

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2010 JUN 30 PM 3: 26

CLERK OF COURTS

Anamika Jain, M.D.,

Appellant-Appellant,

v.

Ohio State Medical Board,

Appellee-Appellee.

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No. 09AP-1180
(C.P.C. No. 09CVF07-11053)
(REGULAR CALENDAR)

NUNC PRO TUNC JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 22, 2010, appellant's two assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellant.

BROWN, J., TYACK, P.J., & SADLER, J.



Judge Susan Brown

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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Anamika Jain, M.D.,

Appellant-Appellant,

v.

Ohio State Medical Board,

Appellee-Appellee.

No. 09AP-1180

(C.P.C. No. 09CVF07-11053)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 22, 2010

Dinsmore & Shohl, LLP, Eric J. Plinke, and Gregory P. Mathews, for appellant.

Richard Cordray, Attorney General, and Karen A. Unver, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Anamika Jain, M.D., appellant, appeals a November 9, 2009 judgment of the Franklin County Court of Common Pleas, in which the court denied her motion to admit additional evidence and granted the motion to dismiss filed by the State Medical Board of Ohio ("board"), appellee.

{¶2} For reasons related to the nature of the legal issues at hand, many of the underlying facts in this case are not contained in the record. On May 13, 2009, the board issued appellant a notice that the board intended to determine whether to limit, revoke,

suspend, refuse to register or reinstate appellant's certificate to practice medicine and surgery. A copy of the notice was also delivered via certified mail to appellant's Nevada attorney. The notice alleged that, on or about February 3, 2009, the Medical Board of California issued a notice of out-of-state suspension order to appellant, notifying her that her California medical license had been suspended on the basis that her Nevada medical license had been suspended on November 14, 2008. The suspension of appellant's Nevada license stemmed from the allegations of patients at Valley Eye Center, which appellant co-owned. Numerous patients reported damage to their vision after receiving LASIK treatment at the eye center. In the notice, the board indicated that the California notice of suspension order constituted a violation of R.C. 4731.22(B)(22), which allows the board to take action on appellant's Ohio medical license if any action is taken on the medical license issued by another jurisdiction. The notice also indicated that:

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.

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.

{¶3} The record before us includes a letter from appellant's Nevada attorney, dated May 21, 2009, and received by the board on May 26, 2009. In the letter, appellant's

Nevada attorney indicated she was "writing on behalf of our client, Dr. Anamika Jain, in response to your correspondence of May 13, 2009, which Dr. Jain received on or about May 18, 2009." The letter went on to summarize the recent actions taken by the California medical board and the status of the actions previously taken by the Nevada medical board. The final three paragraphs of the letter indicated:

Please note that at the time of Dr. Jain's hearing, the Ohio Medical Board had been the only state that had not taken action against Dr. Jain. We find it curious that the Ohio Medical Board has now opened an investigation. Dr. Jain contends she did nothing wrong; in fact, her husband, Vikas Jain, was performing the same duties in Nevada as he had been performing in Ohio after his license revocation.

With regard to a request for a hearing, Dr. Jain is in the process of obtaining Ohio counsel.

If you have any questions or require further information, please do not hesitate to contact me.

{¶4} Apparently, an administrator for the board, Barbara Jacobs, reviewed the May 21, 2009 letter and determined it was not a request for hearing, and the full board did not review the letter to determine whether it constituted a request for hearing. On July 8, 2009, the matter came before the board, and the board voted to non-permanently revoke appellant's license to practice medicine. On July 8, 2009, the board mailed appellant its findings, order, and adjudication entry.

{¶5} On July 23, 2009, appellant filed an appeal of the board's order with the Franklin County Court of Common Pleas. On August 28, 2009, the board filed a motion to dismiss appellant's appeal for failure to exhaust administrative remedies. On September 30, 2009, appellant filed a motion to admit additional evidence, which sought to include the following evidence that was not in the board's certified record: (1) the

minutes from the board's July 8, 2009 meeting regarding the board's deliberations; (2) the audiotape of the board's July 8, 2009 meeting; (3) the transcript of the audiotape of the board's July 8, 2009 meeting; (4) the memorandum from Jacobs to the board members, dated June 25, 2009; (5) the affidavit of Jacobs that contains Jacobs' testimony regarding the board's process of determining whether a timely hearing request has been filed in response to a notice of opportunity for hearing; and (6) the affidavit of appellant's Nevada counsel. On November 9, 2009, the trial court issued its decision denying appellant's motion to admit additional evidence and granting the board's motion to dismiss. Appellant appeals the court's judgment, asserting the following assignments of error:

[I.] The court of common pleas erred in dismissing Dr. Jain's appeal for failure to exhaust administrative remedies.

[II.] The court of common pleas erred in denying Dr. Jain's Motion to Admit Additional Evidence.

{¶6} Appellant argues in her first assignment of error that the trial court erred in dismissing her appeal due to her failure to exhaust administrative remedies. In an appeal from a board order, a reviewing trial court is bound to uphold the order if it is supported by reliable, probative, and substantial evidence, and is in accordance with law. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122; R.C. 119.12. On questions of law, however, the common pleas court does not exercise discretion and this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, paragraph one of the syllabus.

{¶7} In the present case, appellant argues that the board's order violated her due process rights by failing to construe her May 21, 2009 letter as a request for hearing and revoking her license without a hearing. "The fundamental requirement of procedural due

process is notice and hearing, that is, an opportunity to be heard." *Korn v. Ohio State Med. Bd.* (1988), 61 Ohio App.3d 677, 684. Due process requires that an individual be given an opportunity for a hearing before being deprived of a significant property interest. *Id.* The type of hearing necessary is determined by balancing the government interest against the private interest. *Id.*

{¶8} R.C. 119.07 provides:

[T]he agency shall give notice to the party informing the party of the party's right to a hearing. Notice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing if the party requests it within thirty days of the time of mailing the notice.

{¶9} R.C. 4731.22(J) provides:

If the [medical] board is required by Chapter 119 of the Revised Code to give notice of an opportunity for a hearing and if the individual subject to the notice does not timely request a hearing in accordance with section 119.07 of the Revised Code, the board is not required to hold a hearing, but may adopt, by an affirmative vote of not fewer than six of its members, a final order that contains the board's findings. In that final order, the board may order any of the sanctions identified under division (A) or (B) of this section.

{¶10} In the present case, the trial court concluded that, because appellant failed to file a request for hearing, appellant failed to exhaust her administrative remedies, and she was not entitled to review by the court of common pleas. A party generally waives the right to appeal an issue that could have been, but was not, raised in earlier proceedings. *MacConnell v. Ohio Dept. of Commerce*, 10th Dist. No. 04AP-433, 2005-Ohio-1960, ¶21. The doctrine of exhaustion requires a person to exhaust administrative remedies before seeking redress from the judicial system. *Basic Distrib. Corp. v. Ohio*

Dept. of Taxation, 94 Ohio St.3d 287, 290, 2002-Ohio-794, citing *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26. The purpose of the doctrine is to allow an administrative agency to apply its expertise in developing a factual record without premature judicial intervention in administrative processes. *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111; *Prairie Twp. Bd. of Trustees v. Hay*, 10th Dist. No. 01AP-1198, 2002-Ohio-4765, ¶26. Allowing a claimant to raise an issue for the first time in an appeal to the court of common pleas would frustrate the statutory system for having issues raised and decided through the administrative process. *Carmack v. Caltrider*, 164 Ohio App.3d 76, 2005-Ohio-5575, ¶6, quoting *Kaltenbach v. Mayfield* (Apr. 27, 1990), 4th Dist. No. 89-CA-10. The failure to exhaust administrative remedies is not a jurisdictional defect, but is rather an affirmative defense if timely asserted and maintained. *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, syllabus.

{¶11} Here, under appellant's first assignment of error, appellant presents several arguments: (1) the doctrine of exhaustion of administrative remedies does not apply because appellant was challenging the board's internal determination that her timely response to the board's citation did not constitute a request for a hearing under R.C. 119.07; (2) application of the doctrine of exhaustion of administrative remedies violated appellant's due process rights; and (3) appellant made a timely and adequate request for hearing and properly presented her position, arguments, and contentions in writing under R.C. 119.07.

