

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO OHIO

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CLERK OF COURTS

Mark W. Hayes, D.P.M., :
Appellant-Appellant, :
v. : No. 99AP-1239
State Medical Board of Ohio, : (ACCELERATED CALENDAR)
Appellee-Appellee. :

JOURNAL ENTRY

Appellee's February 2, 2001 motion for clarification of this court's December 3, 1999 entry is granted. The suspension of the order of the State Medical Board of Ohio terminated when this court journalized its judgment on September 21, 2000.


Judge Charles R. Petree

HEALTH & HUMAN
FEB 20 2001
SERVICES SECTION



12

The Supreme Court of Ohio

FILED

JAN 24 2001

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Mark W. Hayes, D.P.M., : Case No. 00-1987
Appellant, :
v. : E N T R Y
State Medical Board of Ohio, :
Appellee. :

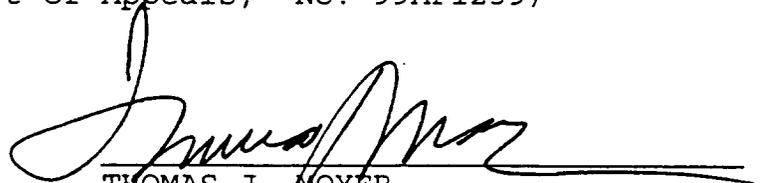


Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, \$40.00, paid by Nancy A. Schell.

(Franklin County Court of Appeals; No. 99AP1239)


THOMAS J. MOYER
Chief Justice

HEALTH & HUMAN

JAN 25 2001

SERVICES SECTION

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

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

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Mark W. Hayes, D.P.M.,	:	
	:	
Appellant-Appellant,	:	No. 99AP-1239
	:	
v.	:	(ACCELERATED CALENDAR)
	:	
State Medical Board of Ohio,	:	
	:	
Appellee-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on September 21, 2000, all three of appellant's 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.

PETREE, TYACK & LAZARUS, JJ.,

BY Charles R. Petree
Judge Charles R. Petree

SEP 25 2000

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Mark W. Hayes, D.P.M., :
Appellant-Appellant, :
v. : No. 99AP-1239
State Medical Board of Ohio, : (ACCELERATED CALENDAR)
Appellee-Appellee. :

O P I N I O N

Rendered on September 21, 2000

Frank R. Recker & Associates Co., L.P.A., Frank R. Recker and Nancy A. Schell, for appellant.
Betty D. Montgomery, Attorney General, and Anne Berry Strait, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

Appellant, Mark W. Hayes, D.P.M., appeals the judgment of the Franklin County Court of Common Pleas affirming the order of appellee, State Medical Board of Ohio ("board"), which permanently revoked appellant's certificate to practice podiatry in the state of Ohio.

Appellant asserts the following assignments of error:

- [1]. The trial court erred to the prejudice of Dr. Hayes by finding that the board's order is supported by reliable, probative and substantial evidence.

[2]. The trial court erred to the prejudice of Dr. Hayes by finding the board's order was in accordance with law.

[3]. The trial court erred to the prejudice of Dr. Hayes by finding that the doctrine of collateral estoppel applies to these proceedings.

In July 1993, appellant, a podiatrist, applied to the Supreme Court of Ohio to register as a candidate for admission to the Ohio bar.

In October 1993, the Joint Committee on Bar Admissions of the Cleveland/Cuyahoga Bar Association ("Joint Committee") interviewed appellant in conjunction with his application. In March 1994, the Joint Committee recommended to the Ohio Supreme Court that appellant not be admitted to practice law in Ohio. Appellant appealed the Joint Committee's recommendation to the Appeals Subcommittee ("Subcommittee"), which affirmed the Joint Committee's recommendation.

Appellant appealed the Subcommittee's recommendation to the Ohio Supreme Court's Board of Commissioners on Character and Fitness ("Board of Commissioners"). The Board of Commissioners appointed a three-person panel to hear the appeal. The panel conducted hearings in September 1994 and November 1995. Appellant testified under oath before the panel.

In January 1997, the panel recommended to the Board of Commissioners that appellant never be admitted to the practice of law in Ohio. In so doing, the panel rendered the following findings of fact:

Based upon the evidence placed before it, including the documents and testimony, and after observing the demeanor of the Applicant and the other witnesses, it is this Panel's conclusion that Dr. Hayes: 1) is not truthful, 2) that he has repeatedly lied under oath, 3) that he lied to each group reviewing him including this Panel, the Appeals

Subcommittee and the interviewers of the Joint Admissions Committee of the Cleveland/Cuyahoga County Bar Association, as well as in each deposition or transcript introduced into evidence at the Panel hearing, [and] 4) that he purposefully omitted relevant information from his Bar Application. ***

In February 1997, the Board of Commissioners adopted the panel's report, including its findings of fact, and recommended to the Ohio Supreme Court that appellant never be admitted to practice law in Ohio.

On February 18, 1998, the Ohio Supreme Court unanimously held:

We have thoroughly reviewed the record. The *findings of fact*, conclusions, and recommendation of the board have ample support, and *we hereby adopt them*. Applicant is unfit to practice law, and his application to register as a candidate for admission to the bar of Ohio is disapproved. Applicant is never to be admitted to the practice of law in Ohio. (Emphasis added). [*In re Application of Hayes* (1998), 81 Ohio St.3d 88, 89.]

By letter dated June 10, 1998, the board notified appellant that it intended to determine whether or not to limit, revoke, suspend, refuse to register or reinstate his certificate to practice podiatry, or to reprimand or place him on probation, based upon the February 18, 1998 order of the Supreme Court of Ohio. Based upon the specific factual findings made by the Board of Commissioners and adopted by the Ohio Supreme Court, the board alleged that appellant's acts, conduct, and/or omissions constituted: (1) "publishing a false, fraudulent, deceptive, or misleading statement," as prohibited by R.C. 4731.22(B)(5); (2) "commission of an act that constitutes a felony in this state regardless of the jurisdiction in which the act was committed *** to wit: Section 2921.11, Ohio Revised Code, Perjury," as prohibited by R.C. 4731.22(B)(10); and (3) "commission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the

act was committed, if the act involves moral turpitude *** to wit: Section 2921.13, Ohio Revised Code, Falsification," as prohibited by R.C. 4731.22(B)(14).¹

The charges were litigated before a board hearing examiner, who issued a report including comprehensive findings of fact and conclusions of law, following which he recommended suspension of appellant's license for at least ninety days, followed by a probationary period of at least five years. Appellant filed objections to the report and recommendation, and the matter was considered by the board at its February 10, 1999 meeting. After deliberating the case, the board adopted the hearing examiner's findings of fact and conclusions of law, but modified the recommended sanction and ordered permanent revocation of appellant's podiatry license.

Upon appeal to the Franklin County Court of Common Pleas, the court found that the board's order was supported by reliable, probative and substantial evidence, and was in accordance with law. Accordingly, the court affirmed the board's order.

A common pleas court is bound to uphold an order of the State Medical Board if that order is supported by reliable, probative and substantial evidence and is in accordance with law. R.C. 119.12; *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

Upon an appeal from the judgment of the common pleas court, the role of the court of appeals is more limited than that of the trial court. An appellate court's role is to determine if the trial court abused its discretion in its review of the evidence. *Pons*,

¹ We will examine the version of R.C. 4731.22(B) in effect as of June 10, 1998, the date the board notified appellant of the disciplinary proceedings against him. We note that the statute was amended effective March 9, 1999.

supra, at 621. An abuse of discretion implies “not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.” *Id.* Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of the board or the trial court. *Id.* Rather, the court of appeals must affirm the judgment of the trial court. *Id.* Moreover, “[w]hen reviewing a medical board’s order, courts must accord due deference to the board’s interpretation of the technical and ethical requirements of its profession.” *Id.* at syllabus.

By the first assignment of error, appellant contends that the common pleas court abused its discretion in finding that the board’s order was supported by reliable, probative and substantial evidence. Appellant first argues that the board’s order was not supported by any evidence in the record, as the only evidence presented by the state consisted of certified documents from the Ohio Supreme Court proceedings.

The state submitted certified copies of materials contained in the records of the Ohio Supreme Court, including appellant’s bar application and related materials, which evidenced appellant’s original responses to the court’s character questionnaires. The state also submitted the report of the Joint Committee, which recommended that appellant’s application be denied because, among other things, appellant did not provide complete and accurate information regarding his past conduct on either the bar application or in his presentations before the Joint Committee. The state further submitted a certified copy of the findings of fact and recommendation of the Board of Commissioners, in which it was found that appellant had admitted to the Board of Commissioners’ hearing panel that he had given evasive answers under oath because he felt he had no obligation to answer truthfully. The Board of Commissioners also found

that appellant had repeatedly lied under questioning by the hearing panel regarding his properties, debts, employees, and podiatry practice.

Appellant contends that the evidence relied upon by the board, *i.e.*, the Board of Commissioners' report and the Ohio Supreme Court's order adopting that report, did not constitute reliable, probative and substantial evidence upon which the board could rely in revoking his podiatry license. Appellant argues that the board was required to introduce something more than the documentary evidence submitted, *e.g.*, testimonial evidence, in support of its allegations against him. In support of this argument, appellant relies on *Doelker v. Accountancy Bd.* (1967), 12 Ohio St.2d 76.

Upon review of *Doelker*, we find that appellant's reliance thereon is misplaced. First, *Doelker* interpreted specific provisions of R.C. Chapter 4701, which apply solely to the practice of accountancy. Further, contrary to appellant's assertion, *Doelker* does not stand for the proposition that a certified order or conviction alone can never constitute reliable, probative and substantial evidence sufficient to support a disciplinary action taken by a professional licensing board. In *Doelker*, the respondent, a certified public accountant ("CPA"), was convicted of one count of willfully failing to file an income tax return. Based upon this conviction, the accountancy board notified respondent that it proposed to take disciplinary action against respondent's certificate to practice as a CPA. The accountancy board charged respondent with a violation of R.C. 4701.16(F) on the basis that she had been convicted of a crime, an element of which was dishonesty or fraud. The court held that because neither dishonesty nor fraud were required elements of the crime of willful failure to file an income tax return, the conviction alone could not support disciplinary action against respondent's accountancy license. In

addition, the court found that the mere fact of the conviction for failing to file an income tax return did not constitute sufficient evidence to find that respondent had committed "an act discreditable to the profession" under R.C. 4701.16(D).

Thus, the accountancy board's case failed because it had not set forth evidence that proved the necessary elements under R.C. 4701.16(D) and (F). The fact that the accountancy board had entered certified conviction records into evidence was not fatal; rather, the court found that the charges brought by the accountancy board required additional evidence that had not been introduced. The court did not hold that in the appropriate case the mere entry of the conviction records would not have been enough to prove the state's case. Rather, the case was determined on narrow factual grounds that do not apply in the instant case.

