

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

|                              |   |                             |
|------------------------------|---|-----------------------------|
| William W. Nucklos, M.D.,    | : |                             |
|                              | : |                             |
| Appellant,                   | : | On Appeal from the Franklin |
|                              | : | County Court of Appeals,    |
|                              | : | Tenth Appellate District    |
| v.                           | : |                             |
|                              | : |                             |
| State Medical Board of Ohio, | : | Court of Appeals            |
|                              | : | Case No. 09 AP 406          |
|                              | : |                             |
| Appellee.                    | : |                             |

**10 - 1404**

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT WILLIAM W. NUCKLOS, M.D.**

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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC  
OR GREAT GENERAL INTEREST AND INVOLVES  
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents two critical issues for the citizens of Ohio: (1) whether an administrative agency is permitted to act in direct contravention to a prohibition expressly placed on it by the General Assembly; and (2) whether the Medical Board can prove, by use of exhibits that are not the physician's medical records or of the physician's creation, that a physician's records show a failure to appropriately treat patients and document that care. These two issues concern the broad and critical issues as to how Ohio's administrative licensure agencies may deprive a licensee of his or her profession.

In this case, the Tenth District Court of Appeals held that the Medical Board is permitted to discipline a physician for violations of R.C. §4731.22(B)(2), (3), (6), and (20) with respect to treatment of intractable pain patients with dangerous drugs. Discipline under any subsection of R.C. §4731.22, however, is expressly prohibited by The General Assembly in R.C. §4731.052(D), providing that such a physician "is not subject to disciplinary action ... under section 4731.22 of the Revised Code solely because the physician treated intractable pain with dangerous drugs." Thus, this case presents the question of whether an administrative agency can take action in direct contravention of such a statutory prohibition. The outcome of that question affects whether Ohio agencies are bound and restricted by the express limitations placed by the Ohio General Assembly, and concerns the rights of all citizens when interacting with those agencies.

This Court has addressed similar cases in the past, in cases such as *Medcorp, Inc. v. Ohio Department of Jobs and Family Services* (2009), 112 Ohio St.3d 622, 2009-Ohio-2058, and *Hughes v. Ohio Dept. of Commerce* (2007), 114 Ohio St.3d 4, 2007-Ohio-2877, holding that

both administrative agencies and the citizens appearing before them must strictly comply with the procedural statutory requirements of Ohio's Administrative Procedures Act, R.C. Ch. 119. This case, however, addresses a slightly different, but no less important question: Must an administrative agency strictly comply with, and remain within the limits set forth in its enabling statutes? The Tenth District Court of Appeals answered that question incorrectly, by finding that such compliance was not necessary. Allowing that decision to stand nullifies the power of the General Assembly to establish limits on Ohio's administrative agencies.

This case also involves the use of State's Exhibits 1-28. These Exhibits are not the physician's medical records, nor has the State ever purported that they are accurate and complete copies of his medical records. Rather, the State has admitted since the outset of this case that some of the pages of these Exhibits are copied from the patient records, some are pharmacy records and reports that would not have been in the patient's medical records, and some are police documents that would not have been in the medical records.<sup>1</sup> Furthermore, the State has never claimed or attempted to prove that the entirety of the patients' medical records from this physician are included in State's Exhibits 1-28. Rather, the hearing record and the Exhibits themselves indicate that portions of the original medical records are missing.

The Court of Appeals incorrectly found that Dr. Nucklos did not challenge the authenticity of State's Exhibits 1-28. Throughout the entire administrative hearing and on appeal, Dr. Nucklos has consistently opposed the introduction of State's Exhibits 1-28 based on the fact that they are not true and accurate copies of Dr. Nucklos's medical records. Prior to the Medical Board hearing, on May 19, 2008, Dr. Nucklos filed a Motion in Limine seeking to exclude State's Exhibits 1-28 based on the fact that the Exhibits were not true and accurate copies of Dr. Nucklos's medical records. The Motion was denied by the hearing examiner.

Then, evidence was introduced at the hearing to show that State's Exhibits 1-28 were incomplete and did not constitute a true and accurate copy of Dr. Nucklos's medical records. The State's expert, Dr. Parran, testified that he found notations throughout the patient records that he reviewed that stated "obtain records," but he never found evidence of previous medical records in the patient files. (Tr. at 68). Dr. Nucklos's office manager, Trisha Woodruff, testified that prior to attending their first appointment, patients were instructed to bring copies of previous medical records, MRIs and CT scans to the office. (Tr. at 446). Ms. Woodruff also testified that previous medical records were often not filed in the patient's chart but were maintained in a filing cabinet or laid on top of the filing cabinet in envelopes with the patient's name. (Tr. at 454-455). Finally, Ms. Woodruff testified that patients were sent by Dr. Nucklos to Mercy Reach, a local drug and alcohol counseling center, for drug testing. (Tr. at 456-457). However, State's Exhibits 1-28 contained no evidence of previous medical examinations or drug screens.

