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STATE MEDICAL BOARD
SEP 16 1994
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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

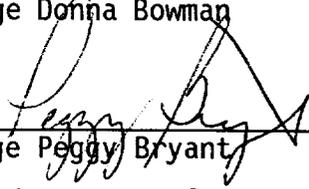
Varughese P. Mathew, D.O.,	:	
Appellant-Appellant,	:	
v.	:	No. 94APE08-1135
The State Medical Board of Ohio	:	(ACCELERATED CALENDAR)
et al.,	:	
Appellees-Appellees.	:	

JOURNAL ENTRY OF DISMISSAL

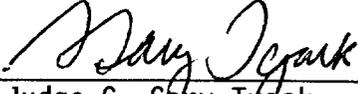
Appellant has filed with the clerk of this court, a notice of appeal from a July 19, 1994 order of the Ohio State Medical Board. This court does not have jurisdiction over direct appeals from the Ohio State Medical Board. The appeal should have been filed in the Franklin County Court of Common Pleas. Accordingly, this appeal is *sua sponte* dismissed.



 Judge Donna Bowman



 Judge Peggy Bryant



 Judge G. Gary Tyack

cc: ✓ Varughese P. Mathew, D.O., *pro se*
 ✓ Anne Berry, AAG
 ✓ Lili C. Kaczmarek, AAG
 ✓ Carla S. O'Day



IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

STATE MEDICAL BOARD
SEP 11 1994
94 SEP -1 PM 4:43

VARUGHESE P. MATHEW, D.O. :

Appellant, :

vs. :

CASE NO. 94APE08-1135

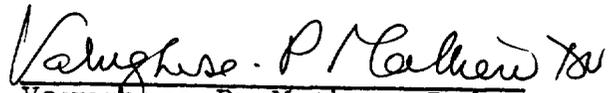
THE STATE MEDICAL BOARD
OF OHIO, ET AL. :

Appellees. :

APPELLANT'S MOTION FOR RECONSIDERATION
OF STAY ON ORDERS FROM
OHIO STATE MEDICAL BOARD ORDERS

Appellant, Varughese P. Mathew, D.O. respectfully moves the Court for reconsideration of its Journal Entry of August 25, 1994. The motion is based upon the following Memorandum in Support.

Respectfully submitted,


Varughese P. Mathew, D.O.
145 North West Street
Bethel, Ohio 45106

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing Motion for Reconsideration was served upon the following individuals, by regular mail on the 30th day of August 1994.

Lili.C. Kaczmarek, AAG
Ohio State Medical Board
77 South High Street, 17th Floor
Columbus, Ohio 43266-0315

Carla S. O'Day, Secretary
19425 Frazier Dr.
Rocky River, Ohio 44116

Varughese P. Mathew 80
Varughese P. Mathew, D.O.

MEMORANDUM IN SUPPORT

This is an appeal from the January 12, 1994 Orders of the Ohio State Medical Board suspending Appellant's license to practice medicine in the State of Ohio. The Ohio State Medical Board gave up its authority to this case by not timely mailing the Orders of January 12, 1994. And in doing so gave jurisdiction to the Court. If this is not true, then this Court as well as Appellant has been entrapped by the Ohio State Medical Board. For the following reasons, Appellant respectfully urges this Court to reconsider its Journal Entry. Attached.

THE BOARD'S ORDER OF JANUARY 12, 1994 WAS NOT ACTED
UPON UNTIL APPELLANT REQUESTED LICENSE RENEWAL
APPLICATION

Letter dated July 14, 1994, Exhibit A, self-explanatory of the entrapment in this case. The Orders were signed July 19, 1994, four months late. By this Court denying the Stay on the Orders of January 12, 1994, the Court is falling into the entrapment of the Ohio State Medical Board.

THE BOARD'S ORDERS ARE NOT
IN ACCORDANCE WITH LAW

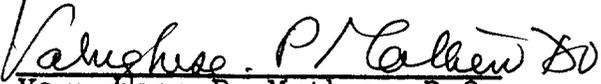
The Board's Orders of January 12, 1994, are not in accordance with law. Exhibit B. "The State Medical Board of Ohio, Disciplinary Guidelines", Board Orders, Exhibit C, January 12, 1994, were not signed until July 19, 1994, and mailed July 25, 1994. The Board would still have the Orders, if the letter of July 14, 1994, was sent.

Since this Court accepted this appeal it has jurisdiction in this matter.

If the Board had any case they would not have to use entrapment and other means to deny appellant his renewal application. The license expires September 30, 1994. There is no due process of the law when there is a willful act of entrapment upon another, as there is in this case.

Appellant humbly request this Court to reconsider its Journal Entry due to the entrapment and violation of the law.

Respectfully submitted,


Varughese P. Mathew, D.O.

Certified Mail No. P 864 587 237
State Medical Board of Ohio
77 South High Street
17th Floor
Columbus, Ohio 43266-0315

July 14, 1994

TO: All Ohio State Medical Board Members
FROM: Varughese P. Mathew, D.O.

Was advised today per telephone conversation with the office of the Ohio State Medical Board that the Board is holding my license renewal application because the Board has not made a decision in this case. This is not true, the Board on January 12, 1994, did in fact, you were all there, make a decision on this case. This decision, as you fully know must be mailed to me within sixty days following your decision. It is now almost July, and the reason your decision has not been mailed is so that I cannot act upon it. The Board by not mailing this decision within the allowed sixty days, has by this inaction illegally entrapped me, held me down, strangled communications, and tied my hands from any further action in this case.

It appears there is illegal finagling going on regarding my license renewal application. It is very plain and simple, if I don't send in my application for renewal of my license, then automatically my license expires on September 30, 1994, "Bingo Case is Over", translation AMBUSH. A couple of months ago I called and advised the office that I had not received my license renewal application, and was told it would be sent shortly. Now, your holding my application under the falsification that there has not been a decision made in this case, is another illegal entrapment.

The case officer advised she would have someone write a letter stating why you are holding my license renewal application, this will not be necessary as I am using the last renewal application, with question regarding Physician Self-Referral, and signature for CME hours. Kindly, send new license application so that the application is properly completed. When one is illegally entrapped as I am in this case, all one can do is what I am doing to meet the deadline, and mail correct fee.

Varughese P. Mathew

Exhibit

THE STATE MEDICAL BOARD OF OHIO
DISCIPLINARY GUIDELINES



EXHIBIT B

CATEGORIES OF VIOLATIONS

EXCESSIVE PRESCRIBING, DISPENSING, OR ADMINISTERING OF CONTROLLED SUBSTANCES

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; 1 to 5 year suspension with subsequent probationary conditions, i. e. :

1. Controlled Substances - Total restriction
Surrender DEA permit
OR Partial restriction
2. Education course
3. Controlled substances log
4. If warranted, Supervised structured environment
5. If warranted, Oral clinical exam
6. If warranted, Pass clinical competency portion of FLEX

EXCESSIVE PRESCRIBING, DISPENSING, OR ADMINISTERING DRUGS TO DETRIMENT OF PATIENT

Maximum Penalty: Revocation
Minimum Penalty: Reprimand

Possible Probationary Conditions:

1. If warranted, Drugs - Partial restriction
2. If warranted, Education course
3. If warranted, Supervised structured environment
4. If warranted, Oral clinical exam
5. If warranted, Pass clinical competency portion of FLEX

UNWARRANTED PRESCRIBING OF CONTROLLED SUBSTANCES WITHOUT PRIOR EXAMINATION

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; 2 to 10 year suspension with subsequent probationary conditions, i. e. :

1. Controlled Substances - Total restriction
Surrender DEA permit
OR Partial restriction
2. Education course
3. Pass clinical competency portion of FLEX
4. Controlled substances log
5. If warranted, Supervised structured environment
6. If warranted, Oral clinical exam

FAILING TO KEEP PATIENT RECORDS OF SUBSTANCES PRESCRIBED, DISPENSED, OR ADMINISTERED

Maximum Penalty: Revocation
Minimum Penalty: Stayed Revocation; 1 to 5 year suspension with subsequent probationary conditions, i.e.:

1. Controlled Substances - Total Restriction
Surrender DEA permit
OR Partial restriction
2. Education course
3. Controlled substances log OR Drug log

4. If warranted, Supervised structured environment
5. If warranted, Oral clinical exam
6. If warranted, Pass clinical competency portion of FLEX

EXCESSIVE ORDERING AND MISADMINISTRATION OF CONTROLLED SUBSTANCES

Maximum Penalty: Revocation
 Minimum Penalty: Revocation

FAILURE TO USE ACCEPTABLE METHODS IN SELECTION OF DRUGS OR OTHER MODALITIES

Maximum Penalty: Revocation
 Minimum Penalty: Stayed Revocation; 2 to 10 year suspension with subsequent probationary conditions, i.e. :

1. Controlled Substances - Total Restriction
 Surrender DEA permit
 OR Partial restriction
 OR Drugs - Partial restriction
2. Education course
3. If warranted, Supervised structured environment
4. If warranted, Oral clinical exam
5. If warranted, Pass clinical competency portion of FLEX
6. If warranted, Controlled substance log
7. If warranted, Drug log

DRUG RELATED CONVICTION

Maximum Penalty: Revocation
 Minimum Penalty: Revocation

FURNISHING DRUGS TO ADDICT IN VIOLATION OF STATE OR FEDERAL LAWS AND REGULATIONS

Maximum Penalty: Revocation
 Minimum Penalty: Revocation

SELLING, PRESCRIBING, GIVING AWAY, OR ADMINISTERING DRUGS FOR OTHER THAN LEGAL & LEGITIMATE THERAPEUTIC PURPOSES

Maximum Penalty: Revocation
 Minimum Penalty: Revocation

PRESCRIBING WITHOUT MEDICAL INDICATION TO DETRIMENT OF PATIENT

Maximum Penalty: Revocation
 Minimum Penalty: Revocation

PRESCRIBING DRUGS FOR SEXUAL FAVORS

Maximum Penalty: Revocation
 Minimum Penalty: Revocation

SEXUAL MISCONDUCT WITHIN PRACTICE

Maximum Penalty: Revocation
 Minimum Penalty: Stayed revocation; 1 to 5 year suspension with subsequent probationary conditions, i.e.:

1. Require third party present when examining/treating patients
2. If warranted, Psychiatric evaluation or psychiatric treatment
3. If warranted, Supervised structured environment
4. If warranted, Pass clinical competency portion of FLEX

MINIMAL STANDARDS OF CARE
(Negligence, Incompetence, Failure to provide emergency or timely treatment, Abandonment of patient, or Performing improper or unnecessary surgery)

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; 1 year suspension with subsequent probation of at least four (4) years

1. Oral clinical exam
2. Pass clinical competency portion of FLEX
3. Education course or clinical training program
4. If warranted, Supervised structured environment

FAILING TO KEEP ADEQUATE PATIENT RECORDS

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; 1 year suspension with subsequent probation of at least four (4) years

1. Oral clinical exam
2. Pass clinical competency portion of FLEX

3. Education course or clinical training program
4. If warranted, Supervised structured environment

FRAUDULENT MISREPRESENTATION IN THE COURSE OF PRACTICE

Maximum Penalty: Revocation
Minimum Penalty: Revocation

SUSPENSION OR REVOCATION BY ANOTHER STATE

Maximum Penalty: Revocation
Minimum Penalty: Corresponds to violation of similar offense in Ohio

PRACTICE DURING SUSPENSION

Maximum Penalty: Revocation
Minimum Penalty: Revocation

DECEPTIVE ADVERTISING

Maximum Penalty: Revocation
Minimum Penalty: 1 year stayed suspension; probation of at least 3 years

Standard conditions

CONVICTION OF A FELONY

Maximum Penalty: Revocation
Minimum Penalty: Revocation

CONVICTION OF A MISDEMEANOR IN THE COURSE OF PRACTICE

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; 3 year suspension; subsequent probation of at least two (2) years

Standard conditions

PROCURING LICENSE BY FRAUD

Maximum Penalty: Revocation
Minimum Penalty: Revocation

SELF ABUSE OF DRUGS

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; probation of at least five (5) years

1. Controlled Substances - Total restriction
Surrender DEA permit
OR
Partial restriction

OR Drugs - Partial restriction

2. Drugs - Rehabilitation Program
3. Drugs - Abstain from use
4. Biological fluid testing
5. Psychiatric evaluation or psychiatric treatment
6. If warranted, Education course
7. If warranted, Abstain from alcohol
8. If warranted, Supervised structured environment
9. If warranted, Oral clinical exam

ALCOHOL ABUSE

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; probation of at least five (5) years

1. Alcohol - Abstain from use
2. Biological fluid testing
3. Alcohol - Rehabilitation program
4. If warranted, Abstain from drugs
5. If warranted, Psychiatric evaluation or psychiatric treatment
6. If warranted, Education course
7. If warranted, Physical evaluation or medical treatment

AIDING AND ABETTING UNLICENSED PRACTICE

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; probation of at least five (5) years

Standard conditions

INABILITY TO PRACTICE

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; probation of at least three (3) years

1. Psychiatric or medical treatment
2. If warranted, Supervised structured environment
3. If warranted, Pass clinical competency portion of FLEX

PERMITTING ONE'S NAME TO BE USED

Maximum Penalty: Revocation
Minimum Penalty: 1 year suspension; subsequent probation of at least one (1) year

Standard conditions

BETRAYING A PROFESSIONAL CONFIDENCE

Maximum Penalty: Revocation
Minimum Penalty: Reprimand

Standard conditions

DIVISION OF FEES

Maximum Penalty: Revocation
Minimum Penalty: 1 year suspension with subsequent probation of at least one (1) year

Standard conditions

REPRESENTATION THAT AN INCURABLE DISEASE CAN BE CURED

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; 1 to 5 year suspension with subsequent probation of at least five (5) years

1. Pass clinical competency portion of FLEX
2. Education course
3. If warranted, Supervised structured environment

VIOLATION OF CONDITIONS OF LIMITATION

Maximum Penalty: Revocation
Minimum Penalty: Revocation

CODE OF ETHICS VIOLATION

Maximum Penalty: Revocation
Minimum Penalty: Reprimand

AIDING AND ABETTING OR CONSPIRING TO VIOLATE THE MEDICAL PRACTICES ACT

Maximum Penalty: Revocation
Minimum Penalty: Corresponds to violation of the actual offense

VIOLATION OF ANY ABORTION LAW

Maximum Penalty: Revocation
Minimum Penalty: Stayed revocation; probation of at least five (5) years

1. Education course
2. Pass clinical competency portion of FLEX
3. Supervised structured environment

STANDARD CONDITIONS: TO BE INCLUDED IN ALL CASES OF PROBATION

1. OBEY ALL LAWS

Respondent shall obey all federal, state and local laws, and all rules governing the practice of medicine in Ohio.;

2. QUARTERLY REPORTS

Respondent shall submit quarterly declarations under penalty of perjury stating whether there has been compliance with all the conditions of probation.

3. BOARD APPEARANCES

Respondent shall appear in person for interviews before the full Board or its designated representative at * month intervals, as requested by the Board.

* 3 mo., 6 mo., various, etc.

4. TOLLING FOR OUT-OF-STATE PRACTICE OR RESIDENCE

In the event that the Respondent should leave Ohio for _____ continuous months, or to reside or to practice outside the State, Respondent must notify the State Medical Board in writing of the dates of departure or return. Periods of time spent outside of Ohio will not apply to the reduction of this probationary period.

5. VIOLATION OF PROBATION (For Stayed Revocations Without Suspension)

If the Respondent violates probation in any respect, the Board, after giving the Respondent notice and the opportunity to be heard, may set aside the stay order and impose the revocation of the Respondent's certificate.

6. VIOLATION OF PROBATION (For Stayed Revocations with Suspensions or Stayed Suspensions with Probation)

If the Respondent violates any conditions of probation, whether during suspension or probation, the Board, after giving the Respondent notice and the opportunity to be heard, may set aside the stay order and impose the (revocation/suspension) of the Respondent's certificate.

7. COMPLETION OF PROBATION

Upon successful completion of probation, Respondent's certificate will be fully restored.

OPTIONAL PROBATIONARY CONDITIONS

CONTROLLED SUBSTANCES - Total Restriction
- Surrender DEA Permit

Respondent shall not prescribe, administer, dispense, order, or possess (except as prescribed, administered, or dispensed to respondent by another person so authorized by law) controlled substances as defined by State or Federal Law.

Respondent shall surrender for cancellation respondent's DEA Permit, together with any triplicate prescription forms and federal order forms, to the Drug Enforcement Administration. Respondent shall not engage in the practice of medicine until Respondent provides documentary proof of that surrender to the Board. Respondent shall not reapply for a DEA permit until Respondent has received written permission to do so from the Board.

CONTROLLED SUBSTANCES - Partial Restriction
(excepting specified Schedules)

Respondent shall not prescribe, administer, dispense, order, or possess (except as prescribed, administered, or dispensed to respondent by another person so authorized by law) controlled substances as defined by State or Federal Law, except for those listed in Schedule(s) _____.

CONTROLLED SUBSTANCES LOG

Respondent shall keep a log of all controlled substances prescribed, dispensed or administered. Such log shall be submitted at such times and in the format as is requested by the Board.

DRUG LOG

Respondent shall keep a log of the following drugs prescribed, dispensed, or administered: _____
Such log shall be submitted at such times and in the format as is requested by the Board.

DRUGS - Partial Restriction

Respondent shall not prescribe, administer, dispense, order, or possess (except as prescribed, administered, or dispensed to respondent by another person so authorized by law) the following drugs:

DRUGS - Abstain From Use

Respondent shall abstain completely from the personal use or possession of drugs (except those available for purchase over the counter OR those prescribed, administered, or dispensed to respondent by another so authorized by law.

ALCOHOL - Abstain From Use

Respondent shall abstain completely from the use of alcohol.

BIOLOGICAL FLUID TESTING

Respondent shall submit to biological fluid testing as determined by the Board.

ALCOHOL - Rehabilitation Program

Within 30 days of the effective date of the decision, Respondent shall undertake and maintain participation in an alcohol rehabilitation program acceptable to the Board. In the Quarterly Reports to the Board, Respondent shall provide documentary evidence of continuing compliance with this program. Respondent shall not engage in the practice of medicine until such program is approved by the Board.

CLINICAL TRAINING PROGRAM

Within 60 days of the effective date of probation, Respondent shall submit to the Board for its prior approval a clinical education program related to the violations found in the decision. The exact number of hours and the specific content of the program shall be determined by the Board or its designee and shall total not less than four (4) nor more than twenty (20) hours per week for a period of not less than three (3) months nor more than two (2) years. Respondent shall complete the clinical training program within two (2) years and six (6) months of the effective date of probation. The Board may require the respondent to pass an examination related to the content of the program. Respondent shall not engage in the practice of medicine until respondent provides documentary proof satisfactory to the Board of successful completion of the clinical training program.

NOTE: This program is for physicians who have demonstrated deficiencies either in medical skills or knowledge but do not constitute a present danger to patients.

ORAL CLINICAL EXAMINATION

(Select one of the following three clauses)

Within 60 days of the effective date of this decision,
OR Upon completion of the education course required

above

OR Upon completion of the clinical training program;

Respondent shall take and pass an oral clinical examination to be administered by the Board or its designee. If respondent fails this examination, respondent must wait three months between re-examinations, except that after three failures respondent must wait one year to take each necessary examination thereafter.

DRUGS - Rehabilitation Program

Within 30 days of the effective date of the decision, Respondent shall submit to the Board for its prior approval a drug rehabilitation program acceptable to the Board. In the Quarterly Reports to the Board, Respondent shall provide documentary evidence of continuing compliance with this program. Respondent shall not engage in the practice of medicine until such program is approved by the Board.

DRUG COUNSELING PROGRAM

Within 30 days of the effective date of the decision, Respondent shall submit to the Board for its prior approval a drug counselling program in which respondent shall observe or participate for a period of _____. Respondent shall not engage in the practice of medicine until Respondent provides documentary proof satisfactory to the Board of successful completion of the approved drug counseling program.

EDUCATION COURSE

Within 30 days of the effective date of this decision, Respondent shall submit to the Board for its prior approval a program of approved Category I Continuing Medical Education related to the violations found in the decision. The exact number of hours and the specific content of the program shall be determined by the Board or its designee and shall not total less than twenty-five (25) nor more than seventy-five (75) hours per year. This program shall be in addition to the Continuing Medical Education requirements for relicensure. The Board may also require respondent to pass an examination related to the content of the program. Respondent shall not engage in the practice of medicine until Respondent provides documentary proof satisfactory to the Board of successful completion of this course.

Respondent shall not engage in the practice of medicine until respondent has passed this oral clinical examination and has been so notified by the Board in writing.

NOTE: The oral clinical examination is for physicians who have demonstrated deficiencies in their medical skill or knowledge which raise questions about their ability to practice medicine safely; for example, physicians who prescribe drugs excessively or without medical indication, or physicians whose general medical knowledge is suspect. This condition should generally be combined with the Education Course or Clinical Training Program.

PASS CLINICAL COMPETENCY PORTION OF FLEX

Respondent shall take and pass the clinical competency portion (FLEX Component II) of the Federation Licensing Examination.

PSYCHIATRIC EVALUATION

Within 30 days of the effective date of the decision, Respondent shall undergo psychiatric evaluation by a psychiatrist designated by the Board who shall furnish a report to the Board stating whether respondent is fit to practice medicine and whether respondent requires psychiatric treatment to practice medicine safely.

Respondent shall not engage in the practice of medicine until respondent has been deemed fit to practice medicine safely by the Board and has been so notified by the Board.

If respondent is judged by the Board to be in need of psychiatric treatment in order to practice medicine safely, respondent shall within 30 days of notification of the requirement of psychiatric treatment submit to the Board for its prior approval the name and qualifications of the psychiatrist of his choice. Upon approval,

respondent shall undergo treatment and continue treatment until such time as the Board deems that no further psychiatric treatment is necessary. To make this determination, the Board may require periodic psychiatric evaluations.

NOTE: This condition is for those cases where the evidence demonstrates that mental illness or disability was a contributing cause of the violations.

PSYCHIATRIC TREATMENT

Within 30 days of the effective date of this decision respondent shall submit to the Board for its prior approval the name and qualifications of a psychiatrist of his choice.

Respondent shall not engage in the practice of medicine until the Board has approved such treating psychiatrist.

Upon approval, respondent shall undergo and continue treatment until the Board deems that no further treatment is necessary. To make this determination, the Board may require periodic psychiatric evaluations.

NOTE: This condition is for those cases where the evidence demonstrates that the respondent has had impairment (impairment by mental illness, alcohol abuse and drug self abuse) related to the violations but is not at present a danger to his patients.

MEDICAL EVALUATION

Within 30 days of the effective date of this decision, respondent shall undergo medical evaluation by a physician designated by the Board who shall furnish a report to the Board stating whether Respondent is fit to practice medicine and whether he requires medical treatment to practice medicine safely.

Respondent shall not engage in the practice of medicine until respondent has been deemed fit to practice medicine safely by the Board and has been so notified by the Board.

If respondent is judged by the physician to be in need of medical treatment in order to practice medicine safely, respondent shall within 30 days of notification of the requirement for medical treatment submit to the Board for its prior approval the name and qualifications of a physician of his choice. Upon approval, respondent shall undergo treatment and continue treatment until such time as the Board deems that no further medical treatment is necessary. To make this determination, the Board may require periodic medical evaluations.

NOTE: This condition is for those cases where the evidence demonstrates that medical illness or disability was a contributing cause of the violations.

MEDICAL TREATMENT

Within 30 days of the effective date of this decision respondent shall submit to the Board for its prior approval the name and qualifications of a physician of his choice.

Respondent shall not engage in the practice of medicine until the Board has approved such treating physician.

Upon approval, respondent shall undergo and continue treatment until the Board deems that no further medical treatment is necessary. To make this determination, the Board may require periodic medical evaluations.

SUPERVISED STRUCTURED ENVIRONMENT

Respondent is prohibited from engaging in solo practice.

Within 30 days of the effective date of this decision, Respondent shall submit to the Board, and receive its prior approval, for a plan of practice limited to a supervised structured environment in which respondent's activities will be overseen and supervised by another physician.

Respondent shall not engage in the solo practice of medicine until Respondent has received prior written approval by the Board.

THIRD PARTY PRESENCE

During probation, respondent shall have a third party present while examining/treating patients.

NOTE: Sexual transgressors should normally be placed in a supervised structured environment.