Appellant's reliance on *Capello v. City of Mayfield Heights* (1971), 27 Ohio St.2d 1, and *Arcaro Bros. Builders, Inc. v. Zoning Board of Appeals* (1966), 7 Ohio St.2d 32, is equally misplaced. In those cases, the Ohio Supreme Court held that unsworn witness testimony offered in an administrative hearing did not constitute evidence upon which an administrative decision could be based. Neither decision held that documentary evidence alone could never constitute sufficient evidence without additional sworn testimony. Rather, *Capello* and *Arcaro* held only that if testimony is offered, it must be sworn. Since the unsworn testimony was the only evidence of record, the cases failed on evidentiary grounds.

Appellant further argues that since the documents relied upon by the board consisted mainly of summaries and conclusions which were based in large part on hearsay, they were inherently unreliable. However, as appellant admits, the hearsay rule

is relaxed in administrative proceedings. *Haley v. Ohio State Dental Bd.* (1982), 7 Ohio App.3d 1, 6. Similarly, under the medical board's hearing rules, the Ohio Rules of Evidence may be taken into consideration by the hearing examiner in determining the admissibility of evidence, but are not controlling. Ohio Adm.Code 4731-13-25(A).

As noted by the hearing examiner, the Ohio Supreme Court is the ultimate authority of law in the state of Ohio. Accordingly, we find that the board was entitled to rely solely on the findings of that court in determining whether appellant violated the provisions of R.C. Chapter 4731.

Appellant next argues that the board did not meet its burden of providing reliable, probative and substantial evidence sufficient to substantiate the particular charges levied against him. Specifically, appellant contends that the board's evidence was insufficient to support its findings that appellant published a "false, fraudulent, deceptive, or misleading statement," in violation of R.C. 4731.22(B)(5), or that he committed acts constituting the felony of perjury, in violation of R.C. 4731.22(B)(10), or the misdemeanor of falsification, in violation of R.C. 4731.22(B)(14), because the board had no evidence that he intended to make such false statements or that he knowingly committed the criminal acts in question. We disagree.

With regard to R.C. 4731.22(B)(5), we note that the statute defines a "false, fraudulent, deceptive, or misleading statement" as one that "includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts *** or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived." During the Board of Commissioners' hearing, appellant admitted that during civil depositions, he had given

false and evasive answers. The Board of Commissioners found that appellant had made false, deceptive and misleading statements while under oath at the panel hearing, and that he had repeatedly lied under oath. These findings by the Board of Commissioners constitute more than sufficient reliable, probative and substantial evidence to support the board's decision that appellant violated R.C. 4731.22(B)(5).

Citing *Rajan v. State Med. Bd. of Ohio* (1997), 118 Ohio App.3d 187, 193-195, appellant argues that the board's case with regard to R.C. 4731.22(B)(5) must fail because no evidence was presented of any intent to deceive. In *Rajan*, this court held that the state medical board is required to demonstrate that a physician has an intent to deceive before they may discipline him under R.C. 4731.22(B)(5). However, the intent required by *Rajan* may be inferred from the surrounding circumstances; e.g., as when a licensee clearly knows something which he failed to disclose in response to a direct question. *Krain v. State Med. Bd.* (Oct. 29, 1998), Franklin App. No. 97APE08-981, unreported. Upon review of the record, we find that there was sufficient evidence in the record upon which the board could find that appellant engaged in a pattern of intentional misrepresentation before both the Joint Committee and the Board of Commissioners. Accordingly, we find no abuse of discretion in the common pleas court's determination that the board's conclusion that appellant violated R.C. 4731.22(B)(5) was supported by reliable, probative and substantial evidence.

Similarly, the common pleas court did not abuse its discretion in finding that the board had more than sufficient evidence to support the finding that appellant violated R.C. 4731.22(B)(10) and (14), which, respectively, permit the board to discipline a licensee for committing an act that constitutes a felony in this state, i.e., perjury under

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R.C. 2921.11, and for committing an act that constitutes a misdemeanor involving moral turpitude, *i.e.* falsification under R.C. 2921.13. Under R.C. 2921.11, a person commits perjury if he knowingly makes a false statement under oath of a material fact in an official proceeding. Under R.C. 2921.13, a person commits falsification if he knowingly makes a false statement in an official proceeding. Falsification is a misdemeanor involving moral turpitude. See, *e.g.*, *Disciplinary Counsel v. Dodge* (1990), 52 Ohio St.3d 132; *Disciplinary Counsel v. Smakula* (1988), 39 Ohio St.3d 143.

Appellant contends that the board did not present any evidence of intent with regard to its allegations that appellant's actions constituted the crimes of perjury and falsification.

As the state notes in its brief, the premise that the intent necessary for conviction under criminal statutes may be inferred from the surrounding facts and circumstances is well-grounded in criminal law. *State v. Teamer* (1998), 82 Ohio St.3d 490, 492. "It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts." *State v. Lott* (1990), 51 Ohio St.3d 160, 168, quoting *State v. Johnson* (1978), 56 Ohio St.2d 35, 39. Upon review of the record in the instant case, the evidence establishes that appellant clearly intended the natural, reasonable and probable consequences of his voluntary acts in making false statements under oath. As noted previously, appellant admitted upon interrogation by Board of Commissioners' panel members that he gave evasive answers during deposition testimony because he believed he was under no obligation to provide truthful testimony.

The evidence before the board establishes that, while under oath, appellant knowingly provided the Board of Commissioners' hearing panel with false, evasive and conflicting testimony concerning his podiatry clinics and credit status, issues clearly material to the determination of whether to approve his bar application. Thus, the board's findings that appellant committed acts constituting the felony of perjury and the misdemeanor of falsification were supported by reliable, probative and substantial evidence.

Appellant's argument that he could not be charged with violations of R.C. 4731.22(B)(10) or (14) because he was never charged with either perjury or falsification fails to recognize the statutory authority given the board under R.C. 4721.22(B) to discipline a physician for committing acts *constituting* a felony or misdemeanor. While the board has the authority to take action against a licensee based upon an actual conviction, see R.C. 4731.22(B)(9), (11), and (13), the board is not required to wait for a criminal prosecution before it acts. As noted by the common pleas court, the board is not required to prove that appellant committed the crimes of perjury and falsification beyond a reasonable doubt. The board's action was against his podiatry license, which requires reliable, probative and substantial evidence under R.C. Chapter 119.

In its decision, the Supreme Court of Ohio specifically found that appellant lied under oath, lied to each group involved in the bar application proceedings, and purposefully omitted relevant information in an official proceeding. Further, the hearing record contains sufficient evidence that appellant intended to make the false statements and provide false information. After reviewing the record, this court finds that the common pleas court did not abuse its discretion in finding that there was reliable,

probative and substantial evidence before the board to support the determination that appellant violated R.C. 4731.22(B)(10) and (14). Appellant's first assignment of error is not well-taken.

By the second assignment of error, appellant contends that the common pleas court erred in finding that the board's order was in accordance with law. Specifically, appellant contends that the board denied his substantive due process rights by relying solely on the findings of the Ohio Supreme Court and Board of Commissioners to deprive him of his constitutionally protected property interest in his podiatry license. Appellant contends that because he had the burden of proof in the bar application proceedings, any findings made in those proceedings cannot constitute reliable, probative and substantial evidence in the board's action against him.

In our view, the fact that appellant had the burden of proof in the proceedings before the Ohio Supreme Court actually supports the use of those findings by the board in the disciplinary action against him. Appellant was well aware that the veracity of statements he made in prior court proceedings, in his bar application, and before the Joint Committee and the Board of Commissioners' hearing panel, were central to the proceedings and the ultimate disposition of the case. Appellant had ample opportunity to prove that he was truthful; instead, he admitted to the hearing panel that he believed that he was under no obligation to tell the truth. The Ohio Supreme Court adopted specific findings and conclusions that he had lied under oath and that he lied both in civil proceedings and in the hearing before the panel. Under such circumstances, we find that the board was clearly entitled to rely solely on the findings of the Ohio

Supreme Court and that such reliance did not constitute a violation of appellant's substantive due process rights.

We further find no merit to appellant's argument that the board violated his due process rights by improperly focusing on his civil litigation history, and, as a result, improperly disciplining him for rendering treatment that was below the standard of care when he had not been charged with standard of care violations. A review of the board's meeting minutes reveals that the board members discussed the large number of malpractice cases involving appellant. However, the board members also expressly recognized that appellant had not been charged with standard of care violations; that no evidence was presented at the hearing concerning such violations; and that if such issues were to be explored, the matter would need to be referred to the secretary and supervising member of the board for investigation.² The board members ultimately determined that appellant's false statements made during the bar application proceedings justified revocation of his license, without consideration of possible future charges concerning his standards of practice. Accordingly, no due process violation occurred in this regard. The second assignment of error is not well-taken.

By the third assignment of error, appellant contends that the common pleas court erred in finding that the doctrine of collateral estoppel precluded him from relitigating the issues raised in the bar admission proceedings before the board.

As the common pleas court found, appellant had ample opportunity to present evidence and defend his truthfulness in the proceedings before the Ohio

² The secretary and the supervising member are the two board members charged with conducting investigations of licensees and tendering formal charges for the board's consideration. R.C. 4731.22(C).

Supreme Court. Under the doctrine of collateral estoppel, he may not attack those findings in the board's case. Where an administrative proceeding is judicial in nature, as the character and fitness proceeding clearly was, the doctrine of collateral estoppel bars relitigation of the same issues in a second administrative proceeding. *Superior's Brand v. Lindley* (1980), 62 Ohio St.2d 133, 135. This is true even though the party asserting the preclusion was not a party to the first action, provided the issue was actually litigated, directly determined, and essential to the judgment in the prior action. *Hicks v. De La Cruz* (1977), 52 Ohio St.2d 71, 74. Appellant's truthfulness was actually litigated, directly determined, and essential to the Ohio Supreme Court's decision.

Indeed, in the proceedings before the Board of Commissioners' hearing panel, appellant had a full and fair opportunity to litigate the issue of his truthfulness on the bar application, in the civil proceedings and before the Joint Committee. At the panel hearing, he discussed what he felt were his justifications for the false and evasive answers he had given. He was represented by counsel throughout the proceedings and was on notice from the time the Joint Committee recommended that his application be denied that his truthfulness was at issue. As noted previously, the findings that he lied under oath and in the application proceedings were made by the highest legal authority in this state. Accordingly, the trial court did not abuse its discretion in finding that the doctrine of collateral estoppel precluded appellant from relitigating the issue of his truthfulness in the proceeding before the board. The third assignment of error is not well-taken.

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Based on the foregoing, all three of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and LAZARUS, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
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FRANKLIN CO. OHIO

Tom

Mark W. Hayes, D.P.M.,

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Plaintiff-Appellant,

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CLERK OF COURTS

v.

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No. 99AP-1239

Ohio State Medical Board,

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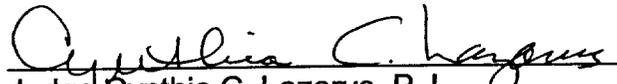
(REGULAR CALENDAR)

Defendant-Appellee.

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JOURNAL ENTRY

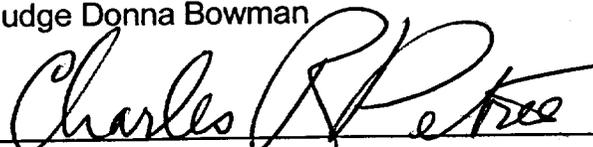
The trial court having suspended the order of the Ohio State Medical Board and R.C. 119.12 providing that such a suspension shall not be vacated during the pendency of an appeal, appellant's November 19, 1999 motion for a stay of the order of the Ohio State Medical Board is granted pending termination of the appellate process.



