

IN THE MATTER OF A DISCIPLINE HEARING BY A DISCIPLINE COMMITTEE,
ESTABLISHED PURSUANT TO *THE LICENSED PRACTICAL NURSES ACT, 2000* AND
BYLAWS TO INQUIRE INTO THE CONDUCT OF LICENSED PRACTICAL NURSE
PATRICK SHIELDS

REASONS FOR DECISION BY:

**SASKATCHEWAN ASSOCIATION OF LICENSED PRACTICAL NURSES
DISCIPLINE COMMITTEE**

Discipline Committee:

J. Carlson (Chair), K. DeVries, M. Halyk, K. Huckabay, M. Wellsch, Q.C.

Legal Counsel:

Darcia Schirr, Q.C. and Brendan Campbell (Counselling and Investigation Committee)

Patrick Shields (Self-Represented Member)

Matthew Klinger (Discipline Committee)

INTRODUCTION:

1. On August 12, 2020 the Discipline Committee of the Saskatchewan Association of Licensed Practical Nurses (the "**Discipline Committee**") heard and considered evidence on certain allegations of professional misconduct against Licensed Practical Nurse, Patrick Shields.
2. Ms. Darcia Schirr, Q.C., appeared as legal counsel for the Counselling and Investigation Committee (the "**Investigation Committee**"). Mr. Shields appeared on his own behalf. The Discipline Committee understands that Mr. Shields consulted with counsel in preparation for, and at one point during the hearing, but that counsel was retained for a limited purpose not extending to appearing on Mr. Shields behalf at the hearing.
3. A copy of the notice of Discipline Hearing was filed, endorsed by Mr. Shields' counsel confirming that he was properly served (Exhibit P-1). Appendix A to that Notice of Discipline Hearing set out the particulars of the allegations against Mr. Shields as follows:

During the period of August 9, 2018 to August 8, 2019, a patient, K.M., resided at the personal care home known as Cypress House in Swift Current, Saskatchewan. In the course of your employment with Cypress House and in the provision of care and treatment to K.M.:

(a) On or about April 3, 2019, you failed to communicate in a respectful manner with the support person for K.M. when stating "Exactly who are you?" and "I'll need to see those papers" in response to the support person's request for information pertaining to K. M.'s lab results;

(b) On or about April 3, 2019, you failed to obtain and review K.M.'s Cypress House Admission Agreement in order to ascertain K.M.'s support person; and

(c) On or about July 4, 2019, you failed to act with honesty, integrity, and trustworthiness in prohibiting K.M.'s support person from transporting K.M. to a medical appointment outside of Cypress House on the basis that the support person did not have authority to do so notwithstanding your knowledge to the contrary.

4. Appendix A of the Notice of Hearing also cites a number of provisions of *The Licensed Practical Nurses Act, 2000* (sections 24 and 49); *The Saskatchewan Association of Licensed Practical Nurses Regulatory Bylaws* (section 20), the Code of Ethics for Licensed Practical Nurses in Canada (Principles 1, 2, 3 and 5) and Standards of Practice for Licensed Practical Nurses in Canada (Standards 1, 3, and 4), as all having application to the formal complaint against Mr. Shields.

5. The Notice of Hearing set out three particularized complaints against Mr. Shields. Each complaint specified certain conduct which the Investigation Committee alleged constituted professional misconduct. The conduct complained of was described in some detail and was identified by date. The specific complaints set out above are the complaints which were referred to the Discipline Committee for adjudication. During the course of the hearing the Discipline Committee heard testimony regarding other interactions between Mr. Shields and the witnesses called by the Investigation Committee. Mr. Shields objected to some of this evidence being admitted, but we allowed it to be heard on the basis that it appeared it might provide relevant context.

6. As will be set out in more detail below, much of this evidence proved to be of little use in determining whether Mr. Shields committed professional misconduct in the specific circumstances alleged in the notice of hearing. The Discipline Committee has disregarded evidence which does not either prove or disprove the specific allegations set out in the Notice of Hearing.

PRELIMINARY MATTERS & PROCEDURAL HISTORY

7. In preparation for the hearing, the original chair of the Discipline Committee panel, Don Robinson, realized that his mother had lived at Cypress House during the time when Mr. Shields was employed there, although he did not recall ever interacting with Mr. Shields. Mr. Robinson raised this issue with the parties' respective counsels. A telephone conference was held to hear submissions on behalf of the Investigation Committee and Mr. Shields regarding whether it was appropriate for Mr. Robinson to recuse himself. Both parties took the position that recusal would be appropriate given the nature of the facts of the case, and because Mr. Shields had provided care

to Mr. Robinson's mother. On August 5, 2020, Mr. Robinson provided a brief email decision to the parties recusing himself from further involvement in this matter on the basis that a reasonably informed person may have perceived Mr. Robinson to be biased if he heard this case. Jaime Carlson replaced Mr. Robinson as chair of the discipline committee panel.

8. On August 10, 2020, a case management call was held between Ms. Carlson, Ms. Schirr, Mr. Shields and Mr. Klinger. The purpose of the conference call was to determine whether there were any preliminary issues which needed to be addressed, and to ensure that Mr. Shields was familiar with the hearing process. That process was described to Mr. Shields, including the order of proceeding, procedures for calling and questioning witnesses, and the distinction between Mr. Shields providing evidence through testimony (if he chose to do so), and Mr. Shields delivering closing submissions at the end of the hearing. Mr. Shields was provided an opportunity to ask questions. It was also confirmed that the hearing would be bifurcated, if necessary, such that the issues of liability would be heard separate and apart from issues related to penalty.