Finally, evidence was introduced at the Medical Board hearing to show that Dr. Nucklos's medical records were not maintained in a manner to preserve their accuracy and then these incomplete records were listed as State's Exhibits 1-28 and introduced as the sole evidence to revoke Dr. Nucklos's medical license. Specifically, when Dr. Nucklos was questioned by the Prosecutor in his criminal trial, the Prosecutor admitted when asked by Dr. Nucklos to review a patient record:

"I'll tell you what, doctor. All I have is a copy right now. Think we have so totally messed up the originals but if you can look at this and identify it as the handwriting, we'll find the original at a later date." (Nucklos Criminal Transcript at 1727-1728).<sup>2,3</sup>

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<sup>2</sup> State's Exhibit 32(A) at the hearing.

<sup>3</sup> Neither the original patient records nor accurate copies of the patient records were ever introduced at the administrative hearing by the State.

Contrary to the finding of the Court of Appeals, the State never introduced true and accurate copies of Dr. Nucklos's medical records, and Dr. Nucklos consistently opposed the use of these incomplete records as a basis to revoke his medical license.

In this case, the Medical Board used these Exhibits, and the expert testimony derived from those Exhibits, as the basis of its decision to permanently revoke Dr. Nucklos's medical license. Although the Rules of Evidence do not strictly apply in an administrative hearing to preclude the introduction of such unauthenticated, hearsay documents, the findings and decision resulting from the hearing must be supported by reliable, probative and substantial evidence. R.C. §119.12. This Court has previously defined "reliable" in this context to mean "evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true." *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303. Similarly, in *Our Place*, this Court defined "probative evidence" in this context to be "evidence that tends to prove the issue in question; it must be relevant in determining the issue." *Id.* This case presents an issue of the application of those definitions. Specifically, can unauthenticated documents that are known to differ from the original records be used as reliable and probative evidence of the entire contents of the original records? The answer to this question has great impact on the ability of licensees in Ohio to protect themselves against discipline or loss of licensure arising from inaccurate information.

In addressing this question, the Tenth District Court of Appeals held that it was the physician's responsibility to place into the record each and every deviation that State's Exhibits 1- 28 had from his original medical records. Ohio Revised Code §119.12, however, places the burden of proof on an administrative agency to support its action. In a case in which the critical information was the contents of the physician's medical records, that burden cannot be sustained

by the Board by using documents it admits are not those records. Allowing the Tenth District's decision to stand would permit government agencies to selectively alter the evidence presented in a hearing to suit the issues it is attempting to prove. Such an outcome denies Ohio citizens the protection of a fair hearing as required by the Due Process clause of the U.S. and Ohio Constitutions, and violates the requirements of Chapter 119. of the Ohio Revised Code.

Administrative agencies perform vital governmental functions – in the case of the Medical Board, to protect the public from unqualified or unscrupulous individuals who would prey on them when they are ill or injured and in need of medical care. This function, however, must be tempered through limitations on that power to ensure it is employed fairly and rationally for the protection of those who hold a license as well as the public. This case is about those limits, and thus, is of public and great general interest and presents a substantial constitutional issue.

#### **STATEMENT OF THE CASE AND FACTS**

William Nucklos, M.D. (“Dr. Nucklos”) had an active medical practice for nearly twenty years, including a small satellite office in Springfield, Ohio. On October 16, 2002, without warning, the Springfield Police Department and DEA seized all of his medical records, documents, billing records, laboratory results, and unfiled records in the Springfield office. Many of the documents taken were stacks of unfiled patient x-rays and laboratory tests which were not kept with the patient files. None of these lab tests or x-rays were included in the records the Board chose to enter as State's Exhibits 1-28 in this matter. Since that day in 2002, Dr. Nucklos has had no access to his original patient charts and other documents from the Springfield office.

On March 8, 2006, the State Medical Board of Ohio (“Medical Board” or “Board”) immediately suspended Dr. Nucklos’s license to practice medicine based solely on a February 16, 2006 criminal conviction. On March 7, 2007, that conviction was reversed by the Second District Court of Appeals because the trial court had required Dr. Nucklos to prove, as an affirmative defense, that he had not violated Ohio law in his prescribing of medications to the patients in question. In other words, the trial court had switched the burden of proof in the criminal case to the defendant.<sup>4</sup> Dr. Nucklos petitioned the Board to have his license immediately restored since the basis for suspending it was gone, but the Board refused to do so. On October 10, 2007, seven months after the criminal conviction was reversed, the Medical Board dismissed the 2006 Immediate Suspension, but summarily suspended Dr. Nucklos’s medical license, and proposed new bases for pursuing disciplinary action (“2007 Notice”). The allegations raised in the 2007 Notice, and the questionable evidence used to support those allegations, are the subject of this case.

The 2007 Notice pertains to Dr. Nucklos’s care and treatment of twenty-eight specific patients for intractable pain, alleging that Dr. Nucklos prescribed medications to these patients without documenting or ordering appropriate consultations, performing or documenting appropriate physical examinations, and ordering or documenting appropriate diagnostic testing. Specifically, the Board alleged the following violations of R.C. §4731.22:

- Failure to comply with O.A.C. §4731-21-02 (the rule for utilizing drugs for the treatment of intractable pain) in violation of R.C. §4731.22(B)(20);
- Prescribing without a legitimate medical purpose in violation of R.C. §4731.22(B)(3); and
- Failure to meet minimal standards of care in violation of R.C. §4731.22(B)(2) and (6).

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<sup>4</sup> The Ohio Supreme Court upheld the reversal of Dr. Nucklos’s criminal conviction. *State v. Nucklos*, 121 Ohio St.3d 332, 2009-Ohio-792.