Judge Cynthia C. Lazarus, P.J.



Judge Donna Bowman



Judge Charles R. Petree



In

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

COMMON PLEAS COURT
FRANKLIN CO. OHIO

MARK W. HAYES, D.P.M.,

Appellant,

v.

STATE MEDICAL BOARD OF OHIO,

Appellee.

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CLERK OF COURTS

CASE NO. 99CVF-03-2007

JUDGE O'GRADY

OHIO STATE MEDICAL BOARD

NOV 1 1999

ENTRY

This matter came before this court on appellant's Emergency Motion for Order Continuing Suspension of Order of the State Medical Board Pending Appeal. Appellant supplied two orders: one setting a telephone conference for oral argument and another continuing the entry adopting the Magistrate's Decision of September 1, 1999.

Having fully reviewed this matter preliminarily, and then reviewing it again after the Magistrate's Decision was written, and after adopting the Magistrate's Decision by Entry, this court does not agree that "nothing has changed in Dr. Hayes' situation." Therefore, this court declines to suspend the board's Order and that Order of Suspension remains in effect.



JAMES J. O'GRADY, JUDGE

COPIES TO:

Frank R. Recker, Esq.
Counsel for Appellant

Anne Berry Strait, Esq.
Counsel for appellee

OHIO STATE MEDICAL BOARD

NOV 19 1999

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

Tom

Mark W. Hayes, D.P.M.,

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Plaintiff-Appellant,

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CLERK OF COURTS

v.

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No. 99AP-1239

Ohio State Medical Board,

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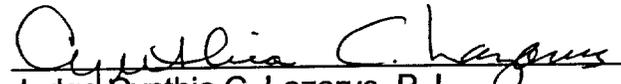
(REGULAR CALENDAR)

Defendant-Appellee.

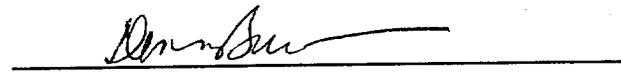
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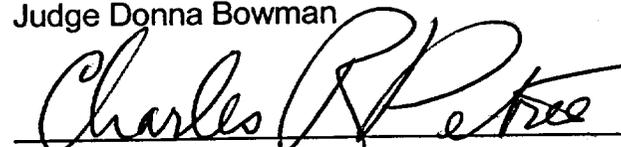
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Judge Cynthia C. Lazarus, P.J.



Judge Donna Bowman



Judge Charles R. Petree



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

1999 OCT 20 AM 11:09

MARK W. HAYES, DPM,

CLERK OF COURT CASE NO. 99CVF03-2007

Appellant,

]

JUDGE O'GRADY

vs.

]

STATE MEDICAL BOARD OF OHIO,

]

Appellee.

]

**DECISION ON MERITS OF REVISED CODE 119.12 ADMINISTRATIVE
APPEAL, AFFIRMING ORDER ISSUED MARCH 2, 1999,
BY STATE MEDICAL BOARD OF OHIO**

Rendered this 20th day of October 1999.

O'GRADY, J.

This case is a Revised Code 119.12 administrative appeal, by Mark W. Hayes, DPM, from a March 2, 1999 order in which the State Medical Board of Ohio permanently revoked Appellant's certificate to practice podiatric medicine and surgery in the state of Ohio. The record that the Medical Board has certified to this court reflects the following undisputed facts.

In July 1993, Appellant, a podiatrist, applied to the Supreme Court of Ohio to register as a candidate for admission to the Ohio bar.

In October 1993, the Joint Committee on Bar Admissions of the Cleveland and Cuyahoga Bar Associations interviewed Appellant in conjunction with his application. In March 1994, the Committee recommended to the Supreme Court that Appellant not be admitted to practice law in Ohio.

Appellant appealed the Committee's recommendation to the Committee's Appeals Subcommittee, which confirmed the Committee's recommendation.

Appellant appealed the Subcommittee's recommendation to the Supreme Court's Board of Commissioners on Character and Fitness. The Board of Commissioners appointed a three-person Panel to hear the appeal. The Panel conducted hearings in September 1994 and November 1995. Appellant's testimony before the Panel was given under oath.

On January 24, 1997, the Panel recommended to the Board of Commissioners that Appellant never be admitted to practice law in Ohio. In so doing, the Panel rendered the following findings of fact:

Based upon the evidence placed before it, including the documents and testimony, and after observing the demeanor of the Applicant and the other witnesses, it is this Panel's conclusion that Dr. Hayes: 1) is not truthful, 2) that he has repeatedly lied under oath, 3) that he lied to each group reviewing him including this Panel, the Appeals Subcommittee and the interviewers of the Joint Admissions Committee of the Cleveland/Cuyahoga County Bar Association, as well as in each deposition or transcript introduced into evidence at the Panel hearing, 4) that he purposefully omitted relevant information from his Bar Application ***.

On February 21, 1997, the Board of Commissioners adopted the Panel's report, including its findings of fact, and recommended to the Supreme Court that Appellant never be admitted to practice law in Ohio.

On February 18, 1998, the Supreme Court unanimously held:

We have thoroughly reviewed the record. The *findings of fact*, conclusions, and recommendation of the board have ample support, and *we hereby adopt them*. Applicant is unfit to practice law, and his application to register as a candidate for admission to the bar of Ohio is disapproved. Applicant is never to be admitted to the practice of law in Ohio. (Emphasis added.)

In re Application of Hayes (1998), 81 Ohio St. 3d 88.

By letter dated June 10, 1998, the State Medical Board of Ohio notified Appellant that the Medical Board proposed to take disciplinary action against Appellant's certificate to practice podiatric medicine and surgery in the state of Ohio. In the letter, the Medical Board charged Appellant as follows:

- (A) On or about February 18, 1998, the Supreme Court of Ohio issued an Order which disapproved your application for admission to the practice of law in Ohio and precluded you from ever practicing law in Ohio. This Order was based in part on findings of fact that:
- 1) you were not truthful;
 - 2) you repeatedly lied under oath;
 - 3) you lied to each group reviewing you, including the Panel, the Appeals Subcommittee, and the interviewers of the Joint Admissions Committee of the Cleveland/Cuyahoga County Bar Association, as well as in each deposition or transcript introduced into evidence at the Panel hearing; and
 - 4) you purposefully omitted relevant information from your Bar application.

Copies of the Order and the Findings of Fact and Recommendation of the Board of Commissioners on Character and Fitness of the Supreme Court of Ohio are attached hereto and fully incorporated herein.

The acts, conduct, and/or omissions underlying findings 1-4, as alleged in paragraph (A) above, individually and/or collectively, constitute "publishing a false, fraudulent, deceptive, or misleading statement," as that clause is used in Section 4731.22(B)(5), Ohio Revised Code.

Further, the acts, conduct, and/or omissions underlying findings 1-4, as alleged in paragraph (A) above, individually and/or collectively, constitute "[c]ommission of an act that constitutes a felony in this state regardless of the jurisdiction in which the act

was committed,” as that clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: Section 2921.11, Ohio Revised Code, Perjury.

Further, the acts, conduct, and/or omissions underlying findings 1-4, as alleged in paragraph (A) above, individually and/or collectively, constitute “[c]ommission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act involves moral turpitude,” as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13, Ohio Revised Code, Falsification.

Appellant requested a hearing on the Medical Board’s proposed disciplinary action. On October 30, 1998, an attorney hearing examiner conducted the requested hearing, during which the State of Ohio presented evidence. Appellant appeared at the hearing through counsel.

In a Report and Recommendation issued on January 15, 1999, the hearing examiner concluded that Appellant had violated R.C. 4731.22(B)(5), (10), and (14), as charged, and recommended that his certificate be suspended for at least ninety days, followed by a probationary period of at least five years.

On March 2, 1999, over Appellant’s written objections, the Medical Board adopted the hearing examiner’s findings of fact and conclusions of law, but instead of suspending Appellant’s certificate, the Medical Board permanently revoked it.

This appeal followed.

Appellant has set forth two arguments in support of his appeal. His first argument is that the Medical Board’s order is not supported by reliable, probative, and substantial evidence. This court does not agree.

On February 18, 1998, the Supreme Court rendered findings of fact concerning Appellant, as recited above. Under the doctrine of collateral

estoppel, Appellant was precluded from relitigating those facts before the Medical Board. See *Superior's Brand Meats, Inc. v. Lindley* (1980), 62 Ohio St. 2d 133, syllabus (where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding).

In *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St. 3d 570, 571, the Ohio Supreme Court defined "reliable, probative, and substantial evidence" as follows:

*** "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. *** "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *** "Substantial" evidence is evidence with some weight; it must have importance and value.

Based upon the Supreme Court's factual findings, the Medical Board was presented with reliable, probative, and substantial evidence that:

- Appellant was not truthful.
- Appellant repeatedly lied under oath.
- Appellant lied to the interviewers of the Joint Committee on Bar Admissions of the Cleveland and Cuyahoga Bar Associations, to the Committee's Appeals Subcommittee, to the Panel appointed by the Supreme Court's Board of Commissioners on Character and Fitness, and in each deposition and transcript introduced into evidence at the Panel hearing.
- Appellant purposefully omitted relevant information from his bar application.

At all times relevant to this appeal, R.C. 4731.22(B)(5) provided:

(B) The [Medical Board], pursuant to an adjudication under Chapter 119. of the Revised Code and by a vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate, refuse to register or refuse to reinstate an applicant, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(5) *** [P]ublishing a false, fraudulent, deceptive, or misleading statement.

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

When Appellant purposefully omitted relevant information from his bar application, he published a false, fraudulent, deceptive, or misleading statement, as defined by R.C. 4731.22(B)(5). Pursuant to R.C. 4731.22(B)(5), the Medical Board was authorized to revoke Appellant's certificate.

At all relevant times, R.C. 4731.22(B)(10) provided:

(B) The [Medical Board], pursuant to an adjudication under Chapter 119. of the Revised Code and by a vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate, refuse to register or refuse to reinstate an applicant, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(10) Commission of an act that constitutes a felony in this state ***[.]

Prior to July 1, 1996, R.C. 2921.11 provided:

§ 2921.11 Perjury.

(A) No person, in any official proceeding, shall knowingly make a false statement under oath or affirmation, or knowingly swear or affirm the truth of a false statement previously made, when either statement is material.

(B) A falsification is material, regardless of its admissibility in evidence, if it can affect the course or outcome of the proceeding. It is no defense to a charge under this section that the offender mistakenly believed a falsification to be immaterial.

(C) It is no defense to a charge under this section that the oath or affirmation was administered or taken in an irregular manner.

(D) Where contradictory statements relating to the same material fact are made by the offender under oath or affirmation and within the period of the statute of limitations for perjury, it is not necessary for the prosecution to prove which statement was false, but only that one or the other was false.

(E) No person shall be convicted of a violation of this section where proof of falsity rests solely upon contradiction by testimony of one person other than the defendant.