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IN THE COURT OF APPEALS OF OHIO

FILED
COURT OF APPEALS
FRANKLIN CO OHIO

TENTH APPELLATE DISTRICT

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THOMAS J. ENRIGHT
CLERK OF COURTS

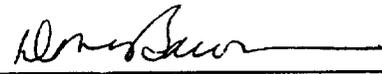
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et al., :
Appellees-Appellees. :

No. 94APE08-1135

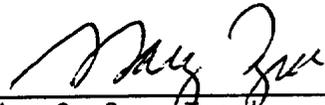
(ACCELERATED CALENDAR)

JOURNAL ENTRY

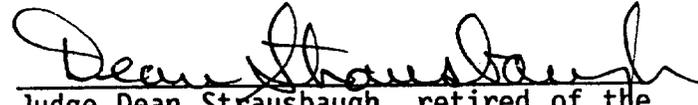
Appellant not demonstrating that this court has jurisdiction over this appeal of an order of the State Medical Board of Ohio, appellant's motion for a stay of execution of said order is denied.



Judge Donna Bowman



Judge G. Gary Gyack



Judge Dean Strausbaugh, retired of the Tenth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

cc: /Varughese P. Mathew, D.O., pro se
Anne Berry, AAG
/Lili C. Kaczmarek, AAG
/Carla S. O'Day



IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO

FROM STATE MEDICAL BOARD
OF OHIO

Court of Common Pleas, Civil Division

Varughese P. Mathew, D.O.
145 North West Street
Bethel, Ohio 45106

Appellant,

v.

The State Medical Board of Ohio
77 South High Street, 17th Floor
Columbus, Ohio 43215

and

Carla S. O'Day, Secretary
The State Medical Board of Ohio
77 South High Street, 17th Floor
Columbus, Ohio 43215

Appellees

Varughese P. Mathew, D.O.

Appellant

v.

The State Medical Board of Ohio
et al.,

Appellees

: 94 AP 808 1155

No. 90CVF-10-8418

NOTICE OF APPEAL

1. Appellant Varughese P. Mathew, D.O., hereby gives notice of his appeal to The Court of Appeals, Franklin County, Ohio from the Orders of the Ohio State Medical Board, dated January 12, 1994, and mailed July 25, 1994. The Ohio State Medical Board, by illegally removing the case from The Court of Common Pleas, reinstated their Orders of October 15, 1990. The Ohio State Medical Board must not be permitted through their own wrongful acts to take from the Courts its legal responsibility. The Ohio State Medical Board violated this Court and abused their power when the Ohio State Medical Board acted alone when it changed Judges in the Court of Common Pleas, and wrote the Journal Entry. This Court didnot instruct the Ohio State Medical Board to write the Journal Entry for the Court of Common Pleas, therefore acted upon an illegal document. Exhibit, A, The Court of Appeals

Journal Entry of Judgment, November 6, 1992. Exhibit B, The Ohio State Medical Board's Journal Entry written for the Court of Common Pleas, August 9, 1993. Exhibit C, The January 12, 1994 Orders of the Ohio State Medical Board, the Ohio State Medical Board has sixty days from January 12, 1994 to mail Order, not doing so the Board by its own failure to issue these Orders shall result in dissolution of the Orders. The Orders were not even signed until July 19, 1994, this makes these Orders months late, not days late.

2. Sec. 4731.22 (5) Second paragraph. "As used in this division, "false, fraudulent, deceptive, or misleading statement" means a statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived."

There are documents in this case that were written for the purpose of filing fraudulent malpractice lawsuits. The documents were written for the purpose of misleading and misrepresent the facts. These documents must be exposed, otherwise they continue the fraud upon this Court.

3. There is a violation of the law regarding due process. Ohio Revised Code Section 119.07 sets forth the requisite procedure that an administrative agency must follow in its notice of charges prior to any administrative hearing. Only charges in the charge letter which is issued before the administrative hearing can be considered.

The State Medical Board didnot comply with Requitelements of R.C. 119.07, to wit:

.....Such notice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for such proposed action, the law, or rule directly involved, and a statement informing the party that he is entitled to a hearing if he request it....

4. There is a conflict of interest in this case, and this conflict of interest must be reported to this Court.

5. Appellant is a physician, and has practiced medicine in the State of Ohio for the past twenty-six years, with an office located at 600 West Plane Street, Bethel, Ohio 45106. Appellant is a general surgeon and also engages in general medicine.

6. Appellees are the State Medical Board of Ohio and its Secretary. Appellees are agents of the State of Ohio pursuant to Chapter 4731 of the Ohio Revised Code.

7. Grounds for this appeal are as follows:

- (a) The State Medical Board violated this Court's Orders, when the agents for the Ohio State Medical Board changed the Judges in this case in the Common Pleas Court, and wrote the Journal Entry for the Common Pleas Court. And the government agents in this case through their wrong took control of our Court and the Judges.
- (b) Fraud within this case, it carried over into this Court.
- (c) Violation of due process.
- (d) Conflict of interest.

8. A copy of this Notice of Appeal is filed with the Court of Appeals, Franklin County, Ohio, in accordance with Section 119.12 of the Ohio Revised Code.

Respectfully submitted,

Varughese P. Mathew D.O.
Varughese P. Mathew, D.O., pro se
145 North West Street
Bethel, Ohio 45106

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served upon the following individuals, by Certified Mail on the 8th day of August 1994.

Anne Berry, Esq.
Assistant Attorney General
Ohio State Medical Board
77 South High Street, 17th Floor
Columbus, Ohio 43266-0315

Carla S. O'Day, Secretary
Ohio State Medical Board
77 South High Street, 17th Floor
Columbus, Ohio 43266-0315

Varughese P. Mathew D.O.
Varughese P. Mathew, D.O., pro se
145 North West Street
Bethel, Ohio 45106



STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

July 19, 1994

Varughese P. Mathew, D.O.
145 N. West Street
Bethel, OH 45106

Re: In the Matter of Varughese P.
Mathew, D.O.

Dear Doctor Mathew:

Please find enclosed a certified copy of the Order and Entry in the above matter approved and confirmed by the State Medical Board of Ohio meeting in regular session on January 12, 1994. This Order and Entry documents the Medical Board's reconsideration of the penalty in your case in accordance with the instructions of the Tenth District Court of Appeals and the Franklin County Court of Common Pleas.

Section 119.12, Ohio Revised Code, may, but does not necessarily, authorize an appeal from this Order. Such an appeal may be taken to the Court of Common Pleas in Franklin County only. Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of a Notice of Appeal with the State Medical Board of Ohio and the appropriate court within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12 of the Ohio Revised Code.

Very truly yours,

Carla S. O'Day M.D.
Carla S. O'Day, M.D.
Secretary

CSO:em

Enclosures

CERTIFIED MAIL NO. P 055 326 203
RETURN RECEIPT REQUESTED

STATE MEDICAL BOARD
OF OHIO

JUL 22 1994

Mailed 7-25-94



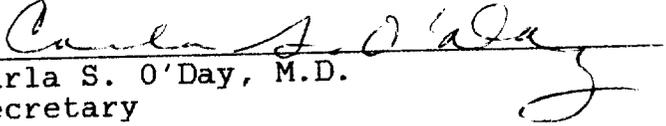
STATE MEDICAL BOARD OF OHIO

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CERTIFICATION

I hereby certify that the attached copy of the Order and Entry of the State Medical Board of Ohio; attached copy of the October 10, 1990 Findings and Order of the State Medical Board in the matter of Varughese P. Mathew, D.O.; and attached excerpt of Minutes of the State Medical Board, meeting in regular session on January 12, 1994, including a Motion to re-adopt the hearing examiner's proposed Order on the basis of Conclusions as modified by the Tenth District Court of Appeals and the Franklin County Court of Common Pleas, constitute a true and complete copy of the Order and Entry of the State Medical Board in the matter of Varughese P. Mathew, D.O., as it appears in the Journal of the State Medical Board of Ohio.

(SEAL)


Carla S. O'Day, M.D.
Secretary

2/19/94
Date

STATE MEDICAL BOARD
OF OHIO
JUL 22 1994

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

STATE MEDICAL BOARD
OF OHIO

*

JUL 22 1994

VARUGHESE P. MATHEW, D.O.

*

ORDER AND ENTRY

This matter originally came before the State Medical Board of Ohio on or about October 10, 1990, when the Board voted to revoke Dr. Mathew's medical license, to stay the revocation, and to indefinitely suspend the doctor's license. The suspension was to be followed by a three year probation, and Dr. Mathew's license was to be permanently limited to restrict him from performing all but a few specified types of surgery. The Board's action was based on its finding that Dr. Mathew had failed to conform to minimal standards of care with respect to four surgical patients.

Dr. Mathew appealed to the Franklin County Court of Common Pleas and was granted a stay of the Board's Order with restrictions on his surgical practice. The Court subsequently issued a decision upholding the Board's findings as to three of the four patients, but modified the Board-ordered sanction with the explanation that it was too harsh. The Court ordered the Board to vacate its suspension of Dr. Mathew's license and to further modify its Order to prohibit Dr. Mathew from performing all but a few specified surgical procedures until he passed the SPEX exam.

Both the Board and Dr. Mathew appealed. On November 5, 1992, the Tenth District Court of Appeals ruled that the Common Pleas Court's modification of the Board's sanction had been improper. The appeals court remanded the case back to the Common Pleas Court with instructions to remand the matter to the Board for redetermination of the penalty or sanctions to be imposed upon Dr. Mathew in light of the courts' holding that there was insufficient evidence to support the Board's finding that Dr. Mathew's treatment of Patient 3 fell below minimal standards. The appeals court also asked that, in crafting its sanction, the Board consider that ". . . to the extent that the board found that Dr. Mathew's failure to involve [Patient 4] in the determination of post-operative options fell below the minimum standard of care, it is supported by reliable, probative and substantial evidence, namely, the opinion testimony of Dr. Falcone. However, to the extent that the finding suggests that the treatment itself fell below standard treatment for breast cancer, it is not supported by reliable, probative and substantial evidence." In other words, the Board's sanction could be based upon the

conclusion that Dr. Mathew's failure to apprise Patient 4 of her post-operative options fell below minimal standards of care. However, the Board could not base its sanction on a finding that the treatment of Patient 4's breast cancer fell below minimal standards.

On August 9, 1993, in accordance with the directive of the Court of Appeals, the Common Pleas Court issued an Entry vacating its prior decision in so far as its modification of the Board's Order and remanding the matter back to the Medical Board for redetermination of the penalty or sanctions to be imposed upon Dr. Mathew.

Wherefore, upon consideration by the Board on January 12, 1994, of the transcript and exhibits of Dr. Mathew's August 2 and August 3, 1990 administrative hearing; the Report and Recommendation of Attorney Hearing Examiner Wanita J. Sage; Dr. Mathew's objections to the Report and Recommendation; minutes of the Board's October 10, 1990 discussion of this case; and decisions and entries from the Court of Common Pleas and Court of Appeals, including the decision of the Tenth District Court of Appeal rendered on November 5, 1992, in the case of Mathew v. State Medical Board of Ohio, Case No. 92AP-199 and Case No. 92AP-243; and exclusively upon consideration of the cases of Patients 1, 2 and 4 as discussed in the Court of Appeals' decision, and excluding from consideration the case of Patient 3, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for January 12, 1994.

It is hereby ORDERED that:

1. The certificate of Varughese P. Mathew, D.O., to practice medicine and surgery in the State of Ohio shall be REVOKED. Such revocation is stayed, and Dr. Mathew's certificate is hereby SUSPENDED for an indefinite period of time.
2. The State Medical Board shall not consider reinstatement of Dr. Mathew's certificate to practice unless and until all of the following minimum requirements are met:
 - a. Dr. Mathew shall submit an application for reinstatement, accompanied by appropriate fees.
 - b. Dr. Mathew shall take and pass the SPEX examination, or any similar written examination which the Board may deem appropriate to assess his clinical competency.
 - c. In the event that Dr. Mathew has not been engaged in the active practice of medicine and surgery for a period in excess of two years immediately preceding the time of his application for reinstatement, the Board may exercise its

discretion under Section 4731.222, Ohio Revised Code, to require additional evidence of Dr. Mathew's fitness to resume practice.

3. Upon reinstatement, Dr. Mathew's certificate shall be **PERMANENTLY LIMITED** and **RESTRICTED** in that Dr. Mathew shall not be permitted to engaged in the practice of surgery, except for the performance of simple excisions and biopsies, the suturing of wounds, and the performance of diagnostic gastroscopies, cystoscopies, colonoscopies, and other endoscopic procedures.
4. Further, upon reinstatement, Dr. Mathew's certificate shall be subject to the following terms, conditions, and limitations for a period of three (3) years:
 - a. Dr. Mathew shall obey all federal, state and local laws, and all rules governing the practice of medicine in Ohio.
 - b. Dr. Mathew shall submit quarterly declarations under penalty of perjury stating whether or not there has been compliance with all the conditions of probation.
 - c. Dr. Mathew shall appeal in person for interviews before the full Board or its designated representative at six (6) month intervals, or as otherwise requested by the Board.
 - d. In the event that Dr. Mathew should leave Ohio for three (3) continuous months, or reside or practice outside of the State, Dr. Mathew must notify the Board in writing of the dates of departure and return. Periods of time spent outside of Ohio will not apply to the reduction of this probationary period.
 - e. Before the end of the first year of probation, or as otherwise approved by the Board, Dr. Mathew shall complete a course approved by the Board on maintaining adequate and appropriate medical records.
 - f. Within thirty (30) days of reinstatement, Dr. Mathew shall submit for the Board's prior approval the name of a monitoring physician, who shall review Dr. Mathew's patients charts and shall submit a written report of such review to the board on a quarterly basis. such chart review may be done on a random basis, with the number of charts reviewed to be determined by the Board. It shall be Dr. Mathew's responsibility to ensure that the monitoring physician's quarterly reports are submitted to the Board on a timely basis. In the event that the

approved monitoring physician becomes unable or unwilling to so serve, Dr. Mathew shall immediately so notify the Board in writing and shall make arrangements for another monitoring physician as soon as practicable.

5. If Dr. Mathew violates the terms of this probation in any respect, the Board, after giving Dr. Mathew notice and an opportunity to be heard, may impose whatever disciplinary action it deems appropriate, up to and including the revocation of his certificate.
6. Upon the successful completion of probation, Dr. Mathew's certificate will be fully restored, except for the permanent limitation and restriction set forth in paragraph 3 (3), above.

This Order shall become effective thirty (30) days from the date of mailing of notification of approval by the State Medical Board of Ohio. In the thirty (30) day interim, Dr. Mathew shall not undertake the care of any patient not already under his care.

Carla S. O'Day
Carla S. O'Day, M.D.
Secretary
7/19/94
Date

(SEAL)

STATE MEDICAL BOARD
OF OHIO

JUL 22 1994



STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

EXCERPT FROM THE MINUTES OF JANUARY 12, 1994

REMAND IN THE MATTER OF VARUGHESE P. MATHEW, D.O.

Dr. Heidt asked whether each member of the Board had received, read, and considered the hearing record, the proposed findings, conclusions, and order, and any objections filed in the matter of Varughese P. Mathew, D.O. A roll call was taken:

ROLL CALL:	Dr. O'Day	- nay
	Mr. Albert	- nay
	Dr. Stienecker	- aye
	Dr. Gretter	- aye
	Dr. Stephens	- aye
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Ms. Noble	- aye
	Mr. Sinnott	- aye
	Dr. Garg	- aye
	Dr. Steinbergh	- aye
	Dr. Heidt	- aye

Dr. Heidt asked whether each member of the Board understands that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. A roll call was taken:

ROLL CALL:	Dr. O'Day	- aye
	Mr. Albert	- aye
	Dr. Stienecker	- aye
	Dr. Gretter	- aye
	Dr. Stephens	- aye
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Ms. Noble	- aye
	Mr. Sinnott	- aye
	Dr. Garg	- aye
	Dr. Steinbergh	- aye
	Dr. Heidt	- aye

In accordance with the provision in Section 4731.22(C)(1), Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of this matter.



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EXCERPT FROM THE MINUTES OF JANUARY 12, 1994
IN THE MATTER OF VARUGHESE P. MATHEW, D.O.

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The original Reports and Recommendations shall be maintained in the exhibits section of this Journal.

Dr. Heidt advised Dr. Mathew that there is not a court reporter present, but instead the Board's minutes serve as the Board's official record of the meeting. Dr. Mathew stated that he did not have any objection to the absence of a court reporter.

Dr. Heidt reminded Dr. Mathew that the Board members have read the entire hearing record, including the exhibits and any objections filed. He added that the Board will not retry the case at this time, and that pursuant to Section 4731.23(C), Revised Code, oral arguments made at this time are to address the proposed findings of fact and conclusions of the hearing examiner. Dr. Heidt stated that Dr. Mathew would be allotted approximately five minutes for his address.

Dr. Mathew stated that this case was stolen from the Courts by Assistant Attorney General Susan Walker. This was terribly wrong, and the Board is supporting illegal activity going on. This case was taken out without his approval or knowledge. The judge in this case was Judge Martin. Judge John Connor was not the judge. If judges are changed, the parties have to be notified and he would have to give approval. So the Board is liable because this case was illegally taken out of the court.

Mrs. Mathew echoed that the case was illegally removed.

Dr. Mathew stated that he has written this to the Board's Secretary and President.

Mrs. Mathew stated that there are also a lot of errors in the memorandum the Board has, and she and Dr. Mathew have the corrections.

Dr. Mathew stated that this is a good example. The last memorandum sent to the Board on November 24 by Lauren Lubow is full of errors. His case was full of errors. It was based on three malpractice cases without one single proof. Hearing Examiner Sage's report contained 218 mistakes.

Mrs. Mathew stated that they also filed objections in 1990 as to how prejudiced and how bad the Hearing Examiner was.

Dr. Mathew stated that Ms. Sage should not be hearing any case because she doesn't know anything about medicine or surgery. The law requires that there must be a qualified hearing examiner who is not prejudiced. Dr. Mathew stated that he wants to be shown one case where he performed below minimal standards. He wants to be shown where the breast tissue was that he left after the subcutaneous mastectomy. The Board has no proof.



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EXCERPT FROM THE MINUTES OF JANUARY 12, 1994
IN THE MATTER OF VARUGHESE P. MATHEW, D.O.

Page 3

Mrs. Mathew stated that the laboratory reports prove without question that the tissue was properly removed.

Dr. Mathew stated that the evidence was totally ignored by Ms. Sage in all those cases. There was no infection in Case 1, and if there was an infection, he took care of it. If anyone studies the charts he will see case after case. He doesn't have time to go through all this, but his objections went through this point by point.

Mrs. Mathew stated that she doubts that any of the Board members received what Dr. Mathew submitted. She added that it proves without question that this case was nothing but a case of fraudulent lawsuits for the purpose of collecting money against the physicians.

Dr. Mathew at this time asked to distribute copies of Ms. Lubow's November 24, 1993 memorandum with errors notated.

Dr. Heidt stated that the Board must decide whether it wishes to accept this information.

Dr. Mathew stated that that is fine, but the Board is responsible.

Dr. Heidt informed Dr. Mathew that he has one minute to summarize his case.

Dr. Mathew stated that he knows Dr. Heidt is watching the clock, but his license is on the line and the Board had better take more time and listen to what he has to say.

Mrs. Mathew stated that this has gone on for five years.

Dr. Mathew added that the investigation has been going on for eight years. The thing is that his attorney was Mr. Todd, who was referred by Assistant Attorney General Dowling. When they found out that Mr. Dowling was referring cases to Mr. Todd's law firm, he left. Dr. Mathew stated that he was never legally represented. He has proof.

Mrs. Mathew asked whether it was right for the Assistant Attorneys General to be referring cases to private lawfirms. She stated that that is not their job. That was going on and they have the proof.

Dr. Mathew stated that he is not here to tell the Board anything that is not true. The Board can ask him any question about this and he will tell the Board, before God, that what he says is the truth. This cannot go on in this country, because when a country fails to realize the truth, if any doctor reviews the chart he can



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EXCERPT FROM THE MINUTES OF JANUARY 12, 1994
IN THE MATTER OF VARUGHESE P. MATHEW, D.O.

Page 4

see, these three cases were set up for lawsuits. That's all. His attorney sold him out behind his back and settled the case out of court without his knowledge.

Dr. Mathew continued that the third case was a nerve ligation, and the nerve was never ligated. Dr. Means' examination itself shows there was no ligation. The EMG report shows there was no nerve ligation.

The fourth case was an 81-year-old woman on whom he performed a lumpectomy in the office. The Board is suggesting that he should give her chemotherapy and radiation therapy. He asked whether the Board is suggesting that he kill somebody who is medically, totally incapable of handling radiation or chemotherapy.

Dr. Heidt thanked Dr. Mathew for his statement. He asked whether Ms. Berry wished to respond.

Ms. Berry stated that she is mystified as to some of the legal conclusions that the Mathews have reached. This case is properly before the Board at this time on remand from the Court of Common Pleas, which remanded the matter under directions from the Court of Appeals. There was a new judge on the case on the Common Pleas Court level, but there is no requirement that the parties in a case approve judges. Ms. Berry urged the Board to read, and she's sure that they have, the Court of Appeals' opinion. This opinion states that the Board's Order as to Patients 1, 2 and 4 was fully supported by reliable, probative and substantial evidence. In the case of Patient 3, the Court found that the Board's allegations regarding the patient's treatment after surgery was supported by reliable, probative and substantial evidence, but the allegations regarding the surgery were not. The only thing different about this case now is that the Court of Appeals has removed from the mix some of the allegations with regard to Patient 3 and asked the Board to again consider the sanction, based on Dr. Mathew's actions with regard to Patients 1, 2, and 4. That is the Board's charge from the Courts today. It is for the Board to now determine what sanction it wishes to impose.

DR. STIENECKER MOVED TO APPROVE AND CONFIRM MS. SAGE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF VARUGHESE P. MATHEW, D.O. DR. GARG SECONDED THE MOTION.

Dr. Heidt asked whether there were any questions concerning the proposed findings of fact, conclusions, and order in the above matter.

Dr. Steinbergh asked Dr. Mathew whether he is currently represented by counsel. Dr. Mathew stated that he is not. He stated that when he found out that his attorney was working for the State Medical Board, he proceeded by himself and has gotten more done by doing that. He went to the court himself and presented his case. He would like to say that in case 4 and in cases 1 and 2 there is proof, if



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EXCERPT FROM THE MINUTES OF JANUARY 12, 1994
IN THE MATTER OF VARUGHESE P. MATHEW, D.O.

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you read the report of the Court of Appeals, there is proof on his side. It said that in the report. It also said that what he did in case 4 was right. So the Court of Appeals agreed with Judge Martin on Case 3 and then they added Case 4. Because an elderly lady, 81 years old, with multiple medical problems such as heart failure, diabetes....

Dr. Steinbergh interrupted, stating that the question in Case 4, as she reads it, is that the doctor did not inform the patient of the options. If he did, he did not document it in the records. When the records were read, there was no documentation that Dr. Mathew informed the patient of her postoperative options in terms of therapy. Dr. Steinbergh stated that the patient may very well have agreed with Dr. Mathew's conclusion, but there was no documentation that he discussed it with the patient.

Dr. Mathew stated that that is true, but he testified that he discussed it with the members of the Tumor Board because he'd been on the hospital's Tumor Board for 20 years.

Dr. Steinbergh asked whether there was documentation of his discussion with the patient.

Dr. Mathew stated that there was no documentation, but he told the Hearing Examiner that he had discussed the case with the Tumor Board and a chemotherapist, Dr. Shahara, who is a radiation oncologist at Good Samaritan Hospital. Dr. Shahara agreed with the discussion not to give the patient radiation. He did not record his discussion with the patient because working in an office is different from working in a hospital where you record everything. It is true he didn't record it. He added that he doesn't believe that that is a reason to take someone's license when he treats everybody right. Dr. Mathew stated that the patient had no complaints.

Dr. Steinbergh stated that the question of substandard care does not have anything to do with documentation of that. The question is whether Dr. Mathew gave the patient her options. Dr. Mathew stated that she had no options. Someone in her medical condition had no option. He asked what kind of options could be given. He stated that he did discuss it with her, but he didn't document. He has given the Board the names of the doctors with whom he discussed this. Also, since he was on the Tumor Board, it was a simple matter to him.

Dr. Steinbergh asked whether the Tumor Board records would indicate documentation of discussion of case such and such, using the patient's initials or an assigned number. She stated that this is how Tumor Board discussions are documented.

Dr. Stephens stated that that is also how the Tumor Board at his hospital documents it.



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EXCERPT FROM THE MINUTES OF JANUARY 12, 1994
IN THE MATTER OF VARUGHESE P. MATHEW, D.O.

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Dr. Mathew stated that the surgery was done in his office because the patient didn't want to go into the hospital because she could not afford it. He tried to do it in the hospital, but the patient was a very poor woman, so he did it in the office. The patient had such respiratory problems that the surgery had to be done in a 45'-50' sitting position. He did discuss with her that she was not a candidate, and she agreed. Dr. Mathew stated that if the Board would review this patient's chart, it will see that the patient had no complaints about his care. None of the four patients had complaints.

Dr. Heidt asked what document Dr. Mathew wished to distribute.