The 2007 Notice did not allege, nor has the Board ever claimed, that Dr. Nucklos violated R.C. §4731.052.

In the administrative hearing on this matter, over Dr. Nucklos's objections in a *Motion in Limine*, the State relied exclusively on State's Exhibits 1-28 and testimony based on the review of those Exhibits. Those Exhibits are partial copies of the records seized from Dr. Nucklos's Springfield office in 2002, along with additional information from various police investigations and pharmacy reports to which Dr. Nucklos would not have been privy. Specifically, State's Exhibits 1-28 failed to include drug screen results and other documents in connection with the treatment of these patients which were taken from Dr. Nucklos' office during the 2002 search and seizure. Throughout these proceedings, the State has admitted that State's Exhibits 1-28 are not Dr. Nucklos's medical records for the patients in question.

Based on this faulty evidence, on August 13, 2008, the Board concluded that Dr. Nucklos's treatment of these twenty-eight pain patients using dangerous drugs violated R.C. §4731.22(B)(2), (3), (6), and (20), and permanently revoked Dr. Nucklos's license to practice medicine ("Order").

Dr. Nucklos appealed the Order to the Franklin County Common Pleas Court which, on March 31, 2009, issued a decision affirming the Medical Board's Order. The Common Pleas Court based its decision upon two erroneous points: first, that Exhibits 1-28 contained all of Dr. Nucklos's medical records for these patients; and that the treatment of the patients in question was not for intractable pain.

Dr. Nucklos sought review by the Tenth District Court of Appeals. That Court held, in direct contravention of the express statutory language, that R.C. §4731.052(D) does not prohibit the Medical Board from disciplining a physician for violations of R.C. §4731.22 regardless of

whether it has asserted or found a violation of R.C. §4731.052(D). It also held that, because Dr. Nucklos was unable to put on proof as to each deviation of State's Exhibits 1-28 and how the accurate information would have affected the opinion of the State's expert witness, use of the admittedly faulty State's Exhibits 1-28 as the basis of the case against Dr. Nucklos did not violate Revised Code Chapter 119. nor deprive him of any rights.

Due to these fundamental errors, Dr. Nucklos submits that the Tenth District Court of Appeals's decision is erroneous and must be reversed.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. I: Unless the Medical Board charges and finds a violation of R.C. §4731.052, a physician cannot be disciplined based on his use of dangerous drugs in the treatment of patients for intractable pain.**

The Medical Board has limited authority to discipline a physician for prescribing pain medications for intractable pain. Due to concerns in the health care community that prescription medications were significantly under-utilized in the treatment of chronic pain for fear of legal consequences, the Ohio General Assembly enacted an express limitation on the Medical Board's authority in this regard. Specifically, R.C. §4731.052(D) states:

A physician who treats intractable pain by managing it with dangerous drugs is *not subject to disciplinary action by the board under section 4731.22* of the Revised Code . . . The physician is subject to disciplinary action *only if* the dangerous drugs are not prescribed . . . in accordance with this section and the rules adopted under it.

R.C. §4731.052(D) (emphasis added). In other words, the Board cannot discipline a physician for prescribing drugs to intractable pain patients unless the Board alleges and proves the physician violated R.C. §4731.052, as well as its rules regarding the treatment of pain.

As an administrative agency, the Medical Board has only the authority that has been conferred on it by the General Assembly. That delegated authority cannot be extended by the Medical Board beyond what the General Assembly deemed appropriate to grant it. *Davis v. State ex rel. Kennedy* (1933), 127 Ohio St. 26; *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 379.

The care in this matter pertains to nothing other than Dr. Nucklos's use of dangerous drugs to treat the intractable pain of each of these patients. Thus, Dr. Nucklos is "not subject to disciplinary action by the board under section 4731.22" unless the Board alleged and found he had violated R.C. 4731.052. It did not. As a result, its Order permanently revoking Dr. Nucklos's medical license exceeded its statutory authority and must be reversed.

**Proposition of Law No. II: Unauthenticated documents that are known to be altered from the originals are not reliable or probative evidence sufficient to support the permanent revocation of a license.**

State's Exhibits 1-28 were candidly described by the Board's attorney as:

comprised of/derived from various state exhibits admitted into the record in the criminal prosecution of Dr. Nucklos in the Clark County Court of Common Pleas, Case No 04-CR-0790 and may contain copies of pharmacies logs as well as other documents not necessarily maintained in the original patient charts by Dr. Nucklos.

*See*, State's Disclosure of Witnesses and Exhibits on Behalf of the State Medical Board of Ohio. In addition, the testimony as well as the notations in State's Exhibits 1-28 indicate that other information that had been part of Dr. Nucklos's medical records were not in these Exhibits. One example of missing information is the drug urine screen results for the patients in question, an item for which the State's expert severely criticized Dr. Nucklos for not conducting, because the results were not included in his review of State's Exhibits 1-28.