(F) Whoever violates this section is guilty of perjury, a felony of the third degree.

When Appellant repeatedly lied under oath, and particularly when he lied under oath to the Panel appointed by the Supreme Court's Board of Commissioners on Character and Fitness, he committed acts that constituted the felony of perjury. Pursuant to R.C. 4731.22(B)(10), the Medical Board was authorized to revoke Appellant's certificate.

At all relevant times, R.C. 4731.22(B)(14) provided:

(B) The [Medical Board], pursuant to an adjudication under Chapter 119. of the Revised Code and by a vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate, refuse to register or refuse to reinstate an applicant, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(14) Commission of an act that constitutes a misdemeanor in this state *** if the act involves moral turpitude[.]

Prior to July 1, 1996, R.C. 2921.13 provided:

§ 2921.13 Falsification.

(A) No person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when any of the following applies:

(1) The statement is made in any official proceeding.

(3) The statement is made with purpose to mislead a public official in performing the public official's official function.

(5) The statement is made with purpose to secure the issuance by a governmental agency of a license, permit, authorization, certificate, registration, release, or provider agreement.

(6) The statement is sworn or affirmed before a notary public or another person empowered to administer oaths.

(7) The statement is in writing on or in connection with a report or return that is required or authorized by law.

(8) The statement is in writing and is made with purpose to induce another to extend credit to or employ the offender, to confer any degree, diploma, certificate of attainment, award of excellence, or honor on the offender, or to extend to or bestow upon the offender any other valuable benefit or distinction, when the person to whom the statement is directed relies upon it to the person's detriment.

(D) Where contradictory statements relating to the same fact are made by the offender within the period of the statute of limitations for falsification, it is not necessary for the prosecution

to prove which statement was false but only that one or the other was false.

(E)(1) Whoever violates division (A)(1), ***, (3), ***, (5), (6), (7), [or] (8) *** of this section is guilty of falsification, a misdemeanor of the first degree.

When Appellant repeatedly lied under oath, particularly when he lied under oath to the Panel appointed by the Supreme Court's Board of Commissioners on Character and Fitness, and when he purposefully omitted relevant information from his bar application, he committed acts that constituted the misdemeanor of falsification, acts that also involved moral turpitude. Pursuant to R.C. 4731.22(B)(14), the Medical Board was authorized to revoke Appellant's certificate.

Accordingly, Appellant's first argument in support of his appeal, that the Medical Board's order is not supported by reliable, probative, and substantial evidence, is not well taken.

Appellant's second argument in support of his appeal is that the Medical Board's order is not in accordance with law because, Appellant contends, the Medical Board "convicted" him of crimes without proof beyond a reasonable doubt that he committed such crimes, thereby violating his due process rights. The court does not agree.

Revised Code 4731.22(B)(10), at all relevant times, conferred upon the Medical Board the authority to revoke the certificate of a podiatrist who committed an act that constituted a felony in Ohio. Revised Code 4731.22(B)(14), at all relevant times, conferred upon the Medical Board the authority to revoke the certificate of a podiatrist who committed an act that

constituted a misdemeanor in Ohio, if that act involved moral turpitude. Consequently, the Medical Board was not obligated to wait for a criminal conviction before it acted.

Accordingly, Appellant's second argument in support of his appeal, that the Medical Board's order is not in accordance with law, is not well taken.

Upon consideration of the entire record, this court finds that the order that the Medical Board issued on March 2, 1999, permanently revoking Appellant's certificate to practice podiatric medicine and surgery in the state of Ohio, is supported by reliable, probative, and substantial evidence and is in accordance with law. The order is therefore **AFFIRMED**.

Counsel for the Medical Board shall submit an appropriate journal entry in accordance with Local Rule 25.



JUDGE JAMES J. O'GRADY

Copies mailed to:

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7809 Laurel Ave., Ste. 10, Cincinnati, OH 45243-2673
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Columbus, OH 43215-3428

APPROVED:

*Frank R. Recker by Anne Strait per telephone
authority*

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Counsel for Appellee, the State Medical
Board of Ohio

of Ohio permanently revoked appellant's certificate to practice podiatric medicine and surgery in Ohio. When appellant appealed the board's order to this court, he also moved the court to suspend the board's order pending the court's determination of the appeal. The board has opposed appellant's motion to suspend.

Revised Code 119.12 provides:

*** In the case of an appeal from the state medical board ***, the court may grant a suspension and fix its terms if it appears to the court that *an unusual hardship to the appellant* will result from the execution of the agency's order pending determination of the appeal *and the health, safety, and welfare of the public will not be threatened* by suspension of the order. *** (Emphasis added.)

Appellant contends that he will suffer an unusual hardship from the execution of the board's order because he is unable to earn an income from his practice and he will sustain irreparable damage to his professional reputation. In the words of his attorney, appellant is "professionally dead." The board contends that appellant's hardship does not rise to the level of "unusual" hardship. This magistrate respectfully disagrees.

The board's revocation of appellant's certificate to practice podiatry was based on his failure to establish his fitness to sit for the Ohio bar examination, and not on any failure in his practice as a podiatrist. It appears to this magistrate that, under such circumstances, appellant will suffer an unusual hardship from the execution of the board's revocation order while the court determines the appeal. It further appears to this magistrate that the health, safety, and welfare of the public will not be threatened by suspension of that order while the court determines the appeal.

In *Ohio Veterinary Med. Licensing Bd. v. Harrison*, Franklin C.P. No.

98CVF10-7821, Judge Alan Travis observed:

We normally do not execute prisoners in criminal cases before providing an opportunity for appeal. It may well be that appellant will be unsuccessful in his appeal from the order below. However, the court is satisfied that appellant has met his burden to demonstrate that "unusual hardship" will occur if the administrative revocation order is enforced before the [court] can review the proceedings of the agency.

This magistrate, likewise, is satisfied that appellant has met his burden. Appellant's "Motion for Immediate Suspension of Order of the State Medical Board of Ohio," filed March 10, 1999, is hereby **GRANTED**.

Appellant's "Motion to Strike Brief of Appellee State Medical Board of Ohio," filed June 30, 1999

On June 30, 1999, appellant moved the court to strike the board's brief on the grounds that the brief exceeds the fifteen-page limitation of Local Rule 12.01. The board has opposed appellant's motion to strike, arguing that Local Rule 12.01 does not apply to administrative appeals.

Whether or not Local Rule 12.01 applies to administrative appeals, appellant has failed to demonstrate that he has been prejudiced by the board's three-page violation of the rule. The court's rules "are to be interpreted to achieve the prompt, efficient, and fair resolution of cases." Local R. 107.01. The board's minor infraction of the rule has not deprived appellant of his right to have his case decided promptly, efficiently, and fairly.

Appellant's "Motion to Strike Brief of Appellee State Medical Board of Ohio," filed June 30, 1999, is hereby **DENIED**.

Pamela Broer Browning
PAMELA BROER BROWNING, MAGISTRATE

Copies to:

FRANK R. RECKER, Esq., NANCY A. SCHELL, Esq., Counsel for Appellant
ANNE BERRY STRAIT, AAG, Counsel for Appellee
MIKE KARN, Bailiff for Judge O'Grady

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FRANK R. RECKER, D.D.S. *
KATRINA L. TRIMBLE COFFARO †

*Admitted in Ohio, Kentucky and Florida
†Admitted in Ohio and Kentucky

March 9, 1999

OHIO STATE MEDICAL BOARD

MAR 10 1999

Via Overnight Delivery

State Medical Board of Ohio
77 S. High Street, 17th Floor
Columbus, Ohio 43266-0315

RE: Mark W. Hayes, D.P.M.

To Whom This May Concern:

Please find enclosed the Notice of Appeal; Motion for Immediate Suspension of Order of the State Medical Board of Ohio to be filed in your office. This pleading is also being filed with the Franklin County Court of Common Pleas pursuant to O.R.C. § 119.12.

Sincerely,



Katrina L. Trimble Coffaro

cc: Anne Berry Strait, Esq. (regular mail w/encl.)
Dr. Mark Hayes

degree from the Akron University Law School. This case arises from Dr. Hayes' application to sit for the Ohio Bar Examination which was disapproved by the Joint Admissions Committee of the Cuyahoga County/Cleveland Bar Association and ultimately upheld by the Ohio Supreme Court. Based upon findings of fact made by the Board of Commissioners on Character and Fitness of the Supreme Court of Ohio, on June 10, 1998, the Appellee Board issued to Dr. Hayes a Notice of Opportunity indicating that it intended to "determine whether or not to limit, revoke, suspend, refuse to register or reinstate [his] certificate to practice podiatry, or to reprimand or place [him] on probation." The Board alleges:

On or about February 18, 1998, the Supreme Court of Ohio issued an Order which disapproved your application for admission to the practice of law in Ohio and precluded you from ever practicing law in Ohio. This Order was based in part on findings that : 1) you were not truthful; 2) you repeatedly lied under oath; 3) you lied to each group reviewing you, including the Panel, the Appeals Subcommittee, and the interviewers of the Joint Admissions Committee of the Cleveland/Cuyahoga County Bar Association, as well as in each deposition or transcript introduced into evidence at the Panel hearing; and 4) you purposefully omitted relevant information from your Bar application.

In its Notice, the Board alleged that the charged acts above constitute: (1) "publishing a false, fraudulent, deceptive, or misleading statement,' as that clause is used in Section 4731.22(B)(5), Ohio Revised Code"; (2) "commission of an act that constitutes a felony in this state regardless of the jurisdiction in which the act was committed,' as that clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: Section 2921.11, Ohio Revised Code, Perjury"; and, (3) "commission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act involves moral turpitude,' as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13, Ohio Revised Code, Falsification." The Notice is attached hereto as Exhibit 2.

An administrative hearing was conducted on October 30, 1998. The only evidence produced by the Appellee Board at the hearing were documents related to Dr. Hayes' Application for Admission to the Ohio Bar. On December 23, 1998, the hearing examiner sua sponte reopened the record and requested that the State provide additional evidence. On January 15, 1999, the hearing examiner issued his Report and Recommendation which is attached to the Board's final Order in Exhibit 1 of this Motion. The hearing examiner recommended that the Board suspend Dr. Hayes' license for not less than 90 days. In its final Order of February 10, 1999, the Board incorporated the hearing examiner's Report and Recommendation but modified the recommended sanction and ordered permanent revocation.

Dr. Hayes has never been convicted of perjury or falsification as alleged in the Notice. In fact, during its deliberations on this case, the Appellee Board wrote in its Minutes, "Dr. Stienecker referred to the Report and Recommendation, noting that it states that the Joint Committee on Bar Admissions '**did not find that Dr. Hayes had committed or been convicted of a crime, had made any false statement, including omissions, or had committed acts involving dishonesty, fraud, deceit or misrepresentation.**'" See Exhibit 1, Minutes attached to the Board's Order (emphasis added). Thereafter, the Board's Minutes state "the Board is left with a charge of publishing a false, deceptive and misleading statement, an act constituting a felony and misdemeanor in the course of practice, involving moral turpitude." See Minutes at 2. However, the Board, through Dr. Stienecker, further acknowledged that the alleged statement **did not occur in the course of Dr. Hayes' practice of podiatry.** See Minutes at 2. Further, Dr. Heidt repeated in the Minutes "this is a very unique case. **There was no specific misdemeanor, no felony. There were no specific problems in the practice that the Board can see. There's**

nothing here that says that the Board can revoke because of what it knows about his practice.” Minutes at 3-4 (emphasis added).