Dr. Mathew stated that it is a copy of the last memorandum the Board received from Ms. Lubow, with a listing of the errors contained in the memorandum sent to the Board.

Dr. Heidt asked whether the Board wished to receive this document.

MR. SINNOTT MOVED TO APPROVE RECEIPT OF THE DOCUMENT. DR. STEINBERGH SECONDED THE MOTION.

Dr. O'Day stated that she misunderstood Dr. Mathew's name at the beginning of his appearance. She stated at this time that she has received, read and considered the hearing record, the proposed findings, conclusions and order and any objections filed in the matter of Varughese P. Mathew, D.O.

A roll call vote was taken on Mr. Sinnott's motion:

ROLL CALL VOTE:	Dr. O'Day	- nay
	Mr. Albert	- abstain
	Dr. Stienecker	- aye
	Dr. Gretter	- aye
	Dr. Stephens	- nay
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Ms. Noble	- aye
	Mr. Sinnott	- aye
	Dr. Garg	- aye
	Dr. Steinbergh	- aye

The motion carried.

Copies of Dr. Mathew's document were distributed to the Board and read at this time.

MR. SINNOTT MOVED THAT THE BOARD ADOPT AN ORDER WHICH BEGINS BY RECITING THAT THE



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EXCERPT FROM THE MINUTES OF JANUARY 12, 1994
IN THE MATTER OF VARUGHESE P. MATHEW, D.O.

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BOARD HAS CONSIDERED THE DECISION OF THE TENTH DISTRICT COURT OF APPEALS, RENDERED ON NOVEMBER 5, 1992, IN THE CASE OF MATHEW V. STATE MEDICAL BOARD OF OHIO, CASE NO. 92AP-199 AND CASE NO. 92AP-243. THE BOARD BASES ITS ORDER IN THIS INSTANCE EXCLUSIVELY ON CONSIDERATION OF THE CASES OF PATIENTS 1, 2, AND 4 IN THE COURT OF APPEALS DECISION, AND NOT ON THE CASE OF PATIENT 3. THE BOARD'S ORDER SHALL REITERATE THE PROPOSED ORDER IN THE HEARING EXAMINER'S REPORT AND RECOMMENDATION OF SEPTEMBER 4, 1990. DR. GARG SECONDED THE MOTION.

Mr. Sinnott noted that the Board doesn't have before it a Proposed Order that the Board can simply move adoption of in this instance. One has to be fashioned at this time. He believes the Order in the Hearing Examiner's Report and Recommendation is the one the Board should adopt.

Mr. Sinnott stated that the motion states that the Board has considered what the Court of Appeals has said, is basing its Order only on those patient cases the Court of Appeals says it can consider, and is adopting its previous Order on the basis of those three cases.

Dr. Agresta spoke in support of the motion, stating that the Order is appropriate in this case.

A roll call vote was taken on Mr. Sinnott's motion:

ROLL CALL VOTE:	Dr. O'Day	- aye
	Mr. Albert	- abstain
	Dr. Stienecker	- aye
	Dr. Gretter	- aye
	Dr. Stephens	- aye
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Ms. Noble	- aye
	Mr. Sinnott	- aye
	Dr. Garg	- aye
	Dr. Steinbergh	- aye

The motion carried.

Dr. and Mrs. Mathew asked what the Order is. Dr. Stephens stated that the Board has adopted the same Order. Dr. Mathew thanked the Board and stated that he would be seeing them again because what they have done is totally illegal. What the Assistant Attorney General said was also illegal. He will be fighting this in Court. If the Board believes Ms. Sage's report, good luck to it.

IN THE COURT OF COMMON PLEAS ^{STATE MEDICAL BOARD}
FRANKLIN COUNTY, OHIO ^{OF OHIO}

93 AUG 13 PM 3:01

VARUGHESE P. MATHEW, D.O. :
: Appellant, :
v. :
STATE MEDICAL BOARD OF OHIO :
: Appellee. :

Case No. 90CVF-10-8418

JUDGE CONNOR

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
93 AUG -9 PM 4: 22
THOMAS J. ENRIGHT
CLERK OF COURTS

JOURNAL ENTRY

Pursuant to and in conformance with the Journal Entry of Judgment entered by the Franklin County Court of Appeals on November 6, 1991, it is hereby **ORDERED** that the judgment entered in this case on February 3, 1992 is **MODIFIED** so that the penalty imposed by the Court is hereby **VACATED** and the matter is hereby **REMANDED** to the State Medical Board for redetermination of the penalty or sanctions to be imposed upon Dr. Mathew.

IT IS SO ORDERED.

JUDGE JOHN A. CONNOR

cc: Susan C. Walker, AAG
Varughese P. Mathew, D.O., pro se

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

1992 NOV -6 AM 10: 22

Varughese P. Mathew, D.O., :

Appellant-Appellant, :

v. :

The State Medical Board of Ohio
et al., :

Appellees-Appellees. :

Varughese P. Mathew, D.O., :

Appellant-Appellee, :

v. :

The State Medical Board of Ohio
et al., :

Appellees-Appellants. :

No. 92AP-199

(REGULAR CALENDAR)

90CVF10-8418

90CVF10-8418

No. 92AP-243

(REGULAR CALENDAR)

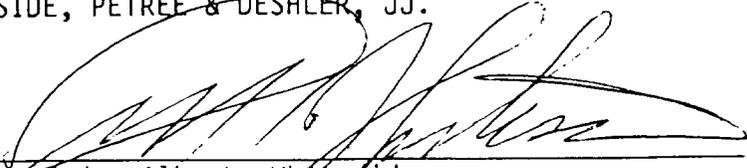
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JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on November 5, 1992, the assignments of error of appellant Dr. Mathew are overruled, as is the second assignment of error of the State Medical Board, but the first assignment of error of the State Medical Board is sustained. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed with respect to all issues other than the modification of the penalty imposed upon Dr. Mathew, as to which the judgment is reversed, and this cause is remanded to that court with instructions to modify its order so as to remand the matter to the State Medical Board of Ohio for redetermination of the penalty or sanctions to be imposed upon Dr. Mathew.

WHITESIDE, PETREE & DESHLER, JJ.

By


Judge Alba L. Whiteside

cc: Varughese P. Mathew
Susan C. Walker

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

NOV 9 1992

Varughese P. Mathew, D.O.,	:	
Appellant-Appellant,	:	
v.	:	No. 92AP-199
The State Medical Board of Ohio	:	(REGULAR CALENDAR)
et al.,	:	
Appellees-Appellees.	:	
Varguhese P. Mathew, D.O.,	:	
Appellant-Appellee,	:	
v.	:	No. 92AP-243
The State Medical Board of Ohio	:	(REGULAR CALENDAR)
et al.,	:	
Appellees-Appellants.	:	

O P I N I O N

Rendered on November 5, 1992

Varughese P. Mathew, pro se.

*Lee Fisher, Attorney General, and Susan C. Walker, for
The State Medical Board of Ohio et al.*

APPEALS from the Franklin County Common Pleas Court.

WHITESIDE, J.

These appeals are from a judgment of the Franklin County Common Pleas Court modifying a decision of the State Medical Board of Ohio ("board") suspending the license of Varughese P. Mathew to practice osteopathic medicine in Ohio. Case No. 92AP-199 is an appeal by Dr. Mathew from the common pleas court judgment to the extent that it affirmed the action of the board and imposed sanctions against Dr. Mathew. Unfortunately, Dr. Mathew fails to raise specific assignments of error in his brief on appeal, nor does his brief otherwise comport with the appellate rules. As heading portions of his brief, he does refer to his entitlement to "[a] fair and impartial hearing and a fair and impartial report," and states that "[t]he laws of the administrative hearing and the report and recommendations of the Ohio State Medical Board gives the government excessive power, and violates due process of law," and that "[t]he Ohio State Medical Board, the decisionmaker accepted a report and recommendations, and conclusions not supported by evidence. ***" In his conclusion part of his brief, he states that "[t]he Medical Board's Orders are not supported by reliable, probative, and substantial evidence ***." Accordingly, we construe this as the assignment of error, namely that the evidence does not support the determination of the board since we find no procedural due process issue raised.

Case No. 92AP-243 is an appeal by the board from that portion of the judgment of the common pleas court modifying the decision of the board and specifically that portion finding that the decision of the board is not supported

by reliable, probative and substantial evidence with respect to patient 3. Although the board labels its appeal as a "cross-appeal," it apparently seeks affirmative relief irrespective of the court's disposition of the appeal of Dr. Mathew. In support of its appeal, the board raises two assignments of error as follows:

"I. Once the court of common pleas determined that there was reliable, probative and substantial evidence to support three of the board's four charges, the court abused its discretion when it modified the penalty lawfully imposed by the State Medical Board of Ohio pursuant to R.C. 4731.22(B).

"II. A court of common pleas must give due deference to the administrative resolution of evidentiary conflicts therefore the common pleas court abused its discretion when it substituted its judgment for that of the State Medical Board which has broad discretion to determine the weight to be given to expert testimony."

Dr. Mathew was charged with professional conduct below the minimum standards with respect to four patients, referred to in the record only by numbers 1 through 4. Patient numbers 1 and 2 received similar treatment from Dr. Mathew, in that he performed a bilateral subcutaneous mastectomy and bilateral implantation of prosthetic devices on each. With respect to patient 1, the prosthetic used was a saline-filled, silastic prostheses implanted subcutaneously. A similar implantation was performed with respect to patient 2. There was expert testimony that implantation subcutaneously (under the skin) rather than subpectorally (under muscle) created a likelihood that the implants would later extrude and that in 1978, the time of the first of the two

operations, the appropriate method of placing a prostheses was subpectoral. Both patients later sought the advise of the same second physician. Both that physician and another expert testified that the treatment by Dr. Mathew of these two patients was below acceptable minimal medical standards.

With respect to patient 3, Dr. Mathew surgically removed a cervical lymph node from the right side of the patient's neck. Subsequently, the patient experienced pain. Dr. Mathew treated her and she consulted other physicians, none of whom apparently discovered the cause until she went to a Dr. Means who referred her to surgery because he felt the right accessory nerve might be severed. The surgery revealed that there was scarring involved in the nerve and when the scar tissue was "taken down" two nonabsorbable sutures were observed "involving the nerve." When the scarring was "lysed," the condition was corrected. A medical expert called by the board opined that the nerve was tied during the surgery Dr. Mathew performed and that the follow-up treatment was inadequate. The common pleas court found the conclusion of the board with respect to patient 3 not to be supported by reliable, probative and substantial evidence.

With respect to patient 4, Dr. Mathew performed a subtotal mastectomy of the right breast under local anesthesia in his office. There was expert testimony that Dr. Mathew's failure to offer appropriate therapy options post-operatively to the patient constituted medical care below the minimum standards of care.

As to patients 1 and 2, there was reliable, probative and substantial evidence supporting the finding of the respondent-commission. Since the court of common pleas affirmed the decision of the board upon these issues, the basic question before this court is whether the evidence construed most strongly in favor of supporting the board's decision, reasonably permits the conclusion that the board reached. The Supreme Court recently defined what is meant by reliable, probative and substantial evidence in *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, as follows:

"The evidence required by R.C. 119.12 can be defined 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." (Footnotes omitted.)

In making this determination, this court (unlike the common pleas court) does not engage in any weighing of the evidence, but instead, as stated above, must view the evidence in the light most favorable to supporting the decision reached by the board. Nevertheless, this involves a question of law for this court to determine independently of the determination of the common pleas court. On the other hand, a related question which sometimes arises is a question of whether the common pleas court abused its discretion with respect to the limited weighing of the evidence that it is required to utilize in reviewing an administrative decision upon an R.C. 119.12 appeal. Ordinarily, the abuse of

discretion test is paramount where the common pleas court has determined the decision of the administrative agency not to be supported by reliable, probative and substantial evidence.

With respect to patients 1 and 2, two medical experts testified, one a subsequent treating physician, and the other an expert called by the board to render an opinion based upon what are essentially hypotheticals gained primarily from reviewing the records of Dr. Mathew, the records of the subsequent attending physician, and hospital records. Both of these doctors rendered opinions that Dr. Mathew's treatment of both patients 1 and 2 fell well below the minimum standard of medical care. On the other hand, Dr. Mathew did present evidence, including his own testimony and that of other medical experts which, if accepted by the board as a basis for its decision, would have resulted in a determination that Dr. Mathew's treatment of the two patients did not fall below the minimum acceptable standards.

Dr. Mathew, in his reply brief, complains that the board relied upon a recommendation of a hearing examiner who is "medically unqualified to evaluate the evidence" so that all the examiner "could hope for is that the State's witnesses were telling the truth." This is not a foundation for error. The hearing examiner need not be a medical expert, but rather, the hearing examiner need only be capable of evaluating the testimony of the various medical experts. The medical opinions come from the medical experts, and the trier of fact (the board) was entitled to determine the credibility of the witnesses and the weight

to be given to their testimony. The fact that the board adopted the hearing examiner's recommendation does not indicate that the board did not fulfill its function of reviewing the evidence as well as the report and recommendations of the hearing examiner in reaching this determination.

Dr. Mathew apparently contends that each medical expert witness' testimony must be independently supported by "medical evidence." However, it is only necessary that the medical expert's opinion be based upon factual evidence, not medical evidence, that is, factual evidence as to what actually occurred in the treatment, the condition of the patient, and that which Dr. Mathew did or did not do with respect to such treatment. For example, Dr. Mathew contends that the evidence that insufficient breast tissue was removed during his surgery is inaccurate. However, in the operative report by the doctor who removed the prosthetic implants placed by Dr. Mathew, it is stated in part:

"It was noted, however, on removing the prosthetics, that breast tissue appeared to be present in both breasts in a circumferential pattern so that it appeared that in the subcutaneous mastectomy, the breast was largely removed in a central area much like the hole of a donut leaving a ridge of breast tissue particularly in the upper half of the circumference of the breast. This gave a somewhat crater like appearance to the breast once the prosthetic was removed with the nipple being the thinnest area, and being depressed in sort of a valley on both sides."

Without detailing the extensive opinion evidence rendered by two physicians that Dr. Mathew's treatment of patients 1 and 2 fell below the minimum medical acceptable standard, it is sufficient to state that the opinions of those

two doctors were properly accepted by the board as a predicate for its determination, and thus, the decision is supported by reliable, probative and substantial evidence, and is not contrary to law. Dr. Mathew does disagree and he testified to the contrary at the hearing. However, the board was not required to accept Dr. Mathew's testimony, but instead, was entitled to accept the medical testimony of the other doctors as a predicate for its determination.

The finding with respect to patient 4 presents a more difficult issue. Here, the hearing officer found that:

"*** Although Dr. Mathew's testimony indicated that he might have had valid reason for not providing Patient 4 with the standard treatment for breast cancer, his failure to document those reasons constitute failure to conform to minimal standards of care. Further, Dr. Mathew's testimony indicated that he unilaterally made the decision for non-treatment, without giving Patient 4 enough information to determine her options and to make an informed choice as to whether or not she wanted to pursue treatment. Such conduct also constitutes a departure from minimal standards of care of physicians under similar circumstances."

Dr. Falcone expressed his opinion with respect to Dr. Mathew's treatment of patient 4 falling below minimum standards of care as follows (Vol. I, Tr. 58):

"A. Although there are frequently mitigating circumstances that prevent a physician from doing optimal therapy, and this lady may have clearly fallen into that perview [sic], she was old, she was sickly. She sounded like she didn't want to do much of anything. I think that as physicians we all need to and do offer the appropriate therapy and options and if a patient declines, then the patient declines, but I have no evidence that he did that.

"***

"I'm not saying he didn't, I just have only the records in front of me and there's no evidence in the records that he did that."

On cross-examination, Dr. Falcone testified (Vol. I, Tr. 101):

"A. That's my primary -- my criticism. I have some questions about the amount of local anesthetic, the operation etc., but my main criticism is in the post op period. She did not have an adequate operation for the cancer. There is no documentation that the options were discussed or that she had any further therapy or intervention from the standpoint of cancer. That's my main criticism from the standpoint of minimal standards."

The doctor then admitted that if Dr. Mathew had discussed these matters with the patient with respect to her options and also discussed the issue with a radiologist and oncologist as to whether radiation therapy would be appropriate, and they advised that it would not be under the circumstances, then his opinion as to whether Dr. Mathew's treatment of patient 4 fell below the minimal standard would be different. Dr. Mathew expressly testified that he had in fact discussed patient 4's treatment options with other physicians, including a radiation therapist who recommended no radiation treatment because of the patient's poor physical condition. By findings of fact 26, the hearing examiner's report recommended a finding (which apparently was adopted by the board) that "[t]hese facts are established by the testimony of Dr. Mathew ***." However, the same finding states that "*** Dr. Mathew testified that he had told Patient 4 that she had cancer and she shouldn't have any further treatment for

it. He stated that Patient 4 had never had any ideas or questions about treatment options ***." Dr. Mathew testified that he took this position (Vol. II, Tr. 291):

"A. Because in my medical and surgical opinion, she should not have any option because it's deleterious to her well being and her health. One of the axiom in medical practice, you don't want to kill a patient. You help them to live as long as you can, and this is what I tried to do.

"***

"She never asked me any options or any questions, no ideas, no options, any options."

This points out a difference of medical opinions between Dr. Mathew and Dr. Falcone as to the appropriate minimum medical standard with respect to advising a patient even one of the age and condition of patient 4. Accordingly, to the extent that the board found that Dr. Mathew's failure to involve the patient in the determination of post-operative options fell below the minimum standard of medical care, it is supported by reliable, probative and substantial evidence, namely the opinion testimony of Dr. Falcone. However, to the extent that the finding suggests that the treatment itself fell below standard treatment for breast cancer, it is not supported by reliable, probative and substantial evidence. This does not involve a question of fact, but the internal inconsistency within the examiner's report adopted by the board, making a finding that Dr. Mathew did in fact consult with other physicians and received the type of advise which Dr. Falcone indicated would change his opinion as to whether the

minimal standard of care was met in this regard. Since this case necessarily will be remanded to the board, it may evaluate the effect of the limitation of the finding with respect to patient 4 upon such remand. Nevertheless, the overall board's decision with respect to Dr. Mathew's treatment falling below the minimum standard of care with patients 1, 2 and 4 is supported by reliable, probative and substantial evidence, and is in accordance with law. Nor was there any abuse of discretion on the part of the common pleas court in weighing the evidence. Accordingly, Dr. Mathew's objections, deemed assignments of error, are not well-taken.

By its first assignment of error, the board contends that the common pleas court abused its discretion in modifying the penalty imposed by the board because the common pleas court determined that there was reliable, probative and substantial evidence to support three of the board's four charges. The board's order first revoked Dr. Mathew's certificate to practice medicine and then stayed the revocation and suspended Dr. Mathew's certificate for an indefinite period of time. Despite the somewhat convoluted language of the order, the net result is that Dr. Mathew's certificate to practice medicine is suspended for an indefinite period. However, part two of the order sets forth three conditions that must be present before the board will consider reinstatement: first, Dr. Mathew must submit an application and pay the appropriate fees; second, Dr. Mathew must take and pass the SPEX examination or another examination the board deems appropriate to assess Dr. Mathew's clinical competency; and third, if Dr.

Mathew has not engaged in the active practice of medicine for a period in excess of two years immediately preceding his application, the board may require additional evidence of Dr. Mathew's fitness to resume practice. Part three of the order provides that, if reinstated, Dr. Mathew's certificate should be limited in that he will not be permitted to engage in the practice of surgery with certain specified exceptions. Part four provides that upon reinstatement, Dr. Mathew's certificate shall be subject to certain conditions outlined in the order, including appearing before the board every six months for interview, completing a course approved by the board as to maintenance of records and being subject to the supervision of a monitoring physician.

The common pleas court not only found that the board's decision was partially unsupported by reliable, probative and substantial evidence, but made an express finding that the penalty imposed likewise was not supported by reliable, probative and substantial evidence. The common pleas court modified the order so as to continue the certificate of Dr. Mathew to practice medicine other than the practice of surgery which was limited to the same type set forth in the board order, but provided that once Dr. Mathew passes the SPEX examination, his certificate to practice surgery would be reinstated; however, upon reinstatement, Dr. Mathew would be subject to the conditions set forth in paragraph 4 of the board's order.

It is premature for either the board or the common pleas court to determine the conditions necessary to be implemented upon Dr. Mathew's

reinstatement if he be reinstated, either to the practice of medicine as contemplated by the board's order or the practice of surgery as contemplated by the court's order. Although R.C. 119.12 does confer upon a common pleas court finding a decision of an administrative agency is in part unsupported by reliable, probative and substantial evidence authority to modify the order so that it is supported by such evidence and is in accordance with law, it was not appropriate for the common pleas court unqualifiedly to reinstate Dr. Mathew's certificate to practice medicine except with respect to surgery. The board's order in effect was an immediate suspension of Dr. Mathew's certificate to practice medicine, including surgery, but with a proviso that Dr. Mathew's certificate could be reinstated, without a waiting period, upon Dr. Mathew's applying for reinstatement, paying the appropriate fees and passing the SPEX examination, or some other examination designated by the board. Upon reinstatement, Dr. Mathew's certificate would be permanently limited to practice other than surgery with certain types of surgery permitted. This is not in accordance with the provisions of R.C. 4731.22. However, the statute does contemplate that the board may make some additional provision for demonstration that the suspended physician is properly able to resume practice.

Under the circumstances, the appropriate action by the common pleas court would be to vacate the board's penalty and to remand the cause to the board for reconsideration of the penalty in light of the insufficiency of the evidence with respect to patient 3 and the borderline basis with respect to patient 4.

To this extent, the board's first assignment of error is well-taken and the judgment of the Franklin County Common Pleas Court will be modified to provide for a vacation of the penalty assessed by the board other than the limitation upon the practice of surgery and a remand to the board for further consideration and determination of the sanction in light of the action of the common pleas court and the decision of this court.

By the board's second assignment of error, the board contends that the common pleas court erred in finding the evidence insufficient to support the board's determination as to patient 3, the board contending that the trial court improperly substituted its judgment for that of the board.

The common pleas court is not required to construe the evidence most strongly in favor of the board's determination upon an R.C. 119.12 appeal, but instead, must engage in a limited weighing of the evidence in order to determine whether the decision of the administrative board is supported by reliable, probative and substantial evidence. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108. The board's determination with respect to patient 3 was predicated upon the testimony of Dr. Falcone. He testified that the post-surgical treatment of this patient by Dr. Mathew fell below the minimum standard of care. He predicated this determination upon the eventual finding of scar tissue involving a nerve and his statement that "the nerve was tied in two places." (Vol. I, Tr. 49.) In addition, he described the corrective measures as "I think basically what he did was remove the sutures, remove the scar tissue

and free the nerve that was around the scar tissue with hopes the nerve would regenerate." (Vol. I, Tr. 50.) With respect to the departure from the standard of care, he testified that "I believe that the main departure was failure to recognize and appropriately treat or refer the patient for a known complication of the surgery he performed." (Vol. I, Tr. 51.) On cross-examination, Dr. Falcone stated that:

"*** The scar tissue was really not the main reason the nerve was having trouble. The main reason was it had two sutures tied around it. They were constricting it. The scar tissue was just a reaction to the fact she had been operated on and had sutures around her nerve, frankly. ***" (Vol. I, Tr. 92.)

After patient 3 terminated her patient relationship with Dr. Mathew, she consulted several physicians, and finally a Dr. Means, who theorized that a nerve had been cut during surgery and was causing her problem. As a result of this diagnosis by Dr. Means, followed by other evaluation, surgery was performed by a Dr. Sawaya. His operative record includes the following statement:

"The nerve was followed proximally and appeared to be coming from the undersurface of the sternocleidomastoid muscle and in that area was normal. When followed more distally, a scarring involving the nerve was immediately seen and further, more distally, the nerve could be seen again within normal tissues. In between the two areas, the scar tissue was taken down and two black stitches were seen involving the nerve at the area of the scarring. These stitches appeared to be either silk or Nurlon and appeared to be of the nonabsorbable type of stitches. *The scarring was then lysed under microscopic magnification and lighting and with gentle irrigation.* A vessel loop was passed around the nerve for mobilization of the nerve. *Once the scarring was lysed, the nerve appeared to in continuity.* *** At this point, the

*proximal end of the nerve was stimulated with a nerve stimulator and good trapezius muscle contraction was noted. Stimulation of either one of the branches also led to trapezius muscle contraction. The nerve under the microscope could be seen in continuity indicating that there was no section of the nerve during previous operation. ***"*

There is no indication in Dr. Sawaya's report either that the two stitches were tied around the nerve or that they were the cause of the problem. Instead, his statement was that after the scarring was lysed, the nerve was in continuity. In light of the report of Dr. Sawaya, the common pleas court could reasonably discount the opinion of Dr. Falcone, which was predicated not upon the express findings of Dr. Sawaya, but instead, upon Dr. Falcone's interpretation of what the findings should have been. Although the word "involved" may signify encircling, it also can signify only affecting. More importantly, Dr. Sawaya did not indicate that it was the sutures rather than the scarring that was the primary cause of the problem, and did not state that he cut the sutures in his report, but rather, indicates that the lysing of the scarring alleviated the nerve problem. In short, there was a reasonable basis for the common pleas court to discount the opinion of Dr. Falcone and accept the opinion of Dr. Cooperman who testified that Dr. Mathew's care with regard to patient 3 did not fall below the minimum standard in light of the limited weighing of the evidence that the common pleas court must engage in order to determine whether the board's order was supported by reliable, probative and substantial evidence. Thus, we find no

abuse of discretion on the part of the trial court, and the board's second assignment of error is not well-taken.

