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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FRANKLIN COUNTY

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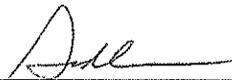
Mitchell Edward Simons, M.D., :
Appellant-Appellant, :
v. :
State Medical Board of Ohio, :
Appellee-Appellee. :

No. 06AP-1000

(REGULAR CALENDAR)

JOURNAL ENTRY OF DISMISSAL

Appellant, through counsel, having filed a motion to voluntarily dismiss this appeal, the same is approved and this appeal is hereby dismissed. Costs shall be assessed against appellant.



JUDGE



JUDGE



ON COMPUTER 12

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

MITCHELL EDWARD SIMONS, M.D., :

Appellant, :

v. :

STATE MEDICAL BOARD OF OHIO, :

Appellee. :

Case No. 06CVF-010837

Judge Lynch

TERMINATION NO. 7

BY: [Signature]

APPELLANT MITCHELL EDWARD SIMONS, M.D.'S NOTICE OF VOLUNTARY DISMISSAL

Pursuant to Civ. R. 41(A)(1), Appellant Mitchell Edward Simons, M.D. voluntarily dismisses this administrative appeal.

Respectfully submitted,

LANE, ALTON & HORST, LLC

[Signature]

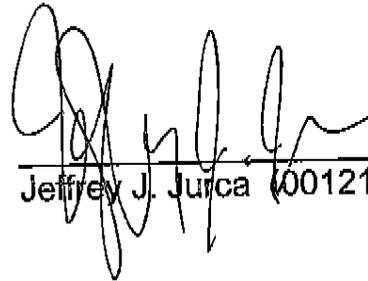
Jeffrey J. Jurca (0012107)
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jjurca@lah4law.com
Counsel for Appellant,
Mitchell E. Simons, M.D.

FILED
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO
06 DEC 28 PM 4:14
CLERK OF COURTS-CV

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was duly served, via facsimile and regular U.S. mail, postage prepaid, this 28th day of December, 2006, upon the following:

Barbara J. Pfeiffer, Esq.
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3428
Attorney for Appelle
State Medical Board of Ohio



Jeffrey J. Jurca (0012107)

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

FILED
COURT OF APPEALS
2006 DEC 28 PM 4:10
CLERK OF COURTS

MITCHELL EDWARD SIMONS, M.D.,	:	
	:	
Appellant,	:	Case No. 06APE-10-1000
	:	
v.	:	Accelerated Calendar
	:	
STATE MEDICAL BOARD OF OHIO,	:	(Appeal from the Court of
	:	Common Pleas, Franklin County,
Appellee.	:	Case No. 06CVF-010837
	:	Judge Lynch)

**APPELLANT MITCHELL EDWARD SIMONS, M.D.'S
MOTION TO VOLUNTARILY DISMISS APPEAL**

Pursuant to App. R. 28, Appellant Mitchell Simons, M.D. moves to voluntarily dismiss this appeal, as he has decided not to proceed further with this litigation.

Respectfully submitted,

LANE, ALTON & HORST, LLC

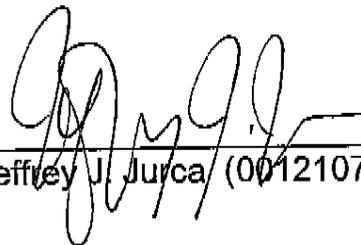


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 (614) 228-0146 (Facsimile)
jjurca@lah4law.com
 Counsel for Appellant,
 Mitchell E. Simons, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was duly served, via facsimile and regular U.S. mail, postage prepaid, this 28th day of December, 2006, upon the following:

Barbara J. Pfeiffer, Esq.
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3428
Attorney for Appellee
State Medical Board of Ohio



Jeffrey J. Jurca (0012107)

42703-1

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FILED
COURT OF APPEALS
FRANKLIN COUNTY

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CLERK OF COURTS

Mitchell Edward Simons, M.D., :

Appellant-Appellant, :

v. :

No. 06AP-1000

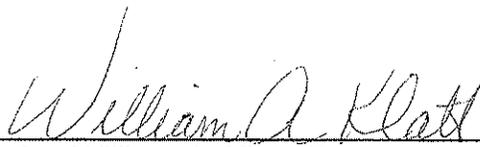
State Medical Board of Ohio, :

(REGULAR CALENDAR)

Appellee-Appellee. :

JOURNAL ENTRY

Appellant's November 13, 2006 motion for a stay of proceedings is denied.



Judge William A. Klatt, P.J.

WJK

HEALTH & HUMAN
DEC 04 2006
SERVICES SECTION

ON COMPUTER 12

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

18987A12

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2006 OCT 19 PM 4:49

CLERK OF COURTS

Mitchell Edward Simons, M.D., :

Appellant-Appellant, :

v. :

State Medical Board of Ohio, :

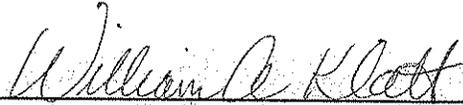
Appellee-Appellee. :

No. 06AP-1000

(REGULAR CALENDAR)

JOURNAL ENTRY

Appellant's October 4, 2006 motion for a suspension of the decision of the State Medical Board of Ohio pending appeal is denied.



Judge William A. Klatt, P.J.



Judge Charles R. Petree



Judge Susan Brown

ON COMPUTER 6

HEALTH & HUMAN

OCT 25 2006

SERVICES SECTION



IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

MITCHELL EDWARD SIMONS, M.D., :

Appellant, :

v. :

STATE MEDICAL BOARD OF OHIO, :

Appellee. :

Case No. 06CVF-010837

Judge Lynch

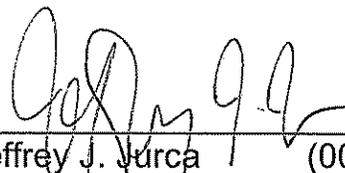
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COMMON PLEAS COURT
FRANKLIN CO., OHIO
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CLERK OF COURTS

NOTICE OF APPEAL

Notice is hereby given that Appellant, Mitchell Edward Simons, M.D., hereby appeals to the Court of Appeals of Franklin County, Ohio, Tenth Appellate District, from the Decision and Entry entered in this action on the 18th day of September, 2006. A copy of the Decision and Entry is attached as Exhibit A.

Respectfully submitted,

LANE, ALTON & HORST, LLC



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7th Floor, 175 South Third Street
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(614) 228-6885 (Phone)
(614) 228-0146 (Facsimile)
jjurca@lah4law.com
Counsel for Appellant,
Mitchell E. Simons, M.D.

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FRANKLIN CO., OHIO
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CLERK OF COURTS

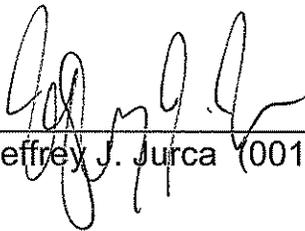
06 APE 10

1000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was duly served, via regular U.S. mail, postage prepaid, this 4th day of October, 2006, upon the following:

Barbara J. Pfeiffer, Esq.
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3428
Attorney for Appelle
State Medical Board of Ohio



Jeffrey J. Jurca (0012107)

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Mitchell Edward Simons, M.D. :
Appellant, :
v. : Case No. 06-CVF-08-10837
State Medical Board of Ohio, :
Appellee. : JUDGE LYNCH

DECISION AND ENTRY DENYING APPELLANT'S MOTION TO STAY,
FILED AUGUST 18, 2006

Rendered this 18th day of September, 2006.

LYNCH, J.

This matter is before the court upon the motion of appellant to stay the order of the State Medical Board of Ohio pursuant to R.C. § 119.12 pending appeal. The State Medical Board of Ohio (Board) filed a memorandum contra. The court has considered all memoranda submitted.

The Board's Order, mailed August 8, 2006, requires that appellant obtain the Board's prior approval prior to commencing the practice of medicine and surgery in Ohio. Further, the Board requires that a chaperone must be present when appellant has any personal contact with a female patient. The Board took disciplinary action against appellant pursuant to R.C. § 4731.22(B) following appellant's execution of an agreed order with the Commonwealth of Kentucky Board of Medical Licensure requiring similar limitations for contact with female patients.

Now, appellant moves for a stay of the Board's Order, claiming that the permanent limitation creates a *de facto* revocation of appellant's license and constitutes

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FRANKLIN CO. OHIO
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HEALTH & HUMAN
SERVICES SECTION
SEP 20 2006

an “unusual hardship” for the purposes of R.C. § 119.12. Appellant also claims that the *de facto* revocation will lead to its report to the National Practitioner Data Bank and that appellant will be terminated from reimbursements of insurance plans, HMOs, and PPOs. Therefore, appellant claims that a stay of the Board’s Order pending the appeal before this court is warranted at this time. The court disagrees.

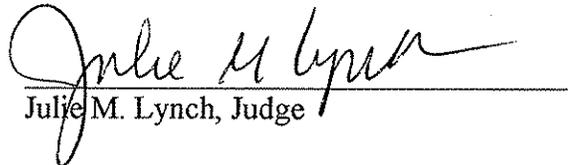
In order to obtain a suspension of an order under R.C. § 119.12, the movant must demonstrate that he will suffer “unusual hardship” if the stay is not granted. The Tenth District Court of Appeals discussed the following factors as considerations of whether it is appropriate to stay an administrative board’s order pending judicial review. *Kihwan Pontiac-GMC Truck, Inc. v. GMC* (2001), 141 Ohio App. 3d 777. Those factors are: (1) whether appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether appellant has shown that it will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others, and (4) whether the public interest would be served by granting a stay.

It is appellant’s position that, absent a stay, he will suffer unusual hardship, as he expects damage to his professional reputation and will be unable to earn an income during the appellate period. The court finds that foreseeable financial hardship from the suspension of one’s license does not rise to the level of unusual hardship. *See Kihwan Pontiac-GMC Truck*, at 783 (noting that, “virtually all license suspension or terminations involve some degree of hardship but only those involving ‘unusual hardship’ are candidates for a stay”). If appellant is entitled to vindication from the underlying Order, the administrative appeals process will evaluate the merits of his claims.

Further, the court agrees with the Board that unusual hardship cannot be demonstrated where appellant has not sought approval from the Board to practice in Ohio and, accordingly, to date no request has been denied. The court agrees that the Board's approval is a safeguard requirement to ensure that appellant has the requisite chaperone in place before appellant commences practicing medicine in Ohio. The court also notes that the Board claims that the agreed order in Kentucky has already been reported to the National Practitioner Data Bank and that any adverse consequences to appellant have already occurred.

Upon review, the court does not find appellant's position well taken, as appellant has failed to show any unusual hardship as is required by Ohio law. Accordingly, the court **DENIES** appellant's motion to stay.

IT IS SO ORDERED.


Julie M. Lynch, Judge

Copies to:

Jeffrey J. Jurca, Esq.
Counsel for Appellant

Barbara Pfeiffer, Esq.
Assistant Attorney General

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

MITCHELL EDWARD SIMONS, M.D.
81 Sweetbriar Avenue
Fort Thomas, Kentucky 41075

Appellant,

v.

STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor
Columbus, Ohio 43215-6108

Appellee

06 CVF 08 10837

Case No.

Judge

STATE MEDICAL BOARD
OF OHIO
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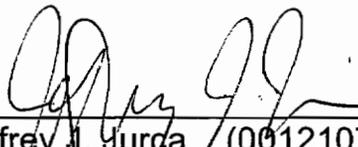
NOTICE OF APPEAL

Mitchell Edward Simons, M.D., hereby gives notice of his appeal, pursuant to R.C. 119.12, of the Order of the State Medical Board of Ohio, mailed on August 8, 2006, a copy of which is attached hereto.