The Notice to Dr. Hayes did not include any charge of treatment by him which was below the standard of care or anything related to his podiatric practice. However, the Board discussed allegations that were never made against Dr. Hayes during its deliberations. The Board’s

Minutes state:

Dr. Stienecker stated that what was alluded to, but not really developed, in reference to this matter was the doctor’s extensive **malpractice history**. Looking at that **malpractice history**, many of the cases were dismissed by the plaintiffs. There were questions of current competency, physical impairment, continuing education, etc., since he hadn’t practiced since 1990. Those are things relating to the Board’s mandate. They were suggested by not really pursued in the evidence and questioning [at the hearing] . . . Dr. Stienecker stated that this is a situation where there is a deep concern as to whether this man can practice podiatry. He would be inclined to remand this matter to the Secretary and Supervising Member to develop a citation on that basis.¹

Minutes at 3 (emphasis added).

Another Board member, Dr. Buchan, stated that he had “reviewed the case thoroughly and felt that, of these 34 civil actions, two were business issues, one was a personal injury, two were collections filed by the bank. That leaves 29 that are **malpractice issues**.” Minutes at 3 (emphasis added).

Dr. Egner stated that she agrees completely with Dr. Stienecker, noting there are a lot of red flags in this record. She can’t find anything reassuring here. **Dr. Hayes did not attend his hearing**. There was no testimony from him. The **malpractice cases** were mentioned but not looked into. She is unsure as to whether it should be sent back to the Secretary and Supervising Member or to the Hearing Examiner, but she doesn’t feel that the Board can act on what is has in front of it today.

¹ This paragraph is factually incorrect. Dr. Hayes was not working temporarily in 1990 due to a back injury but since 1995 has worked on a full time basis. See Affidavit of Dr. Hayes attached hereto as Exhibit 3.

Minutes at 3 (emphasis added). It is obvious that the deliberations focused on Dr. Hayes' civil litigation history.

Further, Dr. Agresta stated that "Dr. Hayes was obviously given the opportunity to come to the hearing to present his case, but he didn't show up." Minutes at 4. And from the remarks by Dr. Egner and Dr. Agresta, it is clear that Dr. Hayes was inappropriately punished for not testifying at the hearing. Dr. Hayes was represented by counsel during the hearing and was not required to be present by the Appellee Board.

More revealing are the egregious remarks of Board members, Dr. Agresta and Dr. Buchan, during the deliberations on this case:

Dr. Agresta stated that if the Board remands the matter to get more information, Dr. Hayes probably won't come. He added that, after listening to the discussion, he sees no reason to prolong the agony. He would rather err in saying that the license should be revoked if he is going to err in this case. The Bar did something equivalent to revocation in this case.

Minutes at 4 (emphasis added).

Dr. Buchan stated that it didn't surprise him when the Chief Justice spoke so harshly in his order that some of this sort, this moral character or lack thereof, just might be involved in 34 civil action cases. Because of that, he's done with this fellow and thinks the Board needs to vote for revocation.

Minutes at 5 (emphasis added). It is clear from these remarks that Dr. Hayes' license was revoked based on something other than the allegations of which he was given notice.

Not only was Dr. Hayes punished for acts with which he was never charged, the record does not contain reliable, probative, and substantial evidence to support the charges that the Board did allege in its Notice against Dr. Hayes. Further, Board's Order is not in accordance with law as required by O.R.C. § 119.12. These issues, and the ones discussed above, will be

more fully addressed in Dr. Hayes' brief to this Court. In the interim, Dr. Hayes requests that this Court issue an Order, suspending the Board's Order until the matter can be fully adjudicated. Copies of Orders issued by courts suspending administrative orders pending judicial review are attached hereto as Exhibit 4.

Ohio Revised Code Section 119.12 provides that "[i]f it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms." Dr. Hayes will suffer "unusual hardship" should this Court not grant the requested suspension of the Board's Order. Dr. Hayes began practicing podiatry in 1982. See Affidavit of Dr. Hayes which is attached hereto as Exhibit 3. After recovering from a back injury which caused him to temporarily stop practicing in 1990, Dr. Hayes resumed his full-time practice of podiatry in 1995. See Hayes Affidavit. He practices at two office locations, one in Parma and the other in Elyria. See Hayes Affidavit. Sanctions by the Board are reported to the National Practitioner Data Bank. See Hayes Affidavit. If the Board's Order is permitted to become effective, Dr. Hayes will suffer the immediate inability to earn an income from the profession, irreparable damage to his reputation, and the loss of a career which he has built since 1982. See Hayes Affidavit. Dr. Hayes has never been charged and/or disciplined by the Appellee Board other than the charge at issue in this appeal, which is completely based upon the denial of his request to sit for the Bar Examination in Ohio. See Hayes Affidavit. Further, the charge by the Board at issue does not involve Dr. Hayes' practice of podiatry, which was acknowledged by the Board in its Minutes. Thus, allowing Dr. Hayes to continue to practice podiatry until this Court has made its final decision on the merits will not cause a threat to the health, safety and welfare of the public.

While determining what demonstrates “unusual hardship” for purposes of granting a suspension of an agency order during an appeal, this Court in Ohio Veterinary Medical Licensing Board v. Harrison, Case No. 98CVF-10-7821 (Franklin Co. Ct. Common Pleas 1998) (opinion attached hereto as Exhibit 5) stated that the appellant had provided the court with an affidavit and portions of the transcript of proceedings below and that appellant had averred that “there was no evidence that he engaged in improper surgical techniques or care of his patients.” Therefore, the Harrison Court refused to vacate a previously issued stay of the agency’s order. Likewise, Dr. Hayes has provided this Court with an Affidavit attesting to the unusual hardship that will occur if the Order is permitted to be effective during this appeal. Furthermore, the charge at issue in this case has absolutely no relation to the care that Dr. Hayes renders to his patients. Thus, an order should be issued suspending the Board’s Order until this Court has decided the merits of the appeal.

Further, this Court in Harrison stated:

We normally do not execute prisoners in criminal cases before providing an opportunity for appeal. It may well be that appellant will be unsuccessful in his appeal from the order below. However, the court is satisfied that appellant has met his burden to demonstrate that “unusual hardship” will occur if the administration revocation order is enforced before the court’s [sic] can review the proceedings of the agency. Therefore, the stay previously entered will remain in force until this court has determined the merits of this appeal.

See Opinion at 3, attached hereto as Exhibit 5 (emphasis added). The consequences on Dr. Hayes constitute an “unusual hardship,” all of which will occur within weeks, if the Board’s Order is not stayed. In fact, even if this Court were to expediently rule in favor of Dr. Hayes and reverse the Order of the Board within a matter of months, Dr. Hayes’ aforementioned irreparable injuries will have already occurred, and his judicial “victory” will have come too late to save his

career and reputation. Indeed, without a suspension of the Board's Order, his right to an appeal under O.R.C. Chapter 119 would effectively be rendered a nullity.

For the foregoing reasons, Dr. Hayes respectfully requests that this Court immediately issue a suspension of the Order of the Board, pending the full adjudication of his appeal.

Respectfully Submitted,



FRANK R. RECKER (00015013)
KATRINA L. TRIMBLE COFFARO (0065050)
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7809 Laurel Avenue, Suite 10
Cincinnati, Ohio 45243-2673
513/561-9600

ATTORNEYS FOR APPELLANT

**COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO**

MARK W. HAYES, D.P.M.	:	CASE NO:
	:	
Appellant,	:	
	:	
v.	:	
	:	
STATE MEDICAL BOARD OF OHIO	:	
	:	
Appellee.	:	

ORDER

Pursuant to O.R.C. § 119.12, this Court hereby orders an immediate suspension of the Order issued by the State Medical Board of Ohio on February 10, 1999, until this appeal can be fully adjudicated.

IT IS SO ORDERED.

JUDGE

Counsel:

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Anne Berry Strait, Esq.
Assistant Attorney General
Health & Human Service Section
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Columbus, Ohio 43215

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 1999, a copy of the foregoing Notice of Appeal; Motion for Immediate Suspension of Order of The State Medical Board of Ohio was served via overnight delivery upon The State Medical Board, 77 South High Street, 17th Floor, Columbus, Ohio 43266 and via regular mail upon Anne Berry Strait, Esq., Assistant Attorney General, Health & Human Services Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215.


Frank R. Recker

EXHIBIT 3

EXHIBIT 4

COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO
FILED
LUCAS COUNTY

JON B. DOVE, D.D.S.

OCT 23 4:49 PM '98 CASE NO: CI0199804159

Appellant,

v.

COMMON PLEAS COURT
HARRY BARLOS
CLERK OF COURT
ASSIGNED TO JUDGE SKOW

OHIO STATE DENTAL BOARD

Appellee.

ORDER

Pursuant to O.R.C. § 119.12, this Court hereby orders an immediate suspension of the Adjudication Order issued by the Ohio State Dental Board, until this appeal can be fully adjudicated.

IT IS SO ORDERED.


JUDGE

Counsel:

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FILED
COURT OF COMMON PLEAS

MAY 14 1998

DELORES REED, Clerk
PORTAGE COUNTY, OHIO

COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

SUSANNA ANDA-BRENNER, D.D.S.

CASE NO. 98 CV0398

Appellant,

JUDGE JOSEPH KAINRAD

v.

OHIO STATE DENTAL BOARD

Appellee.

ORDER

Pursuant to O.R.C.Sec. 119.12 and on motion of appellant, this Court hereby orders temporary immediate suspension of the Adjudication Order issued by the Ohio State Dental Board pending hearing on Appellant's motion to stay. Hearing is scheduled for Thursday, May 28, 1998 at 1:30 p.m..

IT IS SO ORDERED.

Counsel:

Thomas J. Sicuro, Esq.
Kane, Sicuro & Simon
101 East Main Street
Ravenna, Ohio 44266.



JUDGE

Frank R. Recker, Esq.
Katrina L. Trimble Coffaro, Esq.
Frank R. Recker and Associates Co., L.P.A.
7809 Laurel Avenue, Suite 10
Cincinnati, Ohio 45243-2673

Mark K. Crawford, Esq.
Assistant Attorney General
Health & Human Service Section
30 E. Broad Street, 26th Floor
Columbus, Ohio 43215-3428

COURT OF COMMON PLEAS
LICKING COUNTY, OHIO

DONALD K. SUMMERFIELD, D.M.D. :

CASE NO:

97CV00622 GLF

Appellant, :

v. :

OHIO STATE DENTAL BOARD :

Appellee. :

ORDER

FILED
1991 OCT - 1 A 11: 37
CLERK OF COMMON PLEAS CT.
LICKING COUNTY, OHIO
LARRY R. BROWN, CLERK

Pursuant to ORC § 119.12, this Court hereby orders an immediate suspension of the Adjudication Order issued by the Ohio State Dental Board, until this appeal can be fully adjudicated.

IT IS SO ORDERED.