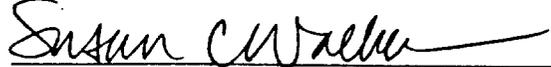
For the foregoing reasons, the assignments of error of appellant Dr. Mathew are overruled, as is the second assignment of error of cross-appellant State Medical Board, but the first assignment of error of the State Medical Board is sustained. Accordingly, the judgment of the Franklin County Common Pleas Court is affirmed with respect to all issues other than the modification of the penalty imposed upon Dr. Mathew, as to which the judgment is reversed, and this cause is remanded to that court with instructions to modify its order so as to remand the matter to the State Medical Board of Ohio for redetermination of the penalty or sanctions to be imposed upon Dr. Mathew.

*Judgment affirmed in part and reversed in part;
and cause remanded with instructions.*

PETREE and DESHLER, JJ., concur.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice of Cross Appeal was sent via regular U.S. Mail this 25th day of February, 1992 to Varughese P. Mathew, D.O., 145 Northwest Street, Bethel, Ohio 45106.



SUSAN C. WALKER (0046714)
Assistant Attorney General

3485S

IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO
and
STATE OF OHIO
THE STATE MEDICAL BOARD

FILED
1992 FEB 18 AM 10:27

92 AP 199

Varughese P. Mathew, D.O.
600 West Plane Street
Bethel, Ohio 45106

Appellant

Case No. 90CVF10-8418

-v-

The State Medical Board of Ohio
77 South High Street
17th Floor
Columbus, Ohio 43215

and

Henry G. Cramblett, M.D., Secretary
The State Medical Board of Ohio
77 South High Street, 17th Floor
Columbus, Ohio 43215

Appellees

FILED
COURT OF APPEALS
FRANKLIN COUNTY, OHIO
1992 FEB 18 AM 10:27
THOMAS J. ENRIGHT
CLERK OF COURTS
COMMISSIONER'S COURT
FRANKLIN CO., OHIO
1992 FEB 18 AM 10:27
THOMAS J. ENRIGHT
CLERK OF COURTS

NOTICE OF APPEAL

1. Appellant Varughese P. Mathew, D.O., pursuant to Section 119.12 of the Ohio Revised Code, hereby gives notice of his appeal to the Court of Appeals of Franklin County, Ohio. Section 4731-13, (attached), 119.12, Ohio Revised Code violates Appellant's Constitutional rights to a fair and impartial hearing, infliction of cruel and unusual punishment, and excessive power of the government, Amendments 6, 8, and 9. Section 119.12, of the Ohio Revised Code gives the government the power in this adjudicatory hearing to destroy a person's life, as well as his life's work, and therefore Appellant is entitled to due process of law. The Constitution is a checks and balance system that assures protection to accuser and accused to have equal rights, and due process of law. A person's name is their personal property, it violates their Constitutional rights to have their name seized, and used without their consent, and not for their benefit, but to mislead.

2. Appellant is a physician, licensed since 1968 to practice medicine in the State of Ohio, with an office located at 600 West Plane Street, Bethel, Ohio 45106. Appellant is a general surgeon and also engages in general medicine practice.

3. Appellees are the State Medical Board of Ohio and its Secretary. Appellees are agents of the government of the State of Ohio pursuant to Chapter 4731 of the Ohio Revised Code.

4. The reason for appeal, this is a case regarding minimal medical standards. Appellant was unfairly denied the right and opportunity to properly defend himself. None of the accusations are supported by evidence. It is a violation of Appellant's Constitutional rights to due process and fair hearing and equal protection of justice.

5. The grounds for appeal are as follows:

- (a) Amendment 6 insures the right to a trial by and by an impartial and fair jury. Section 4731-13-03, violates this right, it gives the hearing examiner the authority to conduct the hearing, evaluate all the material, report the facts to the Board, and make recommendation for Board Orders.
- (b) This case is a case of medical standards, the hearing examiner in this case is not qualified to evaluate medical material and decide what the medical standard is. The hearing examiner does not have the necessary medical experience, or medical training that would qualify the hearing examiner to comprehend and evaluate the medical material that must be reviewed to reach a decision and present the Board with a reliable report and recommendation.

- (c) The government violated the Appellants Constitutional right to an impartial hearing by not providing a qualified hearing examiner to comprehend and evaluate the medical facts in this case.
- (d) The hearing examiner's life work is not similar to the Appellants, and therefore this makes the hearing examiner unqualified to write a medical standards report and therefore, equally unqualified to make any recommendations to the Board.
- (e) The Board accepted a report and recommendation without question from an unqualified hearing examiner regarding medical standards.
- (f) The Board violated the Appellant's Constitutional rights by accepting a report that was not impartial or fair, and refused evidence from the Appellant: who is qualified by his life's work to report on medical evidence.
- (g) 4731-13-03, (4) (The hearing examiner) Make ruling on the admissibility of evidence. 4731-13-03, (4) is unconstitutional, this allows important medical evidence to be suppressed and the hearing examiner the authority to pick and choose evidence.
- (h) 4731-13-03, (7) (The hearing examiner) Request briefs before, during or following the hearing, as well as suggested findings, orders, and conclusions of law within such time limits as the attorney hearing examiner may determine:, 4731-13-03, (7) totally violates due process of law. The government empowers the hearing examiner with all the rights, even accepting briefs, suggested facts, orders and conclusions. The Appellant is not given the opportunity to discover what is in the briefs, where the suggested finding came from,

or these additional facts that are incorporated into the hearing examiners report and recommendations. Not providing Appellant the right to discover all material in the government's file, gives the government excessive power, and thus the Appellant can receive unwarranted cruel and undo punishment that is not supported by evidence. This violates the Appellant's Constitutional rights. Amendment 8.

(i) 4731-13-15 Reports and recommendations (A) Within thirty days following the close of an adjudication hearing conducted pursuant to Chapter 119. of the Revised Code, the attorney hearing examiner shall submit a written report setting forth proposed findings of facts and conclusions of law and a recommendation of the action to be taken by the board. The hearing shall not be considered closed until such time as the record is complete, as determined by the attorney hearing examiner.

4731-13-15 Report and recommendations (C) The respondent's representative of records may, within ten days of his receipt of the attorney hearing examiner's report and recommendation, file written objections to the report and recommendation. Only those objections filed in a timely manner shall be considered by the board before approving, modifying, or disapproving the attorney hearing examiner's recommendation.

4731-13-15, (A) (C), is unconstitutional, the government is given thirty days, and all the evidence, materials, testimonies, ect. that the government has collected before, during and after the hearing to write a report and make recommendations. The Appellant receives only the report and recommendations and

ten days to respond. The government has empowered the hearing examiner with the authority to withhold evidence from the Appellant used to make the hearing examiner's report and recommendations. thus trapped the Appellant into a position where the Appellant cannot defend himself properly. Amendment 9.

(j) Section 119.12 of the Ohio Revised Code's laws permits the government to violate the Appellant's Constitutional rights, and in doing so Appellant has been submitted to discrimination, prejudice, harassment, invasion of privacy, false documentation, total disregard for evidence, prejudice witness, distortion of facts, undo hardship on patients, family, as well as mental, physical and financial hardship.

6. The Judgment Entry of February 3, 1992, is deceptive.

(a) The Judgment was not Proposed by Appellant, or anyone or any party representing Appellant.

(b) Time stamped Entry was presented to Court that notified Court that two days before January 31, 1992, the party presenting the Judgment Entry on January 31, 1992, no longer represented the Appellant, nor Appellant's interest.

(c) The notation states Proposed by Appellant is deceptive, and thereby states a fact that is not true. (attached true copies)

7. A copy of this Notice of Appeal is filed with the Court of Appeals, Franklin County, Ohio, in accordance with Section 119.12 of the Ohio Revised Code.

Respectfully submitted,

Varughese P. Mathew *DM*
Varughese P. Mathew, D.C.
600 West Plane Street
Bethel, Ohio 45106

Chapter 4731-13

Conduct of Hearings

Promulgated pursuant to RC Ch 119

4731-13-01	Representatives; appearances; communications; applicability
4731-13-02	Filing request for hearing
4731-13-03	Authority and duties of attorney hearing examiners
4731-13-04	Consolidation
4731-13-05	Intervention
4731-13-06	Continuance of hearing
4731-13-07	Motions
4731-13-08	Filing
4731-13-09	Service
4731-13-10	Computation and extension of time
4731-13-11	Notice of hearings
4731-13-12	Transcripts
4731-13-13	Subpoenas for purposes of hearing
4731-13-14	Mileage reimbursement and witness fees
4731-13-15	Reports and recommendations
4731-13-16	Reinstatement of certificate
4731-13-17	Settlements, dismissals, and voluntary surrenders
4731-13-18	Exchange of documents and witness lists
4731-13-19	Prehearing conference
4731-13-20	Depositions and transcripts of prior testimony
4731-13-21	Prior action by the state medical board
4731-13-22	Stipulation of facts
4731-13-23	Witnesses
4731-13-24	Conviction of a crime
4731-13-25	Evidence
4731-13-26	Broadcasting and photographing administrative hearings

4731-13-01 Representatives; appearances; communications; applicability

(A) As used in Chapter 4731-13 of the Administrative Code, "respondent" shall be defined as the person who is requesting or has requested a hearing as provided in Chapter 119. of the Revised Code.

(B) The respondent may represent himself or may be represented by an attorney admitted to the practice of law in Ohio. If the respondent does represent himself, he shall be deemed the representative of record for purposes of Chapter 4731-13 of the Administrative Code.

(C) The respondent is not required to personally appear at any hearing provided he has not been subpoenaed and has authorized his representative to represent him in all facets of a hearing before the board.

(D) The respondent or his representative may present his position, arguments, or contentions in writing rather than personally appearing at any hearing provided the respondent has not been subpoenaed.

(E) The representative of record for the respondent shall enter his appearance in writing.

(F) The representative of record from the office of the attorney general shall enter his appearance in writing.

(G) One who has entered an appearance as representative remains the representative of record unless and until a written withdrawal is filed with the state medical board.

(H) Except as otherwise provided under Chapter 119. of the Revised Code, communications from the board or its attorney hearing examiner shall be sent to the representative of record.

(I) At no time between the issuance of a notice of opportunity for hearing pursuant to Chapter 119. of the Revised Code and final disposition by the board in an adjudicatory matter shall a respondent, any representative or any member of the medical board's investigative or enforcement staff communicate or cause another to communicate as to the merits of the case with an attorney hearing examiner or a member of the state medical board who will be participating in the adjudication of the matter except:

(1) In the course of the adjudication hearing;

(2) By telephone conference between the attorney hearing examiner and all representatives of record;

(3) As otherwise authorized by statute or by this chapter.

(J) Except as otherwise provided under this chapter or by statute, no attorney hearing examiner or member of the state medical board shall initiate or consider *ex parte* communications concerning a pending or impending adjudicatory proceeding. Nothing contained herein, however, shall preclude the attorney hearing examiner from nonsubstantive [*sic*] *ex parte* communications on procedural matters and matters affecting the efficient conduct of adjudicatory hearings.

(K) The attorney hearing examiner and members of the state medical board shall disclose on the record the source and substance of any *ex parte* or attempted *ex parte* communications. That disclosure shall be made at an adjudicatory hearing or at a board meeting prior to deliberation on a pending or impending adjudicatory proceeding.

(L) Except as otherwise provided under this chapter or by statute, a rule promulgated under this chapter shall apply only to those administrative proceedings for which the notice of opportunity for hearing was mailed to respondent, or his representative, on or after the effective date of the particular rule.

(M) If any provision of the rules in this chapter is held or if the application of any provision of the rules in this chapter to any person or circumstance is held invalid, the invalidity does not affect any other provision of the rules in this chapter, or the application of

any other provision of the rules in this chapter, that can be given effect without the invalid provision or application, and, to this end, the provisions of the rules in this chapter are hereby declared severable.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1315)

CROSS REFERENCES

RC 119.07, Notice of hearing; contents; notice of order of suspension of license; publication of notice; effect of failure to give notice

RC 119.09, Adjudication hearing

RC 4731.05, Administrative procedure act applies; executive director; training of investigators

RC 4731.23, Hearing examiner for state medical board; procedure for hearings

4731-13-02 Filing request for hearing

(A) In order to request a hearing under Chapter 119. of the Revised Code, a respondent or his representative must, in accordance with rule 4731-13-08 of the Administrative Code, file in writing a statement requesting such adjudication hearing within thirty days of the date of mailing of the board's notice of opportunity for hearing, or of personal service in the event of summary suspension, whichever occurs first. The date of mailing shall be the date appearing on the certified mail receipt.

(B) A respondent or his representative properly filing a request for an adjudication hearing shall be entitled to such adjudication hearing within fifteen days but not sooner than seven days after such request has been filed unless both representatives agree otherwise or a continuance is granted pursuant to section 119.09 of the Revised Code and rule 4731-13-06 of the Administrative Code.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1316)

CROSS REFERENCES

RC 119.07, Notice of hearing; contents; notice of order of suspension of license; publication of notice; effect of failure to give notice

RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-03 Authority and duties of attorney hearing examiners

(A) Adjudication hearings shall be conducted before an attorney hearing examiner pursuant to section 4731.23 of the Revised Code.

(B) All hearings shall be open to the public, but the hearing examiner conducting a hearing may close the hearing to the extent necessary to protect compelling interests and rights or to comply with statutory requirements. In the event the hearing examiner determines to close the hearing, the hearing examiner shall state the reasons therefor in the public record.

(C) The hearing examiner shall conduct hearings in such a manner as to prevent unnecessary delay, maintain order, and ensure the development of a clear and adequate record.

(D) The authority of the attorney hearing examiner shall include, but not be limited to, authority to:

(1) Administer oaths and affirmations;

(2) Order issuance of subpoenas and subpoenas *duces tecum* to require the attendance of witnesses at hearings and depositions and to require the production of evidence for hearings and depositions;

(3) Examine witnesses and direct witnesses to testify;

(4) Make rulings on the admissibility of evidence;

(5) Make rulings on procedural motions, whether such motions are oral or written;

(6) Hold prehearing conferences pursuant to rule 4731-13-19 of the Administrative Code;

(7) Request briefs before, during or following the hearing, as well as suggested findings, orders, and conclusions of law within such time limits as the attorney hearing examiner may determine;

(8) Prepare entries, findings, orders, or reports and recommendations pursuant to rule 4731-13-15 of the Administrative Code;

(9) Request preparation of entries, findings, or orders;

(10) Make rulings on requests to broadcast, record, televise or photograph the hearing;

(11) Take such other actions as may be necessary to accomplish the purposes of paragraph (C) of this rule;

(12) Determine the order in which any hearing shall proceed.

(E) The authority of the attorney hearing examiner shall not include authority to:

(1) Grant motions for dismissal of charges;

(2) Modify, compromise, or settle charges or allegations.

(F) The attorney hearing examiner shall have such other powers, duties, and authority as are granted by statutes or rules.

(G) All rulings on evidence and motions and on any other procedural matters shall be subject to review by the board upon presentation of the proposed findings of facts and conclusions of law of the attorney hearing examiner. When such rulings warrant, the matter may be remanded to the attorney hearing examiner.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1316)

CROSS REFERENCES

RC 119.09, Adjudication hearing

RC 4731.05, Administrative procedure act applies; executive director; training of investigators

RC 4731.22, Grounds for refusal to grant and revocation of certificate; hearing and investigation; report; medical examinations; summary or automatic suspension

RC 4731.23, Hearing examiner for state medical board; procedure for hearings

4731-13-04 Consolidation

Upon motion by any representative of record, the attorney hearing examiner may consolidate two or more hearings into a single hearing.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1316)

CROSS REFERENCES

RC 119.08, Date, time, and place of adjudication hearing
 RC 119.09, Adjudication hearing
 RC 4731.05, Administrative procedure act applies: executive director; training of investigators
 RC 4731.23, Hearing examiner for state medical board; procedure for hearings

4731-13-05 Intervention

Petitions to intervene shall not be permitted.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1316)

CROSS REFERENCES

RC 119.07, Notice of hearing; contents; notice of order of suspension of license; publication of notice; effect of failure to give notice
 RC 4731.05, Administrative procedure act applies: executive director; training of investigators

4731-13-06 Continuance of hearing

(A) Except in matters of summary suspension under division (D) or automatic suspension under division (F) of section 4731.22 of the Revised Code, the board, or the board through its attorney hearing examiner, shall initially continue a hearing upon its own motion in order to more efficiently and effectively conduct its business unless the circumstances establish that a continuance would not serve the interest of justice.

(B) The attorney hearing examiner may continue a hearing upon the motion of a representative of record. The motion must specify the reason for the request.

(1) Motions for continuance shall be made in the manner provided in rules 4731-13-07 and 4731-13-08 of the Administrative Code, except that motions for continuance shall be filed not later than five days prior to the scheduled date of hearing.

(2) The board shall make a reasonable attempt to contact all of the witnesses subpoenaed and inform them of any continuance.

(C) Hearings shall not be continued upon motion by a representative unless a showing of reasonable cause and proper diligence is presented. Before granting any continuance, consideration shall be given to harm to the public which may result from delay in proceedings. In no event will a motion for a continuance by a representative requested less than five days prior to the scheduled date of the hearing be granted unless it is demonstrated that an extraordinary situation exists which could not have been anticipated and which would justify the granting of a continuance.

(D) No continuance of an adjudicatory hearing under division (D) or (F) of section 4731.22 of the Revised Code shall be granted without the written agreement of the respondent or his representative and the board.

(E) If a continuance is granted, the attorney hearing examiner shall immediately establish a new hearing date, unless circumstances prohibit.

(F) Hearings shall not be continued due to the unavailability of a subpoenaed witness without

approval of the attorney hearing examiner. The attorney hearing examiner may hold the record open to accept a deposition in lieu of oral testimony of a subpoenaed witness. The procedures set forth in rule 4731-13-20 of the Administrative Code shall apply to any deposition taken pursuant to this rule.

(G) No adjudication hearing shall be continued for more than ninety days for the purpose of exchanging documents or witness lists to the extent provided in rule 4731-13-18 of the Administrative Code unless the board or attorney hearing examiner finds in writing that such exchange was diligently pursued but was not completed due to the unusual circumstances of the case.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1316)

CROSS REFERENCES

RC 119.08, Date, time, and place of adjudication hearing
 RC 119.09, Adjudication hearing
 RC 4731.05, Administrative procedure act applies: executive director; training of investigators
 RC 4731.22, Grounds for refusal to grant and revocation of certificate; hearing and investigation; report; medical examinations; summary or automatic suspension
 RC 4731.23, Hearing examiner for state medical board; procedure for hearings

4731-13-07 Motions

(A) Except as otherwise provided under Chapter 4731-13 of the Administrative Code or Chapter 119. of the Revised Code, all motions, unless made upon the record at the hearing, shall be made in writing. A written motion shall state with particularity the relief or order sought, shall be accompanied by a memorandum setting forth the grounds therefor, and shall be filed in compliance with rule 4731-13-08 of the Administrative Code. A proposed entry may accompany any motion. Except in cases of summary suspensions pursuant to division (D) of section 4731.22 of the Revised Code, all motions except those filed subsequent to the close of the hearing shall be made no later than fourteen days before the date of hearing unless express exception is granted by the attorney hearing examiner or by this chapter.

(B) All motions, together with supporting documentation, if any, shall be served as provided in rule 4731-13-09 of the Administrative Code.

(C) Within ten days after service of a written pre-hearing motion, or such other time as is fixed by the attorney hearing examiner, a response to that motion may be filed. A movant may reply to a response only with the permission of the attorney hearing examiner.

(D) Before ruling upon a written motion, the attorney hearing examiner shall consider all memoranda and supporting documents filed. The attorney hearing examiner shall enter a written ruling and shall issue copies to the representatives as identified under rule 4731-13-01 of the Administrative Code. The ruling on all oral motions made at hearing shall be included in the record except where the attorney hearing examiner elects to take the motion under advisement and issue a written ruling at a later time. The attorney

hearing examiner shall include in each written ruling on a motion a short statement of the reasons therefor.

(E) Except as otherwise provided in this chapter or Chapter 119. of the Revised Code, rulings on all motions filed subsequent to the issuance of the report and recommendation shall be rendered by the board or, if the board is not in session, by the president acting on its behalf.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1317)

CROSS REFERENCES

RC 119.07, Notice of hearing; contents; notice of order of suspension of license; publication of notice; effect of failure to give notice

RC 119.09, Adjudication hearing

RC 4731.05, Administrative procedure act applies; executive director; training of investigators

RC 4731.23, Hearing examiner for state medical board; procedure for hearings

4731-13-08 Filing

(A) A document is "filed" when it is received and time stamped in the offices of the state medical board.

(B) An original of any document required to be served by Chapter 4731-13 of the Administrative Code shall be filed with the state medical board not more than three days after service.

(C) All filings shall be addressed to the board to the attention of its case control officer.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1317)

CROSS REFERENCES

RC 119.07, Notice of hearing; contents; notice of order of suspension of license; publication of notice; effect of failure to give notice

RC 119.09, Adjudication hearing

RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-09 Service

(A) Any document required by Chapter 4731-13 of the Administrative Code to be served by a representative of record may be served either personally or by mail. Service shall be made upon the representative as identified in rule 4731-13-01 of the Administrative Code. Service is complete on the date of mailing or on personal service of the document.

(B) All motions and briefs shall contain the name, address, and telephone number of the person submitting the motion or brief and shall be appropriately captioned to indicate the name of the respondent.

(C) A motion shall be considered by the board or its attorney hearing examiner only if a certificate of service appears on it. Any signed statement is an acceptable certificate of service so long as it contains all of the following information:

- (1) Date of service;
- (2) Method by which service was made;
- (3) Address where service was made; and

(4) Name of the person or authority who was served.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1317)

CROSS REFERENCES

RC 119.07, Notice of hearing; contents; notice of order of suspension of license; publication of notice; effect of failure to give notice

RC 119.09, Adjudication hearing

RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-10 Computation and extension of time

(A) The date of occurrence of the event causing time to run is not counted in the computation of any time limit under Chapter 4731-13 of the Administrative Code. The last day of the period is included in the computation of the time limit. If the last day of a period is not a regular business day, the time period runs through the end of the next regularly scheduled business day.

(B) The board or its attorney hearing examiner may extend the time for filing or responding to motions and briefs.

(1) Requests for extension of time shall be made in writing and filed as provided in rule 4731-13-08 of the Administrative Code prior to the expiration of any applicable time limit.

(2) Requests for extension of time shall be addressed to the attention of the board's case control officer.

(3) Requests for extension of time shall be served as provided in rule 4731-13-09 of the Administrative Code.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1318)

CROSS REFERENCES

RC 119.07, Notice of hearing; contents; notice of order of suspension of license; publication of notice; effect of failure to give notice

RC 119.09, Adjudication hearing

RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-11 Notice of hearings

Notice specifying the date, time and place set for hearing shall be mailed by certified mail to the representatives as identified in rule 4731-13-01 of the Administrative Code.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1318)

CROSS REFERENCES

RC 119.07, Notice of hearing; contents; notice of order of suspension of license; publication of notice; effect of failure to give notice

RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-12 Transcripts

(A) Duplicate transcripts of the stenographic record taken of hearings may be obtained directly from the court reporter at the requestor's expense prior to receipt of the original transcript by the board.

(B) Upon request made to the board's case control officer, a copy of original transcripts may be reviewed at the board offices or signed out for a period of forty-eight hours. Additional copies may be prepared at the requestor's expense.

(C) Original transcripts shall not be removed from the board offices.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1318)

CROSS REFERENCES

RC 119.09, Adjudication hearing
RC 4731.05, Administrative procedure act applies; executive director; training of investigators.

4731-13-13 Subpoenas for purposes of hearing

(A) 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. Copies of such subpoenas shall be issued to the representatives as identified in rule 4731-13-01 of the Administrative Code.

(B) For purposes of a hearing conducted under Chapter 119, of the Revised Code, subpoena requests shall specify the name and address of the individual to be served and the date and time at which they are to appear. With respect to the production of books, records and papers, such request may specify a date of compliance not more than seven days prior to hearing.