9. The hearing was held on August 12, 2020. The Investigation Committee called two witnesses (Bryan Penner and Shelley Muhle). The Investigation Committee tendered a book of eight documents which was marked as Exhibit P-2 at the commencement of the hearing. One page of progress notes from K.M.'s patient file was tendered by Mr. Shields at the commencement of the hearing, and was marked as exhibit D-1.

10. Following the presentation of the case for the Investigation Committee the hearing was briefly adjourned. Following the adjournment, (during which we understand Mr. Shields consulted with his counsel by phone), Mr. Shields indicated that he did not wish to testify or offer any other evidence. Ms. Carlson confirmed that Mr. Shields understood that if he chose not to testify he could not provide evidence during his closing argument. Mr. Shields indicated he understood this limitation, and the hearing proceeded to closing arguments.

EVIDENCE

CYPRESS HOUSE

11. Cypress House is a licensed personal care home located in Swift Current, Saskatchewan. Bryan Penner is the Manager-Administrator of Cypress House. Mr. Penner was called as a witness by the Investigation Committee and testified by video conference. The Discipline Committee found Mr. Penner to be a credible witness. However, as described further below, there were certain areas where Mr. Penner was uncertain as to certain facts or was unable to testify from personal knowledge.

12. Cypress House has 72 suites which can be occupied by up to 80 residents. Those residents require a variety of levels of care to assist with basic personal living, including meal preparation, assistance with grooming, bathing, dressing, and similar personal care, assistance in providing

medication to residents and monitoring residents' health. The level of care varies depending on the needs of individual residents from relatively minor assistance to what was described as, "total care" for residents who need extensive assistance.

13. Cypress House arranges for regular visits by physicians to the facility, and residents may choose to use these doctors, However, residents also have a right to choose their own health care professionals. Residents have a right to come and go from the facility as they like (for medical care or for any other reason).

14. Cypress House is divided into four "houses" within the building, each of which has common kitchen, dining, and living room facilities, as well as individual rooms in which each resident lives.

15. Each resident's medical chart is stored in the house where that resident lives. Staff members who are involved in caring for a particular patient have access to this file. This file also contains any powers of attorney which apply to a resident. Cypress House also contains an administrative office. Certain information regarding residents, including admission agreements and home care assessments, are stored in the office. During the day staff members would be able to access the information stored in these files.

16. Cypress House currently employs approximately 40 personal care workers and 3 Licensed Practical Nurses. However, in April 2019, when Mr. Shields commenced his employment with Cypress House, Mr. Shields was the only Licensed Practical Nurse on staff.

K.M.'s ADMISSION TO CYPRESS HOUSE

17. The allegations against Mr. Shields relate to the care of a resident, K.M. as well as his interactions with K.M.'s friend and support person, Shelley Muhle. Ms. Muhle was called as a witness by the Investigation Committee and testified in person. The Discipline Committee found Ms. Muhle to be a credible witness.

18. K.M. became a resident of Cypress House in August of 2018. At that time K.M. was elderly and required increasing assistance, although she was still involved in decision making and was able to walk with the assistance of a walker.

19. K.M. had two sons, D.N. and R.N. At the time K.M. became a resident of Cypress House D.N. lived approximately half an hour away and regularly visited K.M. R.N. lived in Saskatoon, and visited less often, although he remained in contact by phone.

20. K.M.'s primary support was provided by Ms. Muhle. Ms. Muhle had been a close friend of K.M. for 24 years. Prior to K.M. becoming a resident of Cypress House, K.M. relied on Ms. Muhle to assist with grocery shopping, to take her to appointments, and to help with other daily

living tasks. K.M., her sons, and Ms. Muhle were all involved in making the decision for K.M. to move into Cypress House.

21. At the time she moved into Cypress House, K.M. signed an admission agreement which was placed in her file in the administration office at Cypress Hill. The agreement was entered into evidence. Most of the agreement is a contract between Cypress House and K.M. setting out their obligations towards each other and addressing issues such as the services and care provided, meals, and resident fees.

22. The last page of the Admission Agreement prior to the signature page sets out “Rights and Privileges of Residents” including the right to come and go as they like, provided they notify Cypress House of when they leave and when they will return, and the right for residents to choose their own health care professionals.

23. The first page of the Admission Agreement includes a heading “Designation of Supporter” The agreement states, “Any resident may nominate a Supporter to act as an advocate for the resident in the resident’s dealings and transactions with the licensee and the (*sic*) assist the resident in the resident’s relationship with the licensee”. The agreement goes on to note that a supporter may include a legal representative such as a power of attorney. In K.M.’s Admission Agreement, Ms. Muhle is designated as K.M.’s supporter.

24. Mr. Penner testified that the Admission Agreement was kept in a file in the administration office at Cypress House. Staff members such as Mr. Shields could have obtained access to the document during the day when the office was unlocked.

25. At the time K.M. was admitted to Cypress House, a Power of Attorney was in place dated January 5, 2011, a copy of which was filed in evidence. The document states, “I appoint [R.N.] or [D.N.] or Shelley Muhle my true and lawful attorney for me”. The document goes on to set out a variety of powers, including power to decide where K.M. is to live, to consent to admission to a health care facility, and to consent to any health care.

26. Mr. Penner testified that the Power of Attorney was not located in K.M.’s file in April 2019. After the events which gave rise to the first and second complaints involving Mr. Shields, Mr. Penner examined Cypress House’s files for K.M. and determined there was no Power of Attorney on file. He asked Ms. Muhle to provide a copy and she did so shortly thereafter. The copy of the Power of Attorney filed in evidence has a fax header indicating it was sent on May 15, 2019.