Appellant states that the Board's Order is not based on reliable, probative, and substantial evidence, and was not issued in accordance with law.

Respectfully submitted,

LANE, ALTON & HORST, LLC

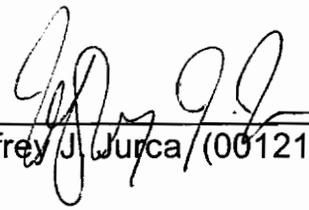

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jjurca@lah4law.com
Counsel for Respondent
Mitchell E. Simons, M.D.

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
06 AUG 18 PM 4:11
CLERK OF COURTS - CV

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was duly served, via regular U.S. mail, postage prepaid, this 18th day of August, 2006, upon the following:

Barbara J. Pfeiffer, Esq.
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3400
Facsimile No. 614-466-6090
Attorney for State of Ohio



Jeffrey J. Jurca / (0012107)

42703-1

STATE MEDICAL BOARD
OF OHIO
2006 AUG 18 P 4:42



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.med.ohio.gov

July 12, 2006

Mitchell Edward Simons, M.D.
81 Sweetbriar
Ft. Thomas, KY 41075

Dear Doctor Simons:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Sharon W. Murphy, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on July 12, 2006, including motions approving and confirming the Findings of Fact and Conclusions of the Hearing Examiner, and adopting an amended Order.

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

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

THE STATE MEDICAL BOARD OF OHIO

Lance A. Talmage, M.D.
Secretary

LAT:jam
Enclosures

CERTIFIED MAIL NO. 7003 0500 0002 4329 8821
RETURN RECEIPT REQUESTED

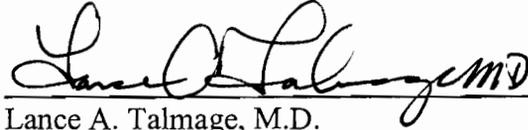
Cc: Jeffrey J. Jurca, Esq.
CERTIFIED MAIL NO. 7003 0500 0002 4329 9996
RETURN RECEIPT REQUESTED

Mailed 8-8-06

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of Sharon W. Murphy, State Medical Board Attorney Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on July 12, 2006, including motions approving and confirming the Findings of Fact and Conclusions of the Hearing Examiner, and adopting an amended Order; constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of Mitchell Edward Simons, M.D., 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.



Lance A. Talmage, M.D.
Secretary

(SEAL)

July 12, 2006
Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

MITCHELL EDWARD SIMONS, M.D.

*

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on July 12, 2006.

Upon the Report and Recommendation of Sharon W. Murphy, State Medical Board Attorney Hearing Examiner, designated in this Matter pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the modification, 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 of Ohio for the above date.

It is hereby ORDERED that:

- A. Dr. Simons' certificate will be PERMANENTLY LIMITED and RESTRICTED as follows:
 1. Dr. Simons shall not commence practice in Ohio without prior Board approval.
 2. Dr. Simons shall have a chaperone present throughout any personal contact with a female patient in his professional office or in any other clinical setting.
 - a. Any chaperone utilized by Dr. Simons must be approved, in advance, by the Board or its staff. Dr. Simons may submit and the Board or its staff may approve more than one chaperone to fulfill this requirement. Dr. Simons shall be solely responsible for payment of the costs of such chaperone(s).
 - b. Any chaperone utilized by Dr. Simons must agree in writing to the following:

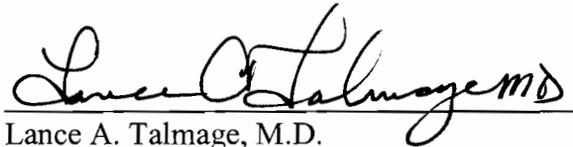
- i. The chaperone shall remain present and within direct eyesight and within clear hearing distance of Dr. Simons and the patient throughout the entire period Dr. Simons is with a female patient;
 - ii. The chaperone shall accurately record the chaperone's presence, or absence, for the entire duration of such patient interaction in the patient's chart, or the patient record maintained by that clinical setting;
 - iii. The chaperone shall immediately notify the Board of any violation of the chaperone requirement by Dr. Simons.
 - c. Upon request Dr. Simons shall immediately make available any requested patient charts for female patients and/or documentation about patient contacts outside of the office. Dr. Simons shall also make available, upon request, the chaperone(s) for interview by Board agents regarding Dr. Simons' compliance with these conditions.
 - d. If Dr. Simons is called upon to see a female patient at a hospital or an outpatient surgical center, he may treat that patient so long as a professional member of the hospital or outpatient surgical center staff is present and is able to hear and see all interactions between Dr. Simons and the patient, throughout Dr. Simons' entire interaction with the patient during the treatment. In such circumstances, Dr. Simons shall have the staff member note his or her presence in the patient's chart. Dr. Simons shall maintain a log for all such circumstances, which shall contain: the patient's name, the date of treatment, the reason for treatment, and the name and signature of the staff member attending. Dr. Simons may utilize a computer generated report from the hospital as the required log, so long as all necessary information is contained within the computer printout. Upon request of the Board, Dr. Simons shall make this log and any patient records available for review. Dr. Simons shall also take any steps necessary to permit, arrange or assist the Board's agents to be able to interview the applicable hospital staff members, upon request.
 3. Dr. Simons shall not have sexual contact with any patient.
- B. Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Simons shall provide a copy of this Order to all employers or entities with which he is under contract to provide health care services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, Dr. Simons shall provide a copy of this Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments.

Further, Dr. Simons shall provide this Board with a copy of the return receipt as proof of notification within thirty days of receiving that return receipt, unless otherwise determined by the Board.

- C. Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Simons shall provide a copy of this Order by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license. Dr. Simons shall also provide a copy of this Order by certified mail, return receipt requested, at time of application to the proper licensing authority of any state in which he applies for any professional license or reinstatement or restoration or restoration of any professional license. Further, Dr. Simons shall provide this Board with a copy of the return receipt as proof of notification within thirty days of receiving that return receipt, unless otherwise determined by the Board.

This Order shall become effective immediately upon mailing of notification of approval by the Board.

(SEAL)



Lance A. Talmage, M.D.
Secretary

July 12, 2006

Date

2006 MAY 23 A 10:48

**REPORT AND RECOMMENDATION
IN THE MATTER OF MITCHELL EDWARD SIMONS, M.D.**

The Matter of Mitchell Edward Simons, M.D., was heard by Sharon W. Murphy, Esq., Hearing Examiner for the State Medical Board of Ohio, on August 25 and October 27, 2005.

INTRODUCTION

I. Basis for Hearing

- A. By letter dated May 18, 2005, the State Medical Board of Ohio [Board] notified Mitchell Edward Simons, M.D., that it had proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board's action was based on allegations that the Commonwealth of Kentucky Board of Medical Licensure [Kentucky Board] had filed an Agreed Order setting terms and conditions under which Dr. Simons could practice medicine in Kentucky. The Board alleged that the Kentucky Board's action constituted "[a]ny of the following actions taken by the agency responsible for regulating the practice of medicine and surgery * * * in another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand,' as that clause is used in Section 4731.22(B)(22), Ohio Revised Code." Accordingly, the Board advised Dr. Simons of his right to request a hearing in this matter. (State's Exhibit 1A)
- B. On June 10, 2005, Jeffrey J. Jurca, Esq., submitted a letter requesting a hearing on behalf of Dr. Simons. (State's Exhibit 1B)

II. Appearances

- A. On behalf of the State of Ohio: Jim Petro, Attorney General, by Barbara J. Pfeiffer, Assistant Attorney General.
- B. On behalf of the Respondent: Jeffrey J. Jurca, Esq.

EVIDENCE EXAMINED

I. Testimony Heard

- J. Fox DeMoisey, Esq.

II. Exhibits Examined

A. Presented by the State

1. State's Exhibits 1A through 1F: Procedural exhibits. [State's Exhibit 1A was paginated by the Hearing Examiner post hearing; moreover, pages 18 through 25 were excluded pursuant to an evidentiary ruling and proffered separately. See Hearing Transcript at 113-116; and Proffered Materials, below.]
2. State's Exhibit 2: Certification by the Board that Dr. Simons' certificate to practice in Ohio, issued in 1984, was current as of August 19, 2005.
3. State's Exhibit 3: Certified copy of documents regarding Dr. Simons on file with the Kentucky Board of Medical Licensure. [Pages 15 through 22 were excluded pursuant to an evidentiary ruling and proffered separately. See Hearing Transcript at 113-116; and Proffered Materials, below.]
4. State's Exhibit 4: Ohio State Medical Board's Memorandum in Response to Respondent's Oral Request to Postpone Issuance of a Report and Recommendation Until Final Disposition of Respondent's Petition for Declaratory (SIC) Judgment Pending in the Commonwealth of Kentucky.
5. State's Exhibit 5: Closing Brief of Ohio State Medical Board.

B. Presented by the Respondent

1. Respondent's Exhibit A: August 4, 2005, affidavit of Dr. Simons.
2. Respondent's Exhibit B: Copy of the Board's Disciplinary Guidelines, effective April 2002.
3. Respondent's Exhibit C: Copy of *Kerr v. Kentucky State Board of Registration* (Ky. App. 1990), 797 S.W.2d 714, and Kentucky statutes.
4. Respondent's Exhibit D: Copy of "Petition for Declaratory Judgment" [sic] in *Simons v. Kentucky Board of Medical Licensure*, filed in Jefferson Circuit Court, Kentucky, on October 26, 2005.
5. Respondent's Exhibit E: Copy of Ky. Rev. Stat. § 311.597.
6. Respondent's Exhibit F: Closing Brief of Respondent, Mitchell Edward Simons, M.D.

- C. Presented by the Hearing Examiner, sua sponte

Board Exhibit A: January 12, 2006, Entry extending the date for filing written closing arguments until February 15, 2006.

PROFFERED MATERIALS

Proffer A: The portions of State's Exhibits 1A and 3 which contain the unproven allegations in the Administrative Complaint issued by the Commonwealth of Kentucky Board of Medical Licensure against Dr. Simons. (See Hearing Transcript at 113-116)

PROCEDURAL MATTERS

1. At the close of the hearing, the parties agreed to submit written closing arguments. Pursuant to a schedule set forth by the Hearing Examiner, the final written argument was filed on February 15, 2006. The hearing record closed at that time. (See Hearing Transcript at 118-119; Board Exhibit A)
2. At hearing, Dr. Simons requested that the Hearing Examiner defer from filing this Report and Recommendation until pending matters in the Commonwealth of Kentucky have been resolved. The State objected to this request. The Hearing Examiner sustains the State's objection. (See Hearing Transcript at 116-118; Respondent's Exhibit F; State's Exhibit 4)

SUMMARY OF THE EVIDENCE

All exhibits and transcripts of testimony, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

1. On November 3, 2003, the Commonwealth of Kentucky Board of Medical Licensure [Kentucky Board] filed an Administrative Complaint against Mitchell E. Simons, M.D. (State's Exhibit [St. Ex.] 3 at 14, 27) On January 20, 2005, Dr. Simons entered into an Agreed Order with the Kentucky Board. (St. Ex. 3 at 2-13) The Agreed Order set forth stipulated facts, including the following:
 14. On September 26, 2001, a Complaint and Jury Demand was filed in the Court of Common Pleas in Hamilton County, Ohio against the licensee [Dr. Simons]. The Complaint was filed on behalf of a former patient and alleged that the licensee inappropriately treated the patient and subjected the patient to sexual harassment.