(C) Except upon leave of the board or its attorney hearing examiner, subpoena requests are to be filed with the board as provided in rule 4731-13-08 of the Administrative Code at least fourteen days in advance of the requested date of compliance in order to allow sufficient time for preparation and service of the subpoenas.

(D) In the event that the number of subpoenas requested appears to be unreasonable, the board or its attorney hearing examiner may require a showing of necessity therefor, and, in the absence of such showing, may limit the number of subpoenas. Absent such a limitation, subpoenas shall be issued within five days of request. Failure to issue subpoenas within this time may constitute sufficient grounds for the granting of a continuance.

(E) After the hearing has commenced the attorney hearing examiner may order the issuance of subpoenas for purposes of hearing to compel the attendance and testimony of witnesses and production of books, records and papers. Copies of such subpoenas shall be issued to the representatives as identified in rule 4731-13-01 of the Administrative Code.

(F) Upon motion and for good cause, the attorney hearing examiner may order any subpoena be quashed. Motions to quash shall be made in the manner provided in rules 4731-13-07 and 4731-13-08 of

the Administrative Code, except that motions to quash shall be filed at least three days prior to the date of compliance. Unless a motion to quash has been granted, a witness shall attend the hearing to which he was subpoenaed. The board shall make a reasonable attempt to contact any witness whose subpoena has been quashed.

(G) Witnesses may not be subpoenaed to prehearing conferences.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1318)

CROSS REFERENCES

RC 119.09, Adjudication hearing
RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-14 Mileage reimbursement and witness fees

(A) Mileage shall be paid in the same manner as that allowed in the court of common pleas in criminal cases in the county of hearing.

(B) The respondent may not subpoena himself.

(C) Mileage and witness fees shall not be paid to anyone who fails to register at the hearing for which he was subpoenaed.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1318)

CROSS REFERENCES

RC 119.09, Adjudication hearing
RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-15 Reports and recommendations

(A) Within thirty days following the close of an adjudication hearing conducted pursuant to Chapter 119, of the Revised Code, the attorney hearing examiner shall submit a written report setting forth proposed findings of fact and conclusions of law and a recommendation of the action to be taken by the board. The hearing shall not be considered closed until such time as the record is complete, as determined by the attorney hearing examiner.

(B) A copy of such written report shall be issued to the representatives of record as identified in rule 4731-13-01 of the Administrative Code. The copy issued to the respondent's representative of record shall be accompanied by notice of the date the report and recommendation is to be considered by the board.

(C) The respondent's representative of record may, within ten days of his receipt of the attorney hearing examiner's report and recommendation, file written objections to the report and recommendation. Only those objections filed in a timely manner shall be considered by the board before approving, modifying, or disapproving the attorney hearing examiner's recommendation.

(D) Upon written request, the board may grant extensions of the time within which to file objections. In the event that the board is not in session, the president of the board may grant such extensions.

(E) The board shall consider the attorney hearing examiner's report and recommendation and any objections thereto at its next regularly scheduled meeting after the time for filing objections has passed. At that time, the board may order additional testimony to be taken or permit the introduction of further documentary evidence, or act upon the report and recommendation. For purposes of taking such additional testimony or documentary evidence, the board may remand to the attorney hearing examiner.

(F) Any motion to reopen the hearing record for purposes of introducing newly discovered material evidence which, with reasonable diligence could not have been discovered and produced at the hearing shall be made in the manner provided in rules 4731-13-07 and 4731-13-08 of the Administrative Code. Such motion to reopen shall be filed not later than ten days prior to the scheduled consideration by the board of the attorney hearing examiner's report and recommendation and any objections thereto. If such motion is filed prior to the issuance of the attorney hearing examiner's report and recommendation, the attorney hearing examiner shall rule on the motion. If such motion is filed subsequent to the issuance of the attorney hearing examiner's report and recommendation, the board shall rule upon the motion.

(G) Without leave of the board, the respondent or any representative of record shall not be permitted to address the board at the time of consideration of the attorney hearing examiner's report and recommendation. Any request for such leave shall be filed by motion no less than five days prior to the date the report and recommendation is to be considered by the board. No such leave shall be granted unless the opposing representative has been actually notified of the request and given opportunity to respond.

(H) If a request to address the board is granted, the opposing representative may also address the board.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1318)

CROSS REFERENCES

RC 119.09, Adjudication hearing
 RC 4731.05, Administrative procedure act applies; executive director; training of investigators
 RC 4731.23, Hearing examiner for state medical board; procedure for hearings

4731-13-16 Reinstatement of certificate

Any disciplinary action taken by the board pursuant to division (B) of section 4731.22 of the Revised Code, which results in a suspension from practice shall either lapse by its own terms or contain a written statement of the conditions under which the certificate may be reinstated.

Such conditions may include but are not limited to:

- (A) Submission of a written application for reinstatement;
- (B) Payment of all appropriate fees as provided in Chapter 4731. of the Revised Code;
- (C) Mental or physical examination;
- (D) Additional education or training;
- (E) Reexamination;
- (F) Practice limitations;

(G) Participation in counseling programs;

(H) Demonstration that he can resume his practice in compliance with acceptable and prevailing standards.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1319)

CROSS REFERENCES

RC 4731.05, Administrative procedure act applies; executive director; training of investigators
 RC 4731.22, Grounds for refusal to grant and revocation of certificate; hearing and investigation; report; medical examinations; summary or automatic suspension

4731-13-17 Settlements, dismissals, and voluntary surrenders

(A) Any matter which is the subject of a hearing may be settled at any time prior to the close of the hearing record. If settlement negotiations are to continue after the close of the hearing record, the representatives of record must, within ten days of the close of the hearing, jointly present the attorney hearing examiner with written notice specifying a period of time, not to exceed thirty days, for which the record is to be held open for purposes of negotiation. Such notice shall toll the attorney hearing examiner's thirty-day time period for issuance of findings of fact and conclusions of law pursuant to section 4731.23 of the Revised Code. If the attorney hearing examiner has not received appropriate written notice that a settlement agreement has been executed within the time period specified by the representatives' joint notice, the tolling of the attorney hearing examiner's thirty-day period for issuance of findings of fact and conclusions of law shall cease, no further settlement negotiations shall be undertaken, and no settlement agreement shall be executed in lieu of the issuance of a final order by the board.

(B) Settlement shall be negotiated on behalf of the state medical board by the secretary and supervising member of the state medical board. Any settlement agreement containing terms not in conformity with the disciplinary guidelines adopted by the board must have the concurrence of the board's president prior to execution.

(C) All settlement agreements shall be in writing and shall be signed by the respondent, the secretary and supervising member of the board. The representative from the office of the attorney general and the respondent's attorney, if any, shall sign the agreement in their representative capacities.

(D) Signed settlement agreements shall be submitted for ratification by the board.

(E) Authorization to enter a notice of dismissal must be received from the board's secretary and supervising member. Such a notice may be entered at any time prior to closing of the hearing record. If negotiations are to be continued and the hearing record has been closed, the procedures in paragraph (A) of this rule must be followed. Any notice of dismissal must be signed by the board's secretary and supervising member.

(F) This rule shall not apply to nor limit the authority granted the board under division (H) of section

4731.22 of the Revised Code with regard to the surrender of a license or certificate or the withdrawal of an application for a license or certificate.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1319)

CROSS REFERENCES

RC 119.09, Adjudication hearing
 RC 4731.05, Administrative procedure act applies; executive director; training of investigators
 RC 4731.23, Hearing examiner for state medical board; procedure for hearings

4731-13-18 Exchange of documents and witness lists

(A) Any representative of record may serve upon the opposing representative of record a written request for a list of both the witnesses and the documents intended to be introduced at hearing. Except in the case of summary suspensions, within twelve days of service of that request the opposing representative shall supply such a list to the requesting representative. In cases of summary suspensions the exchange of lists of both witnesses and documents intended to be introduced at hearing shall be completed forthwith, but in no event less than three days prior to hearing.

(B) Failure without good cause to comply with paragraph (A) of this rule may result in exclusion from the hearing of such testimony or documents, upon motion of the representative to whom disclosure is refused.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1319)

CROSS REFERENCES

RC 119.09, Adjudication hearing
 RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-19 Prehearing conference

(A) At any time prior to hearing, the attorney hearing examiner may direct participation by the representatives of record in a prehearing conference. Such conference may be initiated by the attorney hearing examiner, or upon motion of either representative.

(B) Prehearing conferences may be held for the following purposes:

- (1) Identification of issues;
- (2) Obtaining stipulations and admissions;
- (3) Agreements limiting the number of witnesses;
- (4) Discussion of documents, exhibits, and witness lists;
- (5) Estimating the time necessary for hearing;
- (6) Discussion of any other matters tending to expedite the proceedings.

(C) All representatives of record shall attend the prehearing conference fully prepared to discuss the items enumerated in paragraph (B) of this rule.

(D) Procedural orders may be issued by the attorney hearing examiner based upon information obtained at a prehearing conference.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1320)

CROSS REFERENCES

RC 119.09, Adjudication hearing
 RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-20 Depositions and transcripts of prior testimony

(A) Upon written motion of any representative of record, and upon service of that motion to all other representatives, the attorney hearing examiner may order that the testimony of a prospective witness, other than one being called to testify as an expert, be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place if it appears probable that:

(1) The prospective witness will be unavailable to attend or will be prevented from attending a hearing; and

(2) The testimony of the prospective witness is material; and

(3) The testimony of the prospective witness is necessary in order to prevent a failure of justice.

In the case of an expert witness, a showing of the unavailability of the expert shall not be necessary for the attorney hearing examiner's consideration of the motion of a representative to take a deposition.

(B) The representatives shall agree to the time and place for taking the deposition in lieu of live testimony. Depositions shall be conducted in the same county in which the hearing is conducted unless otherwise agreed to by the representatives. If the representatives are unable to agree, the attorney hearing examiner shall set the time or fix the place of deposition. At a deposition taken pursuant to this rule, representatives shall have the right, as at hearing, to fully examine witnesses. A deposition taken under this rule shall be filed with the board not later than one day prior to hearing, and may be offered into evidence at hearing by either representative in lieu of the prospective witness' personal appearance. The cost of preparing a transcript of any testimony taken by deposition in lieu of live testimony which is offered as evidence at the hearing shall be borne by the board. In the event of appeal, such costs shall be made a part of the cost of the hearing record. The expense of any video deposition shall be borne by the requestor.

(C) Any deposition or transcript of prior testimony of a witness may be used for the purpose of refreshing the recollection, contradicting the testimony or impeaching the credibility of that witness. If only a part of a deposition is offered into evidence by a representative, the opposing representative may offer any other part. Nothing in this paragraph shall be construed to permit the taking of depositions for purposes other than those set forth in paragraph (A) of this rule.

(D) A transcript of testimony and exhibits from a prior proceeding may be introduced for any purpose if that prior proceeding forms the basis for the allegations. Upon offering part of a transcript or exhibit from a prior proceeding, the offering representative may be required by the opposing representative to present

any other part of the offered item which should in fairness be considered contemporaneously with it.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1320)

CROSS REFERENCES

RC 119.09, Adjudication hearing
RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-21 Prior action by the state medical board

The attorney hearing examiner may admit evidence of any prior action taken by the state medical board of Ohio if it is offered:

- (A) To prove notice to a respondent that particular conduct was unacceptable; or
- (B) To prove a continuing problem justifying harsher discipline than might otherwise be the case; or
- (C) For purposes of impeachment.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1320)

CROSS REFERENCES

RC 119.09, Adjudication hearing
RC 4731.05, Administrative procedure act applies; executive director; training of investigators
RC 4731.23, Hearing examiner for state medical board; procedure for hearings

4731-13-22 Stipulation of facts

Representatives of record may, by stipulation, agree on any or all facts involved in proceedings before the attorney hearing examiner. The attorney hearing examiner may thereafter require development of any fact deemed necessary for just adjudication.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1320)

CROSS REFERENCES

RC 119.09, Adjudication hearing
RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-23 Witnesses

(A) All witnesses at any hearing before the attorney hearing examiner shall testify under oath or affirmation.

(B) A witness may be accompanied and advised by legal counsel. Participation by counsel for a witness other than the respondent is limited to protection of that witness' rights, and that legal counsel may neither examine nor cross-examine any witnesses.

(C) Should a witness refuse to answer a question ruled proper at a hearing or disobey a subpoena, the state medical board may institute contempt proceedings pursuant to section 119.09 of the Revised Code.

(D) The presiding attorney hearing examiner, because of his duties, shall not be a competent witness nor subject to deposition in any adjudication proceeding. Unless the testimony of a board member or an attorney hearing examiner is material to the factual

allegations set forth in the notice of opportunity for hearing, board members and an attorney hearing examiner shall not be competent witnesses nor subject to deposition in any adjudication proceeding. Evidence from other persons relating to the mental processes of the presiding attorney hearing examiner or board members shall not be admissible.

(E) Any representative of record may move for a separation of witnesses.

(F) Each representative of record at a hearing shall inform the attorney hearing examiner prior to the commencement of a hearing of the identity of each potential witness for his cause present in the hearing room. Failure to so identify potential witnesses at this time may be grounds for their later disqualification as witnesses.

(G) No witnesses shall be permitted to testify as to the nature, extent, or propriety of disciplinary action to be taken by the board. A witness may, in the discretion of the attorney hearing examiner, testify as to an ultimate issue of fact.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1320)

CROSS REFERENCES

RC 119.09, Adjudication hearing
RC 4731.05, Administrative procedure act applies; executive director; training of investigators

4731-13-24 Conviction of a crime

A certified copy of a plea of guilty to, or a judicial finding of guilt of any crime in a court of competent jurisdiction is conclusive proof of the commission of all of the elements of that crime.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1321)

CROSS REFERENCES

RC 119.09, Adjudication hearing
RC 4731.05, Administrative procedure act applies; executive director; training of investigators
RC 4731.22, Grounds for refusal to grant and revocation of certificate; hearing and investigation; report; medical examinations; summary or automatic suspension

4731-13-25 Evidence

(A) The "Ohio Rules of Evidence" may be taken into consideration by the board or its attorney hearing examiner in determining the admissibility of evidence, but shall not be controlling.

(B) The attorney hearing examiner may permit the use of electronic or photographic means for the presentation of evidence.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1321)

CROSS REFERENCES

RC 119.09, Adjudication hearing
RC 4731.05, Administrative procedure act applies; executive director; training of investigators
RC 4731.23, Hearing examiner for state medical board; procedure for hearings

4731-13-26 Broadcasting and photographing administrative hearings

If the attorney hearing examiner determines that broadcasting, televising, recording or taking of photographs in the hearing room would not distract participants or impair the dignity of the proceedings or otherwise materially interfere with the achievement of a fair administrative hearing, the broadcasting, televising, recording or taking of photographs during hearing proceedings open to the public may be permitted under the following conditions and upon request:

(A) Requests for permission for the broadcasting, televising, recording or taking of photographs in the hearing room shall be made in writing to the attorney hearing examiner prior to the commencement of the hearing, and shall be made a part of the record of the proceedings;

(B) Permission is expressly granted prior to commencement of the hearing in writing by the attorney hearing examiner and is made a part of the record of the proceedings;

(C) If the permission is granted, the attorney hearing examiner shall specify the place or places in the hearing room where operators and equipment are to be positioned;

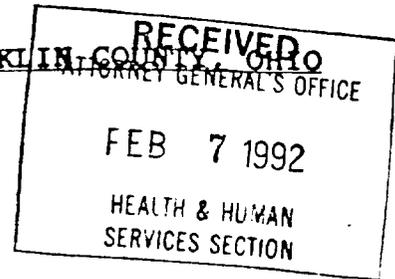
(D) The filming, videotaping, recording or taking of photographs of witnesses who object thereto shall not be permitted.

HISTORY: Eff. 6-30-89 (1988-89 OMR 1321)

CROSS REFERENCES

RC 119.09, Adjudication hearing
RC 4731.05, Administrative procedure act applies: executive director; training of investigators

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO



Varughese P. Mathew, D.O.,

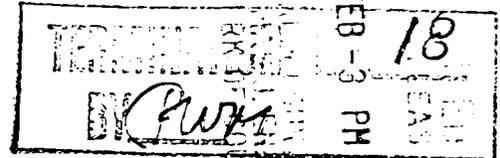
Appellant,

-vs-

The State Medical Board
of Ohio, et al.,

Appellees.

Case No. 90CVF10-8418
Judge Paul W. Martin



JUDGMENT ENTRY

This action came before the Court for consideration of Appellee's Motion to Clarify and to Reconsider the Decision rendered by the Court on April 30, 1991 in connection with the appeal of Appellant Varughese P. Mathew pursuant to Section 119.12 of the Ohio Revised Code.

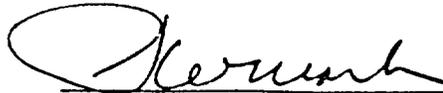
Upon review of the briefs filed by counsel for both parties, and after oral argument, the Court has determined that the State Medical Board of Ohio's determination as to the penalty to be imposed against Dr. Mathew in the within matter was not supported by reliable, substantial, and probative evidence, and therefore, the sanction mandated by the Board was unsupported as a matter of law. The Court thus reaffirms its Decision of April 30, 1991.

Accordingly, it is hereby ORDERED that the Board's Order be MODIFIED as follows:

1. The Certificate of Varughese P. Mathew, D.O., to practice general medicine in the State of Ohio shall remain in force.
2. Dr. Mathew shall not engage in the practice of surgery -- except for the performance of simple excisions and biopsies, the suturing of wounds, and the performance of diagnostic gastroscopies, cytoscopies, colonoscopies, and other endoscopic procedures -- until such time as he passes the SPEX examination. Once Dr. Mathew passes the SPEX examination, his certificate to practice surgery in the State of Ohio shall be reinstated.
3. Upon reinstatement of Dr. Mathew's certificate to practice surgery, Dr. Mathew shall be subject to the conditions outlined in Paragraph 4 of the Board's Order.

It is further ORDERED that this action be remanded to the Board to vacate the suspension of Dr. Mathew's medical license, for further consideration, and to modify the Board's Order

consistent with the terms of this Court's Order.



Judge Paul W. Martin

Approved:

John C. Dowling (0003806)
Assistant Attorney General
Health, Education, and Human
Services Section
30 E. Broad Street, 15th Floor
Columbus, Ohio 43266-0410
Attorney for Appellee
State Medical Board of Ohio

✓

William M. Todd (0023061)
Virginia E. Lohmann (0038851)
PORTER, WRIGHT, MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215
Attorneys for Appellant
Varughese P. Mathew, D.O.

LOH:2350

Proposed by Dr. Mathew

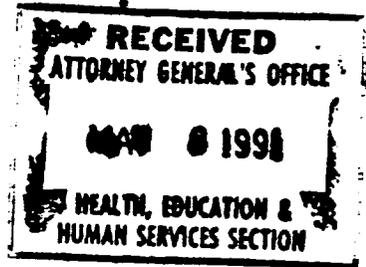
IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

FILED

COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO

VARUGHESE P. MATHEW, D.O.,]
Appellant,]
vs.]
THE STATE MEDICAL BOARD OF]
OHIO, et al.,]
Appellees.]

1991 APR 30 AM 10:54
CASE NO 90CVF 10 8418
JUDGE MARTIN
THOMAS S. ENRIGHT
CLERK OF COURTS



DECISION

Rendered this 30th day of April, 1991.

MARTIN, J.

This action comes for consideration of the appeal of Appellant Varugheese P. Mathew, D.O. pursuant to R.C. 119.12. Appellant seeks reversal of the Decision of the State Medical Board of Ohio ("Board") dated October 10, 1990. That Decision adopted the report and recommendation of the Board's hearing examiner. The Order of the Board among other things revoked Appellant's license to practice medicine and surgery and stayed the revocation, but suspended the license until Appellant successfully passed the SPEX examination. Appellant upon reinstatement was also prohibited from engaging in surgery except as noted in the Order.

Appellant asserts a number of errors upon which he seeks reversal of the Board's Order. The Court will deal infra with the substantive errors asserted.

The first assignment of error is that Appellant was denied due process. Appellant rests this contention upon a lack of discovery,

STATE MEDICAL BOARD
MAY 13 1991

specifically, a lack of time to prepare and also states that the agency denied access to its investigative files. The Court finds neither of these bases well taken. Appellant was granted two continuances of his hearing, one of which was partially premised upon Appellant's traveling out-of-state (July 2, 1990 memorandum). Appellant had approximately four months to prepare his response to the charging letter of April 11, 1990, (Exhibit 1).

Appellant seeks to have this Court determine that he had a right to discovery of the agency's investigative files. There is no case law supporting this contention. Although R.C. 4731.22 (C)(1) establishes confidentiality in civil actions, it is not clear that the legislature has also spoken to the right of a physician to discover those files in an administrative action. In light of the silence of the legislature as to this contention and in view of the case law holding that the civil rules of procedure with respect to discovery do not apply to adjudicatory proceedings, it is the determination of this Court that Appellant was not entitled to discovery of those files. See Yoder v. Ohio State Board of Education (1988) 40 Ohio App. 3d 111. In light of this determination, it is irrelevant as to whether Appellant properly subpoenaed the records in those files.

Even if the files were made accessible, Appellant has failed to show such prejudice as would rise to a denial of due process with respect to their denial. There is no showing in this action that Appellant failed to have the necessary documentation to present his side of the matter.

The last two issues in the area of due process relate to the sufficiency of the charging letter and the inability to depose or interview the patients who were the subject of the charging letter. As to the charging letter, it is concluded that Appellant was given adequate information to be apprised of and prepare to rebut the charges as to the four named patients. The inability to depose or interview those patients is in the same vein as that of the sought after investigative files. First, no showing of a right to such has been made and second, even if given, there is no indication that Appellant would have prepared his responses any differently.

Appellant's second principal area of assignment of error is that the Board automatically adopts the recommendation of its hearing examiner. Although the Board in this action did adopt the hearing examiner's report and recommendation, the record supports that the Board did review the record and independently weighed the considerations in the matter sub judice. The Board denied Appellant the right to "highlight the evidence", but the Board did allow Appellant to present his contentions before the Board. It appears that the Board gave full and fair consideration to the report of the examiner before adopting it and gave Appellant the right to address the Board in a final effort to convince the Board of any lack of culpability. The Board on October 10, 1990 had twelve members present at that meeting with seven of those in attendance, members of the medical specialties. The fact that the Board adopted the hearing examiner's report does not imply that it was a "rubber stamp" adoption. The error asserted is not supported

by credible evidence and is not well taken.

Appellant has contended in his legal argument that the Board failed to apply the correct standard as it relates to R.C. 4731.22 (B)(6). That section states that a physician may be disciplined for "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." The Court is unaware of any succinct legal definition relating to minimal standard of care. The record is replete with testimony by the State's witnesses, Drs. Falcone and Weithe, as to their opinion that Appellant failed to conform to or departed from the minimal standards of care of similar practitioners. (Deposition of Dr. Weithe page 23, 29; transcript page 36, 41, and 58). The quality of their opinions is a matter of credibility. Compliance with Section 4731.22(B)(6) appears to contemplate a standard less than one of negligence and any evaluation as to negligence on Appellant's part would not be prejudicial to Appellant. This assignment of error is therefore not well taken.

Appellant has stated that the Board's Order is not supported by reliable, substantial and probative evidence. Case law abounds with holdings concerning the standard of review in this area of administrative law. The Board's expertise is to be given due deference. See Mofu v. State Medical Board (1984) 21 Ohio App. 3d 182. The reviewing court is not to engage in a redetermination of credibility issues nor come to contrary conclusions where some

evidence of qualitative nature supports the conclusions of the Board. As was indicated above, seven member of the medical profession listened to Dr. Mathew's arguments, reviewed the record and report, and none cast a vote against the proposed order. For this Court to substitute its judgment for that of those experts would clearly usurp the role of the Board unless the evidence was lacking to support the Board's judgment.

It is obvious that Dr. Mathew's and his expert, Dr. Angel did not agree with the opinions of Dr. Weithe and Dr. Falcone. This does not imply that the Board was not entitled to give credence to its witnesses. While the burden of proof is upon the State, the credibility and weight of the evidence are issues for the trier of fact to determine, not the reviewing court. See University of Cincinnati v. Conrad (1980) 63 Ohio State 2d 108. While the record reflects conflicting evidence as to Appellant's standard of care, there is reliable, substantial and probative evidence to support the Board's Order with respect to patients 1, 2 and 4. As will be indicated below the Court does not find reliable, substantial and probative evidence to support the charges with respect to patient 3.

The final error raised by Appellant is that of the sanctions imposed by the Board. It is Appellant's position that the sanctions are too harsh. The record bears no indication of any departure from the standard of care since 1986. Further it is indicated that Appellant no longer does the surgery that gave rise to the Board's charges. This Court agrees that the sanction of

suspension of the right to practice until successful completion of the SPEX examination is too harsh.

