

IN THE SUPREME COURT OF OHIO

|                                |   |                                         |
|--------------------------------|---|-----------------------------------------|
| Beverly Clayton, C.N.P., R.N., | : | On Appeal from the Franklin             |
|                                | : | County Court of Appeals Tenth           |
| Appellant,                     | : | Appellate District                      |
|                                | : |                                         |
| vs.                            | : | Ohio Supreme Court Case No. 2014-1092   |
|                                | : |                                         |
| Ohio Board of Nursing          | : | Court of Appeals Case No. 13-AP-726     |
|                                | : |                                         |
| Appellee.                      | : | Franklin County Common Pleas Court Case |
|                                | : | No. 12CV-13572                          |

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APPELLANT BEVERLY CLAYTON'S MOTION FOR RECONSIDERATION OF  
DECISION NOT TO ACCEPT MERITS JURISDICTION

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**APPELLANT BEVERLY CLAYTON'S MOTION FOR RECONSIDERATION OF  
DECISION NOT TO ACCEPT MERITS JURISDICTION**

This is a Motion for Reconsideration of the 5-2 decision to reject merits review in this matter.

Because this is an administrative appeal from an Adjudication Order of the Ohio Board of Nursing under shocking circumstances, involving the license of a Registered Nurse for over 25 years, we are specifically, in part, directing this Motion for Reconsideration to *Justice William M. O'Neill*, who himself is a Registered Nurse and has worked as such in Hillcrest Hospital in Cuyahoga County, Ohio.

Moreover, while this Motion is directed to all Justices, we wish to make a specific appeal to *Justice Pfeifer*, who has on more than one occasion expressed strong views about the right of licensees to Due Process of Law in administrative proceedings.

Finally, we wish to commend *Justices French and O'Donnell* for voting in favor of merits review by recognizing the importance of the issue raised in Proposition I of our Memorandum in Support of Jurisdiction.

*Justice O'Neill* must certainly appreciate the tremendous value of a nursing license and the huge educational and career investment both in attaining and retaining a nursing license. Clearly, Justice O'Neill can fully comprehend that a nurse accused of violations of the Nursing Practice Act, based upon a one-night shift in an ICU, cannot adequately defend herself against these charges without having access to copies of the charts and records *for that shift* of the *8 or 9 patients* there that night. This is particularly true where Appellant's highly qualified expert testified that he was unable to fully ground or support his opinion that the Appellant was overwhelmed that chaotic night in the ICU, with too few nurses, too many patients per nurse, untrained nurses incapable of

inserting i.v.'s, no separate charge nurse and no unit secretary. Appellant Beverly Clayton, *under these circumstances*, was forced to simultaneously fill the triple roles of direct care nurse for two patients, Charge Nurse and Unit Secretary. There is a fundamental problem with the Ohio Board of Nursing in license adjudication cases. The Hearing Examiners and the Board routinely ignore or minimize the poor planning, negligence and shortcomings of the management of the medical facility, choosing to lay all of the blame on the individual nurse for any oversight or untoward consequence. This is not only unfair to the nurse whose license is in jeopardy. It is also unfair to the public because this approach does not focus on management's part of the responsibility for whatever failures may or may not have occurred. *Isn't it relevant to both guilt and/or mitigation of sanctions to distinguish between the individual nurse's responsibility and the facility's systemic responsibility?* In this case, the overall chaotic and overwhelming tasks imposed upon Appellant under these circumstance are highly relevant to Appellant's defenses of exoneration and mitigation. In order to assess the circumstances, aren't patient acuities, ratios, needs and circumstances in 8-9 patient records and charts for one shift indispensable to a full and fair assessment of the circumstances?