JUDGE
COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PARNEET S. SOHI, D.D.S.,

Appellant,

vs.

OHIO STATE DENTAL BOARD

Appellee.

CASE NO. A9605966

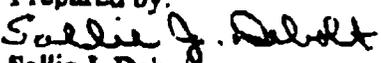
JUDGE PATRICK T. DINKELACKER

ORDER AND ENTRY

The Court hereby amends the Order and Entry filed on November 18, 1996 in the above referenced matter and grants Appellant's request for a suspension of the October 17, 1996 Order of the Ohio State Dental Board pursuant to O.R.C. 119.12, upon the following Condition:

1. At all times during the suspension of the agency order, the appellant shall not render dental care unless an employee is present in the operatory and in contact with the child.


 PATRICK T. DINKELACKER, JUDGE
 1-6-97

Prepared by:

 Sallie J. Deboit
 Assistant Attorney General
 Counsel for Ohio State Dental Board

561-9640

IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO

DORCAS MILLER, CLERK
COMMON PLEAS COURT
HOLMES COUNTY, OHIO

ROBERT J. EARNEY, DDS
Appellant,
vs.
OHIO STATE DENTAL BOARD,
Appellee.

CASE NO. 98 CV 053
JOURNAL ENTRY

Q134P104

Before the Court is appellant's motion for suspension of the Adjudication Order of the Ohio State Dental Board of May 7, 1990 in the administrative case of *In the Matter of: Robert J. Earney, DDS*.

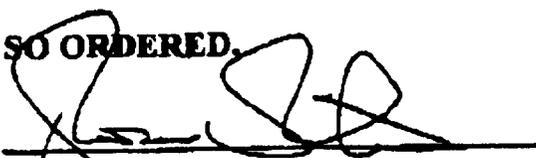
Prior to considering this matter on an ex parte basis, the Court instructed counsel for appellant to attempt to contact counsel for appellee to set up a telephone conference. Counsel for appellant informed the Court that counsel for appellee was not available on Wednesday, May 13, 1998. As the terms of the Adjudication Order take effect immediately, it is necessary for the Court to consider appellant's motion ex parte.

For the reasons stated in support of appellant's motion and pursuant to R.C. 119.12, the Court hereby orders a temporary and immediate suspension of the Adjudication Order. Appellant's motion for stay for the duration of the appeal shall come on for hearing before a judge of this Court at 1:00 p.m. on June 11, 1998. If appellee opposes the motion, appellee shall file a memorandum in opposition to the motion before May 28, 1998. Appellant may file a reply memorandum before June 4, 1998.

The Court shall also conduct a case management conference at 1:00 p.m. on June 11, 1998 and shall issue a scheduling order for the appeal.

The Clerk of Court shall serve a copy of this order upon the Ohio State Dental Board by certified mail, return receipt requested.

SO ORDERED.


THOMAS D. WHITE, JUDGE

cc: Atty. Knowling, Atty. Recker, AAG Crawford, and Ohio State Dental Board.

[] Copies distributed on _____ by _____.

COURT OF COMMON PLEAS
LICKING COUNTY, OHIO

CLERK OF COMMON PLEAS CT.
LICKING COUNTY, OHIO
LARRY R. CROWN, CLERK

1996 DEC 11 A 11:38

RONALD R. FULLER, D.V.M.

:

CASE NO:

FILED

Appellant.

:

JUDGE

96CV00611 GLF

v.

:

:

OHIO VETERINARY MEDICAL
BOARD

:

Appellee.

:

ORDER

Pursuant to ORC § 119.12, this Court hereby orders an immediate suspension of the Adjudication Order issued by the Ohio Veterinary Medical Board on December 3, 1996, until the appeal of said Adjudication Order can be fully heard and decided by this Court.

IT IS SO ORDERED.



JUDGE

COURT OF COMMON PLEAS

SCIOTO COUNTY
OHIO
FILED

OCT 2 1 35 PM '96

COURT OF COMMON PLEAS
SCIOTO COUNTY, OHIO

~~ROBERTA A. NELSON~~, D.D.S.
CLERK OF COURTS

Case No.: 96-CIF-007

Appellant,

vs.

OHIO STATE DENTAL BOARD

Appellee.

ORDER

Pursuant to O.R.C. § 119.12, this Court hereby orders an immediate stay of the Adjudication Order issued by the Ohio State Dental Board on September 19, 1996, until the appeal of said Adjudication Order is fully heard and decided by this Court.

IT IS SO ORDERED.



JUDGE
COURT OF COMMON PLEAS



IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

MARYANNE S. OLYNYK, M.D.,

Case No. 95CVF-12-8850

APPELLANT,

Judge B. Pfeiffer

v.

STATE MEDICAL BOARD OF OHIO,

APPELLEE.

ON COMPUTER
10

DECISION AND ENTRY GRANTING APPELLANT'S MOTION FOR STAY,
FILED FEBRUARY 8, 1996

Rendered this 21ST day of March, 1996.

PFEIFFER J.

Appellant Maryanne Olynyk, M.D., seeks to stay an order of the Ohio State Medical Board imposing a six month suspension of her license to practice medicine and surgery in the State of Ohio. Appellant's motion is opposed.

The record reflects that Appellant received a suspension for failing to submit to bi-weekly drug screens as required by a 1990 consent decree between Appellant and Appellee. Appellant has appealed the Board's order to this Court and seeks to stay the suspension on the grounds Appellant will suffer undue hardship if the order is executed, and the health, safety and welfare of the public will not be threatened by the suspension of the order.

Appellant states she is completing her second and final year of an occupational medicine residency in Texas. Appellant contends that once the Texas Board is informed of the Ohio order, it may take action to prevent Appellant from finishing her residency which is scheduled to end in September, 1996. If the Ohio order is not stayed, Appellant may be ineligible to complete her residency the 1995-96 school year and may even be required to forfeit the

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Clerk of Court
Franklin County, Ohio
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EXHIBIT
4

residency for the 1996-1997 school year if the legal action is not resolved prior to the beginning of the school year. Thus, Appellant contends that "such a result is more draconian than the Board's order, which envisions a minimum six month hiatus of Dr. Olynyk's practice".

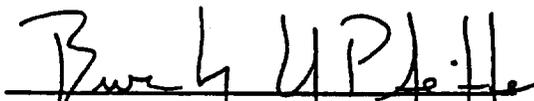
Appellant further contends she has no criminal record, no record of drug use for five years and no claims of failure to provide adequate care to patients. In Appellant's view, she committed a technical violation of the consent order as she had submitted to monthly, as opposed to bi-weekly, drug screenings for approximately a four month period in 1994 but has since returned to compliance with the bi-weekly requirements. Lastly, Appellant has presented evidence that she is performing very satisfactorily in her residency and her treatment of patients is directly supervised by other physicians.

In response to Appellant's position, the Board contends that although the suspension may put Appellant's career in limbo this does not constitute "unusual hardship" under R.C. 119.12. The Board further claims the Appellant's continued practice of medicine would threaten public health, safety and welfare but offers no specific reasons, other than counsel's conclusory statements. The Court also notes that the Board's decision on Appellant's suspension was not unanimous, contrary to counsel's assertion.

This Court has often held that a party demonstrating "unusual hardship" must show something more than just the loss of the ability to continue practicing in a profession and its attendant

COMMUNITY COLLEGE OF OHIO
FACULTY COLLEGE
APPELLANT'S COURT
SEP 2 1994
COURT REPORT

financial consequences. Upon review of the memorandum and evidence, the Court finds Appellant has demonstrated an unusual hardship in this case and that the health, safety and welfare of the public will not be threatened by the suspension of the Board's order. Accordingly, the Court grants a STAY of the Board's order dated December 11, 1995 pending resolution of the appeal before this Court.


BEVERLY Y. PFEIFFER, JUDGE

53188802

Copies to:

Sheila P. Cooley
Counsel for Appellant

Lili Kazmarek
Assistant Attorney General
Counsel for Appellee

FILED REC
COMMON PLEAS COURT
FRANKLIN CO., OHIO
07 MAR 22 AM 10:34
JOSE U. VULLI
CLERK OF COURTS

222 3817

HANCOCK COUNTY, OH

FEB 5 11 44 AM '92

CLERK

IN THE COMMON PLEAS COURT OF HANCOCK COUNTY, OHIO

Kevin D. Less, D.D.S.,
Plaintiff/Appellant,

Case No. 91-296-AP

vs.

JUDGMENT ENTRY

Ohio State Dental Board,
Defendant/Appellee.

February 4, 1992

This cause comes on for the Court's attention this date on the Motion for Stay filed by the appellant herein on November 4, 1991. Appellant requests that this Court stay the adjudication order of the Ohio State Dental Board issued on October 30, 1991, suspending the license of Kevin D. Less, D.D.S. for a period of thirty (30) days and further placing him on probation subject to defined terms and conditions for a period of two (2) years. This Motion for Stay is filed pursuant to Ohio Revised Code §119.12 and contends that an "unusual hardship" to the appellant will result from the execution of the agency's order pending the determination of this appeal. In addition the appellee, by and through counsel on November 7, 1991, filed a Memorandum in Opposition to Appellant's Motion for Stay.

This Court conferred with counsel of record for their respective representatives on November 5, 1991, and accordingly has been under the mistaken impression that counsel for appellee was in agreement with the motion of counsel for appellant for a stay.

The Court, having further conferred with counsel of record by telephone on January 29, 1992, and having reviewed the file herein as well as the record of proceedings filed by appellee on December 5, 1991, finds that appellant has demonstrated that "an unusual hardship" will result to appellant "from the execution of the agency's order pending determination of the appeal." See Ohio Revised Code §119.12.

It is therefore ORDERED, ADJUDGED, AND DECREED that appellant's Motion for Stay of the order issued by the Ohio State Dental Board on October 30, 1991, is granted and accordingly execution of the order of the Ohio State Dental Board heretofore issued is stayed pending determination of this appeal.

In view of this Court's order of this date, as well as the telephonic conference with counsel of record on January 29, 1992, the following timetable for orderly disposition of this appeal is established:

Counsel of record for appellant, Kevin D. Less, D.D.S., shall file his brief and supporting materials as to the issues before the Court on or before February 12, 1992;

Counsel of record for appellee, Ohio State Dental Board, shall file any and all materials in response thereto on or before February 26, 1992;

This cause shall be heard by the Court upon oral argument of counsel at 2:00 p.m. on March 4, 1992.

All until further order of the Court.


JOSEPH H. NIEMEYER, JUDGE

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 5th day of February, 1992, a time-stamped copy of the foregoing was delivered to Frank R. Recker, attorney for plaintiff/appellant, 2900 Carew Tower, 441 Vine Street, Cincinnati, OH 45202; and to Susan C. Walker and Ava Serrano, Assistant Attorney General, 300 East Broad Street - Fifteenth Floor, Columbus, OH 43266-0410 by ordinary U.S. Mail.


JOSEPH H. NIEMEYER, JUDGE

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Yulav
Morrissey

JOHN P. BLAZIC, D.D.S.
10430 Hickory Point Drive
Cincinnati, Ohio 45236

Case No. A-8810150
(Morrissey, J.)

0002

Appellant,

vs.