As stated in Heele v. Ohio State Veterinary Medical Board (1988) 47 Ohio App. 3d 167, not only must the finding of violation of rule be established by reliable, substantial and probative evidence, but also there must be that same quantum of evidence supporting the sanction and the sanction must be within the range of those merited by the violation. The holding of Berezoski v. The Ohio State Medical Board (1988) 48 Ohio App. 3d 231 is that the Court is not authorized to alter the penalty if the Order is supported by the record. The Court in Berezoski did specifically mention that there would be instances where modification of a penalty might be appropriate. The Court determines this to be such an instance.

The evidence is that the Board was supported in its conclusion that Appellant departed from the minimal standard of care with respect to the surgery and post operative care as regards to the three mastectomy procedures. The evidence does not support the findings or conclusions of the Board that Appellant departed from the standard of care as to the removal of the cervical lymph node. The charge as to that procedure is that Appellant ligated the right accessory nerve and there is no evidence of such ligation in the record. The fact that the nerve regained function after surgery and removal of scar tissue indicates that the nerve had not been ligated. The patient was also seen by a number of subsequent treating physicians who failed to make the diagnosis that Appellant

was supposed to have made. The record simply stated does not support the Board on this charge. With this in mind and the fact that Appellant no longer does surgery of the nature that gave rise to charges 1, 2, and 3, it is inappropriate to totally prohibit Appellant from the practice of any portion of medicine. No evidence has been offered by the Board to show any deterioration of Appellant's ability to practice family medicine. This appears the scope of his current practice. The length of service in the practice of medicine by Appellant warrants a lesser sanction. The sanction against major surgery is supported and if the Board determines that there is support for further sanctions if Appellant fails to satisfactorily complete the SPEX exam then further review may be appropriate.

This Court finds that the sanction levied is beyond the range of sanctions appropriate in light of the failure to show a violation of charge 3 in the charging order and the evidence of record. This Court therefore modifies the Order of the Board and remands the action for further consideration in light of this Decision.



PAUL W. MARTIN, JUDGE

Appearances:

WILLIAM M. TODD, ESQ.
Counsel for Appellant

JOHN C. DOWNLING, ESQ., AAG
Counsel for Appellee

The court document for this date cannot be found in the records of the Ohio State Medical Board.

Please contact the Franklin County Court of Common Pleas to obtain a copy of this document. The Franklin County Court of Common Pleas can be reached at (614) 462-3621, or by mail at 369 S. High Street, Columbus, OH 43215.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
and
STATE OF OHIO
THE STATE MEDICAL BOARD

Varughese P. Mathew, D.O.
600 West Plane Street
Bethel, OH 45106

Appellant,

-vs-

The State Medical Board of Ohio
77 South High Street
17th Floor
Columbus, OH 43215

and

Henry G. Cramblett, M.D.
Secretary
The State Medical Board of Ohio
77 South High Street
17th Floor
Columbus, OH 43215

Appellees.

:
: 90CVF10-8418
: Case No. 9

NOTICE OF APPEAL

1. Appellant Varughese P. Mathew, D.O., pursuant to Section 119.12 of the Ohio Revised Code, hereby gives notice of his appeal to the Court of Common Pleas of Franklin County, Ohio from the Order of the State Medical Board of Ohio dated October 15, 1990, and mailed October 16, 1990 (the "Order"). A true and complete copy of the Order is attached hereto and incorporated herein by reference as Exhibit A.

2. Appellant is a physician, licensed since 1968 to practice medicine in the State of Ohio, with offices located at 600 West Plane Street, Bethel, Ohio 45106. Appellant is a general surgeon and also engages in general medical practice.

3. Appellees are the State Medical Board of Ohio and its Secretary. Appellees are agents of the State of Ohio pursuant to Chapter 4731 of the Ohio Revised Code.

4. The grounds for this appeal are as follows:

- (a) The Order is not supported by clear and convincing evidence that Appellant violated Section 4731.22(B)(6);
- (b) The Order is not supported by reliable, probative, and substantial evidence;
- (c) The Order is not in accordance with law and is contrary to law;
- (d) The Order is arbitrary, unreasonable, and capricious;
- (e) The Order is based on evidence evaluated under an incorrect legal standard, namely, the reasonable care standard rather than the minimal care standard of Section 4731.22(B)(6) of the Ohio Revised Code;
- (f) The Order is invalid and contrary to law because Appellant was unfairly denied the right and opportunity to effectively conduct discovery, to

cross-examine the State's witnesses, and to prepare his defense such that he was deprived of a full and fair hearing in accordance with due process of law;

(g) The Order unlawfully deprives Appellant of his liberty and property interests without due process of law and denies Appellant his right to equal protection of the laws in violation of the due process clause of The Fourteenth Amendment to the United States Constitution and Article I, Sections 1, 2, and 16, of the Constitution of Ohio.

(h) The Order inflicts cruel and unusual punishment upon Appellant in violation of the Eighth Amendment of the United States Constitution and Article I, Section 9, of the Constitution of Ohio.

5. A copy of this Notice of Appeal is filed with the Court of Common Pleas, Franklin County, Ohio, in accordance with Section 119.12 of the Ohio Revised Code.

Respectfully submitted,

William M. Todd by VEE
William M. Todd (TOD02)

Virginia E. Lohmann
Virginia E. Lohmann (LOH03)
PORTER, WRIGHT, MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215
(614) 227-2000
Attorneys for Appellant,
Varughese P. Mathew, D.O.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served upon the following individuals:

Henry G. Cramblett, M.D.
Secretary
The State Medical Board of Ohio
77 South High Street
17th Floor
Columbus, Ohio 43215

and

John Dowling, Esq.
Assistant General Attorney
Health, Education and
Human Services Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43266-0410
Attorney for State Medical Board
of Ohio

on the 31st day of October, 1990.

Virginia E. Lohmann
Virginia E. Lohmann (LOH03)

LOH:565

STATE OF OHIO
THE STATE MEDICAL BOARD
77 South High Street
17th Floor
Columbus, Ohio 43266-0315
(614)466-3934

October 12, 1990

Varughese P. Mathew, D.O.
145 North West Street
Bethel, Ohio 45106

Dear Doctor Mathew:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Wanita J. Sage, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of the Minutes of the State Medical Board, meeting in regular session on October 10, 1990, including Motions approving and confirming the Report and Recommendation as the Findings and Order of the State Medical Board.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal may be taken to the Franklin County Court of Common Pleas only.

Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of a Notice of Appeal with the State Medical Board of Ohio and the Franklin County Court of Common Pleas within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12 of the Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO



Henry G. Cramblett, M.D.
Secretary

HGC:em

Enclosures

CERTIFIED MAIL RECEIPT NO. P 290 319 180
RETURN RECEIPT REQUESTED

cc: William M. Todd, Esq.
Virginia E. Lohmann, Esq.

George E. Pattison, Esq.

CERTIFIED MAIL NO. P 290 319 181
RETURN RECEIPT REQUESTED

CERTIFIED MAIL NO. P 290 319 182
RETURN RECEIPT REQUESTED

Mailed 10/16/90

STATE OF OHIO
STATE MEDICAL BOARD

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; attached copy of the Report and Recommendation of Wanita J. Sage, Attorney Hearing Examiner, State Medical Board; and attached excerpt of Minutes of the State Medical Board, meeting in regular session on October 10, 1990, including Motions approving and confirming the Report and Recommendation as the Findings and Order of the State Medical Board, constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of Varughese P. Mathew, D.O., as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.

(SEAL)



Henry G. Cramblett, M.D.
Secretary

October 15, 1990

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

VARUGHESE P. MATHEW, D.O.

*

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio the 10th day of October, 1990.

Upon the Report and Recommendation of Wanita J. Sage, Attorney Hearing Examiner, Medical Board, in this matter designated pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board for the above date.

It is hereby ORDERED that:

1. The certificate of Varughese P. Mathew, D.O., to practice medicine and surgery in the State of Ohio shall be REVOKED. Such revocation is stayed, and Dr. Mathew's certificate is hereby SUSPENDED for an indefinite period of time.
2. The State Medical Board shall not consider reinstatement of Dr. Mathew's certificate to practice unless and until all of the following minimum requirements are met:
 - a. Dr. Mathew shall submit an application for reinstatement, accompanied by appropriate fees.
 - b. Dr. Mathew shall take and pass the SPEX examination, or any similar written examination which the Board may deem appropriate to assess his clinical competency.
 - c. In the event that Dr. Mathew has not been engaged in the active practice of medicine or surgery for a period in excess of two years immediately preceding the time of his application for reinstatement, the Board may exercise its discretion under Section 4731.222, Ohio Revised Code, to require additional evidence of Dr. Mathew's fitness to resume practice.

Varughese P. Mathew, D.O.

3. Upon reinstatement, Dr. Mathew's certificate shall be permanently limited and restricted in that Dr. Mathew shall not be permitted to engage the practice of surgery, except for the performance of simple excisions and biopsies, the suturing of wounds, and the performance of diagnostic gastroscopies, cystoscopies, colonoscopies, and other endoscopic procedures.
4. Further, upon reinstatement, Dr. Mathew's certificate shall be subject to the following terms, conditions, and limitations for a period of three (3) years:
 - a. Dr. Mathew shall obey all federal, state and local laws, and all rules governing the practice of medicine in Ohio.
 - b. Dr. Mathew shall submit quarterly declarations under penalty of perjury stating whether or not there has been compliance with all the conditions of probation.
 - c. Dr. Mathew shall appear in person for interviews before the full Board or its designated representative at six (6) month intervals, or as otherwise requested by the Board.
 - d. In the event that Dr. Mathew should leave Ohio for three (3) continuous months, or reside or practice outside of the State, Dr. Mathew must notify the Board in writing of the dates of departure and return. Periods of time spent outside of Ohio will not apply to the reduction of this probationary period.
 - e. Before the end of the first year of probation, or as otherwise approved by the Board, Dr. Mathew shall complete a course approved by the Board on maintaining adequate and appropriate medical records.
 - f. Within thirty (30) days of reinstatement, Dr. Mathew shall submit for the Board's prior approval the name of a monitoring physician, who shall review Dr. Mathew's patient charts and shall submit a written report of such review to the Board on a quarterly basis. Such chart review may be done on a random basis, with the number of charts reviewed to be determined by the Board. It shall be Dr. Mathew's responsibility to ensure that the monitoring physician's quarterly reports are submitted to the Board on a timely basis.

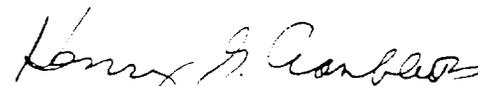
Varughese P. Mathew, D.O.

In the event that the approved monitoring physician becomes unable or unwilling to so serve, Dr. Mathew shall immediately so notify the Board in writing and shall make arrangements for another monitoring physician as soon as practicable.

5. If Dr. Mathew violates the terms of this probation in any respect, the Board, after giving Dr. Mathew notice and an opportunity to be heard, may impose whatever disciplinary action it deems appropriate, up to and including the revocation of his certificate.
6. Upon the successful completion of probation, Dr. Mathew's certificate will be fully restored, except for the permanent limitation and restriction set forth in paragraph three (3), above.

This Order shall become effective thirty (30) days from the date of mailing of notification of approval by the State Medical Board of Ohio. In the thirty (30) day interim, Dr. Mathew shall not undertake the care of any patient not already under his care.

(SEAL)



Henry G. Cramblett, M.D.
Secretary

October 15, 1990

Date

REPORT AND RECOMMENDATION
IN THE MATTER OF VARUGHESE P. MATHEW, D.O.

The Matter of Varughese P. Mathew, D.O., came on for hearing before me, Wanita J. Sage, Esq., Hearing Examiner for the State Medical Board of Ohio, on August 2 and August 3, 1990.

INTRODUCTION AND SUMMARY OF EVIDENCE

I. Basis for Hearing

- A. By letter of April 11, 1990 (State's Exhibit #1), the State Medical Board notified Varughese P. Mathew, D.O., that it proposed to take disciplinary action against his license to practice medicine and surgery in Ohio, based upon factual allegations relating to his care of Patients 1 through 4 (identified in a Patient Key sealed to protect patient confidentiality). The Board alleged that Dr. Mathew's acts, conduct, and/or omissions with regard to his care of these 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", as that clause is used in Section 4731.22(B)(6), Ohio Revised Code. Dr. Mathew was advised of his right to request a hearing in this Matter.
- B. By letter received by the State Medical Board on April 26, 1990 (State's Exhibit #3), George E. Pattison, Esq., requested a hearing on behalf of Dr. Mathew.

II. Appearances

- A. On behalf of the State of Ohio: Anthony J. Celebrezze, Jr., Attorney General, by John C. Dowling, Assistant Attorney General
- B. On behalf of the Respondent: William M. Todd, Esq.; Virginia E. Lohmann, Esq.; and George E. Pattison, Esq.

III. Testimony Heard

- A. Presented by the State
1. Dale R. Wiethe, M.D., by deposition taken on July 30, 1990
 2. Robert E. Falcone, M.D.
 3. Varughese P. Mathew, D.O., as on cross-examination

STATE MEDICAL BOARD
OF OHIO

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B. Presented by the Respondent

1. Marc Cooperman, M.D., by deposition taken on July 31, 1990 (transcript identified as Respondent's Exhibit Q)
2. Varughese P. Mathew, D.O.
3. Victor D. Angel, D.O.

IV. Exhibits Examined

In addition to State's Exhibits #1 and #3 (identified above), the following exhibits were identified and admitted into evidence in this Matter:

A. Presented by the State

1. State's Exhibit #2: Certified mail receipt and return card showing service of State's Exhibit #1.
2. State's Exhibit #4: April 27, 1990, letter to George E. Pattison, Esq., from the State Medical Board advising that a hearing initially set for May 10, 1990, was postponed pursuant to Section 119.09, Ohio Revised Code.
3. State's Exhibit #5: May 4, 1990, letter to Attorney Pattison from the State Medical Board scheduling the hearing for June 15, 1990.
4. State's Exhibit #6: June 14, 1990, Entry granting a continuance and rescheduling the hearing for July 18 and 20, 1990.
5. State's Exhibit #7: June 21, 1990, notice of the appearance of William M. Todd, Esq., as counsel for Dr. Mathew.
6. State's Exhibit #8: July 5, 1990, Entry denying a request for continuance of the July 18 and 20, 1990, hearing.
7. State's Exhibit #9: July 17, 1990, Entry granting a continuance and rescheduling the hearing for August 2 and 3, 1990.
8. State's Exhibit #10: July 23, 1990, Entry granting the State's motion to take the deposition of Dale R. Wieth, M.D., in lieu of live testimony at hearing.
9. State's Exhibit #11: Curriculum vitae of Robert E. Falcone, M.D.
- * 10. State's Exhibit #12: Records from Epp Memorial Hospital with regard to a July 23 to July 28, 1978, admission of Patient 1.

STATE MEDICAL BOARD
OF OHIO

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Report and Recommendation
In the Matter of Varughese P. Mathew, D.O.
Page 3

- * 11. State's Exhibit 13: Records from Epp Memorial Hospital with regard to a November 28 to December 10, 1978, admission of Patient 1.
- * 12. State's Exhibit #14: Records from Christ Hospital with regard to a May 7 to May 10, 1979, admission of Patient 1.
- * 13. State's Exhibit #15: Records from Christ Hospital with regard to a March 9 to March 14, 1980, admission of Patient 1.
- * 14. State's Exhibit #16: Office notes of Dr. Mathew with regard to Patient 1.
- * 15. State's Exhibit #17: Office notes of Dr. Dale R. Wiethe with regard to Patient 1.
- * 16. State's Exhibit #18: Records from Epp Memorial Hospital with regard to a July 19 to July 21, 1978, admission of Patient 2.
- * 17. State's Exhibit #19: Records from Epp Memorial Hospital with regard to an October 15 to October 22, 1978, admission of Patient 2.
- * 18. State's Exhibit #20: Records from Epp Memorial Hospital with regard to a January 23 to January 30, 1979, admission of Patient 2.
- * 19. State's Exhibit #21: Records from Christ Hospital with regard to a March 29 to April 3, 1979, admission of Patient 2.
- * 20. State's Exhibit #22: Office notes of Dr. Dale Wiethe with regard to Patient 2.
- * 21. State's Exhibit #23: Office notes of Dr. Mathew with regard to Patient 2.
- * 22. State's Exhibit #24: Summary prepared by Dr. Mathew with regard to his care of Patient 3.
- * 23. State's Exhibit #25: Records from University of Cincinnati Hospital with regard to treatment of Patient 3 from June 7 through November 7, 1983.
- * 24. State's Exhibit #26: Records from Epp Memorial Hospital with regard to a November 16 to November 26, 1986, admission of Patient 4.
- * 25. State's Exhibit #27: Dr. Mathew's office records with regard to Patient 4.

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26. State's Exhibit #28: July 31, 1990, Entry granting the Respondent's motion to take the deposition of Marc C. Cooperman, M.D., in lieu of live testimony at hearing.
27. State's Exhibit #29: July 31, 1990, Entry ordering that subpoenas issued pursuant to the Respondent's July 25, 1990, request be quashed.
28. State's Exhibits #30A through #30G: Seven photographs, stipulated by the parties to be of Patient 1 (see Tr. at 107-108).

B. Presented by the Respondent

1. Respondent's Exhibit D: Article by Vincent R. Pennisi, M.D., and Angelo Capozzi, M.D., entitled "Treatment of Chronic Cystic Disease of the Breast by Subcutaneous Mastectomy" from Plastic and Reconstructive Surgery (Vol. 52, No. 5, 1973).
2. Respondent's Exhibit F: Article by Simon Fredricks, M.D., entitled "A 10-Year Experience with Subcutaneous Mastectomy" from Clinics in Plastic Surgery (Vol. 2, No. 3, 1975).
3. Respondent's Exhibit H: Article by John E. Woods, M.D., James K. Masson, M.D., and George B. Irons, M.D., entitled "Experience with Subcutaneous Mastectomy" from Surgery (Vol. 80, No. 4, 1976).
4. Respondent's Exhibit I: Excerpts from Reconstructive Breast Surgery (C.V. Mosby Co., 1976), consisting of: pp. 254-282, Chapter 19, "Subcutaneous Mastectomy"; pp. 283-291, Chapter 20, "Immediate Reconstruction of the Breasts Following Subcutaneous Mastectomy"; and pp. 292-317, Chapter 21, "Reconstruction of the Breasts Following Mastectomy".
5. Respondent's Exhibit J: Excerpts from Chapter 24, "The Breast", Davis-Christopher Textbook of Surgery, 11th Edition (W. B. Saunders Co., 1977), consisting of pp. 623, 632, 666-674.
6. Respondent's Exhibit M: Article by Eugene H. Courtiss, M.D., Robert M. Goldwyn, M.D., and Gaspar W. Anastasi, M.D., entitled "The Fate of Breast Implants with Infections Around Them" from Plastic and Reconstructive Surgery (Vol. 63, No. 6, 1979).
7. Respondent's Exhibit N: Editorial by Leonard R. Rubin, M.D., entitled "The Deflating Saline Implant--Facing Up To Complications" from Plastic and Reconstructive Surgery (Vol. 65, No. 5, 1980).

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- * 8. Respondent's Exhibit O: Certificate of Death with regard to Patient 4.
- 9. Respondent's Exhibit P: July 21, 1990, affidavit in support of Dr. Mathew from Harry C. Malott, a patient of Dr. Mathew for more than two years.
- 10. Respondent's Exhibit Q: Transcript of the deposition of Marc Cooperman, M.D., taken on July 31, 1990.
- 11. Respondent's Exhibits R-1 through R-8: Eight photographs, indicated by the testimony of Dr. Mathew to be of Patient 1.
- 12. Respondent's Exhibits S-1 and S-2: Two photographs, indicated by the testimony of Dr. Mathew to be of Patient 2.

* NOTE: THOSE EXHIBITS MARKED WITH AN ASTERISK (*) ABOVE HAVE BEEN SEALED TO PROTECT PATIENT CONFIDENTIALITY AND/OR IDENTITY.

V. Other Matters

- A. All objections made at the depositions of Dr. Wiethe and Dr. Cooperman are hereby overruled. In addition, the objections and the motion to strike stated at hearing (Tr. at 5, 109-111) with regard to the deposition of Dr. Wiethe are hereby respectively overruled and denied.
- B. All transcripts of testimony and exhibits, whether or not specifically referred to hereinafter, were thoroughly reviewed and considered by the Hearing Examiner prior to her findings, conclusions, and recommendations in this Matter.

FINDINGS OF FACT

- 1. Varughese P. Mathew, D.O., has been engaged in private practice since his completion of a three-year residency in general surgery in 1968. His current solo practice in Bethel, Ohio, is primarily an office practice where he sees an average of 15 to 20 patients per day. In 1988, he voluntarily relinquished his surgical privileges at Epp Memorial Hospital (now Kenwood Jewish Hospital).

These facts are established by the testimony of Dr. Mathew (Tr. at 115-120, 259-264) and the testimony of Dr. Victor D. Angel (Tr. at 241-258).

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2. On July 21, 1978, Dr. Mathew noted in his office record for Patient 1, a 47-year-old female, "Pain and tenderness over the right breast area. X-rays were negative." On July 23, 1978, Dr. Mathew admitted Patient 1 to the hospital with an admitting diagnosis of bilateral fibrocystic disease. On July 24, Dr. Mathew dictated a history and physical report, which indicated that Patient 1 complained chiefly of pain in the left breast, and had a history of pain in both breasts dating back to a hysterectomy which had been done several years ago. The report also indicated that no palpable masses were found upon examination, but that Patient 1's breasts exhibited tenderness and "cystic disease." Also on July 24, 1978, an x-ray was taken of Patient 1's chest and ribs. The x-ray report showed an unhealed, non-displaced fracture of the right fifth rib. However, Dr. Mathew made no mention of this finding in his progress notes prior to his performing breast surgery on Patient 1.

These facts are established by State's Exhibits #12 and #16.

3. On July 25, 1978, Dr. Mathew performed a bilateral subcutaneous mastectomy and bilateral implantation of McGhan silastic prosthetic implant on Patient 1. The surgical pathology report confirmed Dr. Mathew's pre-operative diagnosis of bilateral fibrocystic disease.

These facts are established by State's Exhibit #12.

4. Robert E. Falcone, M.D., who testified as an expert witness for the State (see curriculum vitae, State's Exhibit #11), observed that Dr. Mathew's pre-surgical documentation and workup provided little support for his pre-operative diagnosis of bilateral fibrocystic disease. He also stated that Patient 1's recent rib fracture could have caused the chest or breast pain of which she complained. However, he noted that Dr. Mathew had stated in the hospital report that Patient 1 had a history of breast pain and a fear of cancer which, in conjunction with a diagnosis of severe fibrocystic disease, were considered by some physicians in 1978 to constitute adequate indication for performing a subcutaneous mastectomy.

These facts are established by the testimony of Dr. Falcone (Tr. at 28-30, 65-69).

5. In performing the bilateral subcutaneous mastectomy on Patient 1, Dr. Mathew failed to remove a sufficient amount of breast tissue. Dale R. Wiethe, M.D., who later treated Patient 1 and removed the prosthetics implanted by Dr. Mathew, testified that Dr. Mathew had left a substantial amount of breast tissue, particularly in the upper half of both of Patient 1's breasts. Once the prosthetics were removed, the breasts exhibited a donut shape due to breast tissue remaining around the breast circumferences, with the nipples sinking into valleys where tissue had been removed. Dr. Wiethe's testimony is supported both by the documentation he prepared at the time he performed his surgery on Patient 1 and by the photographs of Patient 1 identified and admitted as State's Exhibits #30F through #30G.

The purpose of a subcutaneous mastectomy, a now outdated procedure, was to remove diseased breast tissue. In a properly done subcutaneous mastectomy, 95% to 99% of all the breast tissue would be removed. It was appropriate to leave a small amount of tissue under the nipple.

These facts are established by the testimony of Dr. Wiethe (7/30/90 Depo. Tr. at 17, 54-55); the testimony of Dr. Falcone (Tr. at 69-72); State's Exhibit #14; and Respondent's Exhibits D, F, H, and I.

6. Dr. Mathew adamantly denied that he had removed insufficient breast tissue from Patient 1. He acknowledged that the surgical pathology report indicated that he had removed less than the amount of breast tissue found in the average breast (150 to 200 grams), but stated that Patient 1's breasts had been smaller than average, as evidenced by a pre-surgery photograph (Respondent's Exhibit R-1). It is noted that this photograph shows Patient 1 in a prone position. Dr. Mathew also claimed that the photograph identified as Respondent's Exhibit R-8 proved that Patient 1's breasts were flat when the prostheses were deflated and that her nipples did not "sink into a valley." However, he admitted that the "paper-thin" deflated prostheses had not yet been removed at the time this photograph was taken. Finally, Dr. Mathew pointed out that the surgical pathology report described a background of fatty tissue adhering to the breast tissue sent for analysis. He stated that such fatty margin around the breast tissue indicated that he had reached the appropriate limits with regard to the breast tissue removed. However, he failed to explain how that fact would prove that he had extended such removal appropriately into the breast circumferences. Furthermore, Dr. Mathew's denial is firmly rebutted by the photographs of Patient 1, identified and admitted as State's Exhibits #30F through #30G, as well as by the testimony and evidence presented by Dr. Wiethe (see Finding of Fact #5, above).