15. On December 19, 2001, the licensee signed and submitted his 2002 Application for Renewal of Kentucky Medical/Osteopathic License for Year 2002. The licensee answered "NO" in response to question twenty-one (21):

"Since you last registered * * * are any malpractice or other civil actions against your medical practice presently pending in any court?"

(St. Ex. 3 at 8)

2. In the Agreed Order, Dr. Simons also stipulated to facts surrounding the patients' complaints, including the following:
 2. The licensee's medical specialty is Pain Management.
 3. On December 27, 2002, the Board received a letter from Lisa Hinkle, an attorney, reporting allegations of inappropriate conduct by the licensee towards a patient.
 4. Patient A was interviewed and reports that she injured her shoulder and hip * * *. Two and a half years ago (2000), she started seeing the licensee for pain management. * * * Each visit Patient A was given a gown and asked to disrobe from the waist up, leaving her bra on. During one visit she disrobed as instructed * * *. During the examination, Patient A alleged that the licensee touched her breast. Patient A alleges that such an examination occurred on approximately three (3) more occasions. On another occasion while examining her for a hip injury, the licensee began the exam by having her walk toward him while he was seated on a stool. When she reached him, he turned her around, so that he was behind her. Still seated, he felt her lower hip (buttocks). He turned her facing him, commenting, and touching her tattoo, which is located in the center of her abdomen. During this visit, Patient A alleged that the licensee touched her breast and kissed her.
 5. Patient B alleged inappropriate contact by the licensee. * * * Although Patient B was primarily treated by other physicians in the office, she reports that within a year she was treated by the licensee three times. During her first visit, Patient B alleged that the licensee touched her breast and inquired about her breast implants. * * *
 6. Nancee Burlington, R.N., stated that she has worked with the licensee for approximately six weeks. She has received no complaints from female patients regarding inappropriate touching. Ms. Burlington stated that the licensee and his Physician Assistant, Tom Feeny, do not use chaperones during female exams. If a female patient is new, she is asked to disrobe to her underwear and given a gown, but during follow up visits they are seldom asked to disrobe. Ms. Burlington stated that she was amazed that nothing

has been said regarding the use of chaperones, because her past employers required them. She did not see how inappropriate touching could occur, because the patient schedule is very heavy, not allowing time for something of that nature, and the licensee does not engage in small talk.

* * *

10. * * * [T]he licensee advised that he does not use chaperones. The licensee could not think of a reason he would need to examine breasts. He might need to examine in close proximity to the breasts due to the muscle structure and occasionally need to examine the hip area. The licensee denies touching any patient inappropriately.

(St. Ex. 3 at 2-5) The Agreed Order further states that Dr. Simons' staff, including his medical assistant, physician assistant, and electro-diagnostic technologist, reported that they had received no complaints regarding inappropriate touching by Dr. Simons. (St. Ex. 3 at 4)

The Stipulated Facts in the Agreed Order also include Dr. Simons' lengthy descriptions of his treatment of Patients A and B. Moreover, Dr. Simons denied the allegations against him made by Patients A and B, including the following: Dr. Simons denied that he had instructed Patient A to take Valium before office visits, that he had instructed his staff to give certain patients the "4:30 appointments," and that he had had inappropriate contact with Patient A. In addition, Dr. Simons asserted that he had examined Patient B's breast because she had expressed concern over a possible rupture of a breast implant. (St. Ex. 3 at 5-7)

3. The Agreed Order quoted several passages from the American Medical Association's Code of Medical Ethics on Sexual Misconduct in the Practice of Medicine. The quotation of Opinion 8.21 included the following: "From the standpoint of ethics and prudence, the protocol of having chaperones available on a consistent basis for patient examinations is recommended." (St. Ex. 3 at 7)
4. The Agreed Order also set forth Stipulated Conclusions of Law, including the following:

While the licensee denies that he violated any provision of the Kentucky Medical Practice Act, the parties agree that that [sic] the Hearing Panel could conclude from the evidence presented at an evidentiary hearing that the licensee has engaged in conduct which violates the relevant provisions of the Kentucky Medical Practice Act, KRS 311.595(9) and/or KRS 311.597. Accordingly, the parties agree there are legal grounds for the parties to enter into this Agreed Order.

(St. Ex. 3 at 8)

5. The Agreed Order states that the "license to practice medicine held by Mitchell E. Simons, M.D., is subject to the terms and conditions of this AGREED ORDER for an

indefinite term, or until further order of the Board.” (St. Ex. 3 at 9) The Agreed Order further states that Dr. Simons “may continue with the full active practice of medicine” in Kentucky subject to the following “TERMS AND CONDITIONS”:

- a. The licensee SHALL have a chaperon present throughout any personal contact with a female patient in his professional office or in any other clinical setting.
- b. Any chaperon utilized by the licensee must be approved, in advance, by the Board or its staff and must agree in writing to 1) remain present and within direct eyesight and within clear hearing distance of the licensee and the patient throughout the entire period the licensee is with a female patient; 2) accurately record the chaperon’s presence, or absence, for the entire duration of such patient interaction in the patient’s chart, or the patient record maintained by that clinical setting; 3) immediately notify the designated contact person at the Board’s offices to report any violation of the chaperon requirement by the licensee. The licensee may submit and the Board or its agents may approve more than one chaperon to fulfill this requirement. The licensee shall be solely responsible for payment of the costs of such chaperon(s).
- c. Upon request, the licensee SHALL immediately make available any requested patient charts for female patients and/or documentation about patient contacts outside of the office. The licensee shall also make available, upon request, the chaperon(s) for interview by Board agents regarding his compliance with that condition.
- d. If the licensee is called upon to see a female patient at the hospital or an outpatient surgical center, he may treat that patient so long as a professional member of the hospital’s staff is present and is able to hear and see all interactions between the licensee and the patient, throughout the physician’s entire interaction with the patient during the treatment. In such circumstances, the licensee will have the staff member note their presence in the patient’s chart and he shall maintain a “log” for all such circumstances, which shall contain: the patient’s name, date of treatment, reason for treatment in the hospital, and name of staff member attending. The licensee may utilize a computer generated report from the hospital as the required “log,” so long as all necessary information is contained within the computer printout. Upon request of the Board’s agent(s), the licensee shall make this log and any patient record(s) available for review. The licensee shall also take any step(s) necessary to permit, arrange or assist the Board’s agent(s) to be able to interview the applicable hospital staff member(s), upon request.
- e. The licensee SHALL NOT have sexual contact with any patient.

- f. The licensee SHALL complete the “Maintaining Proper Boundaries” course through the Center for Professional Health at Vanderbilt University Medical Center in Nashville, Tennessee within six (6) months from entry of this Agreed Order.
- g. The licensee SHALL provide written proof that he has successfully completed the “Maintaining Proper Boundaries” course to the Board’s agent assigned to supervise his probation and the Board’s General Counsel or Assistant General Counsel.

(St. Ex. 3 at 9)

6. The Agreed Order provides that, should Dr. Simons violate any term of the Agreed Order, that violation may serve as basis for **additional disciplinary action * * ***” (St. Ex. 3 at 11)(emphasis added)
7. On August 24, 2005, Dr. Simons stated in an affidavit that he had completed the “Maintaining Proper Boundaries” course described in the Agreed Order. He further stated that he has followed and will continue to follow all the terms and conditions set forth in the Agreed Order in his practice in Ohio and Kentucky.¹ (Respondent’s Exhibit [Resp. Ex.] A)

LEGAL ARGUMENT

1. At hearing, Dr. Simons argued that the Board may not discipline his certificate based on the Kentucky Board action because the Kentucky Board action was illegal and unconstitutional. As basis for this argument, Dr. Simons advised that, on October 25, 2005, he had filed a Petition for Declaratory Judgment [sic] in the Jefferson Circuit Court in Kentucky. In this petition, Dr. Simons alleged that, in June 2005, the Kentucky Board had filed an Adverse Action Report with the National Practitioner Data Bank [NPDB], reporting Dr. Simons’ Agreed Order as a “final disciplinary action.” Dr. Simons provided a copy of his dispute to the NPDB regarding the Kentucky Board’s report, along with a copy of the Kentucky Board’s policy for reporting to the NPDB. Dr. Simons further alleged that the Kentucky Board had declined to grant his request to withdraw its designation of the matter to the NPDB. Dr. Simons claimed, among other things, that the Kentucky Board’s policy for reporting its orders to the NPDB is illegal and unconstitutional. (Resp. Ex. D and attached exhibits; see, also, Resp. Exs. B-C, E, F; St. Ex. 5)

¹ During the hearing on October 27, 2005, Dr. Simons’ counsel acknowledged that, when practicing in Ohio, Dr. Simons’ compliance with the terms and conditions of the Agreed Order is voluntary and not pursuant to any order. See Hearing Transcript at 117-118.

In addition, J. Fox DeMoisey² testified at hearing on behalf of Dr. Simons. Mr. DeMoisey testified that he had been Dr. Simons' attorney during the proceedings in Kentucky. Mr. DeMoisey further testified regarding Kentucky law and the Kentucky Board. He stated that it had been his understanding that Dr. Simons' Agreed Order would not be deemed by the Kentucky Board to be a "disciplinary action" reportable to the NPDB. Although Mr. DeMoisey acknowledged that no agreement to that effect appears in the Agreed Order, he argued that the language of the Agreed Order legally requires that it must be "something other than a final disciplinary action in Kentucky." (Tr. at 25-111; Resp. Ex. C; see also, St. Ex. 5)

The Hearing Examiner finds this argument unpersuasive, especially since the Agreed Order provides that, "should Dr. Simons violate any term of the Agreed Order, that violation may serve as basis for **additional disciplinary action** * * *." (Emphasis added.)

2. Dr. Simons also argued that the Kentucky Board's action against him is not actionable by this Board because Section 4731.22(B)(22), Ohio Revised Code, provides a list of penalties that are actionable if imposed by another state. More specifically, that section provides that the Board may act based on the action of another state only when the other state imposes one or more of the following penalties:

the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand.

R.C. 4731.22(B)(22). Dr. Simons acknowledged that the statute includes limitations, but argued that the penalties imposed by the Kentucky Board were conditions rather than limitations. Therefore, he reasoned, the action of the Kentucky Board is not actionable under Section 4731.22(B)(22), Ohio Revised Code, because the penalties imposed by the Kentucky Board are not included in the actionable penalties listed in that statute. (Tr. at 29-111; Resp. Exs. C, F; see also, St. Ex. 5)

This argument is without merit. The Agreed Order imposes requirements on Dr. Simons that limit and restrict him as a physician, in that Kentucky law does not require all physicians to have a chaperone present during contact with female patients. Pursuant to the Agreed Order, if Dr. Simons does not obtain a chaperone, he is restricted from treating female patients in Kentucky. Moreover, Kentucky law does not require that all physicians complete a course in "Maintaining Proper Boundaries." Thus, Dr. Simons is practicing under limitations that do not apply to other physicians in Kentucky, regardless of whether the Agreed Order explicitly designated the requirement as a "restriction" or "limitation."