27. Ms. Muhle testified that she had provided a copy of the Power of Attorney to Cypress House when K.M. became a resident in August of 2018. She indicated that following the events of April 3, 2019 she provided a new copy to Cypress House.

28. It is possible that Ms. Muhle was mistaken, and only provided Cypress House a copy of the Power of Attorney in May 2019. It is also possible that she did provide a copy in August 2018,

and that it was not properly placed on K.M.'s file. In any event, the Discipline Committee concludes that prior to May 15, 2019, K.M.'s file at Cypress House did not contain a copy of the Power of Attorney. After that date a copy was available at Cypress House. Mr. Penner testified that the copy was placed in the resident medical file contained in the house where K.M. lived (along with her medical charts).

29. K.M. lived at Cypress House from August 2018 until August 2019, at which time K.M. moved to a facility in Medicine Hat, Alberta. Throughout the time K.M. lived at Cypress House, Ms. Muhle continued to regularly visit and provide support to K.M., including by taking K.M. to medical appointments, or taking her for lunch.

MR. SHIELDS' EMPLOYMENT AT CYPRESS HOUSE

30. Mr. Shields was formerly employed as a Licensed Practical Nurse at Cypress House. Mr. Shields began his employment at Cypress House on April 3, 2019. His employment with Cypress House ended in November 2019.

31. Mr. Penner testified that on his first day Mr. Shields was provided an orientation by Cypress House's home coordinator. However, on cross-examination Mr. Penner acknowledged that the orientation might have been provided by another employee, a personal care worker. In his testimony Mr. Penner testified regarding what he thought would have been discussed in orientation. It became apparent in the course of his testimony that Mr. Penner did not have personal knowledge of what was actually discussed with Mr. Shields during his orientation. He did not personally know whether Mr. Shields was told during orientation that he could access the admission agreements of patients which are stored in the office, or whether Mr. Shields was told that the admission agreements contained any information about who was authorized to act as a supporter for a resident, or to receive medical information about a resident.

32. Tab 6 of Exhibit P-2 contains an "Orientation Check List" for Mr. Shields. It indicates that Mr. Shields received some information regarding a variety of topics including progress notes, resident information, resident care records and admission agreements. However, this form is dated August 28, 2019, well after the events which are the subject of this hearing. The document indicates that Mr. Shields received some training during the course of his employment (although it does not describe what specific training was received). The document does not demonstrate that Mr. Shields had received this training by April 3, 2019 or July 4, 2019 (the dates identified in the Hearing Notice).

33. The Discipline Committee accepts that Mr. Shields was provided an orientation on April 3, 2019 which included showing him information required to perform basic job duties, such as the residents' charts and associated documents which are stored in a file in each resident's home. However, the evidence does not indicate that Mr. Shields received any specific training regarding

what documents would be available in the resident files stored in the office, or regarding where he should obtain information about supporters or contact persons for residents.

34. During the course of his employment with Cypress House, Mr. Shields provided care to residents including K.M. He interacted with Ms. Muhle on a number of occasions from April 3, 2019 until K.M. left Cypress House in September 2019. Mr. Shields was employed by Cypress House until November 2019. Mr. Penner provided some testimony regarding the end of Mr. Shields' employment. This testimony did not relate to interactions with K.M. or Ms. Muhle. The testimony regarding the end of Mr. Shields' employment was irrelevant and we have disregarded it in reaching our decision.

35. We have also disregarded testimony from Ms. Muhle regarding an interaction she had with Mr. Shields outside of Cypress House in October 2019. This interaction was also not the subject of the complaints set out in the hearing notice, and was not related to patient care. The evidence was irrelevant to the issues in this case.

EVENTS OF APRIL 3, 2019

36. In March of 2019, K.M. had blood tests performed to investigate certain health concerns. It was expected that once K.M.'s doctor obtained the results of the blood work, those results would be reported to Cypress House and placed on K.M.'s file.

37. On April 3, 2019 Ms. Muhle called Cypress House and asked for the results of the blood tests. Prior to that date Ms. Muhle had called Cypress House on a variety of occasions to obtain information about K.M.'s medical condition. Many of the staff were familiar with Ms. Muhle, and were aware that K.M. had authorized the disclosure of this information to Ms. Muhle, so the information was routinely provided.

38. Ms. Muhle testified that when she called on April 3, 2019, she spoke to Mr. Shields. She testified that this was the first time she had spoken to Mr. Shields. She testified that she identified herself to Mr. Shields, and politely asked him about K.M.'s test results. She testified that Mr. Shields asked, "Exactly who are you". Ms. Muhle testified that she then explained either that she was K.M.'s support person or that she was designated in K.M.'s power of attorney. She testified that Mr. Shields then said, "I will need to see those papers". Ms. Muhle described Mr. Shields' tone as rude, and said that he "snapped" at her. She indicated she was shocked that she had been treated that way. Ms. Muhle indicated that she said she would provide the papers, and that this was the end of the phone call.

39. During her testimony Ms. Muhle imitated the tone of voice that Mr. Shields used in her phone conversation. The tone was sharp and abrupt. It could be regarded as rude. Mr. Shields did not testify about this call. The Discipline Committee accepts Ms. Muhle's testimony as accurately reflecting the content and tone of the April 3, 2019 conversation.

40. No testimony was provided regarding what Mr. Shields did after his conversation with Ms. Muhle, such as whether he checked K.M.'s patient file. Ms. Muhle testified that her next interaction with Mr. Shields occurred some days later, when she visited K.M. at Cypress House. She indicated that she asked Mr. Shields again about the blood test results but was told by Mr. Shields she was not allowed to see them. Ms. Muhle indicated she planned to raise the issue with Cypress Hills management.