These facts are established by the testimony of Dr. Mathew (Tr. at 130-147), State's Exhibits #12 and #30F through #30G, and Respondent's Exhibits R-1 and R-8.

7. Dr. Mathew's operative report with regard to the July 25, 1978, surgery indicates that he found Patient 1's right breast to be "full of pus" with "drainage from the nipple." Nevertheless, after completing the subcutaneous mastectomy, he immediately proceeded to implant prostheses in both breasts.

Respondent's Exhibit I (pg. 276) indicates that contamination from any potentially infected cysts, ducts, or biopsy sites, would constitute reason for delaying prosthetic implantation. This reference states, "When contamination is feared, a short delay of a few days or weeks has been used with excellent end results. If there is any doubt, delay the implantation!"

These facts are established by State's Exhibit #12 and Respondent's Exhibit I.

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8. The prostheses Dr. Mathew implanted in Patient 1's breasts were large, 345 cc, saline-filled, silastic (made of silicone) ones. He implanted these prostheses subcutaneously (under the skin flap), rather than subpectorally (under the chest-wall muscle).

Dr. Dale Wiethé testified that subcutaneous placement of such prostheses following a subcutaneous mastectomy was inappropriate, and that any experienced surgeon of that time would have placed the prostheses subpectorally. Dr. Robert Falcone testified that subcutaneous placement of implants after subcutaneous mastectomy was highly unusual by 1978, though such placement was done for augmentation. The testimony of both of these physicians indicated that placing prosthetics immediately under the thin skin flaps which result from subcutaneous mastectomy would create a likelihood that the prosthetics would later extrude.

Most of the pre-1978 excerpts presented as Respondent's Exhibits contain some suggestion that subpectoral, rather than subcutaneous, implantation would be appropriate after subcutaneous mastectomy when the skin flaps are thin or scarred. Furthermore, several references which discuss subcutaneous placement of implants following subcutaneous mastectomy, also recommend that only a small size prosthesis (200 to 250 cc) be used to minimize the risk of eventual extrusion due to normal contracture of the spherical scar in which the implant becomes encased (see, especially, Respondent's Exhibit F). In the case of Patient 1, Dr. Mathew inserted 345 cc implants subcutaneously. Dr. Wiethé observed, when he later examined her, that the skin covering the large prosthetics which Dr. Mathew had inserted was very thin and tense, with an obvious potential for imminent extrusion of the implants.

These facts are established by the testimony of the Dr. Wiethé (7/30/90 Depo. Tr. at 14-17, 22); the testimony of Dr. Falcone (Tr. at 25-26, 72-74); State's Exhibits #12, #14, and #16; and Respondent's Exhibits D (pp. 522-523), F (pg. 348-350), I (pp. 273, 278), J (pg. 668), and M.

9. At some point before Patient 1 was discharged from the hospital, one of the drainage tubes which Dr. Mathew had inserted in her breasts at the time of surgery disappeared. A progress note indicates that Dr. Mathew discovered that the left drain was missing on July 27, 1978. Although he ordered a mammogram, which showed the tube to be in the axillary (armpit) area of the breast, he made no further mention of the displaced tube in the hospital record. Dr. Mathew's office record shows that Patient 1 came in on August 3, 1978, stating that she had located the drainage tube in the left breast. At that time, Dr. Mathew opened the incision and removed the drain.

At hearing, Dr. Mathew stated that he had simply decided to leave the drain where it was, unless it caused problems in the future. He stated that the risk of infection from an inert silastic tube was very low.

Thus, he had felt it would be better to give Patient 1 a chance to heal before removing it. He had later taken the tube out in the office because Patient 1 had said it was sticking out.

In the opinion of Dr. Robert Falcone, the retained drain was a minor complication which had been dealt with appropriately and had eventually been removed.

These facts are established by the testimony of Dr. Falcone (Tr. at 31-32), the testimony of Dr. Mathew (Tr. at 139-142), and State's Exhibit #12.

10. Although Dr. Mathew denied that Patient 1 had ever evidenced any sign of post-operative infection, his office record indicates otherwise. Dr. Mathew saw Patient 1 post-operatively from August 1 through December 21, 1978. Throughout the post-operative course, Patient 1 exhibited signs of infection in both breasts. Dr. Mathew failed to recognize, diagnose, or appropriately treat that infection.

On August 1, 1978, one week after surgery, Patient 1 complained of pain in the breast area. Thereafter, she consistently complained of pain, burning, and drainage from the breasts. Throughout August, 1978, while drainage persisted and the left breast wound failed to close, Dr. Mathew attempted various remedies, including giving pain medication, giving oral and topical antibiotics, prescribing a rib belt, and applying a butterfly closure to the open area of the wound. Despite the open wound and persistent drainage, Dr. Mathew's office notes during this period indicated that he felt Patient 1's progress to be satisfactory. In fact, Dr. Mathew's testimony at hearing indicated that he had considered the drainage to be either a normal sign of healing or a leakage of the saline-filled implant (Tr. at 149-151).

In September, 1978, the left prosthesis apparently began to show signs of deflation. On September 25, 1978, Dr. Mathew attempted to re-inflate the left prosthesis by injecting 30 cc's of saline through the skin (percutaneously) and into the implant. On October 12, 1978, when Patient 1 returned to Dr. Mathew's office, the left breast prosthesis had again decreased in size. Dr. Mathew advised her to wait a couple of weeks before returning for another injection of saline into the implant. The implant continued to deflate.

In November, 1978, Dr. Mathew readmitted Patient 1 to the hospital. On November 30, 1978, he removed a completely deflated implant from the left breast and replaced it with an even larger, 400 cc prosthesis (350 cc McGhan to which he added another 50 cc's of saline). He also added another 50 cc's of saline to the right breast prosthesis. Soon thereafter, both implants began leaking. On December 5, 1978, Dr. Mathew took Patient 1 back to the operating room, removed both deflated prostheses,

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and replaced them with large McGhan prostheses (at least 350 cc; it is unclear from the operative report whether or not the antibiotics and 50 cc's of saline were instilled into the implants).

Following this second hospitalization, Patient 1 continued to have drainage from the left breast. Dr. Mathew last saw Patient 1 on December 21, 1978. At that time, her wound was still draining and unhealed.

These facts are established by State's Exhibits #13 and #16, Respondent's Exhibit M (pg. 813), and the testimony of Dr. Mathew.

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11. On March 9, 1979, Patient 1 sought advice from Dr. Dale Wiethe. At that time, she had a draining sinus in the wound of the left breast. Dr. Wiethe advised Patient 1 that both of the prosthetic implants should be removed and the breasts allowed to heal before further surgery was contemplated. Approximately two months later, Patient 1 entered Christ Hospital, where Dr. Wiethe removed the protheses from both breasts on May 8, 1979. Thereafter, Patient 1 healed satisfactorily. Over 10 months later, on March 10, 1980, Dr. Wiethe reconstructed Patient 1's breasts with 235 cc silicone prosthetics implanted subpectorally. Following that surgery, Patient 1 healed without complications.

These facts are established by State's Exhibits #14, #15, and #17 and by the testimony of Dr. Wiethe.

12. Based upon his review of the medical records with regard to Patient 1 (State's Exhibits #12 through #17), it was the opinion of Dr. Robert Falcone that Dr. Mathew's care with regard to Patient 1 fell below minimal standards of care of similar practitioners under the same or similar circumstances. Dr. Falcone stated that Dr. Mathew's failure to appropriately manage the serious post-operative complication of infection constituted a major departure from standards of care. Dr. Falcone stated that, with very few exceptions, contaminated prosthetic material must be removed to allow the infection to clear up. While a brief attempt to salvage the implants by conservative treatment might be appropriate, Dr. Mathew had definitely failed to remove Patient 1's prostheses in a timely manner. Furthermore, when he did remove them, he inappropriately replaced them, in the presence of active infection, without first giving the breasts a chance to heal. His replacing the implants subcutaneously, rather than subpectorally, was also inappropriate, especially in view of the prior infection problems. Subpectoral implantation provides better support and vascularity over the implant and, thus, reduces the risk of infection and other complications. With regard to Dr. Mathew's attempt to re-inflate Patient 1's prosthesis by percutaneous injection of saline, Dr. Falcone stated that this was not a known or recommended procedure in 1978, or ever. Saline-filled prostheses can be inflated only through the

valves built into them for that purpose. Inserting a needle through the wall of a prosthetic would only result in a leak of saline through the needle hole.

These facts are established by the testimony of Dr. Falcone (Tr. at 28-37, 65-86).

13. It was also the opinion of Dr. Dale Wiethé that Dr. Mathew's care with regard to Patient 1 constituted a departure from minimal standards of care of similar practitioners under the same or similar circumstances. Dr. Wiethé stated that he was appalled by the number of procedures Patient 1 went through without resolution of her problems. Dr. Mathew had failed to perform the original procedure properly, in that he had failed to remove a substantial amount of breast tissue and had placed the prostheses subcutaneously, rather than subpectorally. In Dr. Wiethé's opinion, it was apparent that Dr. Mathew had undertaken the performance of a surgical procedure about which Dr. Mathew lacked adequate knowledge. Dr. Wiethé also felt that Dr. Mathew had inappropriately ignored or mistreated the continual drainage and open wound problems, indicative of infection, throughout Patient 1's post-operative course and had inappropriately attempted to re-inflate her silastic prosthesis by injecting saline into it through the skin.

These facts are established by the testimony of Dr. Wiethé (7/30/90 Depo. Tr. at 11-23, 36-62).

14. On October 15, 1978, Dr. Mathew admitted Patient 2, a 50-year-old female, to the hospital. His admitting diagnosis of bilateral fibrocystic disease was well supported by his office record for this patient, as well as by the results of an excisional breast biopsy done during a hospitalization in July, 1978.

These facts are established by State's Exhibits #18, #19, and #23.

15. On October 17, 1978, Dr. Mathew performed a bilateral subcutaneous mastectomy with bilateral insertion of McGhan prostheses on Patient 2. Dr. Mathew inserted the large, 365 cc (315 cc plus 50 cc's of saline added by Dr. Mathew) prostheses subcutaneously.

These facts are established by State's Exhibit #19 and the testimony of Dr. Mathew.

16. When Patient 2 came to Dr. Mathew's office on October 26, 1978, nine days after the surgery, Dr. Mathew noted that there was drainage from her right breast and that it appeared bruised. Thinking that the bruised appearance was due to an accumulation of blood, he made a small incision to drain it, but found no blood accumulated. Throughout November, 1978, Patient 2 continued to experience right breast pain and drainage. On November 21, 1978, Patient 2 complained that her right breast was still seeping, her right armpit was painful, and she had a hole in her right breast. On that

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date, Dr. Mathew excised necrotic tissue from the breast and sutured the wound. One week later, in his office, Dr. Mathew removed the infected prosthesis from the right breast. Dr. Mathew saw Patient 2 twice in December, 1978. On December 15, he noted, "breast healing well, still some drainage, no infection, return in two weeks." In early January, 1979, there was still slight drainage from the right breast. On January 16, 1979, Patient 2 complained of some soreness under the left breast incision area. Dr. Mathew noted, "Breast healing well. Arrange admit to hospital next Wednesday for surgery Thursday."

On January 23, 1979, Dr. Mathew again admitted Patient 2 to the hospital, with an admitting diagnosis of infected wound and prosthesis. On January 24, 1979, he performed surgery on Patient 2's right breast. His operative report indicates that he removed a scarred and infected area, then inserted a 300 cc McGhan prosthesis into the breast, covering it with a skin flap developed from the abdomen. The surgical pathology report on the right breast tissue indicated, among other things, the presence of chronic inflammatory cells, predominantly lymphocytes. The pathological diagnosis was chronic mastitis (inflammation of the breast) and multiple foreign body granulomas.

When Patient 2 came to Dr. Mathew's office on February 1, 1979, eight days after that surgery, she complained of severe pain in the right arm and the right breast, radiating into the back. On February 15, Dr. Mathew noted that there was a slightly infected area over the breast. By March 6, 1979, the incision had opened and the implant was extruding. Dr. Mathew attempted to re-suture the wound in the office. A week later, Patient 2 reported that the sutures had come out. Dr. Mathew did not see Patient 2 after March 13, 1979.

These facts are established by State's Exhibits #20 and #23.

17. On March 20, 1979, Patient 2 went to the office of Dr. Dale Wiethé. Dr. Wiethé's office notes indicate that he found the skin flap, with which Dr. Mathew had attempted to reclose the eroded right breast, to have also eroded. The prosthetic was exposed widely at the end of the flap. He also noted that the left breast had a fluid mass in it under the dome of the breast and that the skin appeared to be "paper-thin." Dr. Wiethé recommended that both prosthetics be removed immediately.

Subsequently, Dr. Wiethé admitted Patient 2 to the hospital, where he removed both prostheses on March 30, 1979. As in the case of Patient 1, Dr. Wiethé's operative report with regard to Patient 2 indicated that, once the prosthetics were removed, the breasts had a donut-like appearance, with the nipples sinking into valleys, due to the fact that breast tissue had been removed mainly in a central area, with a substantial amount remaining around the breast circumferences, particularly in the upper halves.

These facts are established by State's Exhibits #21 and #22.

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18. As in the case of Patient 1, it was the opinion of both Dr. Dale Wiethé and Dr. Robert Falcone that Dr. Mathew's care with regard to Patient 2 constituted a departure from minimal standards of care of similar practitioners under the same or similar circumstances. In Dr. Wiethé's opinion, Dr. Mathew had improperly performed the original surgery, in that he had left a significant amount of breast tissue and had placed the prostheses under very thin skin flaps, rather than placing them subpectorally. When an extrusion occurred, the second operation which Dr. Mathew had performed to close it also demonstrated his lack of knowledge of the type of surgical procedure with which he was dealing.

In Dr. Falcone's opinion, Dr. Mathew had again failed to appropriately treat an infected prosthesis. When the wound of the right breast had broken down and drained, Dr. Mathew had tried topical and oral antibiotics and resuturing before removing the infected prosthesis. Dr. Falcone stated that attempting to resuture infected tissue was not appropriate. It was also not appropriate for Dr. Mathew to have replaced the right prosthesis subcutaneously. The patient had apparently continued to have problems after the replacement. Dr. Mathew had simply failed to provide the appropriate course of treatment in Patient 2's case; i.e., prompt removal of the infected prostheses, subsequent treatment with antibiotics as indicated by cultures, and allowing the area to heal for at least six months to a year before subpectoral replacement of the prostheses.

These facts are established by the testimony of Dr. Wiethé (7/30/90 Depo. Tr. at 23-28, 62-74) and the testimony of Dr. Falcone (Tr. at 37-42).

19. Dr. Mathew's testimony indicated that he was either unaware that infected tissue could heal once the source of infection was removed or confused about the difference between necrotic tissue and infected tissue. He stated that it was a "cardinal principle in surgery" to excise infected tissue. He contended that the fact that Dr. Wiethé had merely removed the implants of Patients 1 and 2, without excising tissue, indicated that there had not been infection present in the breasts of either of these patients at the time Dr. Wiethé had seen them.

In Dr. Mathew's opinion, the problems of Patient 1, and of Patient 2 after her second surgery, were not due to infection, but rather were caused by their failure to follow his instructions. He stated that both of these patients had constantly aggravated their wounds by lifting objects, moving their arms up and down, and tampering with their wounds and dressings. In fact, he suggested that Patient 1 simply hadn't wanted to heal, and had done everything she could to sabotage the surgeries.

These facts are established by the testimony of Dr. Mathew (Tr. at 149-158, 172-175, 272-281).

20. Dr. Mathew stated that he had not done any subcutaneous mastectomies since 1979. He also stated that he had done only 12 such procedures in 1978 and 1979, with Patients 1 and 2 being the only ones to have developed problems.

Dr. Mathew had received training in performing subcutaneous mastectomies and other breast surgeries during his residency from 1965 through 1968. He stated that, in 1977, he had "brushed up his memory" by attending a three and one-half day seminar at the University of Michigan. He admitted that this lecture-type seminar had covered various topics related to plastic surgery techniques for general surgeons, and was unable to recall how much time had been devoted to subcutaneous mastectomies. Dr. Mathew had not observed or scrubbed with any surgeons doing subcutaneous mastectomies since his residency.

These facts are established by the testimony of Dr. Mathew (Tr. at 120-122, 264-269).

21. Patient 3, a 64-year-old female, came to Dr. Mathew's office on March 22, 1983, with an enlarged lymph node on the right side of her neck. According to Dr. Mathew's summary of his office record for this patient, she had had this problem for over two years. According to a history later taken from Patient 3 by Dr. Eugene Means, a neurologist, she had had the problem for approximately two weeks, having developed a "knot" on the right side of her neck within a couple of weeks after she had the flu in February.

On March 23, 1983, Dr. Mathew removed the enlarged cervical lymph node from the right side of Patient 3's neck, performing the surgery in his office under a local anesthesia. According to Dr. Mathew's patient summary, the lymph node was sent for laboratory analysis; the pathological diagnosis was "reactive hyperplasia." Such diagnosis would indicate that the lymph node had simply been enlarged in reaction to something, such as a viral infection, that had affected it.

Dr. Mathew's patient record summary indicates that Patient 3 had no complaints when she came to his office on March 25, 1983. When she returned on March 29, 1983, to have her sutures removed, she complained of having had a slight headache and "fever blisters" for two days. She stated that she had no problems with the surgery and that the arthritis pills, Motrin, really helped her neck. On April 5, 1983, Patient 3 stated that she still had a stiff neck and was seeing a chiropractor. Dr. Mathew gave her Tolectin 40 mg. On April 22, 1983, Patient 3 complained of being unable to raise her right arm, with pain radiating downward and some swelling in the joint, as well as soreness in the neck. She indicated that her arm pain had worsened because she had been lifting. Dr. Mathew injected the "trigger area" with 4 cc's of Xylocaine and 1 cc of Prednasone. On April 29, 1983, Patient 3 still had pain in her neck and was still unable to raise her right arm, but stated that the injection had helped her shoulder. Dr. Mathew performed osteopathic manipulation therapy and applied ultrasound to her neck. Although he recommended that she continue the ultrasound treatments, Patient 3 did not thereafter return to Dr. Mathew's office.

According to the history which Dr. Eugene Means later took from Patient 3, Patient 3 had developed soreness in her right shoulder approximately three days after surgery and, over the ensuing several days, had become unable to raise her arm without considerable pain. Thereafter, when she had complained that her shoulder was very sore and that the pain had spread to the anterior and posterior chest wall, Dr. Mathew had given her a "shot" in the shoulder and had told her the pain was due to "muscle." He had later performed an adjustment and prescribed ultrasound treatments, which had helped only temporarily. Since April, Patient 3 had been seen by several other physicians, who had apparently been unable to diagnose Patient 3's problem. Sometime in May, 1983, Patient 3 had seen Dr. Phillip A. Pfalzgraf, Jr., who had referred her to Dr. Means for neurological evaluation.

Dr. Means examined Patient 3 on June 1, 1983. His report to Dr. Pfalzgraf indicated that the neurological review of her systems was essentially unremarkable, and that she had noted no symptoms referable to the cranial nerves. However, her right trapezius muscle was clearly atrophied. Ever since Dr. Mathew had done the biopsy of her "neck knot," she had noticed progressive wasting of the muscles about her neck, and had experienced persistent, dull, aching pain in the neck, shoulder, and arm. Based on these facts, Dr. Means suspected that the accessory nerve to Patient 3's trapezius muscle had been injured when she had had the biopsy. Dr. Means recommended as a first step that Patient 3 have an electromyogram to determine whether or not she had active denervation of the trapezius muscle. An EMG done on June 8, 1983, confirmed that Patient 3 had severe denervation in the right trapezius muscle, indicating injury to the right accessory nerve.

On July 1, 1983, Dr. Raymond Sawaya, a neurosurgeon, performed exploratory surgery on Patient 3 to determine the status of her right accessory nerve. Upon opening the scar from Dr. Mathew's biopsy and tracing the accessory nerve, Dr. Sawaya discovered a scarring involving the nerve. Upon removing the scar tissue, he found two, black, nonabsorbable sutures involving the nerve. The nerve was freed by removing the sutures and the surrounding scar tissue. An EMG subsequently done on September 7, 1983, showed mild slowness, but marked improvement, in the motor conduction of Patient 3's right accessory nerve.

These facts are established by State's Exhibits #24 and #25 and the testimony of Dr. Falcone (Tr. at 102-103).

22. Dr. Robert Falcone stated that it was difficult to tell from Dr. Mathew's patient record summary exactly what had gone on. However, it appeared that soon after Dr. Mathew had removed the lymph node from her neck, Patient 3 had begun to complain of neck and shoulder pain, which Dr. Mathew had treated as arthritis. The pain symptoms had apparently persisted and had become associated with weakness of and inability to raise the shoulder. Eventually, Patient 3 had gone to other doctors, one

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of whom had appropriately diagnosed an injury to the right accessory nerve. Subsequently, a neurosurgeon had performed exploratory surgery, and had removed ligatures around the nerve.

In Dr. Falcone's opinion, Dr. Mathew's failure to recognize and appropriately treat or refer Patient 3 for complications of the surgery Dr. Mathew had performed constituted a departure from minimal standards of care. Dr. Falcone stated that Dr. Mathew had made an incision directly over the area of the spinal accessory nerve, and should have been able to recognize the characteristic symptoms of a compromised right accessory nerve. Dr. Mathew had apparently failed to make any connection between his surgery and the patient's subsequent symptoms, and had failed to perform appropriate evaluation of her symptoms or to make an appropriate referral. According to Dr. Falcone, the nerve, upon being ligated by two sutures, would have immediately quit conducting, with immediate degeneration distally. Findings and symptoms would have been progressive, but should have been obvious within four to six weeks. The patient so affected would likely exhibit pain in the upper neck, down the back, and onto the anterior chest wall; weakness in the ability to lift the shoulder; and progressive atrophy of the muscle supplied by the nerve. A denervated trapezius muscle would begin to atrophy within a couple of weeks, with such atrophy becoming obvious upon gross examination, even in a thin or unmuscular woman, within a month's time. Dr. Falcone stated that a general surgeon who undertook to operate in the area of the spinal accessory nerve should be capable of suspecting and ruling out a ligation of that nerve when the patient subsequently complained of pain and inability to raise the shoulder. Such ligation is a relatively common and easily recognizable complication of a cervical lymph node biopsy, which involves an incision directly over the field of the spinal accessory nerve.

These facts are established by the testimony of Dr. Falcone (Tr. at 42-51, 89-97, 102-103).

23. Marc Cooperman, M.D., who testified as an expert witness for the Respondent, was of the opinion that Dr. Mathew's care with regard to Patient 3 did not fall below minimal standards. Although a complication had occurred because a nerve had been transfixated by or encircled by sutures placed by Dr. Mathew, such complication is not uncommon with a cervical lymph node biopsy. Dr. Cooperman stated that surgical misadventures happen to the best, and this situation could not be considered one of grossly negligent surgical treatment. Nevertheless, Dr. Cooperman admitted upon cross-examination that Dr. Mathew probably should have entertained the possibility of spinal accessory nerve injury in this case, and should have either looked into it or referred the patient. Although Patient 3's complaints had been rather nonspecific and had

included unrelated symptoms, such as the swelling of joints and headache, Dr. Mathew's awareness that this particular type of surgery had taken place should have been a differential factor.

These facts are established by the testimony of Dr. Cooperman (7/31/90 Depo. Tr. at 7-12, 18-25).

24. Dr. Mathew testified that Patient 3 had been his patient since 1975. Over the years, he had treated her upon several occasions for problems with her neck and shoulders. He had thought her complaints after the biopsy to be indicative of another such episode. Dr. Mathew acknowledged that the cervical lymph node could be in the same area as the nerve affected in this case, but stated that that would vary from person to person. He claimed that he always checked for nerves when doing such a procedure, and that there had been no nerves in field when he had done the biopsy on Patient 3. He had, therefore, placed a few deep sutures to make sure that there would be no bleeding and to achieve a better cosmetic result. He had used nonabsorbable sutures because the patient had been allergic to catgut, a fact which is substantiated by the University of Cincinnati records.