² In his August 24, 2005, affidavit, Dr. Simons stated that he had been represented before the Kentucky Board by his attorney, J. Fox DeMoisey. Moreover, Dr. Simons authorized Mr. DeMoisey to testify on his behalf before the Ohio Board within narrow parameters, as follows: "I hereby authorize attorney DeMoisey to testify for the limited purpose of discussing his legal analysis of the Agreed Order dated February 17, 2005." (Resp. Ex. A)

3. Finally, Dr. Simons argued that, because the Kentucky Board's Agreed Order contains neither findings that the patients' allegations are true nor admissions of guilt by Dr. Simons, the Board cannot take action against him based on the Kentucky Board's Agreed Order. However, Section 4731.22(B)(22), Ohio Revised Code, does not require that the action of another board specify findings or admissions of guilt. The statute merely requires that, for the Board to take action against a licensee based on the action of another state's agency, the other state shall have acted "for any reason other than the nonpayment of fees." Therefore, the Board may take action based on the Kentucky Board action and may consider the penalties imposed in the Agreed Order. Nevertheless, because the patients' allegations were not found to be true in the Kentucky Board Agreed Order, they are not considered to be factual in this Report and Recommendation.

FINDINGS OF FACT

On February 17, 2005, the Commonwealth of Kentucky Board of Medical Licensure [Kentucky Board] filed an Agreed Order regarding Mitchell Edward Simons, M.D. In that Agreed Order, the Kentucky Board ordered, and Dr. Simons agreed, that his license to practice medicine in the Commonwealth of Kentucky would be subject to certain "terms and conditions" as set forth in the Agreed Order. Among these conditions, Dr. Simons must have a chaperone present throughout any personal contact with female patients in his professional office or in any other clinical setting, and the chaperone must be approved in advance by the Kentucky Board or its staff. Dr. Simons further agreed to complete the "Maintaining Proper Boundaries" course through the Center for Professional Health at Vanderbilt University Medical Center in Nashville, Tennessee.

CONCLUSIONS OF LAW

The action taken by the Commonwealth of Kentucky Board of Medical Licensure against Mitchell Edward Simons, M.D., as set forth in the Findings of Fact, constitutes one of "the following actions taken by the agency responsible for regulating the practice of medicine and surgery * * * in another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand," as that clause is used in Section 4731.22(B)(22), Ohio Revised Code.

PROPOSED ORDER

It is hereby ORDERED that:

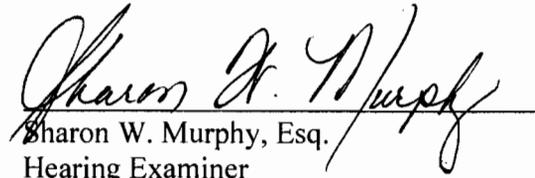
- A. The certificate of Mitchell Edward Simons, M.D., to practice medicine and surgery in the State of Ohio shall be **SUSPENDED** for thirty days.

- B. Upon reinstatement, Dr. Simons' certificate will be PERMANENTLY LIMITED and RESTRICTED as follows:
1. Dr. Simons shall not commence practice in Ohio without prior Board approval.
 2. Dr. Simons shall have a chaperone present throughout any personal contact with a female patient in his professional office or in any other clinical setting.
 - a. Any chaperone utilized by Dr. Simons must be approved, in advance, by the Board or its staff. Dr. Simons may submit and the Board or its staff may approve more than one chaperone to fulfill this requirement. Dr. Simons shall be solely responsible for payment of the costs of such chaperone(s).
 - b. Any chaperone utilized by Dr. Simons must agree in writing to the following:
 - i. The chaperone shall remain present and within direct eyesight and within clear hearing distance of Dr. Simons and the patient throughout the entire period Dr. Simons is with a female patient;
 - ii. The chaperone shall accurately record the chaperone's presence, or absence, for the entire duration of such patient interaction in the patient's chart, or the patient record maintained by that clinical setting;
 - iii. The chaperone shall immediately notify the Board of any violation of the chaperone requirement by Dr. Simons.
 - c. Upon request Dr. Simons shall immediately make available any requested patient charts for female patients and/or documentation about patient contacts outside of the office. Dr. Simons shall also make available, upon request, the chaperone(s) for interview by Board agents regarding Dr. Simons' compliance with these conditions.
 - d. If Dr. Simons is called upon to see a female patient at a hospital or an outpatient surgical center, he may treat that patient so long as a professional member of the hospital or outpatient surgical center staff is present and is able to hear and see all interactions between Dr. Simons and the patient, throughout Dr. Simons' entire interaction with the patient during the treatment. In such circumstances, Dr. Simons shall have the staff member note his or her presence in the patient's chart. Dr. Simons shall maintain a log for all such circumstances, which shall contain: the patient's name, the date of treatment, the reason for treatment, and the name and signature of the staff member attending. Dr. Simons may utilize a computer generated report from the hospital as the required log, so long as all necessary information is contained within the computer printout. Upon request of the Board, Dr. Simons shall

make this log and any patient records available for review. Dr. Simons shall also take any steps necessary to permit, arrange or assist the Board's agents to be able to interview the applicable hospital staff members, upon request.

3. Dr. Simons shall not have sexual contact with any patient.
- C. Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Simons shall provide a copy of this Order to all employers or entities with which he is under contract to provide health care services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, Dr. Simons shall provide a copy of this Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments. Further, Dr. Simons shall provide this Board with a copy of the return receipt as proof of notification within thirty days of receiving that return receipt, unless otherwise determined by the Board.
 - D. Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Simons shall provide a copy of this Order by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license. Dr. Simons shall also provide a copy of this Order by certified mail, return receipt requested, at time of application to the proper licensing authority of any state in which he applies for any professional license or reinstatement or restoration of any professional license. Further, Dr. Simons shall provide this Board with a copy of the return receipt as proof of notification within thirty days of receiving that return receipt, unless otherwise determined by the Board.

This Order shall become effective immediately upon mailing of notification of approval by the Board.


Sharon W. Murphy, Esq.
Hearing Examiner



State Medical Board of Ohio

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EXCERPT FROM THE DRAFT MINUTES OF JULY 12, 2006

REPORTS AND RECOMMENDATIONS

Dr. Robbins announced that the Board would now consider the findings and orders appearing on the Board's agenda. He asked whether each member of the Board had received, read, and considered the hearing records, the proposed findings, conclusions, and orders, and any objections filed in the matters of: Douglas Paul Bosack, M.D.; John R Hanagan, M.D.; Mitchell Edward Simons, M.D.; and Frank Murray Strasek, D.P.M. A roll call was taken:

ROLL CALL:	Mr. Albert	- aye
	Dr. Egner	- aye
	Dr. Talmage	- aye
	Dr. Varyani	- aye
	Dr. Kumar	- aye
	Mr. Browning	- aye
	Dr. Davidson	- aye
	Dr. Madia	- aye
	Dr. Steinbergh	- aye
	Dr. Robbins	- aye

Dr. Robbins 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:	Mr. Albert	- aye
	Dr. Egner	- aye
	Dr. Talmage	- aye
	Dr. Varyani	- aye
	Dr. Kumar	- aye
	Mr. Browning	- aye
	Dr. Davidson	- aye
	Dr. Madia	- aye
	Dr. Steinbergh	- aye
	Dr. Robbins	- aye

Dr. Buchan returned to the room at this time.

Dr. Robbins asked Dr. Buchan whether he had received, read, and considered the hearing records, the proposed findings, conclusions, and orders, and any objections filed in the matters of: Douglas Paul Bosack, M.D.; John R Hanagan, M.D.; Mitchell Edward Simons, M.D.; and Frank Murray Strasek, D.P.M. Dr. Buchan replied that he had.

Dr. Robbins asked Dr. Buchan whether he 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. Dr. Buchan stated that he does understand.

Dr. Robbins noted that, in accordance with the provision in Section 4731.22(F)(2), 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 these matters. In the matters before the Board today, Dr. Talmage served as Secretary and Mr. Albert served as Supervising Member.

Dr. Robbins stated that, if there were no objections, the Chair would dispense with the reading of the proposed findings of fact, conclusions and orders in the above matters. No objections were voiced by Board members present.

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

.....
MITCHELL EDWARD SIMONS, M.D.

Dr. Robbins directed the Board's attention to the matter of Mitchell Edward Simons, M.D. He advised that objections were filed to Hearing Examiner Murphy's Report and Recommendation and were previously distributed to Board members.

Dr. Robbins continued that a motion to deny Dr. Simons' defacto motion to reopen the hearing record and to exclude materials included in Dr. Simons' objections was presented by the Office of the Attorney General. He asked for a motion to grant or overrule Ms. Pfeiffer's motion.

MR. BROWNING MOVED TO GRANT MS. PFEIFFER'S MOTION TO EXCLUDE THE MATERIALS FROM THE HEARING RECORD. DR. STEINBERGH SECONDED THE MOTION. A vote was taken:

Vote:	Mr. Albert	- abstain
	Dr. Egner	- aye
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Kumar	- aye

Mr. Browning - aye
Dr. Davidson - aye
Dr. Madia - aye
Dr. Steinbergh - aye

The motion carried.

Dr. Robbins stated that Ms. Pfeiffer's motion is granted and the materials will be excluded.

Dr. Robbins advised that a request to address the Board has been timely filed on behalf of Dr. Simons. Five minutes would be allowed for that address.

Dr. Simons did not appear before the Board. His attorney, Jeffrey J. Jurca, addressed the Board on Dr. Simons' behalf.

Mr. Jurca thanked the Board for the opportunity to address it, and for deferring this matter for one month to accommodate his schedule.

Mr. Jurca stated that this case involves, primarily, a legal argument that has been addressed at some length throughout the transcript and in his objections. Dr. Simons' position is that the Agreed Order in Kentucky does not constitute a limitation, revocation or suspension of that license that would allow the triggering of §4731.22(B)(22), Ohio Revised Code. Their position is that the appropriate action by this Board would be to dismiss the charges in Ohio. Mr. Jurca stated that he's briefed that at some length.

Mr. Jurca stated that the other part of their objections, without waiving the legal argument that's been briefed, relates to the proposed Report and Recommendation to the extent that it actually includes a suspension of Dr. Simons' Ohio license. Mr. Jurca stated that it would appear that in the absence of any finding of wrongdoing by either Kentucky or Ohio, or any admission of wrongdoing by Dr. Simons, the Order, if adopted, would punish him in the absence of any misconduct. Mr. Jurca stated that they think that result would be unfair.

Mr. Jurca noted that the conditions set forth in both the Kentucky Agreed Order and repeated in the Report and Recommendation are presumably designed to protect the public and, of course, would protect Dr. Simons as well. To add a suspension of his Ohio license would seem unfair, given the fact that there's simply no finding of any misconduct on his part.

Mr. Jurca stated that, for those reasons, they object to the Report and Recommendation, as drafted; they urge the Board to dismiss the charges or, in the alternative and without waiving that argument, remove the suspension provisions.

Mr. Jurca stated that he would respond to any questions if Board members had any.

Dr. Robbins asked whether the Assistant Attorney General wished to respond.

Ms. Pfeiffer stated that Dr. Simons agreed in the Kentucky Order to certain “limitations” on his license, the gist of which require him to have a chaperone present throughout all personal contact with a female patient in his office or in the hospital. He also had to take and complete the “Maintaining Proper Boundaries” course. Ms. Pfeiffer stated that this Board is allowed to take disciplinary action against Dr. Simons’ Ohio license if the Board finds that his Kentucky license has been limited, revoked or suspended. The question in this case is whether or not the Kentucky license has been limited. Ms. Pfeiffer stated that the answer is pretty simple, and it’s “yes.” Ms. Pfeiffer stated that Rule 4731-13-36(D) of the Board’s administrative rules have defined the term, “limitation,” as follows:

“Limitation” means to preclude the certificate holder from engaging in a particular conduct or activity, to impose conditions on the manner in which that conduct or activity may be performed, or to require the certificate holder to abide by specific conditions in order to continue practicing medicine. A limitation shall be either temporary or permanent.