{¶12} With regard to appellant's first argument, appellant maintains that the doctrine of exhaustion of administrative remedies should not apply here because the threshold issue was whether the procedures used by the board violated appellant's due

process rights. In essence, what appellant contends is that the trial court should not have applied the doctrine of exhaustion of administrative remedies because the board improperly denied her the opportunity to exhaust her administrative remedies based upon unconstitutional procedures. However, the trial court did not merely apply the doctrine of exhaustion of administrative remedies without any consideration of appellant's due process arguments. Before proceeding to the issue of whether appellant failed to exhaust her administrative remedies, the trial court first addressed the board's procedures. Specifically, the trial court concluded (1) appellant failed to cite any legal authority to support her contention that the full board was required to consider the issue of whether the May 21, 2009 letter constituted a hearing request; and (2) appellant cited no authority to support her argument that, if a hearing is not required under R.C. 4731.22(J), the board must conduct an objective review of the evidence to determine whether appellant requested a hearing. In effect, the trial court was finding that appellant failed to demonstrate that the board's procedures violated her due process rights. We concur with these conclusions and find appellant fails to direct us to any authority that demands that she or other like-positioned individuals be afforded any additional procedural safeguards. The procedure implemented by the board afforded appellant notice and an opportunity to be heard, but appellant failed to invoke such opportunity, as discussed in detail infra. Therefore, this argument is without merit.

{13} With regard to appellant's second argument, that the trial court violated her due process rights by applying the doctrine of exhaustion of administrative remedies, we disagree. Appellant argues that, in dismissing her appeal, the court violated her due process rights by ignoring the primary issues raised in the appeal, which were that she

made an adequate request for a hearing in a timely manner and the procedures used by the board were inadequate. However, the trial court addressed both of these issues before applying the doctrine of exhaustion of administrative remedies. As discussed above, the trial court found appellant failed to demonstrate that the procedure used by the board was improper or that the board was required to perform any additional duties. Importantly, it found that, even if it were to consider the May 21, 2009 letter, the contents of the letter did not constitute a request for hearing. Thus, the trial court did, in fact, address the essential issues in appellant's appeal even though it ultimately decided the matter must be dismissed based upon the failure to exhaust administrative remedies.

{¶14} With regard to appellant's third argument, that the May 21, 2009 letter constituted a timely and adequate request for hearing, we agree with the trial court that the letter did not constitute a request for hearing. To support her claim that the board should have construed her letter as a request for hearing, appellant terms her duty variously as one to "respond to" the board's notice of opportunity for hearing, to submit a "timely written response" to the board, to show that she "fully intends" to request a hearing, and to make an "effort to challenge" the board's order. However, her duty was greater than any of these she urges. Appellant's duty is embodied by R.C. 119, which provides that a "party is entitled to a hearing if the party requests it," and R.C. 4731.22(J), which provides that the individual must "timely request a hearing." Thus, appellant was required to specifically request a hearing and not just "respond to" the order, "intend" to request a hearing, or make "an effort" to challenge the order.

{¶15} Although appellant maintains it was fundamentally unfair for the administrator to strictly construe her May 21, 2009 letter as not being a request for

hearing, we find that, even construing it liberally, the letter did not constitute a request for hearing. A plain reading of the letter fails to reveal any request for a hearing therein. In the only passage of the letter that mentions a request for a hearing, appellant's Nevada counsel clearly does not request a hearing and, in fact, leaves any request open for a yet-to-be-obtained Ohio attorney to pursue at a later time. Specifically, the relevant portion of the letter indicates, "With regard to a request for a hearing, Dr. Jain is in the process of obtaining Ohio counsel." This court envisions no way that a reasonable reader of this passage could construe it as a present request for a hearing. The only reasonable interpretation is that any request for hearing would be pursued by an unnamed Ohio attorney at a later date. Thus, we find the trial court did not err when it found appellant's May 21, 2009 letter did not constitute a request for hearing. For all the above reasons, the trial court properly dismissed appellant's appeal for failure to exhaust administrative remedies. Appellant's first assignment of error is overruled.

{¶16} Appellant argues in her second assignment of error that the trial court erred when it denied her motion to admit additional evidence. As indicated in the summary of facts above, appellant filed a motion with the common pleas court to admit the following additional evidence, which was not in the board's certified record: (1) the minutes from the board's July 8, 2009 meeting regarding the board's deliberations ("item 1"); (2) the audiotape of the board's July 8, 2009 meeting ("item 2"); (3) the transcript of the audiotape of the board's July 8, 2009 meeting ("item 3"); (4) the memorandum from Jacobs to the board members ("item 4"), dated June 25, 2009; (5) an affidavit of Jacobs that contains Jacobs' testimony regarding the board's process of determining whether a timely hearing request has been filed in response to a notice of opportunity for hearing

("item 5"); and (6) the affidavit of appellant's Nevada counsel ("item 6"). Appellant asserts that, after she appealed the board's decision to the common pleas court, she discovered that the board was not aware of several items that should have been made part of the record.

{¶17} The trial court denied appellant's motion to submit additional evidence, citing R.C. 119.12, which provides, in pertinent part:

Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

Thus, in an R.C. 119.12 proceeding, "a common pleas court may exercise its discretion to admit additional evidence into the record in an appeal from an administrative proceeding only if it has first determined that the additional evidence is both newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency." *Chong-Hadaway, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 03AP-302, 2003-Ohio-5584, ¶17, quoting *Daniels Buick Co. v. Gen. Motors Corp.* (Oct. 13, 1996), 10th Dist. No. 97APE12-1701. Newly discovered evidence is evidence that was in existence at the time of the administrative hearing. *Cincinnati City School Dist. v. State Bd. of Edn.* (1996), 113 Ohio App.3d 305, 317. Newly discovered evidence does not refer to newly created evidence. *Golden Christian Academy v. Zelman* (2001), 144 Ohio App.3d 513, 517.

{¶18} This court reviews a trial court's decision regarding whether to admit additional evidence, pursuant to R.C. 119.12, under an abuse-of-discretion standard.

See *Northfield Park Assn. v. Ohio State Racing Comm.*, 10th Dist. No. 05AP-749, 2006-Ohio-3446, ¶57. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶19} Here, none of the items appellant sought to add to the trial court's record met the requirements for newly discovered evidence as set forth in R.C. 119.12. Initially, item 1, the board's minutes from the July 8, 2009 meeting, was already included as part of the board's record. As to items 2, 3, and 6, these were not in existence at the time of the board's hearing and cannot be deemed newly discovered evidence. See *Cincinnati City School Dist.* at 317. Items 2, 3, and 6 were also newly created since the board's hearing, which does not fit within the definition of newly discovered evidence. See *Golden Christian Academy* at 517. With regard to item 4, Jacobs' June 25, 2009 memorandum to the board, although appellant apparently argued to the trial court that it was in existence, but unavailable to her due to the board's confidentiality statute, appellant fails to present such an argument on appeal, and, regardless, she presents no authority to support that this type of unavailability would fit within the requirements of R.C. 119.12. Furthermore, item 5 is an affidavit prepared by Jacobs for purposes of another case; thus, it was not newly discovered and could have been ascertained at the time of the board hearing.

{¶20} Notwithstanding the failure of the additional evidence to meet the requirements of R.C. 119.12, appellant maintains that the requirements in R.C. 119.12 presuppose that the licensee was given an opportunity to respond to and participate in the administrative hearing, and they have no application here, where the licensee contends that the procedures used by the board systematically excluded material

documents from the record. However, we have already determined that appellant was given a proper opportunity consistent with due process to request and participate in an administrative hearing, but failed to do so. If appellant had wanted to ensure certain evidence would be included in the record both before the board and the trial court, she should have taken the proper steps to procure a hearing. Furthermore, items 5 and 6 clearly do not fit within the purview of appellant's argument that the board systematically excludes these documents from the record, as item 5 was an affidavit prepared by Jacobs for the purposes of another case, and item 6 was created by appellant's Nevada counsel after the hearing. For these reasons, we find the trial court did not abuse its discretion when it denied appellant's motion to admit additional evidence. Therefore, appellant's second assignment of error is overruled.