MEETINGS REGARDING K.M.'s CARE

41. On May 7 and May 14, Ms. Muhle testified she attended meetings at Cypress House regarding K.M.'s care. The meetings were attended by Ms. Muhle and her husband, as well as R.N. and his wife. Mr. Shields attended these meetings as did Mr. Penner. The discussion at the meetings included discussion of who was authorized to receive medical information and make medical decisions for K.M. A third meeting regarding the same issue was held with representatives of Cypress House and K.M.'s children on May 17, 2019, which Ms. Muhle and her husband were prevented from attending.

42. Both Mr. Penner and Ms. Muhle testified about what occurred during these meetings. However, we note that the Hearing Notice does not contain any allegations of professional misconduct by Mr. Shields in relation to any of those meetings. The allegation that Mr. Shields failed to communicate in a respectful manner is limited to the events of April 3, 2019. The relevance of the meetings is limited to providing context for the events of July 4, 2019, which is the subject of a complaint in the Hearing Notice.

43. Both Mr. Penner and Ms. Muhle testified that Mr. Shields took a leading role during the May 7 and May 14 meetings, and that he was argumentative, particularly with Ms. Muhle. Ms. Muhle testified that she specifically discussed the Power of Attorney which K.M. had signed. She testified that at the May 14 meeting Mr. Shields told her that because R.N. was listed first on the Power of Attorney, that R.N. took precedence in decision making. Ms. Muhle disputed this during the meeting.

EVENTS OF JULY 4, 2019

44. K.M. regularly saw a podiatrist to provide care for her feet. On July 4, 2019 Ms. Muhle had made an appointment for K.M. to attend a podiatrist outside of Cypress House. Ms. Muhle had previously taken K.M. on excursions from Cypress House, for appointments or for lunch, without difficulty.

45. Ms. Muhle went to K.M.'s room. When she was preparing to leave with K.M. she encountered Mr. Shields. Mr. Shields spoke to K.M. about an activity which was to occur that afternoon. Ms. Muhle indicated they were leaving to go to the podiatrist. Ms. Muhle testified that Mr. Shields became upset and said, "You are not taking her anywhere". Ms. Muhle testified that

Mr. Shields indicated he was going to call R.N., and that he stated that K.M. had an appointment with a podiatrist at Cypress House. Ms. Muhle testified that she told Mr. Shields that she would take K.M. where she wanted. Mr. Shields repeated that Ms. Muhle was not taking K.M. Ms. Muhle testified that Mr. Shields removed K.M.'s socks.

46. Ms. Muhle testified that, based on what had been said and how Mr. Shields had acted, she thought Mr. Shields might physically prevent her from leaving with K.M. Following these interactions with Mr. Shields, Ms. Muhle did not persist in trying to take K.M. to the podiatrist that day.

47. Mr. Shields did not testify about these interactions. We accept Ms. Muhle's testimony as accurately reflecting these events.

48. Exhibit D-1, filed by consent at the start of the hearing, is a copy of Cypress House nurses notes for K.M. They indicate that on July 17, 2019, K.M. saw a podiatrist who came in to Cypress House. During her testimony Ms. Muhle suggested that this appointment was not made until after July 4, 2019. However, she had no personal information to indicate the appointment was booked after July 4, 2019.

ARGUMENT

INVESTIGATION COMMITTEE

49. Counsel for the Investigation Committee acknowledged that the Investigation Committee bore the onus of demonstrating that it was more likely than not that Mr. Shields had committed professional misconduct in the manner alleged. Counsel for the Investigation Committee submitted that this burden had been discharged, and emphasized that Mr. Shields had chosen not to provide testimony. Counsel argued that this was an appropriate case where adverse inferences could be drawn as the Investigation Committee had proven its case, and Mr. Shields had declined to provide any explanation or to refute the evidence presented.

50. Counsel for the Investigation Committee emphasized the importance of Licensed Practical Nurses acting appropriately in interacting with long term care patients, their family members and supporters. Counsel argued that respectful communication with family members of patients is one of the cornerstones of the nursing profession.

51. Counsel for the Investigation Committee briefly reviewed the evidence and urged the committee to accept the testimony of Ms. Muhle as credible and unchallenged. Counsel argued that Mr. Shields decided he did not like Ms. Muhle and treated her inappropriately. Counsel suggested that if Mr. Shields was confused as to what the power of attorney meant, he could have simply asked Mr. Penner.

52. With respect to the events of July 4, 2019, Counsel noted that Mr. Shields had not testified and offered an explanation for why he had acted as Ms. Muhle testified. Counsel argued that in order to prove the charge it was only necessary to prove factually what happened. Counsel argued that there was no need to prove what Mr. Shields was thinking, or that he was intentionally difficult.

53. In closing, the Investigation Committee argued that the Discipline Committee had no alternative but to find that the charges were sustained, in light of the uncontradicted evidence and Mr. Shields' decision not to testify.

MR. SHIELDS

54. During the course of his submissions Mr. Shields made some comments which were not in evidence. Mr. Shields was reminded that he had chosen not to testify, and that his submissions must be limited to addressing the evidence which was presented, and whether the charges had been proven. The Discipline Committee did not consider any evidentiary remarks by Mr. Shields that were not testified to by one of the witnesses.

55. Mr. Shields emphasized the importance of his nursing career to him, and indicated he believed in nursing as a career in which he could demonstrate empathy. He also noted that privacy and confidentiality are very important for nursing. He indicated he tried to always ensure continuity of care for patients and never denied care for patients.

56. Mr. Shields argued that he had never acted dishonestly in treating patients, and stated he was offended at the allegation in the complaint that his actions had been dishonest.