Dr. Mathew contended that his sutures had not caused the problem directly. He pointed out that he had only used a local anesthetic on the skin, so that if he had touched the nerve during surgery, the patient would have experienced immediate, terrible pain. However, Patient 3 hadn't complained of pain until nearly a month after surgery. On April 22, 1983, the patient had complained that she was unable to raise her arm and that she had pain radiating downward and some swelling in the joint. When he had examined her, there had been indications of a trapezius muscle problem, a problem which many people experience, so he had injected the trigger point in her right shoulder. Often when people have problems raising their shoulders, putting pressure on the points of tenderness in the trapezius muscle helps relax it so that the patient can then raise the shoulder. An injection of Xylocaine and Cortisone would be his normal follow-up to that procedure. In fact, when the patient had returned on April 29, 1983, she had said that the injection had helped her shoulder. Although she had still had pain in the neck and had been unable to raise her right arm, it had been his impression that her symptoms were caused by arthritis, aggravated by lifting. Dr. Mathew stated that Patient 3 had simply not related any complaints which he could have connected with the surgery, during the time he treated her. He had not seen her again after April 29.

Dr. Mathew pointed out that, even Dr. Means, who had seen Patient 3 over a month later, had not been able to formulate a definitive diagnosis based on the symptoms stated by Patient 3. Dr. Mathew contended that the progressive development of scar tissue around the sutures might have caused Patient 3 to develop symptoms during the interim which would have

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prompted Dr. Means to refer her for an EMG; however, when Dr. Mathew had last seen her, this patient had exhibited neither muscle atrophy nor other symptoms referable to a nerve injury.

These facts are established by the testimony of Dr. Mathew (Tr. at 189-222, 282-289).

25. Patient 4, a 76-year-old female, was hospitalized under the care of Dr. Mathew from November 16 to November 26, 1986. A CAT scan of the chest done during that admission indicated that she had an incomplete expansion of the left lung (atelectasis, lingula), mild to moderate in nature; a 2 cm lesion in the right breast; and arteriosclerotic vascular disease. The diagnoses upon discharge were pneumonia, left lower lung; dehydration; hypokalemia (low potassium levels); and lesion in the right breast. Dr. Mathew noted on his discharge summary that the breast would be biopsied in the office.

On December 3, 1986, Dr. Mathew performed a subtotal mastectomy of the right breast, in his office under local anesthesia, on Patient 4. From an 11 x 10 x 6 cm specimen sent for laboratory analysis, the pathological diagnosis was infiltrating ductal carcinoma. Although an operative report contained in the patient record also lists carcinoma as the pre-operative diagnosis, the testimony of Dr. Mathew indicated that this report had been prepared in hindsight at the request of an insurance company.

According to the patient record, Dr. Mathew saw Patient 4 several times after the surgery, making house calls on December 5, December 18, December 26, 1986, and January 27, 1987, and seeing her on three occasions in June, 1987. However, he failed to perform any further staging, evaluation, or treatment of Patient 4's breast cancer. Further, he failed to advise Patient 4 to seek medical treatment from another physician. Dr. Mathew's office record contains no documentation indicating that he advised Patient 4 of her diagnosis, presented any treatment options to her, consulted with other physicians, or made any effort to formulate a prognosis or treatment plan for this patient.

These facts are established by State's Exhibits #26 and #27.

26. Dr. Mathew testified that he had first discovered Patient 4's breast mass when she was in the hospital in November, 1983. Although the hospital records do not so indicate, Dr. Mathew claimed that he had tried to get her on the operating room schedule at that time, but had been forced to discharge her because it had been filled until the following week. He also claimed that Patient 4 had subsequently stated that she couldn't afford to go back into the hospital. Thus, Dr. Mathew had decided to do the surgery in his office. Although Dr. Mathew had surgical facilities in his office, he had no surgical assistant or other assistant with formal medical training.

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Dr. Mathew stated that he would have done the surgery on Patient 4 under local anesthesia, even if she had been hospitalized, because she had not been a candidate for general anesthesia due to her severe cardiac and respiratory problems. He also stated that the surgical area had not required a great amount of local anesthesia because Patient 4's breasts had been thin and pendulous, and he had excised the right breast close to the chest wall where its circumference had been small. He had ruled out doing a simple mastectomy because that procedure would have required either general anesthesia or using a possibly toxic amount of local anesthesia to anesthetize the whole area of Patient 4's breast. He had also ruled out axillary node dissection because it would have required the administration of general anesthesia. Dr. Mathew stated that he had found no palpable nodes when he had examined Patient 4's axilla. He admitted that axillary node dissection would have been the only definitive way to rule out nonpalpable spread of the cancer, but stated that general anesthesia had simply been out of the question for Patient 4. It is noted that the hospital records identified as State's Exhibit #26 indicate that Patient 4 had diabetes, circulatory problems, and recent respiratory problems, but do not support Dr. Mathew's at-hearing claim that she had severe emphysema.

Although Dr. Mathew's medical records do not so indicate, he claimed that he had discussed Patient 4's treatment options with other physicians, including a radiation therapist, who had recommended no radiation treatment because of Patient 4's poor physical condition. Dr. Mathew testified that he had told Patient 4 that she had cancer, and that she shouldn't have any further treatment for it. He stated that Patient 4 had never had any ideas or questions about treatment options (Tr. at 291).

Patient 4 died on August 14, 1988, from conditions unrelated to her cancer. Dr. Mathew felt that this fact indicated that his non-treatment decision had been justified.

These facts are established by the testimony of Dr. Mathew (Tr. at 222-235, 289-293), State's Exhibit #26 and #27, and Respondent's Exhibit 0.

27. In the opinion of Dr. Marc Cooperman, Dr. Mathew's choice of surgical therapy for Patient 4, under the circumstances given, was totally appropriate and did not indicate a deviation from reasonable standards of care. Dr. Cooperman stated that the age and physiological status of a patient must be a consideration in treatment decisions. According to Dr. Mathew, Patient 4 had had severe lung disease, with shortness of breath so severe that the surgery had to be done with the patient in an almost upright position. Dr. Cooperman stated that a lumpectomy is acceptable treatment for breast cancer in a patient of this age. The pathology report had indicated that the margins around the tumor were free of malignancy, which indicated that Dr. Mathew had done an adequate lumpectomy. Dr. Cooperman stated that he himself would have done tests

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for hormone receptors after the surgery, because such tests are useful to both surgeons and oncologists in determining the patient's prognosis and in formulating subsequent therapy, if any. However, Dr. Mathew had apparently been dealing with a patient who refused to go to the hospital. In 1986, such tests had to be done on freshly frozen tissue, rather than on tissue already fixed in formalin. Dr. Cooperman acknowledged that the patient's unwillingness to go to the hospital had not been documented in Dr. Mathew's medical records. In addition to hormone receptor tests, Dr. Cooperman stated that some cancer surgeons would insist that axillary lymph node dissection should be part of treatment for cancer. However, if Dr. Mathew had considered the options available in the event that the nodes had been found positive, and had deemed local removal to be the optimum treatment because the patient was not likely to live much longer, Dr. Mathew's omission of further testing would have been appropriate. Dr. Cooperman stated that he was unable to determine what Dr. Mathew's thinking had been from his medical records. Nevertheless, the fact that Patient 4 had died a couple of years after the surgery from unrelated causes indicated that Dr. Mathew's treatment decision had been correct.

These facts are established by the testimony of Dr. Cooperman (7/31/90 Depo. Tr. at 12-16, 25-31).

28. Dr. Robert Falcone stated that it would be highly unusual to perform the type of surgery which Dr. Mathew did on Patient 4 in the office under local anesthesia. While circumstances might require the use of local anesthesia, such procedures are almost universally done in an outpatient surgical facility where the patient can be monitored closely for possible complications, including toxicity from the anesthesia. Moreover, doing a fairly sizeable tissue resection, such as had been done in this case, might require dilution of the anesthesia, special chest techniques such as nerve blocks and nerve infiltration, and sedation. However, Dr. Falcone admitted that he had no knowledge of the type of surgical facilities or surgical assistance Dr. Mathew had in his office.

In Dr. Falcone's opinion, Dr. Mathew's failure either to provide the standard treatment for breast cancer or to document his reasons for deviation in this case, constituted departure from minimal standards of care for physicians. In 1986, the standard treatment for breast cancer consisted of modified radical mastectomy (total mastectomy with axillary node dissection, but leaving the pectoral muscles intact), staging (scans of body organs to look for metastatic tumor), and radiation therapy. While a partial mastectomy or lumpectomy, such as that performed by Dr. Mathew, is one of at least three acceptable treatment options in 1990, it was considered an experimental protocol in 1986. Nevertheless, partial mastectomy was justified in many situations. However, when it was done for malignancy, it was generally followed by further therapy to the remaining breast, such as axillary tissue removal and radiation therapy. Dr. Mathew's patient record gave no indication that he had done any further diagnostic evaluation or had offered Patient 4 any further therapy

for her cancer, even though he had seen her on several occasions after the surgery. Dr. Falcone acknowledged that Patient 4 appeared to have been old and sickly, but stated that physicians, nevertheless, have a duty to advise the patient of options, to offer appropriate therapy and, if the patient declines treatment, to document that refusal. Dr. Mathew failed to do so.

These facts are established by the testimony of Dr. Falcone (Tr. at 51-58, 99-101) and by State's Exhibits #26 and #27.

29. Victor D. Angel, D.O., a practicing surgeon and former chief of staff at Epp Memorial (now Kenwood Jewish) Hospital, testified on behalf of Dr. Mathew. Dr. Mathew and Dr. Angel have been colleagues at the hospital since 1980, where they have consulted with each other in medical and surgical cases and have worked together on various hospital committees. Based on his knowledge and observations of Dr. Mathew in the hospital, it was the opinion of Dr. Angel that Dr. Mathew competently performed as a surgeon and physician. Dr. Angel stated that Dr. Mathew had admitted thousands of patients to the hospital over the years and had never been identified as having problems in any particular areas. Further, to Dr. Angel's knowledge, no review of Dr. Mathew's cases had ever resulted in disciplinary action or limitation of his privileges. Dr. Angel had no knowledge of or involvement in Dr. Mathew's office practice.

These facts are established by the testimony of Dr. Angel (Tr. at 239-258).

30. An affidavit submitted by a patient on behalf of Dr. Mathew indicated that Dr. Mathew has a good reputation as a physician and surgeon in Bethel, Ohio.

These facts are established by Respondent's Exhibit P.

CONCLUSIONS

1. The acts, conduct, and/or omissions of Varughese P. Mathew, D.O., with regard to his treatment of both Patients 1 and 2, as set forth in Findings of Fact #2 through #20, above, constitute "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", as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

Substantial, reliable, and probative testimony and evidence presented in this Matter indicate that Dr. Mathew's surgical techniques with regard to both of these patients were deficient. In performing bilateral subcutaneous mastectomies on these patients, Dr. Mathew failed to remove

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sufficient amounts of breast tissue, as evidenced by the medical testimony, medical documentation, and the State's photographs of Patient 1. In addition, the testimony and evidence, including the Respondent's Exhibits, indicate that Dr. Mathew's placing of large prosthetics subcutaneously, under thin skin flaps, was inappropriate and created a likelihood that the prosthetics would later extrude.

Furthermore, in both of these patients, Dr. Mathew failed to recognize, diagnose, or appropriately treat postoperative infections. In fact, Dr. Mathew's testimony at hearing indicated that he still would not recognize an open, draining wound as a clinical sign of infection. Despite those signs, and others, of infection, Dr. Mathew failed to remove the contaminated prostheses of these patients in a timely manner, but rather persisted in inappropriate attempts to salvage the implants, including attempting to reclose unhealed wounds. In the case of Patient 1, Dr. Mathew inappropriately attempted to reinflate a leaking prosthesis by means of a percutaneous injection of saline. When Dr. Mathew was forced to remove the prosthetics of Patient 1 due to deflation, he immediately replaced them in the presence of active infection. In the case of Patient 2, Dr. Mathew removed a prosthesis because of infection, and thereafter implanted another one into the still-infected breast, after attempting to excise an infected area from the breast. Not only did Dr. Mathew fail to give the breasts of both of these patients an appropriate time to heal before replacing the prosthetics, but also he inappropriately replaced them subcutaneously, rather than subpectorally. When both of these patients continued to have problems after Dr. Mathew's inappropriate replacements of their implants, Dr. Mathew persisted in taking inappropriate conservative measures, rather than removing the contaminated implants. At hearing, Dr. Mathew denied that these patients' problems had been due to postoperative infections, and blamed the patients for having constantly aggravated their wounds.

2. The acts, conduct, and/or omissions of Dr. Mathew with regard to his treatment of Patient 3, as set forth in Findings of Fact #21 through #24, above, constitute "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", as that clause is used in Section 4731.22(B)(6), Ohio Revised Code. The testimony and evidence in this Matter substantially indicate that Dr. Mathew failed to diagnose, properly treat, or refer Patient 3 with regard to the ligated right accessory nerve which resulted from Dr. Mathew's performance of a cervical lymph node excision. Even Dr. Cooperman, Dr. Mathew's own expert witness, acknowledged that Dr. Mathew's awareness that this particular surgery had taken place should have been a factor enabling him to make or suspect the diagnosis. Dr. Mathew failed to appropriately evaluate Patient 3's complaints, but rather treated her symptoms as arthritis. As in the case of Patients 1 and 2, Patient 3 was forced to go to other physicians because of Dr. Mathew's failure to appropriately assess and manage her postoperative complication.

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It is noted that the history later taken by Dr. Means indicates that Dr. Mathew failed to take an accurate history of Patient 3's initial problem, and may have performed the cervical lymph node biopsy without adequate indication. However, due to the fact that Dr. Mathew's original record was lost, the evidence is deemed insufficient to support a conclusion as to this point.

3. Dr. Mathew's acts, conduct, and/or omissions with regard to his treatment of Patient 4, as set forth in Findings of Fact #25 through #28, above, also constitute "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", as that clause is used in Section 4731.22(B)(6), Ohio Revised Code. Although Dr. Mathew's testimony indicated that he might have had valid reason for not providing Patient 4 with the standard treatment for breast cancer, his failure to document those reasons constitute failure to conform to minimal standards of care. Further, Dr. Mathew's testimony indicated that he unilaterally made the decision for non-treatment, without giving Patient 4 enough information to determine her options and to make an informed choice as to whether or not she wanted to pursue treatment. Such conduct also constitutes a departure from minimal standards of care of physicians under similar circumstances.

* * * * *

The circumstances of the cases reviewed and the testimony of Dr. Mathew suggest that he has some serious deficiencies in medical judgment and knowledge. Dr. Mathew's voluntary relinquishment of his hospital privileges to perform surgery cannot satisfy all concerns raised. His faulty surgical techniques in the cases of Patients 1 and 2, indicate an apparent former willingness on his part to undertake the performance of surgeries in which he lacked current training or experience. Such conduct reflects poor judgment. Of perhaps more immediate concern, are his failure to appropriately manage post-surgical complications, and his persistent denial of the existence of clinical symptoms of such complications, even though they are apparent from his own patient records. His handling of the cases of Patients 1 and 2, as well as his testimony at hearing, indicate that Dr. Mathew was, and continues to be, unable or unwilling to either recognize the clinical signs of post-surgical infection or to treat such infections appropriately. Likewise, in the case of Patient 3, Dr. Mathew was apparently unable or unwilling to recognize any connection between the surgery he had performed and the patient's subsequent symptoms. Both the testimony of Dr. Falcone and Dr. Cooperman suggested that he should have been able to recognize the signs of a relatively common complication of such surgery, based upon the patient's complaints coupled with Dr. Mathew's awareness that the particular surgery had been done. In the case of Patient 4, it is unclear whether Dr. Mathew merely failed to appropriately document or whether he failed to appropriately treat. However, Dr. Mathew admitted that he had not presented

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treatment options to this patient. Such conduct also reflects poorly on Dr. Mathew's judgment. The evidence substantially indicates that Dr. Mathew's failure to properly manage post-surgical complications caused at least three of the four patients reviewed a great deal of unnecessary pain and suffering. All of these cases raise substantial concerns about Dr. Mathew's competence and judgment. This Board is obligated to address those concerns by determining whether or not Dr. Mathew is capable of practicing medicine in a safe and responsible manner.

PROPOSED ORDER

It is hereby ORDERED that:

1. The certificate of Varughese P. Mathew, D.O., to practice medicine and surgery in the State of Ohio shall be revoked. Such revocation is stayed, and Dr. Mathew's certificate is hereby SUSPENDED for indefinite period of time.
2. The State Medical Board shall not consider reinstatement of Dr. Mathew's certificate unless and until all of the following minimum requirements are met:
 - a. Dr. Mathew shall submit an application for reinstatement, accompanied by appropriate fees.
 - b. Dr. Mathew shall take and pass the SPEX examination, or any similar written examination which the Board may deem appropriate to assess his clinical competency.
 - c. In the event that Dr. Mathew has not been engaged in the active practice of medicine or surgery for a period in excess of two years immediately preceding the time of his application for reinstatement, the Board may exercise its discretion under Section 4731.222, Ohio Revised Code, to require additional evidence of Dr. Mathew's fitness to resume practice.
3. Upon reinstatement, Dr. Mathew's certificate shall be permanently limited and restricted in that Dr. Mathew shall not be permitted to engage the practice of surgery, except for the performance of simple excisions and biopsies, the suturing of wounds, and the performance of diagnostic gastroscopies, cystoscopies, colonoscopies, and other endoscopic procedures.
4. Further, upon reinstatement, Dr. Mathew's certificate shall be subject to the following terms, conditions, and limitations for a period of three (3) years:
 - a. Dr. Mathew shall obey all federal, state, and local laws, and all rules governing the practice of medicine in Ohio.

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- b. Dr. Mathew shall submit quarterly declarations under penalty of perjury, stating whether or not there has been compliance with all of the conditions of probation.
 - c. Dr. Mathew shall appear in person for interviews before the full Board or its designated representative at six (6) month intervals, or as otherwise requested by the Board.
 - d. In the event that Dr. Mathew should leave Ohio for three (3) continuous months, or reside or practice outside of the State, Dr. Mathew must notify the Board in writing of the dates of departure and return. Periods of time spent outside of Ohio will not apply to the reduction of this probationary period.
 - e. Before the end of the first year of probation, or as otherwise approved by the Board, Dr. Mathew shall complete a course approved by the Board on maintaining adequate and appropriate medical records.
 - f. Within thirty (30) days of reinstatement, Dr. Mathew shall submit for the Board's prior approval the name of a monitoring physician, who shall review Dr. Mathew's patient charts and shall submit a written report of such review to the Board on a quarterly basis. Such chart review may be done on a random basis, with the number of charts reviewed to be determined by the Board. It shall be Dr. Mathew's responsibility to ensure that the monitoring physician's quarterly reports are submitted to the Board on a timely basis. In the event that the approved monitoring physician becomes unable or unwilling to so serve, Dr. Mathew shall immediately so notify the Board in writing and shall make arrangements for another monitoring physician as soon as practicable.
5. If Dr. Mathew violates the terms of this probation in any respect, the Board, after giving Dr. Mathew notice and an opportunity to be heard, may impose whatever disciplinary action it deems appropriate, up to and including the revocation of his certificate.
 6. Upon the successful completion of probation, Dr. Mathew's certificate will be fully restored, except for the permanent limitation and restriction set forth in paragraph three (3), above.

This Order shall become effective thirty (30) days from the date of mailing of notification of approval by the State Medical Board of Ohio. In the thirty (30) day interim, Dr. Mathew shall not undertake the care of any patient not already under his care.


Wanita J. Sage
Attorney Hearing Examiner



STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

EXCERPT FROM THE MINUTES OF OCTOBER 10, 1990

REPORTS AND RECOMMENDATIONS

.....

Dr. Kaplansky asked if each member of the Board had received, read, and considered the hearing record, the proposed findings, conclusions, and orders, and any objections filed in the matters of Varughese P. Mathew, D.O.; David Ferrero, D.P.M.; and Hemalathadevi V. Tarikere, M.D.

ROLL CALL:	Dr. Cramblett	- aye
	Dr. O'Day	- aye
	Dr. Gretter	- aye
	Dr. Stephens	- aye
	Mr. Jost	- aye
	Dr. Ross	- aye
	Dr. Rauch	- aye
	Mr. Albert	- aye
	Dr. Daniels	- aye
	Ms. Rolfes	- aye
	Dr. Agresta	- aye
	Dr. Kaplansky	- aye

Mr. Jost stated that, because he was Supervising Member in the matter of Hemalathadevi V. Tarikere, M.D. and is therefore ineligible to discuss the matter or to vote, he did not read the hearing record.

.....

REPORT AND RECOMMENDATION IN THE MATTER OF VARUGHESE P. MATHEW, D.O.

.....

MR. ALBERT MOVED TO APPROVE AND CONFIRM MS. SAGE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF VARUGHESE P. MATHEW, D.O. DR. GRETTTER SECONDED THE MOTION.

.....



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EXCERPT OF THE MINUTES OF OCTOBER 10, 1990
IN THE MATTER OF VARUGHESE P. MATHEW, D.O.

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A roll call vote was taken on Mr. Albert's motion:

ROLL CALL VOTE:	Dr. Cramblett	- abstain
	Dr. O'Day	- aye
	Dr. Gretter	- aye
	Dr. Stephens	- aye
	Mr. Jost	- aye
	Dr. Ross	- aye
	Dr. Rauch	- abstain
	Mr. Albert	- aye
	Dr. Daniels	- aye
	Ms. Rolfes	- aye
	Dr. Agresta	- aye

The motion carried.

STATE OF OHIO
THE STATE MEDICAL BOARD
77 SOUTH HIGH STREET
17TH FLOOR
COLUMBUS OH 43215

April 11, 1990

Varughese P. Mathew, D.O.
145 North West Street
Bethel, OH 45106

Dear Doctor Mathew:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio intends to determine whether or not to limit, revoke, suspend, refuse to register or reinstate your certificate to practice osteopathic medicine and surgery, or to reprimand or place you on probation for one or more of the following reasons:

- (1) On or about July 25, 1978, you performed a bilateral subcutaneous mastectomy and bilateral subcutaneous implantation of McGhan silastic prosthetic implant on Patient 1 (identified in the attached Patient Key, not subject to public disclosure). The medical record indicates a preoperative diagnosis of bilateral fibrocystic disease. During the course of your treatment you failed to remove sufficient amounts of breast tissue, failed to promptly remove a drain tube which had become displaced and, although you performed several follow up surgical procedures on Patient 1, you failed to recognize or diagnose Patient 1's infection and failed to appropriately treat that infection. You attempted to reinflate a leaking prosthesis by injecting 30 cc of sterile saline and you replaced the prostheses of Patient 1 while she still had an active infection.
- (2) On or about October 17, 1978, you performed a bilateral subcutaneous mastectomy with bilateral insertion of McGhan prosthesis on Patient 2. The medical records indicate a preoperative diagnosis of bilateral fibrocystic disease. During the course of your treatment you failed to remove sufficient amounts of breast tissue, you failed to adequately diagnose and treat Patient 2's post operative infection, you replaced the right prosthesis in the presence of an active infection, and you attempted to resuture the area where the prosthesis was partially extruded and the skin was not healing.

April 11, 1990

- (3) On or about March 23, 1983, you removed the cervical lymph node from the right side of Patient 3's neck as an office procedure. The preoperative diagnosis was "palpable cervical lymphadenopathy, has had it for over two years." In follow-up, Patient 3 complained of a stiff neck, inability to raise the right arm with pain radiating downward and swelling in the joint. You diagnosed Patient 3 as having "reactive hyperplasia." At no time did you diagnose or properly treat the ligated right accessory nerve.
- (4) On or around December 3, 1986 you performed a "subtotal mastectomy of the right breast" in your office under local anesthesia on Patient 4. The preoperative diagnosis was carcinoma of the right breast. Although the pathology report diagnosed this as infiltrating ductal carcinoma and you saw the patient on a number of follow up visits, you failed to perform any further staging, evaluation, or treatment on Patient 4. Further, you did not advise Patient 4 to seek further medical treatment from another physician.

The acts, conduct, and/or omissions as alleged in paragraphs (1) through (4) above, individually and/or collectively, constitute "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," as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty (30) days of the time of mailing of this notice.

You are further advised that you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before the agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

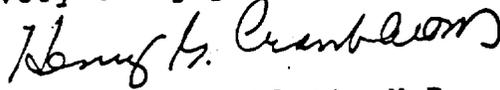
In the event that there is no request for such hearing received within thirty (30) days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, suspend, refuse to register or reinstate your certificate to practice osteopathic medicine and surgery or to reprimand or place you on probation.

Varughese P. Mathew, D.O.
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Copies of the applicable sections are enclosed for your information.

Very truly yours,



Henry G. Cramblett, M.D.
Secretary

HGC:jmb

Enclosures:

CERTIFIED MAIL #P 746 510 150
RETURN RECEIPT REQUESTED