{¶21} Accordingly, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Anamika Jain, M.D.,

Appellant,

vs.

Ohio State Medical Board,

Appellee.

Case No. 09 CVF07-11053

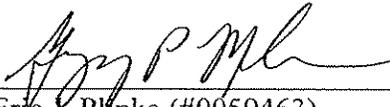
Judge Schneider

NOTICE OF APPEAL OF APPELLANT ANAMIKA JAIN, M.D.

Appellant Anamika Jain, M.D., by and through the undersigned counsel, hereby gives this Notice of Appeal of this matter to the Tenth District Court of Appeals from the decision and final judgment of the Court of Common Pleas, Franklin County, Ohio, filed on November 20, 2009, which affirmed the Ohio State Medical Board's Order. The judgment entry was issued as a final and appealable order on November 20, 2009.

09 A P E 12 1180

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been sent via regular U.S. mail to Karen A. Unver, Assistant Attorney General, Health and Human Services Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215, this 17th of December, 2009.



Eric J. Pinke
Gregory P. Mathews

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

TERMINATION NO. 18
11/20/09 BY: KY

ANAMIKA JAIN, M.D.,

Appellant,

v.

OHIO STATE MEDICAL BOARD

Appellee.

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Case No. 09 CV 011053

JUDGE SCHNEIDER

FINAL APPEALABLE ORDER

JUDGMENT ENTRY

On November 9, 2009, this Court issued a Decision (1) DENYING Appellant's Motion to Admit Additional Evidence, Filed September 30, 2009, and (2) GRANTING Appellee's Motion to Dismiss, Filed August 28, 2009.

It is therefore ORDERED, ADJUDGED, and DECREED that the July 8, 2009 Findings, Order and Journal Entry approved and confirmed by Appellee, the Ohio State Medical Board, In the Matter of Anamika Jain, M.D., Case No. 09-CRF-061, is hereby AFFIRMED. This is a FINAL ENTRY.

IT IS SO ORDERED.

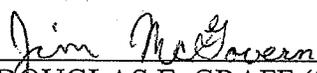


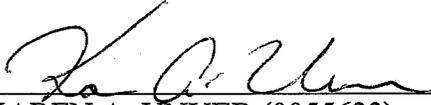
JUDGE SCHNEIDER

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Approved by:

RICHARD CORDRAY
Ohio Attorney General

per email
outgoing 2021

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FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

CLERK OF COURTS

ANAMIKA JAIN, M.D., :
Appellant, :
v. : Case No. 09CVF07-11053
OHIO STATE MEDICAL BOARD, : Judge Schneider
Appellee. :

DECISION (1) DENYING APPELLANT'S MOTION TO ADMIT
ADDITIONAL EVIDENCE, FILED SEPTEMBER 30, 2009, AND
(2) GRANTING APPELLEE'S MOTION TO DISMISS,
FILED AUGUST 28, 2009
(Case Terminated)

Rendered this 6 day of November, 2009.

Schneider, C., J.

I. Motion to Admit Additional Evidence

On June 29, 2006, appellant filed its motion to admit additional evidence. Appellant seeks to introduce (1) the minutes from the Board's July 8, 2009 meeting, (2) an audio tape of the July 8 meeting, (3) a transcript of that audio tape, (4) Barbara Jacob's June 25, 2009 memorandum to the Board, (5) Jacob's affidavit, and (6) attorney Maria Nutile's affidavit.

The Tenth District Court of Appeals has discussed a motion to admit additional evidence as follows:

R.C. 119.12 provides that, unless otherwise provided by law, additional evidence -- -- that is, evidence beyond that in the record certified

by the agency -- -- may be admitted by the court of common pleas only when it is newly discovered and could not with reasonable diligence have been ascertained prior to the administrative hearing:

"Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency." R.C. 119.12.

The decision to admit additional evidence lies within the discretion of the court of common pleas, but only after the court has determined that the evidence is newly discovered and that it could not with reasonable diligence have been ascertained prior to the agency hearing. *Ganley, Inc. v. Ohio Motor Vehicle Dealers Bd.* (Sept. 29, 1994), 1994 Ohio App. LEXIS 4391, Franklin App. No. 93APE12-1646, unreported (1994 Opinions 4662, 4668); see *Rollins v. Ohio Real Estate Comm.* (May 2, 1985), 1985 Ohio App. LEXIS 7552, Cuyahoga App. No. 48546, unreported. Newly discovered evidence is evidence that was in existence at the time of the administrative hearing. *Swope v. Board of Building Standards* (Dec. 23, 1993), 1993 Ohio App. LEXIS 6255, Franklin App. No. 93AP-595, unreported (1993 Opinions 5712, 5725); *Steckler v. Ohio State Bd. of Psychology* (1992), 83 Ohio App. 3d 33, 38, 613 N.E.2d 1070. . . .

Cincinnati City School Dist. v. Ohio Bd. of Educ. (Franklin 1996), 113 Ohio App. 3d 305, 317; see Northfield Park Assocs. v. Ohio State Racing Comm'n (Franklin App., June 30, 2006), No. 05AP-749, 2006 Ohio App. LEXIS 3398, at *35 ("pursuant to R.C. 119.12, the trial court has no discretion to admit additional evidence if it is not satisfied that the evidence is newly discovered and could not with reasonable diligence have been ascertained prior

to the hearing before the agency"); Creager v. Ohio Dep't of Agric. (Franklin App., Nov. 16, 2004), No. 04AP-142, 2004 Ohio App. LEXIS 5529, at *8 (quoting Cincinnati City School Dist., 113 Ohio App. 3d at 317); Lluberes, Inc., v. Ohio Liquor Control Comm'n (Franklin App., Nov. 6, 2003), No. 02AP-1326, 2003 Ohio App. LEXIS 5262, at *5 (quoting Cincinnati City School Dist., 113 Ohio App. 3d at 317).

In this regard, appellant's motion is unwarranted. O.R.C. 119.12 states that additional evidence is admissible when it is "newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency" and "was in existence at the time of the administrative hearing." Cincinnati City School Dist., 113 Ohio App. 3d at 317. However, appellant has not met this standard.

First, Jacob's memorandum, the audio tape, and the transcript of the audio tape are not part of the record to be considered in determining an administrative appeal. That materials might have some connection with an administrative appeal is insufficient to include them in the record of proceedings or to admit them as additional evidence. Likewise, although arguing that June 25, 2009 memorandum "was in existence, but not available to Respondent, due to the Board's confidentiality statute,"

appellant cites no legal authority which has held that "unavailable" meets O.R.C. 119.12's requirements.

Second, the affidavits did not exist at the time of the administrative hearing and so cannot constitute admissible, additional evidence.

Third, the Board states that the minutes of the July 2009 meeting were filed with the record in this case. In contrast, appellant fails to show that the minutes should be admitted as additional evidence.

Fourth, appellant's conjecture as to possible "errors in and omissions from the Minutes" does not demonstrate that an audio tape of the July 8 meeting or a transcript of the audio tape is necessary. See Ferrari v. Ohio St. Med. Bd. (Lorain App., June 22, 1983), No. 3474, 1983 Ohio App. LEXIS 15500, at *3 ("The minutes of a Board meeting at which no evidence was taken is a sufficiently precise history of that proceeding to afford adequate review on appeal. The certification of those minutes, rather than a stenographic transcript, does not render the record of proceedings incomplete.").

Also, appellee notes that such audio tapes are "transitory documents" under O.A.C. 4731-9-01(A) and states that the audio tape no longer exists in accordance with the

Board's records-retention schedule under O.R.C. 149.33 and 149.34.

The asserted relevance and importance of the materials sought to be admitted as additional evidence do not meet O.R.C. 119.12's requirements that additional evidence be admitted only if "newly discovered" and could not have been ascertained with "reasonable diligence." Thus, the Court declines to exercise its discretion to permit appellant to introduce additional evidence.