57. Mr. Shields also argued that the complaints process had caused difficulty for him, including difficulty gaining employment and financial hardship.

DECISION

58. The primary issue before the Discipline Committee is whether Mr. Shields' alleged conduct, as set out in the Notice of Hearing, amounts to professional misconduct as defined in *The Licensed Practical Nurses Act, 2000* (the "*Act*"). The *Act* reads as follows:

Professional misconduct

Professional misconduct is a question of fact, but any matter, conduct or thing, whether disgraceful or dishonourable, is professional misconduct within the meaning of this Act if:

- (a) it is harmful to the best interests of the public or the members;
- (b) it tends to harm the standing of the profession;
- (c) it is a breach of this Act or the bylaws; or

(d) it is a failure to comply with an order of the counselling and investigation committee, the discipline committee or the council.

59. The Investigation Committee bears the onus of proving the allegations on a balance of probabilities, which means that the Discipline Committee must be satisfied that misconduct took place based on the preponderance of evidence.

Charge (a) – Communications on April 3, 2019

(a) On or about April 3, 2019, you failed to communicate in a respectful manner with the support person for K.M. when stating "Exactly who are you?" and "I'll need to see those papers" in response to the support person's request for information pertaining to K. M.'s lab results;

60. This charge relates to the manner in which Mr. Shields communicated with Ms. Muhle during the phone call on April 3, 2019. Ms. Muhle called to ask for test results for K.M., which she was authorized to receive. Mr. Shields, who had just begun his employment at Cypress House, refused to provide them. Ms. Muhle told Mr. Shields either that she was K.M.'s supporter or her power of attorney. Mr. Shields indicated he needed to check the documentation.

61. Ensuring the privacy of patients and the protection of their health information is fundamental to nursing care, and the standards expected of nurses. As Mr. Shields was not familiar with Ms. Muhle, it was appropriate for him to ask the basis for her request for K.M.'s medical information, and for him to indicate that he needed to check the relevant documentation prior to disclosing any medical information.

62. The issue raised in charge (a) is the manner in which Mr. Shields communicated that message to Ms. Muhle. The uncontradicted evidence from Ms. Muhle is that Mr. Shields used a sharp, abrupt and rude tone during the conversation, which was notably different than her experience dealing with other staff members at Cypress House. We accept this characterization.

63. The relevant question is whether Mr. Shields' actions on April 3, 2019 were serious enough to constitute professional misconduct.

64. The *Standards of Practice for Licensed Practical Nurses in Canada*, s. 4.7 requires Licensed Practical Nurses to, "Communicate in a respectful, timely, open and honest manner". The *Code of Ethics for Licensed Practical Nurses in Canada*, s. 1.6 requires nurses to, "Collaborate with clients, their families (to the extent appropriate to the client's right to confidentiality), and health care colleagues to promote the health and well-being of individuals, families and the public."

65. The standards above require Licensed Practical Nurses to interact with patients and their family or other supporters in a respectful manner. There is no doubt that in an appropriate case disrespectful and inappropriate communications can amount to professional misconduct.

Professional misconduct could be established either as a result of a single particularly serious incident, or a pattern of repeated disrespectful communications.

66. The communication at issue in this case was rude, but it involves a single brief telephone call. Mr. Shields should have been more respectful in how he addressed Ms. Muhle when refusing to provide the test results, and indicating he needed to check on documentation. However, we do not find that this single incident of adopting a rude and abrupt tone is sufficiently serious to constitute professional misconduct. Not every minor deviation from ideal respectful behavior constitutes professional misconduct.

67. We note that during the course of the hearing there was some testimony provided regarding incidents after April 3, 2019 which could potentially have been argued to constitute a pattern of disrespectful conduct. However, the Investigation Committee never presented the case on that basis. The Investigation Committee chose to advance a single charge of disrespectful conduct which related to a specific conversation on April 3, 2019. That is the allegation Mr. Shields was required to answer at the hearing. He was under no obligation to tender any evidence or explanation regarding incidents which the Investigation Committee had decided not to include when preparing the formal Notice of Hearing.

68. The Investigation Committee has not proven that the manner in which Mr. Shields communicated with Ms. Muhle on April 3, 2019 constituted professional misconduct.

Charge (b) – Failing to Review the Admissions Agreement on April 3, 2019

(b) On or about April 3, 2019, you failed to obtain and review K.M.'s Cypress House Admission Agreement in order to ascertain K.M.'s support person;

69. This charge relates to Mr. Shields conduct during and following the April 3, 2019 call by Ms. Muhle regarding K.M.'s test results. The Investigation Committee has alleged that Mr. Shields ought to have reviewed the Admission Agreement, and has alleged that if he had he would have known that K.M. was a support person. The Investigation Committee has argued that failing to do so constituted professional misconduct.

70. There are multiple problems with these allegations. First, the evidence does not actually prove that Mr. Shields did not check the Admission Agreement. There is no evidence regarding what Mr. Shields did after his conversation with Ms. Muhle ended. For example, there is no evidence that Mr. Shields subsequently told Ms. Muhle or Mr. Penner that he had not checked the Admissions Agreement.

71. An adverse inference can be drawn where a *prima facie* case has been shown, and a party refuses to testify. We are not prepared to draw an adverse inference because Mr. Shields chose not to testify where the Investigation Committee failed to lead evidence of one of the elements of an allegation.

72. Secondly, and most importantly, it is not apparent that Mr. Shields ought to have known to check the Admission Agreement.

73. The evidence indicates that Cypress House maintains two files for each resident. One file is contained in the resident's house, which contains the resident's chart and other medical notes. Mr. Penner also testified that this file also contained contact information and any powers of attorney applicable to a resident. The second file, which is stored in the office, contains the admissions agreement and home care assessment.