OHIO STATE DENTAL BOARD
77 S. High Street, 18th Floor
Columbus, Ohio 43266-0306

ENTERED
FEB 23 1989
FEE: 4.00

ENTRY

Appellee.

This matter came to be heard on February 28, 1989 on Appellant's Motion for Stay of the Order issued on November 30, 1988 by the Ohio State Dental Board. Upon due consideration of the memoranda and arguments of counsel, the Court finds that the Appellant's Motion for Stay pending his appeal of the Order of the Ohio State Dental Board is well taken and is hereby granted. *until March 23, 1989. DMB 92*

Wm. Morrissey
HON. WILLIAM J. MORRISSEY, Court of
Common Pleas, Hamilton County, Ohio

Donna M. Bergmann
DONNA M. BERGMANN (B-839)
Attorney for Plaintiff
SCHWARTZ, MANES & RUBY
2900 Carew Tower, 441 Vine St.
Cincinnati, Ohio 45202
(513) 579-1414

92-241

Joseph D. Emanuel
JOSEPH D. EMANUEL
Attorney for Defendant
Assistant Attorney General
1680 State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0440
(614) 466-8600

FILED
MAY 20 1992
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

EXHIBIT
5

161

5

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

88CV - 07 - 4747

AEI Group, Inc.,

Plaintiff
Appellant

Case No.

vs.

Judge

Department of Commerce
Division of Securities

Defendant
Appellee

1988 JUL 13 AM 4:22
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ORDER FOR STAY PURSUANT TO OHIO
REVISED CODE SECTION 119.12

Upon the motion of Plaintiff - Appellant, AEI Group, Inc., and pursuant to R.C. §119.12, the Court having determined that an unusual hardship will result to plaintiff - appellant unless a stay of the order issued by defendant - appellee on July 11, 1988 (Division of Securities file no. 88 - 116) is granted, it is ORDERED, that the order of defendant - appellee issued July 11, 1988 (Division of Securities file no. 88 - 116) is stayed and suspended pending a final determination on the appeal filed in this matter.

plaintiff deposit a \$25,000 CD with credit of this court by 4 p.m. July 14, 1988.

W. E. Co.
Judge

Approved:

Lyman Brownfield
Lyman Brownfield
Attorney for Plaintiff - Appellant

Donald A. Miller
Attorney for Defendant
Appellee

EXHIBIT
7

EXHIBIT D

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

AEI GROUP, INC.	:	Case No. 88CV-07-4747
Appellant.	:	Judge D. Cain
vs.	:	
DEPARTMENT OF COMMERCE DIVISION OF SECURITIES.	:	
Appellee.	:	

*we are informed that
the judge
deprecates
action
-116*

ADDENDUM FOR PURPOSE OF CLARIFICATION OF
ORDER FOR STAY DATED JULY 13, 1988

The Court hereby ORDERS that the July 13, 1988 Order for stay, stays and suspends only the suspension of Appellant, AEI Group, Inc.'s securities dealer license and does not stay or suspend any administrative procedures relating to the revocation of the securities dealer license of Appellant, AEI Group, Inc. as set forth in the notice issued by the Appellee, Department of Commerce Division of Securities. (Division of Securities File No. 88-116.)

Judge D. Cain

Approved:

DANIEL A. MALKOFF
Attorney for Appellee.

Attorney for Appellant

EXHIBIT 5

COPY

FILED
COMMON PLEAS COURT
COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

98 NOV 17 AM 10:36

CLERK OF COURTS.

OHIO VETERINARY MEDICAL
LICENSING BOARD,

Plaintiff-Appellee,

-v-

JAMES W. HARRISON, DVM, MS,

Defendant-Appellant.

CASE NO. 98CVF-10-7821

JUDGE TRAVIS

NOV 17 1998

DECISION
DENYING APPELLEE'S
MOTION TO VACATE STAY
(Filed October 20, 1998)

Rendered this 16TH day of November, 1998.

TRAVIS, J.

This administrative appeal comes before the court upon the motion of appellee, the Ohio Veterinary Medical Licensing Board, for an order vacating the stay entered on October 9, 1998. The order of October 9, 1998 stayed enforcement of appellee's order which revoked appellant's license to practice veterinary medicine, pending resolution of the appeal by this court. Appellant and appellee have submitted memoranda on the issue.

Appellee argues that appellant is not entitled to a stay of the proceedings below because he has failed to demonstrate that immediate enforcement of the administrative order will create an unusual hardship to him. R. C. 119.12. In pertinent part, that section provides as follows.

Any party adversely affected by any order of an agency. . .
revoking or suspending a license...may appeal the order of
the agency to the court of common pleas of the county in
which the place of business is located . . .
The filing of a notice of appeal shall not automatically
operate as a suspension of the order of the agency. If it

The filing of a notice of appeal shall not automatically operate as a suspension of the order of the agency. If it appears to the court that an **unusual hardship** to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms.

(Emphasis supplied.)

Under R.C. 119.12, stays are to be granted only upon a determination of "unusual hardship". Although apparently not subject to discussion by the Ohio Supreme Court of the Ohio Court of Appeals, a number of common pleas courts have analyzed the requirement of "unusual hardship" found in the statute. In substance, these decisions note that by employing the adjective "unusual" to the word hardship, the legislature recognized that there would be hardship is virtually every case involving an order of an administrative agency. This court found that to be true in **Excalibur Club, Inc. v. Liquor Control Commission**, Case No. 98CVF-03-1952, (March 23, 1998), wherein the court denied a stay requested by the appellant. **Excalibur Club** involved a seven day suspension of liquor permit privileges and the appellant therein did not claim unusual hardship; simply that hardship would occur.

The court is mindful that some common pleas courts have refused to grant a stay even where the administrative order subject of the appeal involved a revocation of a license. See **Sukumar Roy, M.D. v. State Medical Board of Ohio**, Case No. 93CVF-3734, Franklin County Common Pleas Court, Hon. Patrick McGrath.¹ In **Hoffman v. State Medical Board**, Case No. 93CVF-6881, Franklin County Common Pleas Court, the Hon. Richard Sheward was confronted with an

¹ **Roy v. Medical Board** was back before the Common Pleas court after a remand from the Court of Appeals to the administrative agency to insure that the agency had considered certain statutory sanctions in addition to the agency's disciplinary guidelines. Thus, success on the second appeal was considered "tenuous at best".

appellant who had been convicted of multiple drug offenses over a period of eight years, all involving deception to obtain dangerous drugs. Judge Sheward found appellant Hoffman to be a "threat to the health, safety, and welfare of the public." In **BP Exploration and Oil, Inc. v. Liquor Control Commission**, Case No. 95CVF-05-3241, Judge Pfeiffer held that simply averring that unusual hardship would occur, without more specificity, was insufficient. In **1043 S. Broadway, Inc. dba Gold Star Market v. Liquor Control Commission**, Case No. 94-3180, Montgomery County Common Pleas Court, the court found that the president of the corporate permit holder was in federal prison in St. Louis serving time for "terrorism".

In contrast, appellant has provided the court with an affidavit and portions of the transcript of proceedings below. It appears that appellant is one of only four veterinarians in the State of Ohio who limit their practice to orthopedics and the only such surgeon who is not affiliated with The Ohio State University. In addition, even the veterinarians who were called as witnesses by the board agreed that appellant was highly regarded as an orthopedic surgeon by others in the field. Appellant avers that there was no evidence that he engaged in improper surgical techniques or care of his patients.

We normally do not execute prisoners in criminal cases before providing an opportunity for appeal. It may well be that appellant will be unsuccessful in his appeal from the order below. However, the court is satisfied that appellant has met his burden to demonstrate that "unusual hardship" will occur if the administrative revocation order is enforced before the court's can review the proceedings of the agency. Therefore, the stay previously entered will remain in force until this court has determined the merits of this appeal.

So Ordered.

A handwritten signature in cursive script, appearing to read "A. Travis", written over a horizontal line.

ALAN C. TRAVIS, JUDGE

COPIES TO:

Barbara A. Serve', Esq.
Counsel for Plaintiff/Appellee

Thomas M. Tyack, Esq.
Counsel for Defendant/Appellant

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

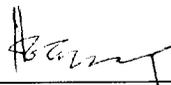
MARK W. HAYES, D.P.M.

*

ENTRY NUNC PRO TUNC

It has come to the attention of the undersigned that, due to clerical error, the Entry of Order in the above captioned matter erroneously identified the certificate issued to Mark W. Hayes, D.P.M., as a certificate "to practice medicine and surgery". The certificate issued to Dr. Hayes, which was permanently revoked pursuant to the February 10, 1999 Entry of Order was, in fact, a certificate to practice *podiatric* medicine and surgery. Said Entry of Order is hereby corrected to reflect the same. All other provisions of the February 10, 1999 Entry of Order, including the mailing date and effective date, remain unaltered by this Entry Nunc Pro Tunc.

(SEAL)



Anand G. Garg, M.D.
Secretary

MAY 11, 1999
Date

CERTIFIED MAIL RECEIPT NO. Z 233 839 240
RETURN RECEIPT REQUESTED

CC: Frank R. Recker, Esq.
CERTIFIED MAIL RECEIPT NO. Z 233 839 241
RETURN RECEIPT REQUESTED

Mailed 5/11/99



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43266-0315 • (614) 466-3934 • Website: www.state.oh.us/med/

February 10, 1999

Mark W. Hayes, D.P.M.
19876 Henry Road
Fairview Park, OH 44126

Dear Doctor Hayes:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of R. Gregory Porter, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on February 10, 1999, 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 may be taken to the Franklin County Court of Common Pleas only.

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

THE STATE MEDICAL BOARD OF OHIO

Anand G. Garg, M.D.
Secretary

AGG:jam
Enclosures

CERTIFIED MAIL RECEIPT NO. Z 233 840 227
RETURN RECEIPT REQUESTED

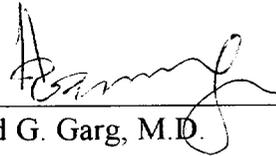
cc: Frank R. Recker, Esq.
CERTIFIED MAIL RECEIPT NO. Z 233 840 228
RETURN RECEIPT REQUESTED

Mailed 3/2/99

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of R. Gregory Porter, State Medical Board Attorney Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on February 10, 1999, 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 Mark W. Hayes, D.P.M., 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.



Anand G. Garg, M.D.
Secretary

(SEAL)

February 10, 1999
Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

MARK W. HAYES, D.P.M.

*

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on February 10, 1999.

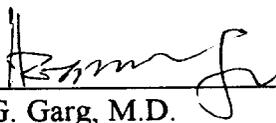
Upon the Report and Recommendation of R. Gregory Porter, State Medical Board Attorney Hearing Examiner, designated in this Matter pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the modification, approval and confirmation by 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:

The certificate of Mark W. Hayes, D.P.M., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED.

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

(SEAL)



Anand G. Garg, M.D.
Secretary

February 10, 1999
Date

99 JAN 14 PM 12:05

**REPORT AND RECOMMENDATION
IN THE MATTER OF MARK W. HAYES, D.P.M.**

The Matter of Mark W. Hayes, D.P.M., was heard by R. Gregory Porter, Attorney Hearing Examiner for the State Medical Board of Ohio, on October 30, 1998.