II. Motion to Dismiss

On August 28, 2009, appellee filed its motion to dismiss for failure to exhaust administrative remedies. Appellee argues that appellant failed to timely request a hearing after it sent a Notice for Opportunity for Hearing.

In response, appellant argues that she timely requested a hearing via the May 21, 2009 letter from attorney Nutile to the Board but did not receive a hearing; that she was entitled to have the full Board consider the issue of whether the May 21 letter constituted a hearing request; and that the doctrine of exhaustion of administrative remedies does not apply.

Exhaustion of remedies is discussed as follows:

. . . . The doctrine of exhaustion requires a person to exhaust administrative remedies [**11] before seeking redress from the judicial

system. *Basic Distrib. Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 290, 2002 Ohio 794, 762 N.E.2d 979, citing *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26, 406 N.E.2d 1095. The purpose of the doctrine is to allow an administrative agency to apply its expertise in developing a factual record without premature judicial intervention in administrative processes. *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111, 564 N.E.2d 477; *Prairie Twp. Bd. of Trustees v. Hay*, Franklin App. No. 01AP-1198, 2002 Ohio 4765, at P26.

While many courts describe the exhaustion doctrine as a jurisdictional concept, the Supreme Court of Ohio and this court have clarified that a party's failure to exhaust available administrative remedies is not a jurisdictional defect. *Jones v. Village of Chagrin Falls*, 77 Ohio St.3d 456, 462, 1997 Ohio 253, 674 N.E.2d 1388. Rather, "it is an affirmative defense which must be timely asserted in an action or it will be considered waived." *Prairie Twp.* at P26, quoting *The Salvation Army v. Blue Cross & Blue Shield of N. Ohio* (1993), 92 Ohio App.3d 571, 577, 636 N.E.2d 399; accord *Grudzinski v. Med. College of Ohio* (Apr. 12, 2000), Lucas App. No. L-00-1098, 2000 Ohio App. LEXIS 1622 (stating that the rule of exhaustion [**12] "is not jurisdictional, but may be raised as an affirmative defense"). . . .

Derakhshan v. State Med. Bd. (Franklin App., Oct. 30, 2007), No. 07AP-261, 2007 Ohio App. LEXIS 5099, at *10-12. The Tenth District Court of Appeals has held that a doctor's "failure to timely request a hearing before appellee was a failure to exhaust his administrative remedies." *Id.* at *16 (quoting *State Med. Bd. v. Fiorica* (Franklin App., Nov. 3, 1988), No. 88AP-516, 1988 Ohio App. LEXIS 4367).

In this regard, appellee's motion is warranted.

First, O.R.C. 4731.22(J) reads as follows:

(J) If the board is required by Chapter 119. of the Revised Code to give notice of an opportunity for a hearing and if the individual subject to the notice does not timely request a hearing in accordance with section 119.07 of the Revised Code, the board is not required to hold a hearing, but may adopt, by an affirmative vote of not fewer than six of its members, a final order that contains the board's findings. In that final order, the board may order any of the sanctions identified under division (A) or (B) of this section.

As such, appellee was not required to have a hearing before revoking appellant's license to practice medicine.

Second, appellant cites no legal authority in support of her argument that appellee was required to have the full Board consider the issue of whether the May 21 letter constituted a hearing request.

Third, appellant cites no applicable legal authority in support of her argument that if a hearing is not required under O.R.C. 4731.22(J), "some objective review of the evidence must be held" as to whether appellant requested a hearing. Her citation of Goldman v. State Medical Bd. (Franklin 1996), 110 Ohio App. 3d 124, is inapplicable because it concerns the application of O.R.C. 4731.22(B) and does not address O.R.C. 4731.22(J). See id. at 128-29.

Fourth, even if the May 21, 2009 letter is considered, the letter does not constitute a request for a hearing. After discussing actions taken by the Medical Board of

California and the Nevada State Board of Medical Examiners, a motion to lift a preliminary injunction, and the Ohio Medical Board's investigation, the May 21 letter states, "With regard to a request for a hearing, Dr. Jain is in the process of obtaining Ohio counsel." This sole reference in the letter to a hearing only conveys the information that Jain was seeking Ohio counsel and does not contain any request for a hearing. Even if the references to a hearing and obtaining Ohio counsel were construed as related to one another, the letter still does not state that attorney Nutile was contemporaneously requesting a hearing. Rather, that sentence could be construed as informing the Board that, if Ohio counsel were retained, Ohio counsel would file any request for a hearing or even that Ohio counsel would determine whether a hearing would be requested at all—neither of which would constitute a request for a hearing at the time the letter was sent to appellee.

Fifth, appellant has failed to show that exhaustion of remedies does not apply in this case. Contrary to her argument, appellant has not shown that an exception to the exhaustion-of-remedies doctrine applies or that exhausting administrative remedies by timely requesting a hearing would have been "futile."

III. Conclusion

Therefore, appellee's motion to dismiss GRANTED, and appellant's motion to admit additional evidence is DENIED. Counsel for appellee shall prepare an appropriate entry and submit the proposed entry to counsel for the adverse party pursuant to Loc. R. 25.01. A copy of this decision shall accompany the proposed entry when presented to the Court for signature.



CHARLES A. SCHNEIDER, JUDGE

Copies to:

Douglas E. Graff, Esq.
James M. McGovern, Esq.
604 East Rich Street
Columbus, Ohio 43215
Attorneys for Appellant

Karen A. Unver, Esq.
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
Attorney for Appellee

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

ANAMIKA JAIN, MD
9811 West Charleston Boulevard, #2873
Las Vegas, NV 89117

09 CVF 7 1105
CASE NO.

2009 JUL 23 PM 4:00

STATE MEDICAL BOARD
OF OHIO

Appellant,

JUDGE

CATEGORY F

Vs.

STATE MEDICAL BOARD OF OHIO
30 East Broad Street, 3rd Floor.
Columbus, OH 43215-6127

Appellee.

NOTICE OF APPEAL

Appellant, Anamika, Jain, MD, through her undersigned counsel, hereby gives Notice of her appeal of the attached Findings, Order and Journal Entry ("Order") of the State Medical Board of Ohio, which was mailed July 9, 2009. The Board's Order is not supported by reliable, probative and substantial evidence and is not in accordance with law. Appellant reserves the right to identify additional errors and grounds for this appeal after the public records requests are honored and after the request for the certified record and transcript have been honored, but Appellant is able to identify the following errors and grounds for appeal that are known at this time:

1. The Board disregarded Dr. Jain's timely hearing request and revoked her Ohio medical license without first allowing Dr. Jain the opportunity to exercise her hearing rights under R.C. Chapter 119 and R.C. Chapter 4731.

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2009 JUL 23 PM 4:25
CLERK OF COURTS-CV

2009 AUG -3 PM 12:09

STATE MEDICAL BOARD
OF OHIO

2. The Board violated Dr. Jain's procedural and substantive due process rights by disregarding Dr. Jain's timely hearing request and revoking her Ohio medical license without first allowing Dr. Jain the opportunity to exercise her hearing rights.

3. The Board erred as a matter of law by allowing a single Board employee to determine whether Dr. Jain timely filed a hearing request in response to the Notice of Opportunity for Hearing the Board issued to Dr. Jain, because this act by the single Board employee adversely affected Dr. Jain's property rights and thus required the Board to follow the steps for an adjudication set forth in R.C. Chapter 119.

4. The Board's Order was based on a Report and Determination ("R&D") prepared by a single Board employee and thus disregarded Dr. Jain's timely request for a hearing before the Board.

5. Dr. Jain was denied substantive due process in violations of the Ohio and United States Constitutions when the State and/or Board employee(s) knowingly presented evidence to the Board that was false, misleading or incomplete.

6. The R&D and resulting Order, that were prepared by a single Board employee, improperly withheld information from the Board regarding both Dr. Jain's request for a hearing and information accompanying the hearing request that was provided by Dr. Jain to explain to the Ohio Board the California Medical Board action that served as the

basis for the Ohio Board's action revoking Dr. Jain's Ohio medical license.