74. There is no direct evidence of what Mr. Shields was told in orientation on April 3, 2019 about the existence of two separate files for each resident. We can infer from the fact he was apparently working with residents that he would have been aware that each resident had a file in the resident's house which contained medical notes, as proper charting of medical notes is of fundamental importance to all nurses. However, we cannot infer that Mr. Shields was aware that there was a second file in the office containing the Admission Agreement. The existence of a second file in an office is a practice at Cypress House, but it is not a fundamental constant in nursing care that any nurse would necessarily be aware of on their first day at work. Even if Mr. Shields knew a second file existed and knew that it contained the Admissions Agreement, there was no evidence to indicate he ought to have known that the Admissions Agreement (which is primarily a contract between Cypress House and a resident) would contain relevant information about disclosure of medical information.

75. If Mr. Shields consulted K.M.'s file in the house on April 3, 2019, he would not have found any power of attorney, because that document was missing from the file at that time. There was a suggestion in Mr. Penner's testimony that this file contained information indicating the identify of supporters or contact persons. After a brief break a copy of the "Resident Care Record Information" for K.M. was produced as exhibit P-3, but Mr. Penner indicated this was not the version which would have been in K.M.'s file on April 3, 2019. That version was lost and replaced. In any event the document merely states the identity of a "Supporter", but provides no explanation of what was meant by "Supporter". The document does not say that a supporter is entitled to medical information of a resident. We were provided with no evidence that a Licensed Practical Nurse would be expected to think that a person identified as a "supporter" would be authorized to receive medical information of a resident or consent to medical care on behalf of a resident in the absence of any further documentation.

76. There is simply a lack of evidence to show that, on April 3, 2019, Mr. Shields ought to have known he should consult the Admissions Agreement to obtain information regarding whether he could disclose K.M.'s test results to Ms. Muhle.

77. Third, even if Mr. Shields had reviewed the Admission Agreement, it would not have told him whether he ought to contact Ms. Muhle to disclose K.M.'s test results. The Admissions Agreement allows a resident to designate a "Supporter" It states that a supporter can, "act as an

advocate for the resident's dealings and transactions with the licensee and the (*sic*) assist the resident in the resident's relationship with the licensee". It goes on to state, "A Supporter may also include any legal representative, such as a Power of Attorney" (emphasis added). There is nothing in the Admissions Agreement that indicates a supporter will always be entitled to disclosure of medical information of a resident. Even if Mr. Shields had consulted the Admissions Agreement it would not have provided him with information confirming that K.M. had consented to disclosure of medical information to Ms. Muhle.

78. For each of the reasons set out above, it has not been proven that Mr. Shields committed professional misconduct by not reviewing the Admissions Agreement on April 3, 2019.

Charge (c) – Failing to Act With Honesty, Integrity, and Trustworthiness on July 4, 2019

(c) On or about July 4, 2019, you failed to act with honesty, integrity, and trustworthiness in prohibiting K.M.'s support person from transporting K.M. to a medical appointment outside of Cypress House on the basis that the support person did not have authority to do so notwithstanding your knowledge to the contrary.

79. This charge relates to the interaction between Mr. Shields and Ms. Muhle on July 4, 2019, when Mr. Shields prevented Ms. Muhle from transporting K.M. to an appointment with a podiatrist. The charge involves the following elements:

- a) Mr. Shields prevented Ms. Muhle from transporting K.M. to the appointment;
- b) Mr. Shields knew that Ms. Muhle had authority to take K.M. to the appointment; and
- c) That Mr. Shields actions demonstrated a lack of honesty, integrity and trustworthiness.

80. The Investigation Committee argued that professional misconduct is a strict liability offence. The Investigation Committee argued that it was only required to prove what Mr. Shields did, and argued that it was not required to prove what Mr. Shields was thinking, or whether he was acting intentionally.

81. It is true that professional misconduct is a strict liability offence. Charges of professional misconduct can be drafted in a way that does not include a mental element. Charge (a) in this case is an example of a charge of that type. It alleged that Mr. Shields committed an act (disrespectful communications) and that this constituted professional misconduct. There was no need for any evidence regarding why Mr. Shields acted as he did. If we had concluded that Mr. Shields' actions were of sufficient severity to constitute professional misconduct, the case could have been proven without inquiring into whether Mr. Shields intended to be disrespectful.

82. However, in the case of charge (c) the Investigation Committee chose to specifically include a mental element. One of the elements of the charge is that Mr. Shields acted with the knowledge that Ms. Muhle had authority to take K.M. to the appointment. The charge also requires demonstrating that Mr. Shields' actions were a failure to act honestly, with integrity and with trustworthiness. As these elements are set out in the charge, they must be proven by the Investigation Committee.

83. The importance of considering whether a member has committed the specific misconduct alleged in a formal complaint has been emphasized by the Court of Appeal. In *Kapoor v Law Society of Saskatchewan* (1986), 52 Sask R 110 (CA), the court held that a member could not be found to have committed professional misconduct based on different allegations than those set out in the charge. Having noted that disciplinary tribunals are not bound by all the formalities of court procedure, Vancise J.A. held that the freedom from court procedure did not extend to finding a professional violated the rules of professional misconduct in a different manner than had been alleged in the complaint, stating at para 58:

Such freedom, however, does not extend to charging a member of the Law Society with conduct unbecoming by contravening the rules in a particular fashion, discovering that there was other conduct which could have constituted conduct unbecoming, and making a determination of conduct unbecoming on the facts discovered and proved at the hearing, which do not conform to the charge as particularized.

