[Cite as *Little v. State Med. Bd. of Ohio*, 2010-Ohio-5627.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Larry Little, M.D.,	:	
Appellant-Appellant,	:	
		No. 10AP-220
v.	:	(C.P.C. No. 09CVF-01-416)
State Medical Board of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on November 18, 2010

Dinsmore & Shohl, LLP, Eric J. Plinke and *Nicole M. Loucks,* for appellant.

Richard Cordray, Attorney General, and *Melinda Snyder Osgood,* for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Appellant, Larry Little, M.D., appeals from a judgment of the Franklin County Court of Common Pleas affirming the order of appellee, State Medical Board of Ohio ("the Board"), that indefinitely suspended appellant's license to practice medicine in Ohio and, by permanently limiting appellant's ability to read the slides of his patients' biopsies and tumors, required appellant to use an outside dermatopathologist to read all

such slides. Because (1) the common pleas court did not abuse its discretion in determining substantial, reliable, and probative evidence supports the Board's order, (2) appellant received adequate notice of the allegations against him and the possible sanctions he faced, (3) the Board, and subsequently the common pleas court, did not err in determining appellant's conduct fell below the minimal standard of care, and (4) the common pleas court did not rely on allegedly improper conclusions of the Board, we affirm.

I. Facts and Procedural History

{¶2} On June 14, 2006, the Board issued a notice letter to appellant informing him it proposed to take disciplinary action against his license to practice medicine and surgery in Ohio. The Board alleged, pursuant to R.C. 4731.22(B)(6), that appellant's conduct as to 12 patients constituted "a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established." (Notice Letter, Board's Exhibit 21-A.) As to eight of the 12 patients, the Board alleged appellant acted inappropriately in treating basal or squamous cell carcinomas with electrodessication and curettage ("ED&C") or cryosurgery instead of the treatment known as Mohs Micrographic Surgical procedure ("Mohs"). The Board further alleged that when appellant performed the Mohs procedure on various occasions, he inadequately did so.

{¶3} Appellant requested an administrative hearing that commenced March 27, 2007. The record before the hearing examiner included the medical records of the 12 patients at issue, as well as a report and deposition testimony of the Board's expert, Dr.

Marlene Willen, a board-certified dermatologist. Dr. Willen examined appellant's medical records for the care and treatment of all 12 patients, including any treatment subsequent treating physicians rendered. Dr. Willen found various instances where appellant's conduct fell below the minimal standard of care.

{¶4} In response, appellant presented the report and expert testimony of Dr. Jennifer Ridge, a board-certified dermatologist. Dr. Ridge agreed "with several of the allegations" of the Board "that several of the patients would have benefited from a much earlier use of Mohs' on their recurrent tumors." (Ridge Report, Appellant's Exhibit A-A at 7.) Dr. Ridge ultimately concluded, however, appellant's conduct did not fall below the minimal standard of care. Appellant also testified on his own behalf.

{¶5} In a report and recommendation issued November 3, 2008, the hearing examiner concluded appellant's conduct fell below the minimal standard of care for nine of the patients and recommended the Board permanently revoke appellant's license to practice medicine and surgery in the state of Ohio. After reviewing the record from the hearing, the Board, at its December 10, 2008 meeting, issued an Entry of Order modifying appellant's sanction to an indefinite suspension of appellant's license for not less than one year. The Board further permanently limited appellant's license to practice, requiring that a dermatopathologist read all slides of biopsies and tumors of appellant's patients. Appellant appealed to the Franklin County Court of Common Pleas.

{¶6} On February 8, 2010, the common pleas court issued a decision and entry affirming the Board's decision. Appellant timely appeals.