7. Dr. Jain was denied substantive due process under both the Ohio and United State Constitutions, because the Board deliberately failed to include information in the Order that was in the possession of the Board regarding a timely request for a hearing submitted on behalf of Dr. Jain.

8. Dr. Jain was denied her substantive due process rights under both the Ohio and the United States Constitutions when the State and/or Board employee(s) deliberately withheld information and evidence in their possession that had a direct bearing on the matters considered and adjudicated by the Board.

2009 AUG -3 PM 12: 09

STATE MEDICAL BOARD
OF OHIO

Dr. Jain reserves the right to raise additional grounds for this appeal as additional information regarding the Order is produced by the Board or other entities in response to Dr. Jain's information requests / Public Records Requests and/or as the Court permits Dr. Jain to introduce additional evidence to the record under R.C. 119.12.

In accordance with R.C. 119.12, the original of this Notice of Appeal is being filed with the State Medical Board of Ohio and a copy is being filed with the Franklin County Court of Common Pleas.

RESPECTFULLY SUBMITTED,



JAMES M. MCGOVERN 0061709

GRAFF & ASSOCIATES

604 East Rich St.

Columbus, OH 43215

(614) 228-5800 tele.

(614) 228-8811 fax

Counsel for Anamika Jain, MD

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and accurate copy of the foregoing was served upon the following:

Karen Unver
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, OH 43215

by hand delivery this 23rd day of July, 2009.



JAMES M. MCGOVERN 0061709

STATE MEDICAL BOARD
OF OHIO
2009 AUG -3 PM 12: 09

State Medical Board of Ohio

30 E. Broad Street, 3rd Floor, Columbus, OH 43215-6127

Richard A. Whitehouse, Esq.
Executive Director

(614) 466-3934
med.ohio.gov

July 8, 2009

Anamika Jain, M.D.
9811 West Charleston Blvd.
#2873
Las Vegas, NV 89117

RE: 09-CRF-061

Dear Dr. Jain:

Please find enclosed a certified copy of the Findings, Order and Journal Entry approved and confirmed by the State Medical Board meeting in regular session on July 8, 2009.

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 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 of the Ohio Revised Code.

Very truly yours,



Lance A. Talmage, M.D.
Secretary

LAT:jam
Enclosures

CERTIFIED MAIL RECEIPT NO. 91 7108 2133 3934 3683 6583
RETURN RECEIPT REQUESTED

Mailed 7-9-09

In the matter of Anamika Jain, M.D.

Page 2

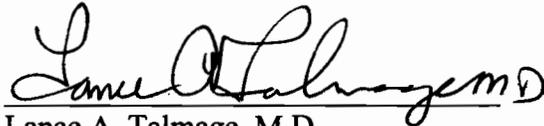
Maria Nutile, Esq.
Nutile, Pitz & Associates
Ridgeview Professional Complex
1070 West Horizon Ridge
Suite 210
Henderson, NV 89012

CERTIFIED MAIL RECEIPT NO. 91 7108 2133 3934 3683 6590
RETURN RECEIPT REQUESTED

CERTIFICATION

I hereby certify that the attached copy of the Findings, Order and Journal Entry approved by the State Medical Board, meeting in regular session on July 8, 2009, constitutes a true and complete copy of the Findings, Order and Journal Entry in the Matter of Anamika Jain, M.D., Case No. 09-CRF-061, as it appears in the Journal of the State Medical Board of Ohio.

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



Lance A. Talmage, M.D.
Secretary

(SEAL)

July 8, 2009

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

CASE NO. 09-CRF-061

ANAMIKA JAIN, M.D.

*

FINDINGS, ORDER AND JOURNAL ENTRY

By letter dated May 13, 2009, notice was given to Anamika Jain, M.D., that the State Medical Board intended to consider disciplinary action regarding her license to practice medicine and surgery in the State of Ohio, and that she was entitled to a hearing if such hearing was requested within thirty (30) days of the mailing of said notice. In accordance with Section 119.07, Ohio Revised Code, said notice was sent via certified mail, return receipt requested, to the address of record of Dr. Jain, that being 9811 West Charleston Boulevard #2873, Las Vegas, Nevada 89117.

A signed certified mail receipt was returned to the Medical Board documenting proper service of the notice. However, no hearing request has been received from Dr. Jain and more than thirty (30) days have now elapsed since the mailing of that notice.

WHEREFORE, having reviewed the May 13, 2009, Notice of Opportunity for Hearing, including the Notice of Out of State Suspension issued by the Medical Board of California in Case Number 16-2009-196845, as well as the affidavit of Kay L. Rieve, Administrative Officer, which are attached hereto and incorporated herein, the Board hereby finds that:

On or about February 3, 2009, the Medical Board of California issued a Notice of Out of State Suspension Order in the matter of Anamika Jain, M.D., Case Number 16-2009-196845, immediately suspending the license of Dr. Jain to practice medicine and surgery in the state of California. The Medical Board of California based its action against Dr. Jain on a suspension of Dr. Jain's license to practice medicine and surgery in the state of Nevada on or about November 14, 2008.

Further, the Board hereby concludes that:

1. Section 4731.22(B)(22), Ohio Revised Code, authorizes the State Medical Board of Ohio to refuse to issue a license or to discipline a licensee following an action 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.
2. Dr. Jain has been subject to a disciplinary action in the state of California, as described above.

Accordingly, the Board hereby ORDERS that:

The license of Anamika Jain, M.D., to practice medicine and surgery in the State of Ohio be REVOKED.

This Order shall become effective IMMEDIATELY.

This Order is hereby entered upon the Journal of the State Medical Board of Ohio for the 8th day of July 2009 and the original thereof shall be kept with said Journal.



Lance A. Talmage, M.D.
Secretary

(SEAL)

July 8, 2009

Date

AFFIDAVIT

The State of Ohio
Franklin County, SS

I, Kay L. Rieve, being duly cautioned and sworn, do hereby depose and say that:

- 1) I am employed by the State Medical Board of Ohio (hereinafter, "The Board").
- 2) I serve the Board in the position of Administrative Officer.
- 3) In such position, I am the responsible custodian of all licensure applications maintained by the Board pursuant to Chapter 4731., Ohio Revised Code.
- 4) I have this day carefully examined the records of the Board pertaining to Anamika Jain, M.D.
- 5) Based on my examination, I have found the last known address of record of Dr. Jain to be:

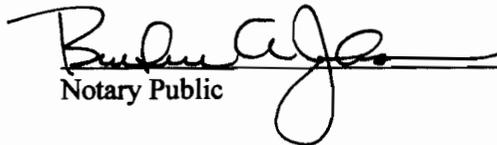
9811 West Charleston Boulevard
#2873
Las Vegas, Nevada 89117

- 6) Further, Affiant Sayeth Naught.



Kay L. Rieve
Administrative Officer

Sworn to and signed before me, Barbara A. Jacobs, Notary Public, this
24th day of June, 2009.



Notary Public

BARBARA ANN JACOBS, ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.



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Service(s): Return Receipt Electronic

Status: Delivered

Your item was delivered at 11:21 AM on May 16, 2009 in LAS VEGAS, NV 89117.

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Detailed Results:

- Delivered, May 16, 2009, 11:21 am, LAS VEGAS, NV 89117
- Electronic Shipping Info Received, May 14, 2009

Notification Options

CITE - JAIN

Track & Confirm by email

Get current event information or updates for your item sent to you or others by email. [Go >](#)

Return Receipt (Electronic)

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Notice of Nondiscrimination



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Date: 05/16/2009

Jackie Moore:

The following is in response to your 05/15/2009 request for delivery information on your Certified Mail(TM) item number 7108 2133 3936 3125 4090. The delivery record shows that this item was delivered on 05/16/2009 at 11:21 AM in LAS VEGAS, NV 89117. The scanned image of the recipient information is provided below.