84. More recently, in *Merchant v Law Society (Saskatchewan)*, 2009 SKCA 33 (“*Merchant*”), the Court of Appeal distinguished between a charge which simply alleged performing an act which contravened the rules of professional misconduct, and a charge of professional misconduct which is drafted to allege a mental element or a deliberate action. In that case one of the charges was drafted to allege intentional misconduct. The Court of Appeal held that it was an error to find that a member committed professional misconduct pursuant to that charge on the basis that the member was negligent or careless, stating:

54 If the *Sault Ste. Marie* classifications properly guide the analysis, the misconduct complained of would logically fall into a category in the nature of a full *mens rea* offence or a strict liability offence. By applying a fault standard amounting to negligence, the Hearing Committee, in effect, reasoned that the misconduct more closely resembled a strict liability offence, and that the defence of due diligence had not been made out by the appellant.

55 The wording of the charge reads as if the alleged misconduct involved deliberate action on the appellant's part. It says he did "correspond to various residents of Estevan" with a letter and retainer agreement reasonably capable of misleading those residents and makes no reference to negligence, a failure to adequately supervise staff or other such matters. Significantly, counsel for the Law Society confirmed that was the import of the charge when, in direct response to a

question from the Chairman, he acknowledged the Committee was not dealing with a "strict liability offence". Accordingly, in the result, the charge had to be read as alleging deliberate or conscious action on the part of the appellant, and evidence of negligence or carelessness was insufficient to warrant the Committee's finding of conduct unbecoming.

56 In consequence, the decision on the Estevan count cannot be sustained as reasonable. I conclude the appellant's conviction must be quashed, and the sentence set aside.

[emphasis added]

85. Therefore, in evaluating whether Mr. Shields committed professional misconduct as alleged in charge (c), the Discipline Committee must consider if all of the elements, including the mental elements, set out in the wording of the charge have been proven on a balance of probabilities.

86. The evidence of Ms. Muhle is clear and uncontradicted. She intended to take K.M. to a podiatrist appointment on July 4, 2019. Mr. Shields clearly indicated that he would not allow her to do so. The evidence also demonstrates that Ms. Muhle was in fact authorized pursuant to the Power of Attorney to take K.M. to the appointment. Cypress House's Admissions Agreement and policies also indicated that K.M. was entitled to come and go from Cypress House, including to attend appointments.

87. The evidence indicates that the first element of charge (c) is proven.

88. The evidence regarding the meetings in May 2019 confirms that Mr. Shields knew about the Power of Attorney, and knew of the specific wording used in the document. However, it falls short of confirming that he specifically knew that Ms. Muhle was authorized by the power of attorney to take K.M. to an appointment when another podiatry appointment had apparently been booked at Cypress House.

89. Ms. Muhle's testimony was that during the meetings in May, Mr. Shields argued that R.N. took priority in decision making because he was listed first in the Power of Attorney. When Mr. Shields refused to allow Ms. Muhle to take K.M. to the appointment, he indicated he was going to call R.N.

90. The Power of Attorney states that it grants authority to, "[R.N.] or [D.N.] or Shelley Muhle". It appears to the Discipline Committee that this grants equal authority to each of R.N., D.N. and Ms. Muhle. However, Mr. Shields' statements in the May meeting indicate he had a different, incorrect understanding of the Power of Attorney. There was no evidence presented which indicated that Mr. Shields had any training in interpreting powers of attorney. There was no evidence that the standard expected of a reasonable Licensed Practical Nurse is that they be able to accurately interpret powers of attorney and similar legal documents as part of their practice.

91. The Investigation Committee suggested that if Mr. Shields was confused as to the meaning of K.M.'s power of attorney, he only had to ask Mr. Penner. Mr. Penner testified as to his understanding of the Power of Attorney, indicating that he understood that it gave Ms. Muhle equal decision making authority to K.M.'s sons. However, there was no evidence presented that Mr. Penner ever told this to Mr. Shields. Both Mr. Penner and Ms. Muhle testified that Mr. Shields did most of the talking in the May 2019 meetings. Mr. Penner was present at those meetings but there was no testimony indicating he stepped in to correct Mr. Shields. Despite being Mr. Shields' boss, it appears Mr. Penner remained silent on this issue during the meetings. Despite testifying regarding his own interpretation of the Power of Attorney, Mr. Penner never indicated he discussed the proper interpretation of the document with Mr. Shields.

92. Considering all of the evidence, it has not been proven on a balance of probabilities that Mr. Shields subjectively knew that Ms. Muhle had authority to take K.M. to the podiatrist under the power of attorney, and that he acted to prevent her from doing so despite subjectively knowing she had such authority.

93. There is also a lack of evidence to show that Mr. Shields acted dishonestly, or with a lack of integrity or trustworthiness. In his closing submissions, Mr. Shields emphasized that he never acted dishonestly. To be clear, that statement is not admissible evidence. It is, however, an argument that the evidence should not be interpreted as demonstrating dishonest conduct.

94. It is apparent that Mr. Shields was wrong to prevent Ms. Muhle from taking K.M. to the podiatrist. Both the Power of Attorney, and Cypress House policies indicate he should have allowed her to do so. However, given the lack of evidence confirming that he knew what he was doing was wrong, we do not find he acted dishonestly. It is apparent that Mr. Shields misapprehended the effect of the Power of Attorney. That was an error, but it does not mean Mr. Shields was dishonest.

95. There is a substantial difference between dishonesty, untrustworthiness and a lack of integrity, and a mistake. Both mistakes and dishonest conduct may constitute professional misconduct. However, dishonest conduct is much more serious. A mistake in practice, even one which falls far below professional standards, suggests a need for further education or training in that area of practice. On the other hand, dishonesty points to a lack of the character required to practice as a Licensed Practical Nurse.