While hearsay is admissible in an administrative proceeding, *Haley v. Ohio State Dental Board* (1982), 7 Ohio App.3d 1, it must be reliable to form the basis of a disciplinary action. Evidence is considered to be reliable when “there is a reasonable probability that it is true.” *Our Place*, 63 Ohio St.3d at 571. Reliable hearsay is defined as evidence that has “sufficient indicia of reliability to support its probable accuracy.” *United States v. Smith* (6<sup>th</sup> Cir. 1989), 887 F. 2d 104, 108. The hearing record establishes that State’s Exhibits 1-28 do not include all of Dr. Nucklos’s records with respect to the patients in question, contain information that was not available to Dr. Nucklos when he was treating these patients, and some information in the Exhibits was altered after leaving Dr. Nucklos’s possession. Accordingly, these Exhibits do not have the probability of truth of reflecting the information contained in Dr. Nucklos’s actual medical records. As such, Exhibits 1-28 and the testimony of the State’s expert witness based on those Exhibits, do not constitute reliable evidence.

Similarly, these Exhibits are not probative of the Medical Board’s allegation that Dr. Nucklos’s treatment of these patients and/or that his documentation was inadequate. To be probative, the evidence must be relevant to the issues and tend to prove the issues. *Our Place*, 63 Ohio St.3d at 571. The incomplete sets of Dr. Nucklos’s medical records, supplemented with additional information not available to Dr. Nucklos, are not relevant to how Dr. Nucklos actually treated the patients, and certainly cannot be relevant to whether the documentation in his original medical records was appropriate. These Exhibits do not provide probative evidence as to Dr. Nucklos’s care of the patients or his documentation of that care.

The necessity of reliable and probative evidence in a case in which the agency seeks to deprive an individual of their license to practice is not only a statutory requirement, but it is also mandated by the U.S. and Ohio constitutions in assuring due process of law in connection with a

deprivation of an individual's property rights. *Cleveland Board of Education v. Loudermill* (1985), 470 U.S. 532, 533. Accordingly, the Medical Board's reliance on the faulty State's Exhibits 1-28 as a basis for permanently revoking Dr. Nucklos's medical license violates the dictates of R.C. Chapter 119. and the U.S. and Ohio constitutions.

**Proposition of Law No. III: Requiring a licensee to prove each and every deviation of the State's Exhibits and its impact when the State has not established or alleged that the documents are accurate copies impermissibly switches the burden of proof and violates the licensee's right to due process of law.**

In disciplinary cases, administrative agencies have the burden of persuasion. "It is a fundamental concept in administrative law and procedure that the party asserting the affirmative issues bears the burden of proof." *Chiero v. Bureau of Motor Vehicles* (1977), 55 Ohio Misc. 22, 24, see also, *Director, Office of Workers Compensation Programs v. Greenwich Collieries* (1994), 512 U.S. 267. Therefore, the Medical Board was required to produce affirmative proof of its allegations, rather than requiring Dr. Nucklos to establish that they are false.

As admitted by the Board and its expert in the case, State's Exhibits 1-28 differ from Dr. Nucklos's actual medical records for these patients in that they (1) are missing significant information pertaining to the care of the patients; (2) have had information altered from the original records; and (3) had after-the-fact police and Pharmacy Board investigation materials added, containing highly prejudicial information that Dr. Nucklos could not have known as he made his treatment decisions.

In light of these admitted deviations of State's Exhibits 1-28 from Dr. Nucklos's original medical records, the Board cannot use these documents as sufficient proof of either the care rendered by Dr. Nucklos to these patients or particularly, the adequacy of the documentation of that care. Yet, this is precisely what the Board did, and what the Tenth District Court of Appeals

has upheld. With no access to his original medical records since they were unexpectedly seized in 2002, the Board and Court held that it was Dr. Nucklos's responsibility to prove what was in his actual medical records. Thus, the burden of proof in this case was switched, requiring Dr. Nucklos to disprove the State's allegations, rather than requiring the Medical Board to prove them. This switch violates R.C. Chapter 119., which the Medical Board was bound to follow. Accordingly, the case should be reversed.

### CONCLUSION

For the reasons stated above, this case involves matters of public and great general interest and a substantial constitutional question. Accordingly, Appellant William W. Nucklos, M.D., respectfully requests that this Court accept jurisdiction in this case so the important issues presented will be reviewed on their merits.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing *Memorandum In Support of Jurisdiction* was served upon the following counsel of record by first class U.S. mail, postage prepaid, on this 17<sup>th</sup> day of August, 2010:.

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Elizabeth Y. Collis

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO

2010 JUN 29 PM 1:36

CLERK OF COURTS

William W. Nucklos, M.D.,

Appellant-Appellant

v.

State Medical Board of Ohio,

Appellee-Appellee

No. 09AP-406  
(C.P.C. No. 08CVF08-12230)

(REGULAR CALENDAR)

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D E C I S I O N

Rendered on June 29, 2010

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*Richard Cordray, Attorney General, Barbara J. Pfeiffer and Karen A. Unver, for appellee.*

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant, William W. Nucklos, M.D. ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas affirming an order of appellee, State Medical Board of Ohio ("the Board"), permanently revoking appellant's license to practice medicine and surgery. For the following reasons, we affirm.