Ms. Pfeiffer stated that Dr. Simons had conditions on his Kentucky license. He had to have a chaperone present for female patients. Ms. Pfeiffer stated that this allows the Ohio Board to take disciplinary action.

Ms. Pfeiffer noted that Ms. Murphy, in her Report and Recommendation, pointed out that because the patient’s allegations in the Kentucky Board action were neither admitted to, nor was there a factual finding of the truth of those admissions, they are not to be considered factual for purposes of this Report and Recommendation. Ms. Pfeiffer stated that she would agree with Mr. Jurca. The Board is in a position where it must decide what, if any, disciplinary action to take against the Ohio license, based simply on the fact that Kentucky has imposed the limitations it has imposed upon his license in Kentucky.

DR. STEINBERGH MOVED TO APPROVE AND CONFIRM MS. MURPHY’S FINDINGS OF FACT, CONCLUSIONS, AND PROPOSED ORDER IN THE MATTER OF MITCHELL EDWARD SIMONS, M.D. DR. KUMAR SECONDED THE MOTION.

Dr. Robbins stated that he would now entertain discussion in the above matter.

Dr. Steinbergh stated that she does agree that Dr. Simons’ license was limited in Kentucky. The Kentucky Board put stipulations on his ability to practice and imposed requirements on him. The Proposed Order, disregarding the suspension upon reinstatement of the license, is consistent with the Kentucky Board agreement. The Board does need to make a decision as to whether or not suspension is appropriate in this case. Dr. Steinbergh stated that she thinks that the Board did have the responsibility to bring this matter to hearing and to make a decision, based upon the fact that Kentucky did limit his license through an agreement with the doctor. Dr. Steinbergh commented that she’s up in the air about the suspension, but she absolutely believes that the Proposed Order itself, and the Report and Recommendation, is very consistent with the finding that his license was limited. She does agree with the Proposed Order in terms of the

reinstatement stipulations. Whether or not the Board stays the proposed suspension is up for discussion.

Dr. Buchan stated that his sense was that Dr. Simons' license was limited, and added that he doesn't have any question about that, and the Board had every right to respond to the Kentucky agreement. He also felt that the Kentucky Order on its face was reasonable. Dr. Buchan stated that he's not too interested in suspending Dr. Simons' license, based on what he sees. He's more interested in bootstrapping the Kentucky Order.

Dr. Kumar stated that, pertaining to whether or not Dr. Simon's Kentucky license was restricted or limited, there's no question in his mind, and the evidence is very clear, that it was limited in some fashion. The Board had an absolute right to look at this case and to protect the citizens of Ohio. As far as bootstrapping the Kentucky Order, Dr. Kumar stated that he absolutely agrees with that. He stated that he sees no purpose at this point to suspend Dr. Simons' license, even with a stayed suspension. He noted that Kentucky did not rule on the allegations before it; Kentucky only took a position on what it needed to do to protect its citizens.

DR. KUMAR MOVED TO AMEND THE PROPOSED ORDER IN THE MATTER OF MITCHELL EDWARD SIMONS, M.D., BY REMOVING THE PROPOSED SUSPENSION LANGUAGE AND TO CHANGE THE LANGUAGE IN THE UPDATED PARAGRAPH "A" BY REMOVING THE OPENING PHRASE, "UPON REINSTATEMENT." DR. STEINBERGH SECONDED THE MOTION.

Dr. Davidson stated that she might be wrong, but her understanding of the Report and Recommendation as regarding the suspension was that the Board was punishing Dr. Simons for lying on his application. The Board has suspended other physicians for such an act.

Dr. Kumar stated that the fraud in the application on the record relates to alleged fraud on Dr. Simons' Kentucky application, not Ohio's renewal application.

A vote was taken:

Vote:	Mr. Albert	- abstain
	Dr. Egner	- aye
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Kumar	- aye
	Mr. Browning	- aye
	Dr. Davidson	- aye
	Dr. Madia	- aye
	Dr. Steinbergh	- aye

The motion carried.

DR. STEINBERGH MOVED TO APPROVE AND CONFIRM MS. MURPHY'S FINDINGS OF FACT, CONCLUSIONS, AND PROPOSED ORDER, AS AMENDED, IN THE MATTER OF MITCHELL EDWARD SIMONS, M.D. DR. VARYANI SECONDED THE MOTION. A vote was taken:

Vote:	Mr. Albert	- abstain
	Dr. Egner	- aye
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Kumar	- aye
	Mr. Browning	- aye
	Dr. Davidson	- aye
	Dr. Madia	- aye
	Dr. Steinbergh	- aye

The motion carried.



State Medical Board of Ohio

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May 18, 2005

Mitchell Edward Simons, M.D.
81 Sweetbriar
Ft. Thomas, KY 41075

Dear Doctor Simons:

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

- (1) On or about February 17, 2005, the Commonwealth of Kentucky Board of Medical Licensure [Kentucky Board] filed an Agreed Order in which you agreed that your license to practice medicine in the Commonwealth of Kentucky would be subject to certain terms and conditions set forth in said Order, including that you would have a chaperone present throughout any personal contact with female patients in your professional office or in any other clinical setting, which chaperone would be approved in advance by the Kentucky Board or its staff. You further agreed to complete the "Maintaining Proper Boundaries" course through the Center for Professional Health at Vanderbilt University Medical Center in Nashville, Tennessee.

The Kentucky Board Agreed Order, a copy of which is attached hereto and incorporated herein, sets forth in additional detail the terms and conditions of the Agreed Order, as well as the stipulated facts and conclusions of law that served as the factual and legal bases for the Agreed Order

The Kentucky Board Agreed Order, as alleged in paragraph (1) above, constitutes "[a]ny of the following actions taken by the agency responsible for regulating the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or the limited branches of medicine in another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand," as that clause is used in Section 4731.22(B)(22), Ohio Revised Code.

MAILED 5-19-05

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 days of the time of mailing of this notice.

You are further advised that, if you timely request a hearing, 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 this 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 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, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand you or place you on probation.

Please note that, whether or not you request a hearing, Section 4731.22(L), Ohio Revised Code, provides that “[w]hen the board refuses to grant a certificate to an applicant, revokes an individual’s certificate to practice, refuses to register an applicant, or refuses to reinstate an individual’s certificate to practice, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate to practice and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate.”

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Lance A. Talmage, M.D.
Secretary

LAT/blt
Enclosures

CERTIFIED MAIL # 7003 0500 0002 4340 6806
RETURN RECEIPT REQUESTED

cc: Otto Daniel Wolff, Esq.
Attorney and Counsellor at Law
The Ernst Mansion
405 Garrard Street
Covington, Kentucky 41011

CERTIFIED MAIL # 7003 0500 0002 4340 6813
RETURN RECEIPT REQUESTED

cc: Jeffrey J. Jurca, Esq.
Lane Alton & Horst, LLC
175 S. Third St., Suite 700
Columbus, Ohio 43215

CERTIFIED MAIL # 7003 0500 0002 4340 6820
RETURN RECEIPT REQUESTED



Danny M. Clark, M.D.
President

Telephone: 502/429-7150
Fax: 502/429-7158
~~Telephone: 502/429-8046~~
~~Fax: 502/429-9923~~

KENTUCKY BOARD OF MEDICAL LICENSURE

Hurstbourne Office Park
310 Whittington Parkway, Suite 1B
Louisville, Kentucky 40222
www.kbml.ky.gov

Date: April 27, 2005

From: C. Jill Lun, Open Records Custodian

Via: First Class Mail

Re: Mitchell E. Simons, M.D.

OHIO STATE MEDICAL BOARD

APR 29 2005

This record is certified not certified

Please find attached the document(s) you requested pursuant to the Kentucky Open Records Act. The Kentucky Board of Medical Licensure is a State agency which is responsible for maintaining the records concerning medical licensure pursuant to KRS 311.530.

Thank you for allowing us to be of assistance. If you require additional information, please do not hesitate to call our office.

CERTIFICATION

I, C. Jill Lun, custodian of the records for the Kentucky Board of Medical Licensure, hereby certify that the attached are true and exact copies of the documents on file with this office.


C. Jill Lun, Open Records Custodian

To: Mark R. Blackmer
Enforcement Attorney
State Medical Board of Ohio
77 South High Street, 17th Floor
Columbus, OH 43215-6127

BOARD SEAL

FEB 17 2005

K.B.M.L.

COMMONWEALTH OF KENTUCKY
BOARD OF MEDICAL LICENSURE
CASE NO. 920
ADMINISTRATIVE ACTION NO. 03-KBML-0474

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF
KENTUCKY HELD BY MITCHELL E. SIMONS, M.D., LICENSE NO. ~~25122~~ 21522
20 NORTH GRAND AVENUE, #2C, FT. THOMAS, KENTUCKY 41075-1755

AGREED ORDER

Comes now the Kentucky Board of Medical Licensure (hereafter "the Board"), acting by and through its Hearing Panel A, and Mitchell E. Simons, M.D., and, based upon their mutual desire to fully and finally resolve the pending Complaint in this case without formal evidentiary proceedings hereby ENTER INTO the following Agreed Order:

STIPULATIONS OF FACT

The parties stipulate the following facts, which serve as the factual bases for this Agreed Order:

1. At all relevant times, Mitchell E. Simons, M.D. (hereafter "the licensee"), was licensed by the Board to practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is Pain Management.
3. On December 27, 2002, the Board received a letter from Lisa Hinkle, an attorney, reporting allegations of inappropriate conduct by the licensee towards a patient.
4. Patient A was interviewed and reports that she injured her shoulder and hip in 1994 when a 200-pound table fell on her. Two and a half years ago, (2000), she started seeing the licensee for pain management. Her pain started in the back of her neck and radiated down her right arm. The first two years went without incident and she felt that her treatments were going well. Each visit Patient A was

given a gown and asked to disrobe from the waist up, leaving her bra on. During one visit she disrobed as instructed, the licensee entered the exam room and began the exam. During the examination, Patient A alleged that the licensee touched her breast. Patient A alleges that such an examination occurred on approximately three (3) more occasions. On another occasion while examining her for a hip injury, the licensee began the exam by having her walk toward him while he was seated on a stool. When she reached him, he turned her around, so that he was behind her. Still seated, he felt her lower hip (buttocks). He turned her facing him, commenting, and touching her tattoo, which is located in the center of her abdomen. During this visit, Patient A alleged that the licensee touched her breast and kissed her.

5. Patient B alleged inappropriate contact by the licensee. Patient B stated that she was referred to the licensee after an automobile accident, which caused shoulder pain. Although Patient B was primarily treated by other physicians in the office, she reports that within a year she was treated by the licensee three times. During her first visit, Patient B alleged that the licensee touched her breasts and inquired about her breast implants. On her last visit with the licensee, Patient B alleged that the licensee took his hand and hit her on the top of the head asking her if it hurt. Patient B replied "yes". The licensee informed Patient B that there was nothing wrong with her.
6. Nancee Burlington, RN, stated that she has worked with the licensee for approximately six weeks. She has received no complaints from female patients regarding inappropriate touching. Ms. Burlington stated that the licensee and his

Physician Assistant, Tom Feeny, do not use chaperones during female exams. If a female patient is new, she is asked to disrobe to her underwear and given a gown, but during follow up visits they are seldom asked to disrobe. Ms. Burlington stated that she was amazed that nothing has been said regarding the use of chaperones, because her past employers required them. She did not see how inappropriate touching could occur, because the patient schedule is very heavy, not allowing time for something of that nature, and the licensee does not engage in small talk.