II. Assignments of Error

{¶7} On appeal, appellant assigns four errors:

> Assignment of Error One: The trial court erred in affirming the Board's Order to permanently limit Dr. Little's ability to read his patients' slides because its ruling was based upon evidence rejected by the Board, and as such, was arbitrary, unreasonable, and not supported by the record.
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> Assignment of Error Two: The trial court erred and abused its discretion in affirming the Board's Order imposing a permanent limitation requiring slides of all biopsies and tumors to be read by a dermatopathologist because the Board's notice letter did not provide the requisite legal notice in violation of R.C. 119.07 and Dr. Little's due process rights.
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> Assignment of Error Three: The trial court erred by basing its affirmance of the Board's Order to permanently restrict Dr. Little from reading his patients' slides on conduct that does not constitute a departure from the minimal standard of care and was not found by the Board to constitute a departure from the minimal standard of care.
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> Assignment of Error Four: The trial court erred by relying upon the Board's improper conclusion that the practice of reading patients' biopsy slides was outside Dr. Little's scope of practice and by incorrectly interpreting the Board's expert's testimony to be the same, which is arbitrary, unreasonable and is not supported by the evidence.

III. Standard of Review

{¶8} Under R.C. 119.12, a common pleas court, in reviewing an order of an administrative agency, must consider the entire record to determine whether reliable, probative, and substantial evidence supports the agency's order and the order is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. The common pleas court's "review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must

appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Conrad* at 111. The common pleas court conducts a de novo review of questions of law, exercising its independent judgment in determining whether the administrative order is "in accordance with law." *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471.

{¶9} An appellate court's review of an administrative decision is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. The appellate court is to determine only whether the common pleas court abused its discretion. Id.; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (defining an abuse of discretion). Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of an administrative agency or the common pleas court. *Pons* at 621. An appellate court, however, has plenary review of purely legal questions. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶15.

IV. First Assignment of Error – Evidence and Penalty

{¶10} In his first assignment of error, appellant asserts the common pleas court erred in upholding the Board's order imposing a sanction permanently limiting appellant's ability to read the slides of his own patients. Without directing his argument to any

particular patient, appellant challenges both the adequacy of the evidence and the validity of the sanction.

{¶11} The action of the various tribunals belies appellant's contentions regarding the adequacy of the evidence. In reaching her legal conclusions, the hearing examiner included a detailed recitation of the supporting evidence from the administrative hearing in her report and recommendation. The common pleas court, in turn, conducted its own review of the entire record. The court analyzed the expert testimony, compared the testimony of Dr. Willen and Dr. Ridge, and specifically noted only Dr. Willen reviewed the medical records of the 12 patients' subsequent treating physicians in reaching her conclusion. Correctly acknowledging the Board members are "experts in their own right," the common pleas court did not abuse its discretion in giving deference to the Board's findings or in concluding reliable, probative, and substantial evidence in the report and testimony of Dr. Willen supports the Board's order. See *Dahlquist v. Ohio State Med. Bd.*, 10th Dist. No. 04AP-811, 2005-Ohio-2298, ¶21, quoting *Arlen v. State Med. Bd. of Ohio* (1980), 61 Ohio St.2d 168, 172 (stating "the board may rely on its own expertise to determine whether a physician failed to conform to minimum standards of care").

{¶12} Appellant argues that, even if that be true, the common pleas court erred because it relied on evidence the Board expressly rejected. Appellant in particular asserts the common pleas court relied on Dr. Willen's expert report concerning Patient 7 even though both the hearing officer and the Board specifically rejected Dr. Willen's testimony concerning Patient 7. Dr. Willen stated that even though the margins on the tissue sample taken from Patient 7 were not clear, appellant failed to re-biopsy the patient, thus

suggesting appellant departed from the minimal standard of care. The hearing examiner, and subsequently the Board, found the "evidence is insufficient" to support the conclusions of Dr. Willen in that regard. (Report and Recommendation, 56.) With that premise, appellant contends the common pleas court abused its discretion in basing its decision upon such evidence. See *Liss v. State Med. Bd. of Ohio* (Sept. 24, 1992), 10th Dist. No. 91AP-1281.