The vivid testimony of Appellant's expert witness is so compelling that it is difficult to imagine how any nurse defending her license could be fairly or constitutionally entirely denied any access whatsoever to the relevant records of the several other patients in the ICU that night in order to illuminate the circumstances under which Appellant Beverly Clayton was forced to work. As Appellant's expert (ICU Nurse) Gallagher testified in the evidentiary hearing:

It appears to me that it was total chaos; numerous admissions during that period of time with inexperienced staff. [Direct Care Nurses unable to set up and insert IV's.] I believe that it was an absolutely insane night the entire night. *However, without the other documentation that we requested, we don't have anything...* (Emphasis added) (T. 560-1)

.....  
I would hold the nursing supervisor and the hospital administration at fault for not having sufficient numbers of staff available and/or well trained that night. One person can only be in so many places at a time, and *we asked of Beverly Clayton to do things that are far above what is reasonable and prudent.* (Emphasis added)(T. 571)

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I believe she was forced into a situation where *errors were set up to occur; we set her up to fail.* (Emphasis added)(T. 572)

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You had a *systemic breakdown of the entire system that night.* You had miscommunication starting from the ER to the ICU. You had a rapid response where the [previous charge] nurse [Tina Forte] did not report off or transfer her care [to Beverly Clayton].

Then you have more patients than are reasonable and prudent in a given situation. You have got a nursing supervisor that continues to send patients to an already overwhelmed ICU without coming down and offering assistance. No, you need to go to the top and work your way down on this one. (Emphasis added)(T. 584)

The Hearing Examiner's Report and Recommendation said absolutely nothing about this testimony of Nurse Gallagher, Appellant's expert. The Adjudication Order of the Ohio Board of Nursing said nothing about it. The Opinion of the Franklin County Common Pleas Court said nothing about it. In the Opinion of the Franklin County Court of Appeals, nothing was stated about it. *Apparently, nobody seems to think that the relevant facts demonstrating the circumstances on Appellant's shift during that night in the ICU had anything to do with whether or not Appellant violated any nursing practice requirements or whether such circumstances could or should be considered in mitigation of sanctions.*

It is bad enough that a Respondent who is defending a medical or nursing license is entitled to no discovery whatsoever and can only subpoena documents or persons for the day of the actual

hearing. It is even worse that the Medical or Nursing Board can subpoena (without notice to Respondent or Respondent's counsel) any and all records even before charges are proffered against the Respondent. The State/Board has a mere limited obligation to produce shortly before the actual hearing *only those documents which the State/Board chooses to use in the hearing*. The State/Board can secrete any exculpatory evidence with impunity. Any subpoena or request of the Board by Respondent requiring the production of any records obtained by the Board is routinely rejected on the ground of statutory investigatory privilege and confidentiality. It makes us wonder if in this case the State/Board actually had these essential patient records and simply objected to producing them because they were supportive of Appellant's defenses. We have no idea about this matter because we have been completely barred from seeing or obtaining even per subpoena duces tecum directed to the hospital, these patient records; note the following objections and rulings of the Hearing Examiner during the testimony of Appellant's expert (preceded by the quashing of Appellant's subpoena for those records, the refusal to allow custodian of records' depositions designed to produce those patient records, et cetera):

Q. The chaos that was referenced previously in other testimony, some of which you heard, related only to the change of shift time. Do you have any reason to believe that there was an overwhelming or chaotic situation, you pick the adjective, between 7 a.m. and 7 p.m. during her shift -- 7 p.m. to 7 a.m. sorry.

A. From the notes from Mary Nutt, who herself admits that there was lack of experience, a busy night, she said something else, it appears to me that it was total chaos; numerous admissions during that period of time with inexperienced staff. I believe that it was an absolutely insane night the entire night. ***However, without the other documentation that we requested, we don't have anything that says we had to run over here. There's another rapid response; here's another admission; here's another admission; here's another admission. I believe that that kind of thing went on that entire time.***

Q. What are you referring to?

A. *I'm referring to Beverly having to run from room to room to room putting out fires because this person is having trouble doing this and that person is having trouble doing that, and/or the supervisor's on the phone sending me another admission when I have no nurses to accept transfer of care for that admission.*

Q. Okay. Are there any kinds of, any sources of information that you did not have available which would have shed more light on this?

MR. APPEL: Objection.

HEARING EXAMINER STEHURA: Well, consistent with the other orders that is subject to the ruling that I have made previously in this matter.

MR. SINDELL: So you're sustaining that objection?

