engaging in a massage. Two, as stated, the offense took place during a massage, an activity regulated by this Board. Three, Respondent has submitted no evidence of rehabilitation and continues to argue that no sexual contact took place between him and J.S. And, four, there is unquestionably a relationship between sexual misconduct and the ability of a licensee who engaged in sexual misconduct to practice as a massage therapist. Accordingly, we conclude that there is more than ample predicate to decide that Respondent violated N.J.S.A. 45:1-21(f), as it currently reads.⁹

Discussion and Conclusion on Penalty

After due consideration of the record in this matter, we unanimously conclude that good cause exists to order the permanent revocation of Respondent's license to practice massage and bodywork therapy in New Jersey. In making our determination, we are mindful of the compelling need to uphold and support the legitimate practice of massage and bodywork therapy and to distinguish it from anything associated with sexual misconduct, so

⁹ We accordingly find that Respondent committed a violation of N.J.S.A. 45:1-21(f), as it was pled, as it is clear he engaged in an offense involving moral turpitude and relating adversely to the profession of massage and bodywork therapy.

as to not erode the public's trust in the profession. For that reason, this Board has continuously imposed the penalty of permanent revocation of upon licensees who have engaged in such conduct, as our purpose to protect the public demands as much.

In our deliberations, we considered whether any action short of permanent revocation could be crafted to allow Respondent to continue to engage in the practice of massage and bodywork therapy, while sufficiently protecting the public. However, we find that Respondent's conduct is so egregious and morally reprehensible, and so fundamentally at odds with anything that we would expect of a massage therapist, that nothing short of permanent revocation would be sufficient to protect the public health, safety and welfare.

Attorneys' Fees and Costs

Finally, we unanimously conclude that Respondent should be assessed the costs incurred - specifically the State's attorneys' fees and the Enforcement Bureau investigation costs - in the prosecution of this matter. The State's costs application is supported by the certification of DAG Mikelberg, dated August 4, 2021, (entered into evidence as Exhibit P-6) and the certification of Richard L. Perry, dated August 2, 2021 (entered into evidence as Exhibit P-9). The Attorney General seeks a total cost award of \$9,176.44, to include \$7,800.00 in attorneys' fees and \$1,376.44 in investigative costs.

Costs, to include attorneys' fees, are traditionally imposed on a disciplined licensee, pursuant to N.J.S.A. 45:1-25, so as not to pass the cost of those proceedings onto other licensees. We have reviewed the cost application submitted by DAG Mikelberg (P-6), and find the costs to be fully reasonable and supported.¹⁰ Starting with the hourly rates sought, the Attorney General seeks compensation for attorney services at hourly rates of \$260/hour for services provided by DAG Mikelberg (admitted to practice since 2007). This hourly rate is consistent with the rates established in a directive of Michelle Miller, Acting Director of the Division of Law ("Miller Directive") which became effective September 1, 2015. We note that Respondent has not raised any contention that the rates were not reasonable. As for the time, DAG Mikelberg has

¹⁰ In reviewing the application for attorney's fees, the Board is guided by the general principles established in Rendine v. Pantzer, 141 N.J. 292 (1995), and reaffirmed in Walker v. Giuffre, 209 N.J. 124, 130 (2012). Specifically, the Board is required to establish a "lodestar" fee by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. In evaluating the reasonableness of hours, the Board is to "carefully and critically" evaluate the aggregate hours claimed, and eliminate duplicative or nonproductive time. See also Poritz v. Stang, 288 N.J. Super. 217, 221 (App. Div. 1996) (in evaluating reasonableness of actual hours expended, one must be mindful that "actual time expended does not necessarily equate with reasonable time."). An attorney seeking a fee award must prepare and provide a certification of services that is sufficiently detailed to allow for an accurate calculation of a lodestar. Rendine, 141 N.J. at 337. While "exactitude" is not required, the submission needs to include "fairly definite information as to the hours devoted to various general activities." Id.

documented a total of 30.5 hours of time spent in this matter. The timesheets submitted by the Attorney General contain detailed notes as to work performed, and DAG Mikelberg's certification provides additional detail. The Board finds the documentation submitted to be sufficiently detailed to support all of the hours of legal work performed, and concludes that the important state interests which were pursued in this matter provide a more than ample predicate to support an award of all attorneys' fees sought. We therefore conclude that attorneys' fees in the amount of \$7,800.00 shall be assessed against Respondent in this matter.

Similarly, we note that that investigative costs, approved many times in the past, are based on salaries, overhead and costs of state employees. Considering the important state interest to be vindicated, specifically, the protection of the public safety and welfare, the investigative costs sought of \$1,376.44 are certainly reasonable.

The Board's ultimate determination as to the appropriateness of a costs in this matter was completed after a full hearing of the issue and review of the evidence. The time expended by the Deputy Attorney General and investigators in this matter warrants reimbursement consistent with established principles of law. The Board is therefore satisfied that an award of costs and attorneys' fees in the total amount of \$9,176.44 is appropriate in this matter.

WHEREFORE it is on this 22 day of December, 2021

ORDERED, effective as of September 28, 2021, the date on which this Order was announced on the public record:

1. Respondent's license to practice massage and bodywork therapy in New Jersey is hereby permanently revoked, with no ability to reapply for licensure.

2. Respondent is assessed attorneys' fees and investigation costs in this matter in the amount of \$9,176.44, to be paid within thirty (30) days of the date this Order is filed. Payment shall be made by bank check, money order, wire transfer or credit card made payable to the New Jersey Board of Massage and Bodywork Therapy and mailed to the State Board of Massage and Bodywork Therapy, Attention: Enid Vazquez, Executive Director, State Board of Massage and Bodywork Therapy, 124 Halsey Street, P.O. Box 45048, Newark, New Jersey 07101. Any other form of payment will be rejected and will be returned to the party making the payment. In the event that Respondent fails to make timely payment, interest shall begin to accrue at the annual court rule rate, a Certification of Debt shall be issued, and the Board may institute such other proceedings as are authorized by law.

NEW JERSEY STATE BOARD OF MASSAGE AND
BODYWORK THERAPY

A handwritten signature in black ink that reads "David Bank". The signature is written in a cursive, flowing style.

By: _____
David Bank, LMBT
Chairperson

Evidence List

Submitted on behalf of the Attorney General

- Exhibit P-1 Certified Police Report, Mercer County
Prosecutor's Office
- Exhibit P-2 Consent Order of Voluntary Surrender, IMO
Asmar Berry, dated November 5, 2018
- Exhibit P-3 Criminal Indictment No. 19-03-0136I
- Exhibit P-4 Transcript for the matter of State of New
Jersey v. Asmar Berry, docketed in the
Superior Court of New Jersey, Law Division,
Criminal Part, Mercer County County, New
Jersey, No. 19-03-00136, dated October 8 and
9, 2019
- Exhibit P-5 October 27, 2020, New Jersey Board of
Massage and Bodywork Investigative Inquiry
Transcript
- Exhibit P-6 Certification of Michelle Mikelberg, DAG,
dated August 4, 2021
- Exhibit P-7 Division of Law Uniform Rate of
Compensation, dated August 6, 2015
- Exhibit P-8 Michelle Mikelberg, DAG, Billing Records,
dated January 1, 2021 to July 27, 2021
- Exhibit P-9 Enforcement Bureau Certification of Billing
Costs, dated August 2, 2021