7. Dwight Cope, Electro Diagnostic Technologist, stated that he has received no complaints from patients that inappropriate touching has occurred.
8. Margaret Schweinzer, Medical Assistant, stated that she has worked with the licensee three years. Ms. Schweinzer escorts the patient to the exam room and if the patient is new they are asked to disrobe to their underwear and given a gown. She stated that chaperones are not used during female exams and no complaints have been made.
9. Tom Feeny, Physician Assistant, stated that he has worked with the licensee for four years. On a female patient's first visit, they are asked to disrobe to their bra and underwear and given a gown. During the follow up visits, there is less exposure, but on occasion, the patient is asked to disrobe as described above. All new patients are seen by the licensee and depending on the type of follow up visit, he may or may not see the patient. Mr. Feeny stated that the licensee and himself do not utilize chaperons during female exams. No patient has complained regarding the inappropriateness of the exams by the licensee.

10. During an interview with the Board Investigator, the licensee advised that he does not use chaperons. The licensee could not think of a reason he would need to examine breasts. He might need to examine in close proximity to the breasts due to the muscle structure and occasionally need to examine the hip area. The licensee denies touching any patient inappropriately.

11. In his written response dated March 4, 2003, the licensee addressed the allegations made by Patients A and B as follows:

During the course of [Patient B's] treatment with Pain Management Centers, I personally saw [Patient B] three times. I first saw [Patient B] at St. Luke Hospital East for performance of a cervical epidural steroid injection on January 31, 1997. I next saw [Patient B] for follow-up on February 4, 1997, she received good results from her epidural... [Patient B] had been in an automobile wreck. She was expressing concern over a possible rupture of her breast implant. She had expressed concern regarding contour, shape, and size, afraid her implant was leaking. I examined her breast area and her implant and did appear to be misshaped. I instructed her to see her plastic surgeon. I recall nothing further than reflected in my office note.

I next saw [Patient B] one year later on February 10, 1998. At that time, Dr. Brott was weaning her from medications. My examination revealed that the patient complained of pain with any touch. When distracted, she felt no pain to touch. My notes state "In other words, I think she is afraid of losing the Tylenol #4, but I am also afraid to keep her on this." I was concerned at that time that [Patient B's] medication was not being taken as prescribed and I was concerned about her desire for narcotic medication.

[Patient B] states that she was "hit" on the top of her head and asked if it hurt. The only reference I can find reflected in her record, is her last office visit of March 5, 1998. At that time, she was seen by Dr. Brott. He found five positive Waddel's signs. Part of this testing involves the physician placing his hand on the patient's head and asking if she feels pain. Positive Waddel signs are indicative of symptom magnification. Her medications were decreased and her Tylenol #4's were discontinued. She never returned to the office.

Regarding [Patient A], she was first seen by our office on March 10, 1998. She remained a patient until last seen January 15, 2001. She was initially diagnosed with myofascial pain syndrome. ...

[Patient A's] claim that she was seen on a weekly basis for approximately a month is incorrect. A review of [Patient A's] file will provide appropriate intervals of office visits. [Patient A's] concerns appear to revolve around her being prescribed Valium and instructed to take two 10 mg tablets prior to office consult. [Patient A] was prescribed 5mg B.I.D. on only two occasions, December 18, 2000 and January 15, 2001. These were [Patient A's] last two office visits. Prior to Valium, she was prescribed Robaxin and before that Soma. We regularly adjust patient's medications. [Patient A] was never prescribed Valium 10 mg, nor was she instructed to take two Valium before appointments. [Patient A] has reported to an anonymous person that the Valium made her "lightheaded". This is not in her medical chart. This would be important information and would be noted by us in the record if we were informed by the patient of this fact. [Patient A] would not have received a second prescription.

I do not remember the exact times of day of [Patient A's] appointments. My scheduling nurse is responsible for the setting of appointment times acceptable to the patient. I did not, nor do I now, instruct my nurses to schedule certain patients for "4:30" appointments. I see my patients, men, women, and children, in the order that they are scheduled. Also, my practice does not allow the luxury of 45 minutes to 1 hour office appointments with any patient, let alone [Patient A].

I do not perform breast examinations on my patients. Early in treatment, [Patient A] complained of right shoulder, neck and chest muscle pain. She was noted to have very tight shoulder muscles and pectoralis muscles. It is not unusual with severe neck injuries to experience muscle spasms and tightness in the chest wall. I sometimes palpate areas to determine whether spasms are present. This exam does not involve touching the patient's breasts.

[Patient A] completed her own Visual Analog charts. These charts allow the patient to pinpoint their own areas of pain. A question was raised regarding the existence of pain in the chest and the hip areas. [Patient A] first complained of chest wall pain on July 21, 1998. Low back, hip, bilateral leg pain was identified on the patient's Visual Analog on September 15, 1998. Her complaints of low back and front shoulder pain persisted throughout much of her treatment course. I would not have examined [Patient A's] hip area or low back area without her first complaining of those areas...

I deny having inappropriate physical contact with [Patient A]. During the course of treating [Patient A], outside consult was sought to help address the issues of prolonged symptoms with [Patient A]. Her course of treatment was not unusual following her symptom presentation and

objective findings on examination. I believe she was provided appropriate medical treatment and care.

12. Opinion 8.14 of the American Medical Association, Code of Medical Ethics on Sexual Misconduct in the Practice of Medicine states as follows:

Sexual contact that occurs concurrent with the physician-patient relationship constitutes sexual misconduct. Sexual or romantic interactions between physicians and patients detract from the goals of the physician-patient relationship, may exploit the vulnerability of the patient, may obscure the physician's objective judgment concerning the patient's health care, and ultimately may be detrimental to the patient's well-being.

If a physician has reason to believe the non-sexual contact with a patient may be perceived as or may lead to sexual contact, then he or she should avoid the non-sexual contact. At a minimum, a physician's ethical duties include terminating the physician-patient relationship before initiating a dating, romantic, or sexual relationship with a patient.

Sexual or romantic relationships between a physician and a former patient may be unduly influenced by the previous physician-patient relationship. Sexual or romantic relationships with former patients are unethical if the physician uses or exploits trust, knowledge, emotions, or influence derived from the previous professional relationship.

13. Opinion 8.21 of the American Medical Association, Code of Medical Ethics on the Use of Chaperones During Physical Exams states as follows:

From the standpoint of ethics and prudence, the protocol of having chaperones available on a consistent basis for patient examinations is recommended. Physicians aim to respect the patient's dignity and to make a positive effort to secure a comfortable and considerate atmosphere for the patient – such actions include the provision of appropriate gowns, private facilities for undressing, sensitive use of draping, and clear explanations on various components of the physical examination. A policy that patients are free to make a request for a chaperone should be established in each health care setting. This policy should be communicated to patients, either by means of a well displayed notice or preferably through a conversation initiated by the intake nurse or the physician. The request by a patient to have a chaperone should be honored.

An authorized health professional should serve as a chaperone whenever possible. In their practices, physicians should establish clear expectations about respecting patient privacy and confidentiality to which chaperones must adhere.

If a chaperone is to be provided, a separate opportunity for private conversation between the patient and the physician should be allowed. The physician should keep inquiries and history-taking, especially those of a sensitive nature, to a minimum during the course of the chaperoned examination.

14. On September 26, 2001, a Complaint and Jury Demand was filed in the Court of Common Pleas in Hamilton County, Ohio against the licensee. The Complaint was filed on behalf of a former patient and alleged that the licensee inappropriately treated the patient and subjected the patient to sexual harassment.
15. On December 19, 2001, the licensee signed and submitted his 2002 Application for Renewal of Kentucky Medical/Osteopathic License for Year 2002. The licensee answered "NO" in response to question number twenty-one (21):

"Since you last registered have you had to pay a judgment in a malpractice action or other civil action against your medical practice or are any malpractice or other civil actions against your medical practice presently pending in any court?"

16. Additionally, the licensee and the Board acknowledge and agree that this action does not preclude the Board from taking further action based upon any disciplinary action by another State Medical Board or violation(s) of the Kentucky Medical Practice Act not the subject of this Board action. The Hearing Panel shall have all options as set forth in KRS 311.591 available to them in assessing the appropriate action for any disciplinary actions by another State Medical Board or any additional violations of the Kentucky Medical Practice Act.

STIPULATED CONCLUSIONS OF LAW

The parties stipulate the following Conclusions of Law, which serve as the legal bases for the Agreed Order:

1. The licensee's Kentucky medical license is subject to regulation and discipline by the Board.
2. While the licensee denies that he violated any provision of the Kentucky Medical Practice Act, the parties agree that that the Hearing Panel could conclude from the evidence presented at an evidentiary hearing that the licensee has engaged in conduct which violates the relevant provisions of the Kentucky Medical Practice Act, KRS 311.595(9) and/or KRS 311.597. Accordingly, the parties agree there are legal grounds for the parties to enter into this Agreed Order.
3. Pursuant to KRS 311.591(6) and 201 KAR 9:082, the parties may fully and finally resolve the pending Complaint through an informal resolution, such as this Agreed Order.

AGREED ORDER

Based upon the foregoing Stipulations of Fact and Stipulated Conclusions of Law, and, based upon their mutual desire to fully and finally resolve this pending Complaint without an evidentiary hearing, the parties hereby ENTER INTO the following

AGREED ORDER:

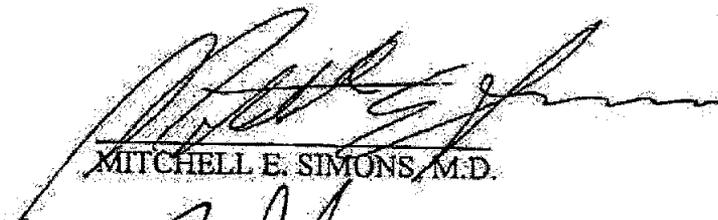
1. The license to practice medicine held by Mitchell E. Simons, M.D., is subject to the terms and conditions of this AGREED ORDER for an indefinite term, or until further order of the Board, and shall become effective immediately upon the filing of this Agreed Order.
2. During the effective period of this Agreed Order, the licensee may continue with the full active practice of medicine in the Commonwealth of Kentucky SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

- a. The licensee SHALL have a chaperon present throughout any personal contact with a female patient in his professional office or in any other clinical setting.
- b. Any chaperon utilized by the licensee must be approved, in advance, by the Board or its staff and must agree in writing to 1) remain present and within direct eyesight and within clear hearing distance of the licensee and the patient throughout the entire period the licensee is with a female patient; 2) accurately record the chaperon's presence, or absence, for the entire duration of such patient interaction in the patient's chart, or the patient record maintained by that clinical setting; 3) immediately notify the designated contact person at the Board's offices to report any violation of the chaperon requirement by the licensee. The licensee may submit and the Board or its agents may approve more than one chaperon to fulfill this requirement. The licensee shall be solely responsible for payment of the costs of such chaperon(s).
- c. Upon request, the licensee SHALL immediately make available any requested patient charts for female patients and/or any documentation about patient contacts outside of the office. The licensee shall also make available, upon request, the chaperon(s) for interview by Board agents regarding his compliance with that condition.
- d. If the licensee is called upon to see a female patient at the hospital or an outpatient surgical center, he may treat that patient so long as a professional member of the hospital's staff is present and is able to hear and see all interactions between the licensee and the patient, throughout the physician's entire interaction with the patient during the treatment. In such circumstances, the licensee will have the staff member note their presence in the patient's chart and he shall maintain a "log" for all such circumstances, which shall contain: the patient's name, date of treatment, reason for treatment in the hospital, and name of staff member attending. The licensee may utilize a computer generated report from the hospital as the required "log", so long as all necessary information is contained within the computer printout. Upon request of the Board's agent(s), the licensee shall make this log and any patient record(s) available for review. The licensee shall also take any step(s) necessary to permit, arrange or assist the Board's agent(s) to be able to interview the applicable hospital staff member(s), upon request.
- e. The licensee SHALL NOT have sexual contact with any patient.
- f. The licensee SHALL complete the "Maintaining Proper Boundaries" course through the Center for Professional Health at Vanderbilt University Medical Center in Nashville, Tennessee within six (6) months from entry of this Agreed Order.
- g. The licensee SHALL provide written proof that he has successfully completed the "Maintaining Proper Boundaries" course to the Board's agent assigned to supervise his probation and the Board's General Counsel or Assistant General Counsel.