Signature of Recipient:

| Delivery Section | |
|------------------|----------------|
| no | |
| id | Christina Vinu |

Address of Recipient:

| | |
|-----|----------------|
| my | 1011 w Charles |
| see | on Blvd |

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Sincerely,

United States Postal Service



Track & Confirm

Search Results

Label/Receipt Number: 9171 0821 3339 3631 2540 83
Class: First-Class Mail®
Service(s): Return Receipt Electronic
Status: Delivered

Your item was delivered at 11:32 AM on May 18, 2009 in HENDERSON, NV 89012.

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Detailed Results:

- Delivered, May 18, 2009, 11:32 am, HENDERSON, NV 89012
- Electronic Shipping Info Received, May 14, 2009

Notification Options

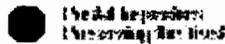
CITE - JAIN - ATTY NUTILE

Track & Confirm by email

Get current event information or updates for your item sent to you or others by email. [Go >](#)

Return Receipt (Electronic)

Verify who signed for your item by email. [Go >](#)



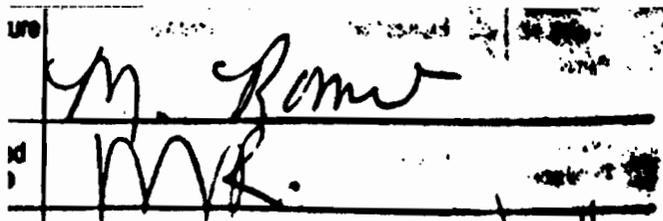


Date: 05/19/2009

Jackie moore:

The following is in response to your 05/15/2009 request for delivery information on your Certified Mail(TM) item number 7108 2133 3936 3125 4083. The delivery record shows that this item was delivered on 05/18/2009 at 11:32 AM in HENDERSON, NV 89012. The scanned image of the recipient information is provided below.

Signature of Recipient:

Signature of Recipient: The image shows a scanned signature of the recipient, "M. Roman", written in black ink on a white background. The signature is written over a horizontal line. To the left of the signature, there are some faint markings, possibly "LRO" and "10".

Address of Recipient:

Address of Recipient: The image shows a scanned handwritten address: "1570 W. Horizon Rd Henderson NV". The address is written in black ink on a white background, with a horizontal line above and below the text. To the left of the address, there are some faint markings, possibly "17" and "10".

Thank you for selecting the Postal Service for your mailing needs. If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,

United States Postal Service

State Medical Board of Ohio

30 E. Broad Street, 3rd Floor, Columbus, OH 43215-6127

Richard A. Whitehouse, Esq.
Executive Director

(614) 466-3934
med.ohio.gov



May 13, 2009

Case number: 09-CRF- 061

Anamika Jain, M.D.
9811 West Charleston Boulevard
#2873
Las Vegas, NV 89117

Dear Doctor Jain:

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 3, 2009, the Medical Board of California issued a Notice of Out of State Suspension Order [California Notice of Suspension Order] to you, notifying you that your California medical license had been suspended effective immediately. The basis of the California action included that your Nevada license to practice medicine had been suspended on November 14, 2008.

A copy of the California Notice of Suspension Order is attached hereto and incorporated herein.

The California Notice of Suspension 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.

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.

Mailed 5.14.09



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/KHM/flb
Enclosures

CERTIFIED MAIL #91 7108 2133 3936 3125 4090
RETURN RECEIPT REQUESTED

cc: Maria Nutile, Esq.
Nutile Pitz & Associates
Ridgeview Professional Complex
1070 West Horizon Ridge
Suite 210
Henderson, NV 89012

CERTIFIED MAIL #91 7108 2133 3936 3125 4083
RETURN RECEIPT REQUESTED



MEDICAL BOARD OF CALIFORNIA
Discipline Coordination Unit



February 3, 2009

Anamika Jain, M.D.
2931 N. Tenaya Way, Suite 204
Las Vegas, NV 89128

OHIO STATE MEDICAL BOARD

RE: NOTICE OF OUT OF STATE SUSPENSION ORDER
California License: G-87884
Case Number: 16-2009-196845

MAR 24 2009

RECEIVED

Dear Dr. Jain:

California Business and Professions Code section 2310 authorizes the Medical Board of California to immediately suspend the California medical license of any physician and surgeon whose medical license has been suspended or revoked in any other state or by any agency of the federal government. A copy of Business and Professions Code section 2310 is enclosed for your review.

The Medical Board of California has determined, upon review of certified documents from the Nevada State Board of Medical Examiners, that your Nevada license to practice medicine was suspended on November 14, 2008. Based on this suspension, your California medical license has been suspended effective immediately. This action will be reported to the National Practitioner Data Bank and the Federation of State Medical Boards.

You have a right to a hearing on the issue of penalty, as provided by Business and Professions Code section 2310(c). This hearing will be held within 90 days from the date of request. You may send this request to:

Jose Guerrero
Supervising Deputy Attorney General
Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Should the status of your medical license in Nevada change, please notify us immediately. If you have any questions regarding this matter, please contact Pamela Mosher at (916) 263-2419.

Sincerely,

BARBARA JOHNSTON
Executive Director

Enclosure

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO *March 17 20 09*
BY *Debra Kuzman* ANALYST

OHIO STATE MEDICAL BOARD

MAR 24 2009

RECEIVED

1 EDMUND G. BROWN JR., Attorney General
of the State of California
2 JOSE R. GUERRERO
Supervising Deputy Attorney General
3 SUSAN K. MEADOWS, State Bar No. 115092
Deputy Attorney General
4 455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
5 Telephone: (415) 703-5552
Facsimile: (415) 703-5480

6 Attorneys for Complainant

7
8 **BEFORE THE**
MEDICAL BOARD OF CALIFORNIA
9 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

10 In the Matter of the Accusation Against:

Case No. 16-2009-196845

11 Anamika Jain, M.D.
12 2931 N. Tenaya Way, Suite 204
13 Las Vegas, NV 89128

ACCUSATION

14 Physician's and Surgeon's Certificate
15 No. G 87884

16 Respondent.

17 Complainant alleges:

18 **PARTIES**

19 1. Barbara Johnston (Complainant) brings this Accusation solely in her
20 official capacity as the Executive Director of the Medical Board of California, Department of
21 Consumer Affairs.

22 2. On or about November 1, 2006, the Medical Board of California issued
23 Physician's and Surgeon's Certificate Number G 87884 to Anamika Jain, M.D., (hereinafter
24 "respondent"). Said certificate is renewed and current with an expiration date of January 31,
25 2010, however, the certificate is in a suspended status based on full license restrictions pursuant
26 to Section 2310(a) of the Business and Professions Code. Disciplinary action was taken against
27 this certificate as follows: on February 3, 2009, pursuant to Section 2310(a) of the Business and
28 Professions Code, a Full Out of State Suspension Order-No Practice was issued.

MAR 24 2009

JURISDICTION**RECEIVED**

1
2 3. This Accusation is brought before the Medical Board of California
3 (Board), Department of Consumer Affairs, under the authority of the following laws. All section
4 references are to the Business and Professions Code unless otherwise indicated.

5 A. Section 2227 of the Code provides that a licensee who is found guilty
6 under the Medical Practice Act may have his or her license revoked, suspended for a
7 period not to exceed one year, placed on probation and required to pay the costs of
8 probation monitoring, or such other action taken in relation to discipline as the Division
9 deems proper.

10 B. Section 2305 of the Code states:

11 "The revocation, suspension, or other discipline, restriction or limitation imposed
12 by another state upon a license or certificate to practice medicine issued by that state, or
13 the revocation, suspension, or restriction of the authority to practice medicine by any
14 agency of the federal government, that would have been grounds for discipline in
15 California of a licensee under this chapter [Chapter 5, the Medical Practice Act] shall
16 constitute grounds for disciplinary action for unprofessional conduct against the licensee
17 in this state."