{¶2} In a notice of summary suspension and opportunity for hearing dated October 10, 2007, the Board notified appellant that it had adopted an entry of order summarily suspending his certificate to practice medicine and surgery in Ohio, pursuant to R.C. 4731.22(G). The Board alleged that from March 2001 to October 2002, appellant

inappropriately prescribed controlled substances and/or dangerous drugs to 28 patients in a manner inconsistent with minimal standards of care and/or without a legitimate medical purpose. The notice cited conduct such as prescribing despite failure to order and/or document ordering appropriate consultations, failure to perform appropriate physical examinations, and failure to order and/or document ordering appropriate diagnostic testing. The notice further alleged appellant had violated R.C. 4731.22(B)(2), (B)(3), (B)(6), and (B)(20), along with Ohio Adm.Code 4731-21-02. Appellant was also advised that he was entitled to a hearing on this matter.<sup>1</sup>

{¶3} A hearing was held before a hearing examiner for the Board on June 2 through June 6, 2008 and concluded on June 12, 2008. Appellant and the Board both provided expert testimony, but none of appellant's former patients testified. Appellant also invoked his Fifth Amendment right not to incriminate himself.

{¶4} Following the hearing, the hearing examiner issued a written report and recommendation, which was received by the Board on July 18, 2008, recommending that appellant's license be permanently revoked. On August 13, 2008, the Board issued an entry of order permanently revoking appellant's license to practice medicine and surgery in Ohio. Appellant then filed an appeal with the common pleas court, pursuant to R.C. 119.12. On March 31, 2009, the common pleas court affirmed the Board's order revoking

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<sup>1</sup>It should be noted that appellant's license was initially suspended in 2006 following a criminal trial that resulted in multiple convictions arising from the conduct at issue. However, those convictions were overturned on March 9, 2007. The State appealed that decision to the Supreme Court of Ohio. In the interim, on October 10, 2007, the Board dismissed the suspension predicated upon appellant's criminal convictions and, on that same date, issued a separate notice of summary suspension and opportunity for hearing, summarily suspending appellant's license based upon standard of care and prescribing violations. It is that October 2007 action which is the subject of this appeal. The Supreme Court of Ohio subsequently affirmed the decision overturning appellant's criminal convictions and the criminal matter was then remanded to the Clark County Court of Common Pleas for retrial. Although the retrial was pending at the time the instant appeal was filed, the criminal case has since been dismissed without prejudice.

appellant's license. In this timely appeal, appellant now asserts the following two assignments of error for our review:

Assignment of Error 1:

It is an abuse of discretion for the trial court to uphold a finding of permanent license revocation when the Medical Board relied upon exhibits that were not medical records and not reliable, probative or substantial evidence.

Assignment of Error 2:

It is an abuse of discretion for the trial court to uphold the Medical Board's permanent revocation Order when the Board was acting outside the express limitation of its authority under R.C. §4731.052, the intractable pain statute.

{¶5} In an administrative appeal, pursuant to R.C. 119.12, the trial court considers the entire record to determine whether a decision is supported by reliable, probative, and substantial evidence and is in accordance with the law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. Therefore, the authority of a common pleas court in reviewing a decision of the medical board, which is an administrative agency, is limited to determining whether the board's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Korn v. Ohio State Med. Bd.* (1988), 61 Ohio App.3d 677. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Conrad* at 111.

{¶6} The Ohio Supreme Court has defined reliable, probative, and substantial evidence as follows:

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

*Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571.  
(Footnotes omitted.)

{¶7} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas determination that the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. Absent an abuse of discretion on the part of the trial court, a court of appeals cannot substitute its judgment for that of the board or the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. However, on the question of whether the board's order was in accordance with the law, this court's review is plenary. *McGee v. Ohio State Bd. of Psychology* (1993), 82 Ohio App.3d 301, 305, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶8} In his first assignment of error, appellant asserts the Board improperly relied upon exhibits which were not medical records. Appellant repeatedly argues the exhibits submitted by the Board, specifically state's exhibit Nos. 1-28, are not his patients' actual medical records. He argues the use of these misleading exhibits, which were comprised of incomplete, altered medical records, as well as additional information such as pharmacy logs and police investigative reports, which appellant did not have at the time

he administered treatment, did not constitute reliable, probative, and substantial evidence upon which the Board could base its decision. Appellant further contends that because the Board's expert witness also relied exclusively upon these same exhibits in formulating his opinion, his testimony is flawed and does not constitute reliable, probative and substantial evidence upon which the Board could base its decision.

{¶9} Appellant contends the exhibits containing the purported medical records were missing documentation, such as the results of his patients' drug screens. He submits that when the records were seized from his practice, there were various documents which had not yet been filed, and that these unfiled documents were not contained in state's exhibit Nos. 1-28. Appellant claims he has not had access to his actual medical records since the day they were seized from his office in October 2002. Without access, he asserts he is unable to compare the exhibits to his actual medical records in order to prove each specific omission, addition, or alteration that exists and to prove that his patient records do in fact support and document the care he provided to his patients. Consequently, he further submits that this circumstance has improperly shifted the burden of proof to him to prove that his actual medical records properly support and document the care he provided.

{¶10} Appellee disputes appellant's assertion that its exhibits contain only parts of each patient's medical records and that there are additional records, such as drug screen results, which exist but were missing from the exhibits. The Board argues that such an assertion is pure conjecture because there is no testimony to support it. Appellee further argues that there was additional evidence considered by the Board beyond just state's exhibit Nos. 1-28 and the testimony of the Board's expert, such as appellant's testimony from the criminal trial. Additionally, the Board submits that the testimony of appellant's

former office manager, Tricia Woodruff, dispels any notion that the exhibits did not include the medical records of appellant's patients.