HEARING EXAMINER STEHURA: Sustained. Yes.

MR. SINDELL: *I will make an offer of proof that if permitted to answer that question, this witness would testify that the records of the other patients in the emergency room are essential to a full understanding of the chaos that he is describing.* And as an offer of proof, he will further testify and in his written report to that effect, preliminary report, that *if he had those records, he would be able to describe in better detail one way or the other, frankly, what the chaos was that impinged upon my client.*

HEARING EXAMINER STEHURA: Move on. You made your record. (Emphasis added)(Nurse Gallagher, T. 559-562)

We call upon *Justice Pfeifer* to act upon his prescient words in his concurring opinion written long ago, early in his tenure on this Ohio Supreme Court:

While there is an overwhelming amount of evidence that Dr. Murray violated the standard of care owed to his patients, I am concerned that the State Medical Board has discretion under R.C. Chapter 119 to revoke or suspend doctors' licenses through a trial by ambush. *During my short tenure on this court, I have seen repeated occasions where the State Medical Board has attempted to provide accused doctors with as little due process as possible by continuously denying defendants' requests for information, interrogatories, and depositions.* On future occasions, I will be less likely to uphold medical board decisions revoking or suspending licenses when the accused doctor has not been permitted to conduct

elementary discovery procedures. (*State Medical Board of Ohio v. Murray*, (1993), 66 Ohio St. 3d 527, 533)

See also *Pons v. Ohio State Medical Board*, (1993), 66 Ohio St. 3d 619 (Dissenting Opinion of Justice Pfeifer): “We do not require Ohio’s doctors to give up all their due process rights in order to practice medicine in Ohio.” (at 624)

*Murray* and *Pons*, decided over 30 years ago, is the last time this Ohio Supreme Court reviewed the due process issues in administrative adjudications raised in these cases.

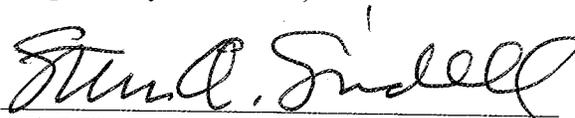
To characterize this Motion for Reconsideration as a mere request for “correction of error”, unworthy of the attention of this Ohio Supreme Court, ignores the fundamental issue underlying this evidentiary preclusion of access to highly relevant evidence. The right to have access to a few patient records covering a single day in the ICU which could impact either guilt or sanctions related to a professional license of a physician, a nurse, a chiropractor, a veterinarian, et cetera, is basic to the most rudimentary notion of Due Process of Law. The loss or interrupted validity of a professional license involves career-impacting consequences after years of training and expense, as well as dire economic impact upon the professional holding the license. The importance of these matters to the nurse or physician can be greater than many criminal charges, including even the possibility of incarceration for a period of time. Some professionals would prefer to serve jail time than lose their license. Yet the constitutional protections afforded criminal defendants far exceeds the loose application of evidentiary principles and the cavalier attitude about forbidding any “discovery” in administrative hearings. Yet a rear-end collision with moderate soft-tissue injuries is a “civil” case entitling the parties to comparatively extensive discovery and evidentiary protections. Even failure to yield or stop a car at a traffic sign, a misdemeanor, affords the driver more due process protections.

This Motion for Reconsideration does not involve a mere discretionary exclusion of evidence; nor does it involve a mere discretionary “discovery” ruling. It involves a total deprivation of material evidence affecting, over time, the lives, careers and economic well-being of hundreds upon hundreds of highly trained and skilled professionals.

Having access to patently relevant evidence on the issues of guilt and mitigation of sanctions in professional license administrative adjudications is a fundamental matter of Due Process of Law.

We urge all of the Justices of this Ohio Supreme Court who voted to deny merits review in this case to reconsider the refusal and to grant merits review, at least with respect to Appellant’s Proposition No. I in her Memorandum in Support of Jurisdiction.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that a true and accurate copy of the foregoing Appellant's Motion for Reconsideration of Decision Not to Accept Merits Jurisdiction was served upon the following by Regular U. S. Mail and E-mail on October 2, 2014:

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