

ORIGINAL

In the
Supreme Court of Ohio

BEVERLY CLAYTON, C.N.P., R.N.	:	Case No. 14-1092
Appellant-Appellant,	:	
	:	On Appeal from the
v.	:	Tenth District Court of Appeals,
	:	Franklin County, Ohio
OHIO BOARD OF NURSING	:	
	:	Court of Appeals
Appellee-Appellee.	:	Case No. 13-AP-726
	:	

MEMORANDUM IN OPPOSITION MOTION FOR RECONSIDERATION

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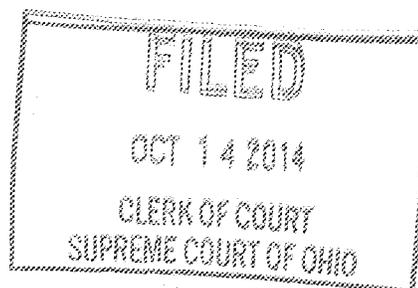
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INTRODUCTION

Appellant Beverly Clayton asks the Court to reconsider its decision to deny jurisdiction in her case. But the Court properly denied jurisdiction in this matter because the case is inherently fact-bound and will not have any broader impact beyond Ms. Clayton. The motion for reconsideration does not raise any new issues beyond those already considered and rejected. *Cf.* S. Ct. Prac. R. 18.02(B). It merely constitutes reargument of her case—albeit reargument with explicit appeals to individual justices rather than to the Court as a whole.

STATEMENT OF THE CASE AND FACTS

In late August 2007, Clayton was the charge nurse in the intensive care unit (“ICU”) at Mercy Franciscan Hospital—Western Hills. *Clayton v. Board of Nursing*, 2014-Ohio-2077, ¶ 4 (10th Dist.). During her shift, Clayton failed to read a patient’s physician’s orders and, as a result, did not administer the treatment required by those orders. *Id.* at ¶ 7. Not only that, but Clayton also administered treatment that was directly contradicted by them. *Id.* at ¶¶ 7, 14, and 35-6. The patient died soon after Ms. Clayton’s shift. *Id.* at ¶ 10.

After a hearing, the Ohio Board of Nursing (“the Board”) subsequently adopted the findings of the hearing examiner and suspended Clayton’s registered nursing license and certified nurse practitioner certificate. *Id.* at ¶ 21. The Board rejected Clayton’s arguments about why a suspension was not warranted. Among other things, although Clayton claimed that the patient’s physician’s orders were missing from the chart, the hearing examiner found that the orders were in the chart when he was admitted to the ICU and remained part of the chart throughout the time that he was there. *Id.* at ¶ 18. The hearing examiner also concluded that while the chaotic and overwhelming conditions of the ICU were a mitigating factor, they did not relieve Clayton “of her duty to practice within the acceptable and prevailing standards of safe

nursing care.” *Id.* at ¶ 19. And at the hearing, even Clayton’s expert acknowledged that Ms. Clayton made mistakes when caring for the deceased patient. He admitted that Ms. Clayton should have: (1) begun a Cardizem drip to titrate Patient 1’s pulse rate to less than a hundred beats per minute, (2) consulted with pulmonologist Dr. Kenneally, and (3) consulted with cardiologist Dr. Desai. Rec. at 439; Tr. at 586. Ms. Clayton’s expert also agreed that even if the orders *were* missing (as Clayton claimed), it could have taken just a few minutes to call to obtain the supposedly missing orders. Rec. at 439; Tr. at 588-589. On appeal from the Board, the Franklin County Court of Common Pleas affirmed the Board’s suspension order. *Id.* at ¶ 22. The Tenth District did so as well.