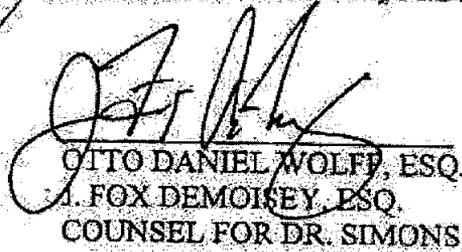
3. The licensee expressly agrees that if the licensee should violate any term or condition of the Agreed Order, the licensee's practice will constitute an immediate danger to the public health, safety, or welfare, as provided in KRS 311.592 and 13B.125. The parties further agree that if the Board should receive information that he has violated any term or condition of this Agreed Order, the Acting Panel Chair is authorized by law to enter an Emergency Order of Suspension or Restriction immediately upon a finding of probable cause that a violation has occurred, after an *ex parte* presentation of the relevant facts by the Board's General Counsel or Assistant General Counsel. If the Acting Panel Chair should issue such an Emergency Order, the parties agree and stipulate that a violation of any term or condition of this Order would render the licensee's practice an immediate danger to the health, welfare and safety of patients and the general public, pursuant to KRS 311.592 and 13B.125, accordingly, the only relevant question for any emergency hearing conducted pursuant to KRS 13B.125 would be whether the licensee violated a term or condition of this Agreed Order.
4. The licensee understands and agrees that any violation of this Agreed Order may serve as the basis for additional disciplinary action pursuant to KRS 311.595(13), including revocation of his Kentucky medical license.
5. The licensee may not request termination or modification of this Agreed Order until a period of twenty-four (24) months has passed from the filing of this Agreed Order, conditioned upon there having been no violation of the same.

SO AGREED on this 20th day of JANUARY, 2005.

FOR THE LICENSEE:



MITCHELL E. SIMONS, M.D.



OTTO DANIEL WOLFF, ESQ.
J. FOX DEMOISEY, ESQ.
COUNSEL FOR DR. SIMONS

FOR THE BOARD:



DONALD SWIKERT, M.D.
CHAIR, HEARING PANEL A.



L. CHAD ELDER
Assistant General Counsel
Kentucky Board of Medical Licensure
310 Whittington Parkway, Suite 1B
Louisville, Kentucky 40222
(502) 429-8046

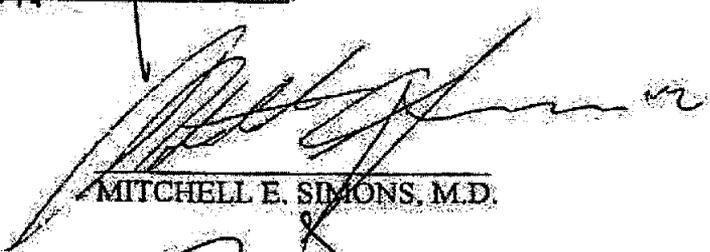
Entered: 02/17/2005

WAIVER OF RIGHTS

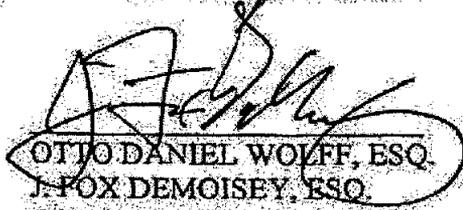
I, Mitchell E. Simons, M.D., am presently the Respondent in Kentucky Board of Medical Licensure Case No. 920. I understand that, under 201 KAR 9:082, I must waive certain rights if I wish to resolve this matter by informal dispensation. Accordingly, I WAIVE my right to raise any constitutional, statutory or common law objection(s) I may have to the Hearing Panel rejecting the proposed informal dispensation or to the curtailment of such a settlement by the Board's Assistant General Counsel.

Furthermore, if the Hearing Panel accepts the proposed Agreed Order as submitted, I WAIVE my right to demand an evidentiary hearing or to raise additional constitutional or statutory objections in this matter. However, if the Hearing Panel should reject the proposed Agreed Order, I understand that further proceedings will be conducted in accordance with KRS 311.530 et seq. and I will have the right to raise any objections normally available in such proceedings.

Executed this 20th day of JANUARY, 2005.



MITCHELL E. SIMONS, M.D.



OTTO DANIEL WOLFF, ESQ.
J. FOX DEMOISEY, ESQ.
COUNSEL FOR DR. SIMONS

NOV 03 2003

COMMONWEALTH OF KENTUCKY
BOARD OF MEDICAL LICENSURE
CASE NO. 920

K.B.M.L.

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF KENTUCKY HELD BY MITCHELL E. SIMONS, M.D., LICENSE NO. 21522
20 NORTH GRAND AVENUE, #2C, FT. THOMAS, KENTUCKY 41075-1755

COMPLAINT

Comes now the Complainant Preston P. Nunnolley, M.D., Chair of the Kentucky Board of Medical Licensure's Inquiry Panel B, and on behalf of the Panel which met on October 16, 2003, states for its Complaint against the licensee, Mitchell E. Simons, M.D., as follows:

1. At all relevant times, Mitchell E. Simons, M.D., was licensed by the Board to practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is Pain Management.
3. On December 27, 2002, the Board received a letter from Lisa Hinkle, an attorney, reporting allegations of inappropriate conduct by the licensee towards a patient. Ms. Hinkle reported that Patient A was willing to speak with a Board Investigator regarding inappropriate advances and personal contact from the licensee while she was being treated by the licensee.
4. Patient A was interviewed and reports that she injured her shoulder and hip in 1994 when a 200-pound table fell on her. Two and a half years ago, (2000), she started seeing the licensee for pain management. Her pain started in the back of her neck and radiated down her right arm. The first two years went without incident and she felt that her treatments were going well. Each visit Patient A was given a gown and asked to disrobe from the waist up, leaving her bra on. During

one visit she disrobed as instructed, the licensee entered the exam room, instructed her to take off her bra and left. She did as he asked. When he returned he began the exam, at which time he groped her breasts and touched her nipples, wanting to know if it hurt. Patient A asked why he was examining her breast, because she had no complaint of pain in that area. He explained that this was all connected and pain in the neck area could cause pain in the chest area. This continued once a week for approximately a month. One visit he gave her a steroidal shot in the upper front right shoulder when all other shots were given to the back of the neck. During her next visit, the licensee came into the exam room and asked her to remove her pants. She did as instructed leaving her bra, underpants, and gown on. He explained that he found she suffered from a hip injury. She had not complained of pain in this area and the licensee had never examined or x-rayed her for this injury. Patient A advised that when she was first injured a hip injury was noted on the workers compensation papers. The licensee began the exam by having her walk toward him while he was seated on a stool. When she reached him, he turned her around, so that he was behind her. Still seated, he felt her lower hip (buttocks). He turned her facing him, commenting and touching her tattoo, which is located in the center of her abdomen. He followed her tattoo with his fingers to her pubic line where it stops. He commented that she was tense and needed to relax, therefore he prescribed her Valium #14 and instructed her to take two before her next visit. Patient A did as instructed and took two Valium before her visit. During this visit, she was wearing a gown, her bra, and underwear when the licensee began the exam. He

asked her to lie on her stomach and he began to massage her shoulders. While he was seated he asked her to stand with her back toward him, he reached from behind, lifted her bra, and started rubbing her breasts. He took both hips in his hands, pulled her to him, and wanted to know if she could feel him, stating, "I am aroused by this." Patient A stated, "Excuse me." The licensee replied, "You make me aroused." The licensee took her hand and placed it on his crotch. She began to walk away when he turned her and kissed her. Patient A stated that this was no light kiss. She began to get dressed while he was in the room. The licensee asked her to come back to the office after hours and was apologizing to her. She advised that this visit and two prior visits were scheduled for 4:30 and one of the nurses (name unknown) commented on how long one of her visits lasted. Patient A advised that her visits with the licensee would last 45 minutes to one hour, that these visits did not feel right, and that they made her tense. She felt the licensee knew what he was doing, because he is the physician. During one visit, an employee Dwight (last name unknown), commented that her appointments were at the end of the day and she needed to be careful. At that time, she did not understand what Dwight was trying to say.

5. Patient A's boyfriend was interviewed and reported that he received two cell phone calls the day of Patient A's last visit to the licensee at approximately 6:15 p.m. from the licensee's office. The first was a hang up and the second was from the licensee wanting to know where Patient A was. Patient A's boyfriend could not provide this information to the licensee because he did not know.

6. During the course of the investigation, Patient B reported inappropriate contact by the licensee. Patient B stated that she was referred to the licensee after an automobile accident, which caused shoulder pain. Within a year, (1997-1998) she was treated by the licensee three times. During her first visit, the licensee asked her to disrobe from the waist up and with both hands, he rubbed her breasts in a circular motion, while asking her about her breasts implants. Patient B stated that he was smiling while doing this. She asked why he was examining her breasts and the answer was that sometimes the ribs could cause pain in the shoulders. On her second visit, Patient B was asked to remove her clothing from the waist up. She removed her shirt, but left her bra on. Patient B felt that the licensee became mad, treated her mean, and tried to intimidate her since she did not remove her bra. The licensee made her feel that he was better than her and she should do as he said because he was the doctor. On her third visit, Patient B was asked to remove her clothing from the waist up, she again left her bra on. The licensee told her to remove her bra and she did not. This upset the licensee, but he continued the exam. He took his hand and hit her on the top of the head asking her if it hurt. Patient B replied "yes". The licensee informed Patient B that there was nothing wrong with her. She could tell that he was still upset so she left.
7. Nancee Burlington, RN, stated that she has worked with the licensee for approximately six weeks. She has received no complaints from female patients regarding inappropriate touching. Ms. Burlington stated that the licensee and his Physician Assistant, Tom Feeny, do not use chaperones during female exams. If a female patient is new, she is asked to disrobe to her underwear and given a gown,

but during follow up visits they are seldom asked to disrobe. Ms. Burlington stated that she was amazed that nothing has been said regarding the use of chaperones, because her past employers required them. She did not see how inappropriate touching could occur, because the patient schedule is very heavy, not allowing time for something of that nature, and the licensee does not engage in small talk.