{¶13} Appellant's argument takes the common pleas court's statement out of context. Although the court refers to Dr. Willen's expert report regarding Patient 7, it does not do so in the context of determining whether reliable, probative, and substantial evidence supports the Board's order that appellant fell below the minimal standard of care. Instead, the court noted that portion of Dr. Willen's expert report to respond to appellant's allegations he was not properly advised that his ability to read his patients' slides was at issue. Cf. *Barnett v. Sexten*, 10th Dist. No. 05AP-871, 2006-Ohio-2271, ¶14 (stating "[e]vidence that is inadmissible for one purpose may be admissible for another purpose"), citing *State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151, 156. Further, even if the common pleas court erroneously relied on the noted portion of Dr. Willen's testimony, other evidence in the record, cited in the hearing examiner's report and the common pleas court's decision and entry, amply supports the Board's order that appellant fell below the minimal standard of care.

{¶14} To the extent appellant challenges the validity of the sanction the Board imposed, his contentions fail under prevailing Supreme Court of Ohio decisions. Where the evidence supports an administrative agency's decision, the common pleas court is

without authority to modify the penalty. *Miller v. Columbus City Pub. Schools*, 10th Dist. No. 08AP-1082, 2009-Ohio-2756, ¶11, citing *State ex rel. Ogan v. Teater* (1978), 54 Ohio St.2d 235, 246-47; *Henry's Café, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233; *Ohio State Univ. v. Kyle*, 10th Dist. No. 06AP-168, 2006-Ohio-5517, ¶27. Here, the Board had available a full range of sanctions available to it, from limiting appellant's license to revoking it altogether. See R.C. 4731.22(B). With reliable, probative, and substantial evidence to conclude appellant's conduct fell below the standard of care for nine of the 12 patients at issue, one of whom died after appellant's shortcomings in reading the patient's diagnostic slides, the hearing examiner initially recommended the Board permanently revoke appellant's license to practice medicine. The Board modified the sanction to require appellant to obtain an outside dermatopathologist to read the slides of appellant's patients in the future. Because substantial, reliable, and probative evidence supports the Board's order, neither the common pleas court nor this court can modify the statutorily authorized penalty the Board imposed.

{¶15} Appellant's first assignment of error is overruled.

V. Second Assignment of Error – Notice

{¶16} Appellant's second assignment of error asserts the common pleas court violated his due process rights in affirming the Board's order because the notice provided him was not sufficient under R.C. 119.07.

{¶17} When an administrative agency proposes to take disciplinary action against a party, R.C. 119.07 requires the agency to "give notice to the party informing the party of the party's right to a hearing." The notice "shall include the charges or other reasons for

the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing if the party requests it within thirty days." R.C. 119.07. Appellant contends he did not receive adequate notice of charges that his practice in dermatopathology fell below the minimal standard of care. Appellant further argues the notice was deficient in failing to inform him that his practice of dermatopathology could be permanently limited as a result of the proceedings.

{¶18} "The fundamental requirement of procedural due process is notice and hearing, that is, an opportunity to be heard." *Korn v. Ohio State Med. Bd.* (1988), 61 Ohio App.3d 677, 684, citing *Luff v. State* (1927), 117 Ohio St. 102. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Althof v. Ohio State Bd. of Psychology*, 10th Dist. No. 05AP-1169, 2007-Ohio-1010, ¶19, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 657 (internal quotation marks omitted). " 'The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.' " Id., quoting *Gonzales v. United States* (1955), 348 U.S. 407, 414, fn. 5, 75 S.Ct. 409, 413, quoting *Morgan v. United States* (1938), 304 U.S. 1, 18, 58 S.Ct. 773, 776.