{¶11} We find appellant's argument to be without merit. If appellant had reason to doubt the authenticity of the medical records submitted by the Board in state's exhibit Nos. 1-28, appellant could have challenged those records using a variety of methods. Appellant could have questioned the authenticity of the records through the former office manager, Tricia Woodruff, or by subpoenaing the person who did the filing for appellant during the two-month time period after Ms. Woodruff left the office and before the records were seized. However, appellant offered no testimony from any witnesses to establish that certain drug screens were in fact scheduled or conducted. Additionally, appellant himself exercised his Fifth Amendment right not to incriminate himself and refused to answer even the most basic of questions, including whether or not there were additional materials. See *Baxter v. Palmigiano* (1976), 425 U.S. 308, 96 S.Ct. 1551 (the Fifth Amendment does not preclude adverse inferences from being drawn against parties to civil actions when they invoke the privilege and refuse to testify in response to probative evidence offered against them in a civil cause).

{¶12} Alternatively, appellant was also free to make a request for the issuance of a subpoena so that he could inspect the records that were originally seized from his office. The medical board is subject to the Administrative Procedure Act, R.C. Chapter 119, as a result of its licensing function. *Korn* at 686. "The Ohio State Medical Board's determination to suspend a physician's license is an adjudication and is, consequently, subject to R.C. 119.09, issuance of subpoenas, pursuant to R.C. 119.07." *Korn* at paragraph six of the syllabus.

{¶13} R.C. 119.09 provides, in relevant part:

For the purpose of conducting any adjudication hearing \* \* \* the agency may, *and upon the request of any party receiving notice of the hearing as required by section 119.07 of the Revised Code shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned.* \* \* \*

(Emphasis added.) See also Ohio Adm.Code 4731-13-13 ("Upon written request, the board shall issue subpoenas for purposes of hearing to compel the attendance and testimony of witnesses and production of books, records and papers. Each subpoena shall indicate on whose behalf the witness is required to testify."). Appellant did not exercise this option.

{¶14} Through the use of its exhibits, as well as the expert testimony of Theodore V. Parran, Jr., M.D. ("Dr. Parran") and the testimony of appellant in the criminal trial, the Board produced reliable, substantial and probative evidence. For example, as the trial court noted, Dr. Parran testified that in preparing for the criminal trial in 2006, he prepared an expert report based upon his review of 49 patient office charts, a pharmacy board generated prescription profile of the controlled drugs taken by those patients, and two undercover police investigation reports. However, the undercover reports were not included in his expert report, which cited violations involving 28 patients.

{¶15} He further testified that he also prepared an expert report for the Board, which was based upon the medical records of the 28 patients he had previously reviewed, along with his initial report prepared in the criminal case, and the transcript of his testimony in the criminal case. Thus, in addition to the pharmacy board generated prescription profiles and the police investigative documents, both of which Dr. Parran acknowledged were not part of appellant's original file but which were easily

distinguishable from medical records, he reviewed the original patient records at issue in preparing his first expert report, which he then later used to prepare his expert report for the Board.

{¶16} Additionally, Dr. Parran testified that despite occasional entries in patient records indicating that a drug screen should be scheduled at a future visit, he did not find evidence in the patients' files demonstrating that appellant had actually followed through with the drug screens. Put another way, Dr. Parran did not find drug screen results in the relevant patient files, nor did he find orders for those drug screens or even notes documenting any drug screen results, thereby leading to the conclusion that those drug screens were in fact never ordered, even if certain notes indicated an intention to do so in the future.

{¶17} We do not dispute that it is fundamental to administrative law and procedure that the party asserting the affirmative issues also bears the burden of proof. *Smith v. City of Columbus*, 10th Dist. No. 02AP-1219, 2003-Ohio-3303, ¶24, citing *Chiero v. Bur. of Motor Vehicles* (1977), 55 Ohio Misc. 22, 24. Yet, we disagree with appellant's contention that the burden of proof was improperly shifted to him to prove that the Board's allegations were false. Appellant cannot simply speculate or allege that the Board's records are inaccurate and that there are additional records somewhere out there which would support his position. Appellant failed to attempt to put on any actual evidence that would call into question the validity or reliability of the documents submitted by the Board. To the contrary, as the trial court noted, Ms. Woodruff identified her own handwriting on some of the records, as well as appellant's handwriting. Additionally, Ms. Woodruff was unable to verify appellant's assertion that a stack of unfiled documents had not made its way in to the patients' medical record files, since Ms. Woodruff left the office two months

before the seizure of the documents and could not testify as to whether or not the office was up to date in its filing at the time the records were seized.

{¶18} We find the trial court did not abuse its discretion in finding that the testimony and records referenced above constitute reliable, substantial and probative evidence. The trial court did not act unreasonably or arbitrarily in finding the records and testimony to be reliable for several reasons. First, the records were kept in the ordinary course of business. Second, Ms. Woodruff identified various records and also identified some of the records as containing her handwriting as well as appellant's handwriting. Additionally, the trial court was within its prerogative to find Dr. Parran to be a qualified expert, particularly given Dr. Parran's background in this area, and thus to find his testimony to be credible and afford it significant weight. Dr. Parran adequately explained his procedure for reviewing and identifying the records and distinguishing between the patient charts and the documents which were obtained after the records were seized from appellant's office, and he also testified he used the pharmacy logs simply to confirm appellant's prescribing history for each patient. We further find the common pleas court did not abuse its discretion in finding the records and the testimony to be probative and substantial, in that they addressed the issues in question, as well as the specific matters alleged in the notice served upon appellant.