96. For example, a nurse may record inaccurate information in a patient's chart regarding a medical exam. If the act was a result of carelessness, that may constitute professional misconduct, and require sanctions focused on further training, as well as deterring similar careless conduct in the future. However, if the inaccurate charting was an effort to cover up not having performed patient exams, the dishonesty would suggest a much more serious form of professional misconduct, meriting severe sanctions.

97. Allegations of dishonesty, untrustworthiness or a lack of integrity are not interchangeable with allegations of errors of judgment. There is a fundamental difference between alleging that a professional made a mistake in failing to follow standards of practice, and alleging that the professional was dishonest, or showed a lack of integrity. As the Court of Appeal found in *Merchant, supra* an allegation of professional misconduct which is framed to require knowing and deliberate conduct cannot be sustained by a finding of carelessness or a simple mistake.

98. The Discipline Committee concludes that it has not been proven that Mr. Shields committed professional misconduct as alleged in charge (c)

Amending Charges

99. Subsections 29(12)-(13) of the *Act* permit the Discipline Committee to amend the charges against a Member in certain circumstances. Those sections state:

(12) If, during the course of a hearing, the evidence shows that the member whose conduct is the subject of the hearing may be guilty of a charge different from or in addition to any charge specified in the formal complaint, the discipline committee shall notify the member of that fact.

(13) If the discipline committee proposes to amend, add to or substitute the charge in the formal complaint, the discipline committee shall adjourn the hearing for any period that the discipline committee considers sufficient to give the member an opportunity to prepare a defence to the amended formal complaint, unless the member consents to continue the hearing.

100. The Discipline Committee considered whether this was an appropriate case to substitute some or all of the charges, and to reconvene the hearing to permit Mr. Shields the opportunity to present a defense to any amended charges.

101. In this case there was some evidence that Mr. Shields might have made disrespectful comments outside of the dates specified in the allegations, which might have constituted professional misconduct. His actions in preventing Ms. Muhle from taking K.M. to the podiatry appointment on July 4, 2019 might have constituted professional misconduct if they were considered under a charge alleging a failure to follow professional standards, instead of dishonesty, untrustworthiness, and a lack of integrity.

102. We wish to emphasize that we are not making a finding that any of Mr. Shields' conduct actually amounted to professional misconduct. If Mr. Shields had been faced with different charges than the case would have been argued on a different basis, and possibly on different evidence. We merely note a hypothetical possibility for the purpose of considering subsections 29(12)-(13). If the charges were amended, Mr. Shields would have a right to present a defense to any amended charges prior to a decision being made.

103. Subsections 29(12)-(13) of the *Act* grant the Discipline Committee a power to amend, add to or substitute a charge. The *Act* does not require the Discipline Committee to do so.

104. In the ordinary course the Investigation Committee is responsible for conducting the investigation of a complaint. Pursuant to section 26 of the *Act*, the Investigation Committee is responsible for prepare the written, formal complaint based on its investigation. The Investigation Committee can choose whether to proceed with a formal complaint, and can choose what matters it includes in the formal complaint. The Investigation Committee exercises an important role within SALPN's disciplinary process in deciding whether to proceed with complaints, and on what basis complaints should be brought before the Discipline Committee. The Investigation Committee makes these decisions based on the results of its investigation, which may include information not before the Discipline Committee. In light of the expertise and specialized statutory role of the Investigation Committee, the Discipline Committee is reluctant to second guess the decisions of the Investigation Committee by rewriting the formal complaints it has prepared.

105. The role of the Discipline Committee is to hear evidence regarding the matters set out in a formal complaint by the Investigation Committee. It is not to investigate or to prosecute potential professional misconduct. Subsections 29(12)-(13) of the *Act* create an exception to the Discipline Committee's ordinary role as an adjudicative body. The Discipline Committee concludes that these powers should not be exercised routinely in any case where it appears the Investigation Committee has not proven their case.

106. Without purporting to exhaustively define all of the circumstances in which it would be appropriate for the Discipline Committee to exercise its powers under subsections 29(12)-(13), the Discipline Committee is of the view that these powers should only be exercised where there is an important consideration of policy or fairness weighing in favour of amending the charges. For example, if evidence came to light at a hearing which demonstrated that a member did not commit the professional misconduct alleged, but instead committed a different form of professional misconduct and the Investigation Committee did not know about and could not reasonably have known about such evidence, the Discipline Committee might amend the charges. As another example, if the evidence at a hearing demonstrated a member committed a different act of professional misconduct than had been alleged which represented an ongoing danger to the public, than in the interest of public protection the Discipline Committee might amend the charges.

107. In this case there is no consideration of policy or fairness which weighs in favour of amending the charges. There was no surprise evidence presented at the hearing. The evidence does not suggest that dismissing the charges against Mr. Shields would endanger members of the public or bring the profession into disrepute. This is an ordinary case where the Investigation Committee did not meet its onus of proving that Mr. Shields committed professional misconduct in relation to certain specific incidents. This is not an appropriate case to exercise our powers pursuant to subsections 29(12)-(13) of the *Act*.

CONCLUSION:

108. The Discipline Committee finds that Mr. Shields has not committed professional misconduct. As such the complaint against Mr. Shields is dismissed.

DATED at Regina, Saskatchewan, this 23rd day of October, 2020.



J. Carlson, Chairperson, on behalf of the Discipline
Committee consisting of J. Carlson, K. DeVries, M.
Halyk, K. Huckabay, M. Wellsch