{¶19} Here, the issue resolves to whether appellant had a reasonable opportunity to know the Board's claims against him concerning his conduct in reading and evaluating his patients' slides related to his treatment of various types of skin cancer. In informing

appellant of the allegations against him, the notice letter provided to appellant expressly stated that "[i]n your dermatological medical care of Patients 1-12, you failed to accurately diagnose and/or document the accurate diagnosis of skin cancers[.]" (Notice Letter, Board's Exhibit 21-A.) It further stated appellant "obtained inappropriate samples for histological examination of skin cancers; and/or * * * failed to identify and/or document the identification of the subtype of skin cancer and/or failed to identify and/or document the identification of the extent of skin cancer invasion. (Notice Letter, Board's Exhibit 21-A.) As relevant here, the notice letter lastly stated appellant "provided inappropriate treatments for skin cancers and other skin disorders and/or * * * inadequately performed Mohs procedures for skin cancers." (Notice Letter, Board's Exhibit 21-A.) The notice letter provided specific examples of appellant's conduct regarding each of the 12 patients.

{¶20} Despite the language of the notice letter, appellant asserts that because the letter never used the term "dermatopathology," appellant was not advised his conduct in practicing dermatopathology allegedly fell below the minimal standard of care. Appellant's brief, however, describes dermatopathology as "the study of skin disease at a microscopic level." (Appellant's brief, 3.) The statements in the notice letter pertaining to appellant's failure to "identify" the subtype of skin cancer are reasonably calculated to put appellant on notice that his ability to read a slide and determine the type of skin cancer was at issue.

{¶21} Indeed, the notice letter not only specifically pointed to appellant's failure to identify and document the subtype of skin cancer of Patient 9 who died, but further referred to appellant's deficiencies on several instances when he performed the Mohs

procedure. Appellant does not allege that, as a dermatologist, he was unfamiliar with what the Mohs procedure entailed, including using microscopic samples of skin on slides to accurately determine the subtype of skin cancer. To the contrary, appellant testified in detail about how to perform the Mohs procedure, testimony that included an explanation of reading the resulting slides. (Hearing Tr., 111-124.) Appellant's expert witness, Dr. Ridge supported appellant's explanation when she, too, explained that "[i]n traditional Mohs' the surgeon acts as the pathologist as well." (Ridge Report, Appellant's Exhibit A-A, at 1.)

{¶22} In the final analysis, appellant offers no alternative explanation for the repeated references in the notice letter to his failure to identify subtypes of skin cancer and to adequately perform the Mohs procedure, if not his failure to accurately read slides. The notice letter was reasonably calculated to place appellant on notice his dermatology practice, including his practice of acting as his own dermatopathologist in reading his patients' slides, was at issue in the proposed disciplinary action. See, e.g., *Althof* at ¶29 (concluding psychologist had fair notice he was accused of "sexual misconduct" with his patients even though the notice letter referred to "sexual intercourse" with patients without expressly referring to that behavior as "inappropriate"). Appellant's own testimony, the testimony and report of his expert witness regarding reading slides, and the undeniable fact that the Mohs procedure involves reading slides, all combine to support the conclusion appellant received adequate notice.

{¶23} As to whether appellant had notice of possible sanctions, the notice provided to appellant expressly stated "the State Medical Board of Ohio [Board] intends to

determine whether or not to *limit*, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery." (Emphasis added.) (Notice Letter, Board's Exhibit 21-A, at 1.) Appellant thus received notice a possible sanction against him could include a limitation on his license to practice medicine, a result consistent with the wide latitude granted to administrative bodies in imposing a sanction for an appropriately charged violation. See, e.g., *Macheret v. State Med. Bd. of Ohio*, 10th Dist. No. 09AP-849, 2010-Ohio-3483, ¶27, citing *Columbus Bar Assn. v. Farmer*, 111 Ohio St.3d 137, 2006-Ohio-5342, ¶49.

{¶24} Because appellant received proper notice both in the form of the charges against him including his ability to read his patients' slides, as well as the range of sanctions he could face, we overrule his second assignment of error.

VI. Third Assignment of Error – Standard of Care

{¶25} In his third assignment of error, appellant contends the common pleas court erred in affirming the Board's order based on appellant's conduct that, he asserts, does not depart from the minimal standard of care.