{¶19} Accordingly, we overrule appellant's first assignment of error.

{¶20} In his second assignment of error, appellant asserts the Board is statutorily prohibited from disciplining a physician for prescribing pain medication for pain patients unless the requirements of R.C. 4731.052 are met. In essence, appellant argues the Board's authority to revoke appellant's license under R.C. 4731.22 is limited by R.C. 4731.052. Appellant argues the Board must prove that appellant violated *both* R.C.

4731.052 and the Board's intractable pain rules set forth under Ohio Adm.Code 4731-21 before it can impose discipline for prescribing controlled substances to intractable pain patients. Because the Board did not allege or find that appellant's treatment and care violated R.C. 4731.052, appellant submits the Board was without the authority to take disciplinary action and permanently revoke appellant's license. However, as the trial court noted, appellant has failed to provide sufficient legal authority to support this position.

{¶21} Chapter 4731 of the Revised Code vests the Board with broad authority to regulate the medical profession in Ohio and to discipline physicians whose conduct fails to conform to its regulations. *Griffin v. State Med. Bd. of Ohio*, 10th Dist. No. 09AP-276, 2009-Ohio-4849. R.C. 4731.22 authorizes the Board to discipline those within its licensing authority. *State of Ohio ex rel. Gelesh v. State Med. Bd. of Ohio*, 172 Ohio App.3d 365, 2007-Ohio-3328. Specifically, R.C. 4731.22(B) grants the Board the authority to revoke, suspend, limit, refuse to register, or reinstate a certificate to practice medicine, based upon one or more of the many reasons enumerated in that division. *Landefeld v. State Med. Bd. of Ohio* (June 15, 2000), 10th Dist. No. 99AP-612.

{¶22} R.C. 4731.052 and the rules set forth in Ohio Adm.Code 4731-21, codify the standard of care for physicians practicing pain management, as established by those physicians practicing such medicine prior to the enactment of the statute and the rules. *Dahlquist v. Ohio State Med. Bd.*, 10th Dist. No 04AP-811, 2005-Ohio-2298, ¶18. R.C. 4731.052 addresses a physician's authority to treat intractable pain using dangerous drugs. *Id.* R.C. 4731.052(B) directed the board to adopt rules to "establish standards and procedures to be followed by physicians in the diagnosis and treatment of intractable pain, including standards for managing intractable pain by prescribing, personally furnishing, or administering dangerous drugs in amounts or combinations that may not be

appropriate when treating other medical conditions." See *Dahlquist* and R.C. 4731.052(B). Ohio Adm.Code 4731-21 was then adopted in response to the enactment of R.C. 4731.052.

{¶23} Ohio Adm.Code 4731-21-02 sets forth rules for the utilization of prescription drugs for the treatment of intractable pain. Specifically, Ohio Adm.Code 4731-21-02(A) sets forth accepted and prevailing standards of care. Among others, these include requirements such as: conducting an initial evaluation that includes a relevant history; establishing and documenting a medical diagnosis indicating the presence of intractable pain; ordering an evaluation by one or more other practitioners who specialize in the treatment of the anatomic system or area of the body perceived as the source of pain prior to a diagnosis of intractable pain; and formulating and documenting an individualized treatment plan specifying the medical justification of the treatment via the utilization of prescription drugs on a protracted basis or in combinations or amounts that may be inappropriate for treating other medical conditions. A violation of a provision of any rule in Ohio Adm.Code 4731-21, such as one or more violations of Ohio Adm.Code 4731-21-02, constitutes a violation of the minimal standards applicable to the administration of drugs under R.C. 4731.22(B)(2), a violation of the provision against prescribing or administering drugs for other than legal and legitimate therapeutic purposes under R.C. 4731.22(B)(3), if done knowingly or recklessly, and a violation of the minimal standards of care of similar practitioners under similar circumstances set forth in R.C. 4731.22(B)(6). See Ohio Adm.Code 4731-21-05.

{¶24} Appellant argues R.C. 4731.052 prohibits the Board from basing an order on alleged violations of R.C. 4731.22 when the violations arise solely from the prescribing of controlled substances for chronic pain. Appellant relies upon R.C. 4731.052(D) to

support his argument that the Board was without the authority to take disciplinary action and permanently revoke his license. R.C. 4731.052(D) reads as follows:

A physician who treats intractable pain by managing it with dangerous drugs is not subject to disciplinary action by the board under section 4731.22 of the Revised Code solely because the physician treated the intractable pain with dangerous drugs. The physician is subject to disciplinary action only if the dangerous drugs are not prescribed, furnished, or administered in accordance with this section and the rules adopted under it.

{¶25} While R.C. 4731.052 provides specific standards and procedures for the diagnosis and treatment of intractable pain with dangerous drugs and, consequently, for pursuing disciplinary action against physicians who provide that type of treatment and fail to comply with those standards and procedures, R.C. 4731.052 does not prohibit the Board from pursuing disciplinary action under R.C. 4731.22 against physicians who fail to practice within minimal standards of care, fail to maintain minimal standards applicable to the selection or administration of drugs, or prescribe drugs for other than legal and legitimate purposes, or fail to comply with accepted and prevailing standards of care.