18 C. Section 141 of the Code states:

19 "(a) For any licensee holding a license issued by a board under the jurisdiction of
20 the department, a disciplinary action taken by another state, by any agency of the federal
21 government, or by another country for any act substantially related to the practice
22 regulated by the California license, may be a ground for disciplinary action by the
23 respective state licensing board. A certified copy of the record of the disciplinary action
24 taken against the licensee by another state, an agency of the federal government, or

25
26 1. Cal. Bus. & Prof. Code section 2002, as amended and effective January 1, 2008,
27 provides that, unless otherwise expressly provided, the term "board" as used in the State
28 Medical practice Act (Cal. Bus. & Prof. Code, sections 2000 et seq.) means the "Medical
Board of California," and references to the "Division of Medical Quality" and "Division of
Licensing" in the Act or any other provision of law shall be deemed to refer to the Board.

1 another country shall be conclusive evidence of the events related therein.”

2 “(b) Nothing in this section shall preclude a board from applying a specific
3 statutory provision in the licensing act administered by that board that provides for
4 discipline based upon a disciplinary action taken against the licensee by another state, an
5 agency of the federal government, or another country.”

6 4. Respondent is subject to discipline within the meaning of section 2305
7 and/or section 141 of the Code as more particularly set forth herein below.

8 **FIRST CAUSE FOR DISCIPLINE**

9 (Discipline, Restriction, or Limitation Imposed by Another State)

10 5. On or about November 14, 2008, at the request of the Secretary-Treasurer
11 of the Nevada State Board of Medical Examiners (Nevada State Board), the District Court, Clark
12 County, Nevada, issued a Temporary Restraining Order and Order Setting Hearing on Motion for
13 Preliminary Injunction against respondent’s medial license. A true and correct copy of the
14 Temporary Restraining Order is attached hereto as Exhibit A and is incorporated by reference.
15 The District Court found that imminent and irreparable harm would result if the Instant
16 Temporary Restraining Order was not issued immediately. Respondent was ordered to refrain
17 from the practice of medicine in the State of Nevada during the pendency of disciplinary action
18 against her medical license. On December 16, 2008, the District Court, Clark County, Nevada,
19 issued an Order on the Nevada State Board’s Motion for Preliminary Injunction in regard to
20 respondent. The injunction was granted and respondent’s medical license was suspended and she
21 was enjoined from practicing medicine in the State of Nevada until the Nevada State Board
22 determines if she is unfit to practice medicine and if her medical license should be permanently
23 revoked. A true and correct copy of the Order on Plaintiff’s Motion for Preliminary Injunction is
24 attached hereto as Exhibit B and incorporated by reference. The Nevada State Board alleged that
25 numerous patients of Valley Eye Center have reported damage to their vision as a result of
26 LASIK treatment.

27 //

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EXHIBIT A

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ORIGINAL

1 ORDR
2 CATHERINE CORTEZ MASTO
3 Attorney General
4 CHRISTINE M. GUERCI-NYHUS
5 Chief Deputy Attorney General
6 Nevada Bar No. 8100
7 555 East Washington Avenue #3900
8 Las Vegas, NV 89101
9 (702) 486-3242
10 (702) 486-0950 (fax)
11 Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

12 RENEE WEST, as Secretary-Treasurer
13 of the NEVADA STATE BOARD OF
14 MEDICAL EXAMINERS,

Plaintiff,

vs.

15 STELLA YI CHOU, M.D., PAUL EZIO
16 CUTARELLI, M.D., ANAMIKA JAIN, M.D.,
17 VIKAS JAIN, and JAIN, LTD. d/b/a VALLEY
18 EYE CENTER,

Defendants.

Case No. A57575

Dept. No.

TEMPORARY RESTRAINING ORDER
AND ORDER SETTING
HEARING ON MOTION FOR
PRELIMINARY INJUNCTION

Hearing Date:
Hearing Time:

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

19 PLAINTIFF'S Motion for Temporary Restraining Order having come before the Court,
20 upon Ex Parte Application, the Court having reviewed PLAINTIFF'S Verified Complaint,
21 Application for Temporary Restraining Order and Motion for Preliminary Injunction and
22 supporting exhibits and documentation, being fully advised in the premises, and good cause
23 appearing therefore,

24 IT IS HEREBY FOUND that PLAINTIFF has demonstrated a likelihood of success on
25 the merits;

26 IT IS FURTHER FOUND that imminent and irreparable harm will result should the
27 Instant Temporary Restraining Order not immediately issue;

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Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that PLAINTIFF'S Application
2 for a Temporary Restraining Order upon an Ex Parte Application, is granted;

3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DEFENDANT STELLA
4 YI CHOU, M.D. is hereby restrained, enjoined and prohibited from practicing medicine during
5 the pendency of the disciplinary action against her before the NEVADA STATE BOARD OF
6 MEDICAL EXAMINERS;

7 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DEFENDANT PAUL
8 EZIO CUTARELLI, M.D. is hereby restrained, enjoined and prohibited from practicing
9 medicine during the pendency of the disciplinary action against him before the NEVADA
10 STATE BOARD OF MEDICAL EXAMINERS;

11 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DEFENDANT
12 ANAMIKA JAIN, M.D. is hereby restrained, enjoined and prohibited from practicing medicine
13 during the pendency of the disciplinary action against her before the NEVADA STATE
14 BOARD OF MEDICAL EXAMINERS;

15 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DEFENDANT VIKAS
16 JAIN is hereby restrained, enjoined and prohibited from practicing medicine;

17 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DEFENDANT JAIN,
18 LTD. d/b/a VALLEY EYE CENTER is hereby restrained, enjoined and prohibited from
19 practicing medicine while the injunction is in place against DEFENDANT ANAMIKA JAIN,
20 M.D.;

21 IT IS FURTHER ORDERED that this Temporary Restraining Order shall be served on
22 the DEFENDANTS in conformance with the provisions of NRCP 65(b) by service of a true
23 copy thereof;

24 IT IS FURTHER ORDERED that the parties to this action are to appear in Department
25 TM of the State of Nevada District Court in Clark County on the 25 day of
26 NOV, 2008, which is a date not more than 15 days from the date of this

27 ..
28 OHIO STATE MEDICAL BOARD

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1 Order, at 9:00 a.m. / p.m. for a hearing on Plaintiff's Motion for a Preliminary Injunction.
2 Defendants to be served personally on or before 11/19/08.

3 THIS ORDER ISSUED on the _____ day of November, 2008 at the hour of _____
4 a.m./ p.m.

5 DATED: this 14th day of November, 2008.

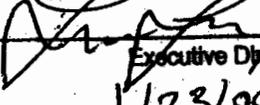
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8 
9 DISTRICT COURT JUDGE

10 Submitted by:
11 CATHERINE CORTEZ MASTO
12 Attorney General

13
14 By: 
15 CHRISTINE M. GUERCI-NEHUS
16 Chief Deputy Attorney General
17 Nevada Bar No. 8100
18 555 East Washington, # 3900
19 Las Vegas, Nevada 89101
20 (702) 486-3242
21 (702) 486-0950 (fax)
22 Attorneys for PLAINTIFF

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

23 STATE OF NEVADA
24 BOARD OF MEDICAL EXAMINERS
25 I, Louis Ling, Official Custodian of the records,
26 do hereby certify that this document is a true and
27 correct copy of the original on file in this office.

28 Signed: 
Executive Director
Date: 1/23/09

OHIO STATE MEDICAL BOARD

MAR 24 2009

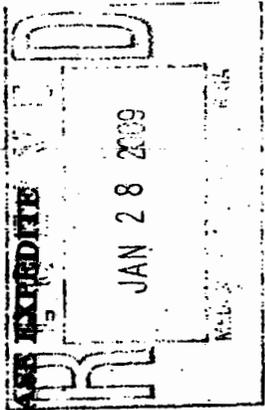
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EXHIBIT B

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ORD

FILED

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DISTRICT COURT

CLARK COUNTY, NEVADA

[Signature]
CLERK OF THE COURT

RENEE WEST, as Secretary-Treasurer
of the NEVADA STATE BOARD OF
MEDICAL EXAMINERS,

Plaintiff,

vs.

STELLA YI CHOU, M.D.; PAUL EZIO
CUTARELLI, M.D.; ANAMIKA JAIN, M.D.;
VIKAS JAIN; and JAIN, LTD d/b/a VALLEY
EYE CENTER,

Defendants.