The Tenth District held that the Board had properly found that Ms. Clayton “violated the standard of care and applicable administrative rules when she failed to locate and implement the physician’s order.” *Id.* at ¶39. With respect to her challenge to the hearing examiner’s decision preventing her from obtaining the medical records of all of the patients present in the ICU during her shift, the court of appeals held that any error in that decision was harmless. It concluded that Clayton was able to obtain the same information through other means. *Id.* at ¶ 30. Specifically, Ms. Clayton was permitted to subpoena other nurses who worked during the overnight shift at the ICU. *Id.* at ¶30. It also found that if Clayton had established at the hearing that there were “deficiencies in her or the other nurses’ memories,” then her argument related to the nondisclosure of other patients’ medical records might have succeeded. *Clayton, 2014-Ohio-2077, ¶ 31.* But, because she pointed to no such deficiencies, the court found that Clayton suffered “no prejudice resulted from the hearing examiner's failure to issue the subpoena in question.” *Id.* Finally, even without the records in question, Clayton was still able to establish the conditions on the ICU during the night in question. *See id.* at ¶ 19 (stating that “the hearing

examiner did consider the chaotic and overwhelming circumstances a mitigating factor in determining the appropriate discipline.”).

ARGUMENT

Clayton’s key argument in her motion for reconsideration is that Board should have permitted her to subpoena the patient records for every patient in the ICU on the night in question. That argument is the same as presented in her memorandum in support of jurisdiction. It did not present a question of public or great general interest then and it does not do so now. It is instead a case-specific question of interest only to Clayton and Clayton alone. For several reasons, the Court should deny the motion for reconsideration.

First, it is undisputed that Clayton had a right to request subpoenas pursuant to R.C. 119.09 and *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St. 3d 143, 145 (1990). A Board hearing examiner however may quash or modify a subpoena “for good cause shown.” Ohio Adm. Code 4723-16-08(E). Thus this case is not about whether Clayton has a right to subpoena documents. She does. *See Frantz*, 51 Ohio St. 3d at 145. It is about whether, *in this case*, the hearing examiner erred by denying the subpoena at issue. That is a fact-specific question about whether this specific hearing examiner erred by denying this specific subpoena in this specific case.

Second, Clayton was able to establish the conditions on the ICU during the night in question even without the requested medical records. Clayton argues that no one considered whether “the circumstances on [Clayton’s] shift during that night in the ICU had anything to do with whether or not [she] violated any nursing practice requirements.” Motion for Reconsideration at 3. But that is not so. The hearing examiner in this case *did* consider those circumstances. He found that while they constituted “a mitigating factor in determining the appropriate discipline,” the “the chaotic and overwhelming circumstances of the ICU did not

relieve Clayton of her duty to practice within the acceptable and prevailing standards of safe nursing care.” *Clayton*, 2014-Ohio-2077 at ¶ 19. The Hearing Examiner also found that the mitigating effect was diminished because “the Hospital had adequate procedures in place for Respondent for Respondent to timely obtain additional nursing staff on her shift” – a step which Ms. Clayton did not take. Rec. at 257, R&R at 45.

Third, the Tenth District found that even if the hearing examiner erred by preventing Clayton from obtaining the records in question, she was not prejudiced by that error. *Id.* at ¶ 27. The court of appeals reached that decision in part because Clayton was able to present the same evidence by other means. *Id.* at ¶¶ 29-31. Reading Clayton’s pleading, the Court could erroneously conclude that she was not permitted to subpoena any information at all. That would be incorrect. For one, she herself testified as to the nature of the ICU and to the care that she provided to other patients that night. *Id.* at ¶30. She was also permitted to subpoena two other ICU nurses who were working on the night in question. *Id.* She chose, however, not to call either nurse to testify at the hearing. *Id.* Ms. Clayton was also permitted to subpoena the full medical record of the patient who died. *See* Respondent Exhibit M (subpoena issued to hospital), Exhibit G (medical records for Patient #1).

In the end, this is an inherently fact-bound case. It involves the discretionary decision by a hearing examiner to permit live testimony, rather than intruding into the confidential records of patients that were under other nurses’ care. In addition, in her motion for reconsideration, Clayton is not asking this Court to address *all* the findings against her. Those findings independently support the Board’s order. Among other things, the Board concluded that Clayton failed to notify a physician when her own documentation showed the patient’s condition had deteriorated and that she administered 847 ml of saline without a physician order. *Id.* at ¶¶ 36,

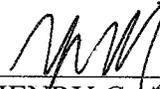
41-42. The Tenth District affirmed both findings. *Id.* These findings have nothing to do with the records from additional patients—and they support the Board’s decision to suspend her registered nursing license and certified nurse practitioner certificate.

CONCLUSION

For the above reasons, this Court should deny Clayton’s motion for reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by U.S. mail this 10th day of October, 2014

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