{¶26} Although the Board may not be required to present expert testimony to support a charge against a physician under R.C. Chapter 4731, other reliable, probative, and substantial evidence must support the charge. *Griffin v. State Med. Bd. of Ohio*, 10th Dist. No. 09AP-276, 2009-Ohio-4849, ¶13, citing *In re Williams* (1991), 60 Ohio St.3d 85, syllabus. When the Board presents expert testimony, "the expert must be capable of expressing an opinion in terms of the particular standard of care that applies to the

physician whose license is at issue." Id., citing *Lawrence v. State Med. Bd. of Ohio* (Mar. 11, 1993), 10th Dist. No. 92AP-1018.

{¶27} Here, the Board's expert unequivocally applied the minimal standard of care multiple times. For example, Dr. Willen concluded in her report with regard to Patient 3 that "it is below the minimal standard of care to treat recurrent [subtypes of skin cancer] with [ED&C] as these tumors have already shown to be aggressive." (Willen Report, Board's Exhibit 15, at 6.) As to Patient 6, Dr. Willen stated in her report that "ED&C is not the standard of care for a multiple recurrent [subtype of skin cancer;] this is below the minimal standard of care." (Willen Report, Board's Exhibit 15, at 6.) Dr. Willen's report included similar opinions as to the minimal standard of care for Patients 7, 8, 10, and 12. (Willen Report, Board's Exhibit 15, at 24, 26, 40.) She further opined the manner in which appellant performed the Mohs procedure was below the minimal standard of care for multiple patients. In her deposition, Dr. Willen testified appellant's treatment of Patient 9 was below the minimal standard of care, explaining in detail what the minimal standard of care entails. (Willen Depo., Board's Exhibit 19 at 84-86.)

{¶28} Appellant nonetheless contends the common pleas court erroneously relied on Dr. Willen's statements regarding the optimal standard of care in determining the minimal standard of care. Appellant argues that even though the evidence demonstrates appellant's failure to obtain an outside reviewer for his slides did not violate the minimal standard of care, the common pleas court nonetheless relied on Dr. Willen's opinion, which concluded "quality assurance dictates that a certain number of slides be reviewed by an outside unbiased reviewer." (Decision and Entry, 18.) Because her statement,

appellant argues, reflects the optimal standard of care rather than the minimal standard of care, the common pleas court erred in affirming the Board's order based on her statement.

{¶29} Appellant's argument again takes a portion of the common pleas court's decision out of context. Read in context, the court's decision referred to Dr. Willen's statement not to determine the applicable standard of care but to determine whether the notice provided to appellant adequately notified him regarding his continued ability to read his own patients' slides. The common pleas court did not conclude appellant fell below the minimal standard of care for failure to employ an outside reviewer but because his ability to read his own patients' slides was inadequate.

{¶30} Accordingly, appellant's third assignment of error is overruled.

VII. Fourth Assignment of Error – Scope of Practice

{¶31} Appellant's fourth and final assignment of error asserts the common pleas court erred in affirming the Board's order because the Board improperly concluded a dermatologist exceeds the scope of practice in reading his own patients' slides.

{¶32} Contrary to appellant's assertion, the Board did not charge appellant with, nor penalize appellant for, practicing outside the scope of his practice. Rather, the Board charged and penalized appellant for practicing dermatology below the minimal standard of care, including his inadequacies in reading the slides of his own patients. Appellant's attempts to apply the common pleas court's statements regarding the adequacy of appellant's notice to the merits of the Board's order is unpersuasive. Appellant's fourth assignment of error is overruled.

VIII. Disposition

{¶33} In summation, the common pleas court did not abuse its discretion in affirming the Board's order, as substantial, reliable, and probative evidence supports that order, and it is in accordance with law. Further, appellant had adequate notice of the allegations against him and the possible sanctions he faced. Having overruled appellant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and BROWN, J., concur.

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