CASE NO. A575753
DEPT NO. XVIII

ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Renee West, as Secretary-Treasurer of the Nevada State Board of Medical Examiners (hereinafter referred to as BME) applied to the Court, and a Temporary Restraining Order and Order Setting Hearing on Motion for Preliminary Injunction was signed on behalf of District Court Department VIII on November 14, 2008 with a hearing set for November 25, 2008. The Temporary Restraining Order and Preliminary Injunction hearing were ultimately continued to be heard before this Court on December 16, 2008. Plaintiffs appeared through counsel, Chief Deputy Attorney General Christine M. Guerci-Nyhus; Defendant Stella Yi Chou, M.D. appeared personally and through counsel, Peter Stirba, Esq. and Kevin E. Beck, Esq.; Paul Ezio Cutarelli, M.D. appeared personally and

DAVID B. BARKER
DISTRICT JUDGE
DEPARTMENT EIGHTEEN
LAS VEGAS, NV 89155

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1 through counsel, Diane Roth, Esq. and Brent Vogel, Esq.; Defendants Anamika Jain, M.D.,
 2 Vikas Jain and Jain, Ltd d/b/a Valley Eye Center appeared personally and through counsel,
 3 Michael Stein, Esq. The Court, having read the papers and pleadings on file herein, and
 4 hearing argument of counsel, finds as follows:

5 Rence West, as Secretary-Treasurer of the BME has applied to this Court for a
 6 preliminary injunction suspending the medical licenses of Defendants above-named pursuant
 7 to NRS 630.388 which states as follows:
 8

- 9
- 10 1. In addition to any other remedy provided by law, the Board,
 11 through its President or Secretary-Treasurer or the Attorney
 12 General, may apply to any court of competent jurisdiction:
 13 (a) To enjoin any prohibited act or other conduct of a licensee
 14 which is harmful to the public;
 15 (b) To enjoin any person who is not licensed under this chapter
 16 from practicing medicine or respiratory care;
 17 (c) To limit the practice of a physician, physician assistant or
 18 practitioner of respiratory care, or suspend his license to
 19 practice; or
 20 (d) To enjoin the use of the title "P.A.," "P.A.-C.," "R.C.P." or
 21 any other word, combination of letters or other designation
 22 intended to imply or designate a person as a physician assistant
 23 or practitioner of respiratory care, when not licensed by the
 24 Board pursuant to this chapter, unless the use is otherwise
 25 authorized by a specific statute.

- 26 2. The court in a proper case may issue a temporary restraining
 27 order or a preliminary injunction for the purposes set forth in
 28 subsection 1:
 (a) Without proof of actual damage sustained by any person;
 (b) Without relieving any person from criminal prosecution for
 engaging in the practice of medicine without a license; and
 (c) Pending proceedings for disciplinary action by the Board.

29 An injunction is proper "upon a showing that the party seeking it enjoys a reasonable
 30 probability of success upon the merits and the defendants' conduct if allowed to continue will
 31 result in irreparable harm for which compensatory damages is an inadequate remedy." Sobol

DAVID B. BARKER
 DISTRICT JUDGE
 DEPARTMENT EIGHTEEN
 LAS VEGAS, NV 89155

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1 v. Capital Management Consultants 102 Nev. 444, 446 (1986)(citing Number One Rent-A-
2 Car v. Ramada Inns, 94 Nev. 779, 780 (1978.)

3 BME is required to show a reasonable likelihood that the statutes were violated and
4 that there is a reasonable likelihood of future violations if the injunction does not issue in
5 order to have a statutory injunction granted. Edwards v. Emperor's Garden Restaurant, 122
6 Nev. 317 (2006). "In assessing whether future violations are likely, the court must consider
7 the totality of the circumstances concerning the alleged violation. In doing so, the court may
8 examine any relevant factors, including (1) the gravity of any harm caused, (2) the extent of
9 and motivation behind the violator's participation in the wrongful conduct, (3) the isolated or
10 recurrent nature of the violation, and (4) whether the violator has recognized culpability
11 and/or sincerely promised that future violations will not occur." Id. at 1285 (emphasis added)

12
13
14 A hearing before BME is presently scheduled for February 23, 2009, with a pre-
15 hearing conference set for January 20, 2009.

16 Pursuant to NRS 630.388(2), the BME is not required to provide proof of actual
17 damages sustained.

18 The Court must look at the effect of a preliminary injunction as to each party
19 individually and determine, based upon the totality of the circumstances, whether the BME
20 has met its burden.

21
22 The BME has alleged that numerous patients of Valley Eye have reported damage to
23 their vision as a result of LASIK treatment received. (See Investigator Gustafson's Affidavit
24 marked as Exhibit "4" and spreadsheet of Valley Eye patients marked as Exhibit "7" attached
25 to the application for temporary restraining order and motion for preliminary injunction.)

26 Individual defendants have provided the court with multiple affidavits of experts in the
27 field of ophthalmology that have opined the Defendants' actions were above or consistent

28
DAVID B. BARKER
DISTRICT JUDGE
DEPARTMENT EIGHTEEN
LAS VEGAS, NV 89155

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1 with national standards and that the complained of pre and post-operative procedures at
2 Valley Eye Center did not fall below any standard of care.

3 The BME replies that the Defendants' experts were not fully informed as to the true
4 nature of the procedures at issue and speculate that their opinions might be changed with
5 additional information.

6 Pursuant to NRS 630.388(1)(a), the Court must balance the alleged conduct which is
7 potentially harmful to the public against the interests of the Defendants herein and based upon
8 the totality of the circumstances, and good cause appearing therefore, it is hereby
9

10 ORDERED that the injunction is granted as to Vikas Jain pursuant to NRS
11 630.388(1)(b) and he is enjoined from the practice of medicine in the State of Nevada as he is
12 not licensed to practice medicine in this or any other State. And, it is further
13

14 ORDERED that the injunction is granted as to Anamika Jain, M.D. pursuant to NRS
15 630.388(1)(c); that her license is suspended and she is enjoined from practicing medicine in
16 the State of Nevada until the BME has determined whether she is unfit and her license should
17 be revoked permanently. And, it is further

18 ORDERED that the injunction is granted as to Jain, Ltd. d/b/a Valley Eye Center and
19 it is enjoined and prohibited from practicing medicine while the injunction is in place against
20 Defendant Anamika Jain, M.D. And, it is further

21 ORDERED that the injunction is granted as to Stella Yi Chou, M.D. pursuant to NRS
22 630.388(1)(c); that her practice is limited and she is enjoined from performing any LASIK
23 eye procedures in the State of Nevada until the BME has determined whether she is unfit and
24 her license should be revoked permanently. And, it is further
25

26 ORDERED that the injunction is denied as to Paul Ezio Cutarelli, M.D. as the Court
27 finds insufficient grounds for a preliminary injunction.
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DISTRICT JUDGE
DEPARTMENT EIGHTEEN
LAS VEGAS, NV 89156

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The Plaintiff shall prepare appropriate Findings of Fact and Conclusions of Law.

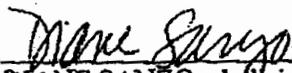
DATED this 16th day of December, 2008



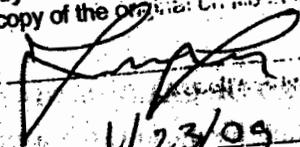
DISTRICT JUDGE

I hereby certify that on the date filed,
I placed a copy of the foregoing Order in the
folder(s) in the Clerk's Office of the following:

- Christine M. Guerci-Nyhus, Esq. (Attorney General's Office)
- Kevin E. Beck, Esq. (Rooker Rawlins, LLP)
- Diane Roth, Esq. (Jennings, Strouss & Salmon, P.L.C.)
- Michael Stein, Esq. (Snell & Wilmer)


DIANE SANZO, Judicial Assistant

STATE OF NEVADA
BOARD OF MINERS
I, Louis Ling, Office Manager for the records,
do hereby certify that the document is a true and
correct copy of the original on file in this office.

Signed: 
Office Manager

Date: 4/23/09

DAVID B. BARKER
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