8. Dwight Cope, Electro Diagnostic Technologist, stated that he remembered Patient A. Mr. Cope denied having any conversation with Patient A regarding the time of day her appointments were scheduled or that she needed to be careful while with the licensee. Mr. Cope has received no complaints from patients that inappropriate touching has occurred.
9. Margaret Schweinzer, Medical Assistant, stated that she has worked with the licensee three years. Ms. Schweinzer escorts the patient to the exam room and if the patient is new they are asked to disrobe to their underwear and given a gown. Ms. Schweinzer remembered Patient A, but could not remember a time that Patient A was asked to disrobe. She stated that chaperones are not used during female exams and no complaints have been made.
10. Tom Feeny, Physician Assistant, stated that he has worked with the licensee for four years. On a female patient's first visit, they are asked to disrobe to their bra and underwear and given a gown. During the follow up visits, there is less exposure, but on occasion, the patient is asked to disrobe as described above. All new patients are seen by the licensee and depending on the type of follow up visit, he may or may not see the patient. Mr. Feeny stated that the licensee and himself

do not utilize chaperons during female exams. Mr. Feeny could not remember a time that the licensee wanted to exclusively see a particular female patient and appointments are set to accommodate the patient within reason. No patient has complained regarding the inappropriateness of the exams by the licensee.

11. Diana Neidhart, RN, worked with the licensee from February 1996 to November 2000. Ms. Neidhart was not surprised a complaint regarding this matter was submitted because there were incidents or comments made that could not be substantiated. Ms. Neidhart stated that Patient C, the licensee, and she were in the office late one afternoon and the licensee dismissed Ms. Neidhart, but she did not leave. Patient C came out of the exam room and appeared to be light headed (drugged) and sat down in the waiting room. The licensee again dismissed Ms. Neidhart, but Patient C asked her to stay with her, which she did. Patient C would not elaborate on what occurred during the exam. On another occasion, Patient A asked Ms. Neidhart about injections in the breast, but never gave a specific complaint. Additionally, Ms. Neidhart noticed that after seeing Patient D, the licensee had make-up on his shirt and smelled of perfume. Ms. Neidhart commented about this fact and he informed her that Patient D placed her head on his chest to be consoled.

Ms. Neidhart also stated that Patient E's child was fathered by the licensee. She could not remember if Patient E was a patient at the time of the birth and the licensee informed her that Patient E was not a patient at the time of conception. The licensee bought her a house after the child was born.

Ms. Neidhart stated that chaperones were only used if the licensee needed assistance with a procedure.

12. Patient E stated that she saw the licensee in 1997 for a short time. She and the licensee have a 2-year-old daughter in common (DOB 05/20/00). Patient E said that they are presently seeing each other and the physician/patient relationship was over when they became involved. She denied any inappropriate contact during her office visits.
13. Patient C, a registered nurse, was a patient of the licensee's from December 1997 to May 1998. Patient C stated that she stopped seeing the licensee because he was very flirtatious and due to the reasons that prompted this investigator to call. She wanted to stay anonymous after giving a statement. She was informed that this could not be accomplished, therefore she would not elaborate, stating she wanted to discuss the matter with her husband first and would call back. On March 12, 2003, Patient C declined to make a statement saying her husband advised her not to, but that she would tell the truth if placed under oath.
14. During an interview with the Board Investigator, the licensee advised that he does not use chaperons. The licensee could not think of a reason he would need to examine breasts or touch the nipples. He might need to examine in close proximity to the breasts due to the muscle structure and occasionally need to examine the hip area. The licensee denies prescribing Valium the way Patient A stated and touching any patient inappropriately. The licensee was asked to provide a written response regarding his relationship with Patient E and whether any inappropriate touching took place during exams with Patient C.

During the interview, the licensee denied touching Patient C inappropriately. The licensee confirmed that he and Patient E have a child together. The licensee stated that he and Patient E did not have an on-going intimate relationship now. The epidural performed October 04, 2000 on Patient E was no different from doing one on his aunt, brother, or any other relative.

15. In his written response dated March 4, 2003, the licensee addressed the allegations made by Patients A and B as follows:

During the course of [Patient B's] treatment with Pain Management Centers, I personally saw [Patient B] three times. I first saw [Patient B] at St. Luke Hospital East for performance of a cervical epidural steroid injection on January 31, 1997. I next saw [Patient B] for follow-up on February 4, 1997, she received good results from her epidural... [Patient B] had been in an automobile wreck. She was expressing concern over a possible rupture of her breast implant. She had expressed concern regarding contour, shape, and size, afraid her implant was leaking. I examined her breast area and her implant and did appear to be misshaped. I instructed her to see her plastic surgeon. I recall nothing further than reflected in my office note.

I next saw [Patient B] one year later on February 10, 1998. At that time, Dr. Brott was weaning her from medications. My examination revealed that the patient complained of pain with any touch. When distracted, she felt no pain to touch. My notes state "In other words, I think she is afraid of losing the Tylenol #4, but I am also afraid to keep her on this." I was concerned at that time that [Patient B's] medication was not being taken as prescribed and I was concerned about her desire for narcotic medication.

[Patient B] states that she was "hit" on the top of her head and asked if it hurt. The only reference I can find reflected in her record, is her last office visit of March 5, 1998. At that time, she was seen by Dr. Brott. He found five positive Waddel's signs. Part of this testing involves the physician placing his hand on the patient's head and asking if she feels pain. Positive Waddel signs are indicative of symptom magnification. Her medications were decreased and her Tylenol #4's were discontinued. She never returned to the office.

Regarding [Patient A], she was first seen by our office on March 10, 1998. She remained a patient until last seen January 15, 2001. She was initially diagnosed with myofascial pain syndrome. ...

[Patient A's] claim that she was seen on a weekly basis for approximately a month is incorrect. A review of [Patient A's] file will provide appropriate intervals of office visits. [Patient A's] concerns appear to revolve around her being prescribed Valium and instructed to take two 10 mg tablets prior to office consult. [Patient A] was prescribed 5mg B.I.D. on only two occasions, December 18, 2000 and January 15, 2001. These were [Patient A's] last two office visits. Prior to Valium, she was prescribed Robaxin and before that Soma. We regularly adjust patient's medications. [Patient A] was never prescribed Valium 10 mg, nor was she instructed to take two Valium before appointments. [Patient A] has reported to an anonymous person that the Valium made her "lightheaded". This is not in her medical chart. This would be important information and would be noted by us in the record if we were informed by the patient of this fact. [Patient A] would not have received a second prescription.

I do not remember the exact times of day of [Patient A's] appointments. My scheduling nurse is responsible for the setting of appointment times acceptable to the patient. I did not, nor do I now, instruct my nurses to schedule certain patients for "4:30" appointments. I see my patients, men, women, and children, in the order that they are scheduled. Also, my practice does not allow the luxury of 45 minutes to 1 hour office appointments with any patient, let alone [Patient A].

I do not perform breast examinations on my patients. Early in treatment, [Patient A] complained of right shoulder, neck and chest muscle pain. She was noted to have very tight shoulder muscles and pectoralis muscles. It is not unusual with severe neck injuries to experience muscle spasms and tightness in the chest wall. I sometimes palpate areas to determine whether spasms are present. This exam does not involve touching the patient's breasts.

[Patient A] completed her own Visual Analog charts. These charts allow the patient to pinpoint their own areas of pain. A question was raised regarding the existence of pain in the chest and the hip areas. [Patient A] first complained of chest wall pain on July 21, 1998. Low back, hip, bilateral leg pain was identified on the patient's Visual Analog on September 15, 1998. Her complaints of low back and front shoulder pain persisted throughout much of her treatment course. I would not have examined [Patient A's] hip area or low back area without her first complaining of those areas...

I deny having inappropriate physical contact with [Patient A]. During the course of treating [Patient A], outside consult was sought to help address the issues of prolonged symptoms with [Patient A]. Her course of treatment was not unusual following her symptom presentation and

objective findings on examination. I believe she was provided appropriate medical treatment and care.

16. Opinion 8.14 of the American Medical Association, Code of Medical Ethics on

Sexual Misconduct in the Practice of Medicine states as follows:

Sexual contact that occurs concurrent with the physician-patient relationship constitutes sexual misconduct. Sexual or romantic interactions between physicians and patients detract from the goals of the physician-patient relationship, may exploit the vulnerability of the patient, may obscure the physician's objective judgment concerning the patient's health care, and ultimately may be detrimental to the patient's well-being.

If a physician has reason to believe the non-sexual contact with a patient may be perceived as or may lead to sexual contact, then he or she should avoid the non-sexual contact. At a minimum, a physician's ethical duties include terminating the physician-patient relationship before initiating a dating, romantic, or sexual relationship with a patient.

Sexual or romantic relationships between a physician and a former patient may be unduly influenced by the previous physician-patient relationship. Sexual or romantic relationships with former patients are unethical if the physician uses or exploits trust, knowledge, emotions, or influence derived from the previous professional relationship.

17. Opinion 8.21 of the American Medical Association, Code of Medical Ethics on

the Use of Chaperones During Physical Exams states as follows:

From the standpoint of ethics and prudence, the protocol of having chaperones available on a consistent basis for patient examinations is recommended. Physicians aim to respect the patient's dignity and to make a positive effort to secure a comfortable and considerate atmosphere for the patient – such actions include the provision of appropriate gowns, private facilities for undressing, sensitive use of draping, and clear explanations on various components of the physical examination. A policy that patients are free to make a request for a chaperone should be established in each health care setting. This policy should be communicated to patients, either by means of a well displayed notice or preferably through a conversation initiated by the intake nurse or the physician. The request by a patient to have a chaperone should be honored.

An authorized health professional should serve as a chaperone whenever possible. In their practices, physicians should establish clear expectations about respecting patient privacy and confidentiality to which chaperones must adhere.

If a chaperone is to be provided, a separate opportunity for private conversation between the patient and the physician should be allowed. The physician should keep inquiries and history-taking, especially those of a sensitive nature, to a minimum during the course of the chaperoned examination.

18. By his conduct, the licensee has violated KRS 311.595(5) and KRS 311.595(9), as illustrated by 311.597(4). Accordingly, legal grounds exist for disciplinary action against his Kentucky medical license.

19. The licensee is directed to respond to the allegations delineated in the Complaint within thirty (30) days of service thereof and is further given notice that:

- (a) His failure to respond may be taken as an admission of the charges;
- (b) He may appear alone or with counsel, may cross-examine all prosecution witnesses and offer evidence in his defense.

20. NOTICE IS HEREBY GIVEN that a hearing on this Complaint is scheduled for June 23 & 24, 2004 at 9:00 a.m., Eastern Standard Time, at the Kentucky Board of Medical Licensure, Hurstbourne Office Park, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222. Said hearing shall be held pursuant to the Rules and Regulations of the Kentucky Board of Medical Licensure. This hearing shall proceed as scheduled and the hearing date shall only be modified by leave of the Hearing Officer upon a showing of good cause.

WHEREFORE, Complainant prays that appropriate disciplinary action be taken against the license to practice medicine held by Mitchell E. Simons, M.D.

This 3rd day of ^{NOVEMBER} ~~October~~, 2003.


PRESTON P. NUNNELLEY, M.D.
CHAIR, INQUIRY PANEL B

CERTIFICATE OF SERVICE

I certify that the original of this Complaint was delivered to Mr. C. William Schmidt, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; and a copy was mailed to Division of Administrative Hearings, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204; and a copy was mailed via certified mail return-receipt requested to Mitchell E. Simons, M.D., 20 North Grand Avenue, #2C, Ft. Thomas, Kentucky 41075-1755 on the 31st day of October, 2003.

~~NDV6666~~



L. CHAD ELDER
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