{¶26} In this case, the violations did not arise simply based upon the prescribing of controlled substances for chronic pain. Instead, many of the violations occurred because appellant's conduct generally fell below the minimal standards of care required of a physician. Examples include appellant's inappropriate or non-existent diagnoses and hopelessly incomplete and inadequate medical records, among numerous others.

{¶27} To illustrate, appellant was cited with a violation of R.C. 4731.22(B)(6). It states, in relevant part, that the Board shall revoke, suspend, or place a doctor on probation if his acts constitute a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, regardless of whether or not there was actual injury to a patient. Appellant was also cited

with a violation of R.C. 4731.22(B)(2), which permits revocation of a certificate to practice medicine if a physician fails to maintain minimal standards applicable to the selection or administration of drugs or the failure to use acceptable scientific methods in the selection of drugs or other modalities for treatment. In addition, appellant was cited with a violation of R.C. 4731.22(B)(3), which authorizes the Board to revoke a physician's license for personally furnishing, prescribing, or administering drugs for other than legal and legitimate therapeutic purposes. Finally, appellant was cited with a violation of R.C. 4731.22(B)(20), which provides that a licensed physician may be disciplined for violating any rule promulgated by the Board. Here, the rule cited was Ohio Adm.Code. 4731-21-02. The common pleas court found that all of these violations were properly supported by reliable, probative and substantial evidence, as discussed below.

{¶28} Dr. Parran testified that appellant failed to conform with the minimal standards applicable to the selection or administration of drugs and failed to conform to the minimal standards of care of similar practitioners, thereby violating R.C. 4731.22(B)(2) and (B)(6), respectively. Dr. Parran testified that appellant furnished, prescribed, or administered drugs for reasons other than legal and legitimate therapeutic purposes, in violation of R.C. 4731.22(B)(3), and violated R.C. 4731.22(B)(20) by violating Ohio Adm.Code 4731-21-02 regarding the utilization of prescription drugs for the treatment of intractable pain. Examples of appellant's non-conformity were numerous.

{¶29} According to the testimony of Dr. Parran, the medical histories taken by appellant were insufficient, as were the physical examinations. Appellant's patient records failed to show a work-up of any medical history, lacked laboratory testing, lacked records of prior treatment and failed to document impressions or a diagnosis in many cases. Additionally, the common pleas court cited to testimony and evidence establishing

that appellant: (1) inappropriately prescribed controlled substances in a manner below the minimal standard of care and without documenting a legitimate purpose, such as by prescribing without any diagnostic workup or evaluation, or adding more controlled substances or higher doses without documenting a supporting diagnosis or for no apparent reason when the patient reported doing well; (2) prescribed high doses or potentially fatal doses of controlled substances without verifying the patient's current level of medication or tolerance level; (3) gave early prescription refills; (4) continued to prescribe despite patients missing medicine checks and/or urine screens; (5) continued to prescribe without contacting other doctors despite notification that patients were seeing other doctors and receiving controlled substances; (6) failed to maintain minimal standards applicable to the selection or administration of drugs and failed to employ acceptable scientific methods in the selection of drugs or other modalities for treatment; (7) prescribed high doses of opiates to patients following gaps in treatment without regard for patient health and safety; and (8) failed to order appropriate consultations from an independent physician with respect to the patient's affected organ system as required under the intractable pain rules.

{¶30} Here, the Board's permanent revocation of appellant's license to practice was not based solely upon appellant's treatment of chronic pain patients using dangerous drugs. As noted above, the Board cited to and subsequently found numerous violations, many of which related to general minimal standards of care applicable to practitioners as a whole. We further note, as did the common pleas court, that, although appellant was not cited with a violation of R.C. 4731.052, he appears to assert the protections found in section (D), which he claims should shield him from any disciplinary action. However, like the common pleas court, we disagree. We make no finding with respect to violations of

R.C. 4731.052, which were not alleged. Yet, we fail to see how he can offer this shield here, as it seems apparent from various related facts contained within the record that, had he actually been cited with a violation of this statute, he would not be shielded from discipline because he failed to follow the steps which could possibly protect him, had the only allegation against him been treating chronic pain patients using dangerous drugs. However, as noted above, the violations asserted against him and subsequently proven did not include a violation of R.C. 4731.052 and encompassed much more than simply using dangerous drugs to treat chronic pain patients.

{¶31} Accordingly, we find the common pleas court did not abuse its discretion in finding that the Board's order was supported by reliable, probative and substantial evidence. Furthermore, we find said order is in accordance with law. Consequently, we overrule appellant's second assignment of error.

{¶32} Having overruled both of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and McGRATH, JJ., concur.

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FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

2010 JUN 29 PM 1:41

CLERK OF COURTS

William W. Nucklos, M.D.,

Appellant-Appellant

v.

State Medical Board of Ohio,

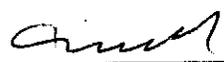
Appellee-Appellee

No. 09AP-406  
(C.P.C. No. 08CVF08-12230)  
  
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 29, 2010, appellant's assignments of error are overruled and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

CONNOR, J., BROWN and McGRATH, JJ.

By   
Judge John A. Connor Dek