INTRODUCTION

I. Basis for Hearing

- A. By letter dated June 10, 1998, the State Medical Board of Ohio [Board] notified Mark W. Hayes, D.P.M., that it had proposed to take disciplinary action against his certificate to practice podiatry in Ohio. The Board's action was based on the following allegations:

On or about February 18, 1998, the Supreme Court of Ohio issued an Order which disapproved [Dr. Hayes'] application for admission to the practice of law in Ohio and precluded [him] from ever practicing law in Ohio. This Order was based in part on findings of fact that:

1. [Dr. Hayes was] not truthful;
2. [Dr. Hayes] repeatedly lied under oath;
3. [Dr. Hayes] lied to each group reviewing [him], including the Panel, the Appeals Subcommittee, and the interviewers of the Joint Admissions Committee of the Cleveland/Cuyahoga County Bar Association, as well as in each deposition or transcript introduced into evidence at the panel hearing; and
4. [Dr. Hayes] purposefully omitted relevant information from his Bar application.

The Board alleged that the acts, conduct, and/or omissions of Dr. Hayes upon which the findings 1 through 4 were based, constituted "'publishing a false, fraudulent, deceptive, or misleading statement,' as that clause is used in Section 4731.22(B)(5), Ohio Revised Code; '[c]ommission of an act that constitutes a felony in this state regardless of the jurisdiction in which the act was committed' as that clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: Section 2921.11, Ohio Revised Code, Perjury; [and/or] '[c]ommission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the

99 JAN 14 PM 12:05

act was committed, if the act involves moral turpitude,' as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13, Ohio Revised Code, Falsification.”

In addition, the Board advised Dr. Hayes of his right to request a hearing in this matter. (State's Exhibit 1)

- B. On July 6, 1998, Michael E. Banta, Esq., submitted a written hearing request on behalf of Dr. Hayes. (State's Exhibit 2)

II. Appearances

- A. On behalf of the State of Ohio: Betty D. Montgomery, Attorney General, by Anne B. Strait, Assistant Attorney General.
- B. On behalf of the Respondent: Frank R. Recker, D.D.S., Esq.

EVIDENCE EXAMINED

I. Testimony Heard

No witnesses were presented.

II. Exhibits Examined

A. Presented by the State

1. State's Exhibit 1-14: Procedural exhibits.
2. State's Exhibit 15: Certified copy of Dr. Hayes' June 8, 1993, application to register as a candidate for admission to the practice of law.
3. State's Exhibit 16: Certified copy of Dr. Hayes' July 9, 1993, Character Questionnaire filed with the Board of Commissioners on Character and Fitness, Supreme Court of Ohio.
4. State's Exhibit 17: Certified Copy of an authorization and release signed by Dr. Hayes on July 9, 1993.
5. State's Exhibit 18: Certified copy of an August 23, 1993, Certificate of Dean of the University of Akron School of Law.

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6. State's Exhibit 19: Certified copy of Dr. Hayes' October 24, 1993, application to take the Ohio Bar Examination.
7. State's Exhibit 20: Certified copy of Dr. Hayes' October 29, 1993, Applicant's Affidavit.
8. State's Exhibit 21: Certified copy of Dr. Hayes' Law School Character Affidavit, signed by William C. Becker, Acting Associate Dean of the University of Akron School of Law.
9. State's Exhibit 22: Certified copy of Dr. Hayes' October 29, 1993, Supplemental Character Questionnaire.
10. State's Exhibit 23: Certified copy of the March 7, 1994, Report of the Joint Committee on Bar Admissions of the Cleveland Bar Association and the Cuyahoga County Bar Association, recommending disapproval of Dr. Hayes' application for admission to the practice of law in Ohio.
11. State's Exhibit 24: Certified copy of the March 7, 1994, notice to Dr. Hayes from the Joint Committee on Bar Admissions of the Cleveland Bar Association and the Cuyahoga County Bar Association advising Dr. Hayes of his appeal rights regarding the recommendation of the admissions committee not to approve his application. (2pp.).
12. State's Exhibit 25: Certified copy of a report from the National Conference of Bar Examiners regarding Dr. Hayes' application to take the Ohio Bar Examination.
13. State's Exhibit 26: Certified copy of a February 18, 1998, Order of the Supreme Court of Ohio disapproving Dr. Hayes' application for admission to the practice of law in Ohio and precluding him from reapplying; the following were attached to the Order: *In re Application of Hayes* (1998), 81 Ohio St.3d 88; and a certified copy of the Findings of Fact and Recommendation of the Board of Commissioners on Character and Fitness of the Supreme Court of Ohio. (Note: The pages of this exhibit were numbered by the Hearing Examiner after the hearing.)
14. State's Exhibit 27: Copy of *In re Application of Hayes* (1998), 81 Ohio St.3d 88.

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- B. Admitted by the Hearing Examiner, *sua sponte*
1. Board Exhibit A: Copy of a November 16, 1998, Entry granting Respondent's request for an extension of time in which to file his brief.
 2. Board Exhibit B: Copy of a November 27, 1998, letter to the Board from Respondent's counsel waiving the opportunity to submit a brief.
 3. Board Exhibit C: December 23, 1998, Entry reopening the hearing record and requesting the State to provide additional evidence.
 4. Board Exhibit D: Copy of a December 29, 1998, Motion for Extension of Time filed by the State.
 5. Board Exhibit E: Copy of a December 29, 1998, letter to the Board from Attorney Recker offering to stipulate to the evidentiary issue that gave rise to reopening the record.
 6. Board Exhibit F: December 29, 1998, Entry inquiring whether the State would agree to the Respondent's offer to stipulate.
 7. Board Exhibit G: Copy of a the Respondent's January 5, 1999, Memorandum in Opposition to State's Motion for Extension of Time.
 8. Board Exhibit H: Copy of the State's January 12, 1999, Notice Concerning Respondent's Stipulation, wherein the State agreed to the stipulation previously offered by the Respondent.
 9. Board Exhibit I: January 12, 1999, Entry closing the hearing record.

PROCEDURAL MATTERS

1. During the hearing in this matter, the record was held open until December 4, 1998, in order to give the parties an opportunity to prepare briefs concerning due process issues that had been raised by the Respondent. By entry dated November 16, 1998, this date was extended to December 11, 1998. On November 27, 1998, Respondent waived the opportunity to submit a brief. The record was held open until December 11, 1998, in order to allow the State to submit a brief; no brief was submitted. (Board Exhibits A and B)
2. On December 23, 1998, the record in this matter was reopened and the State was

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requested to provide additional evidence concerning whether Dr. Hayes' testimony before the Panel of the Board of Commissioners on Character and Fitness of the Supreme Court of Ohio had been made under oath. On December 29, 1998, the Respondent offered to stipulate that such testimony had been made under oath. Subsequently, on January 12, 1999, the State agreed to the Respondent's stipulation. Accordingly, the hearing record closed on January 12, 1999.

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 or about June 8, 1993, Mark W. Hayes, D.P.M. registered as a candidate for admission to the practice of law in the state of Ohio. In addition, Dr. Hayes submitted a character questionnaire, [Questionnaire] dated July 9, 1993. (State's Exhibits [St. Exs.] 15 and 16)

Among the general requirements for admission to the practice of law in Ohio, an applicant must demonstrate that he or she possesses the requisite character, fitness and moral qualifications. The determination of whether an applicant possesses these qualifications is made by a local bar association's admissions committee. In making its determination, the local admissions committee utilizes personal interviews, a report from the National Conference of Bar Examiners, and a detailed questionnaire that is completed by the applicant. (St. Ex. 16 at 1)

If the local bar association's admissions committee determines it cannot approve an applicant's character or moral fitness to practice law, an applicant may then appeal to the Board of Commissioners on Character and Fitness and, if necessary, to the Supreme Court of Ohio. (St. Ex. 16 at 1)

2. In the Questionnaire, Dr. Hayes indicated, among other things, that he had graduated from the Ohio College of Podiatric Medicine in June 1982 and that he held podiatry licenses in Ohio and Pennsylvania. Dr. Hayes indicated, concerning his then-current employment, that he was "[c]urrently disabled on account of back injury." In his employment history, however, Dr. Hayes listed employment with the Parma Podiatry Clinic from December 1982 to the present, although he also indicated his reason for leaving was "[d]isabled 7/90." Similarly, Dr. Hayes listed employment with Madison Podiatry from March 1987 to the present, although he again indicated his reason for leaving was "[d]isabled 7/90." (St. Ex. 16 at 8-12)

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Dr. Hayes further stated in the Questionnaire that, in April 1989, he had been disabled due to a back injury he suffered in an automobile accident. Dr. Hayes indicated that he had been struck by a drunk driver and had suffered head trauma and post-concussion syndrome. Dr. Hayes also indicated that he had been treated for nervousness and panic attacks as a result of the automobile accident, but had been asymptomatic since June 1989. (St. Ex. 16 at 8-12)

In August 1988, Dr. Hayes enrolled as a law student at the University of Akron School of Law. Dr. Hayes transferred to the evening division in August 1990. (St. Ex. 16 at 8)

3. Dr. Hayes indicated in the Questionnaire that he had been involved in 34 civil court actions, including malpractice actions and delinquent debts. In addition, Dr. Hayes indicated that on June 8, 1988, he had been charged with disturbance of the peace, which was later dismissed. Moreover, Dr. Hayes indicated that on September 18, 1991, he had been found in contempt of court by the Stark County Court of Common Pleas and fined \$2,500. Finally, Dr. Hayes answered "Yes" to a question that asked, "To your knowledge, has your conduct ever been questioned with reference to the unauthorized practice of law?" With regard to that answer, Dr. Hayes stated that he had "attempted to represent [his] corporation [in a civil action] and was told by the judge that this was not permitted because it would amount to the practice of law. [Dr. Hayes] was merely protecting [his] interests as the sole shareholder and officer but withdrew and hired an attorney to represent the corporation at the judge's request." (St. Ex. 16 at 15-20 and Questionnaire Supplement)
4. In its report dated March 7, 1994, the Joint Committee on Bar Admissions of the Cleveland Bar Association and the Cuyahoga Bar Association [Joint Committee] recommended that Dr. Hayes' application for admission to the practice of law in Ohio be disapproved. The Joint Committee based its recommendation on the following findings:
 - Dr. Hayes had committed an act constituting the unauthorized practice of law in that he had "[a]ttempted to represent [a] corporation in defense of a lawsuit."
 - Dr. Hayes had "failed to provide full, and accurate information concerning his past conduct."
 - Dr. Hayes had "a past record of neglect of financial responsibilities."
 - Dr. Hayes had neglected his professional obligations in that he "has been sued and has settled numerous medical malpractice cases arising out of his podiatry practice."

- Dr. Hayes had violated an order of a court in that he was “held in contempt by Judge Haas of [the] Stark County Court of Common Pleas.”

The Joint Committee did *not* find that Dr. Hayes: had committed or been convicted of a crime; had made any “false statement, including omissions”; or had committed “[a]cts involving dishonesty, fraud, deceit, or misrepresentation.” Those sections were left blank on the Joint Committee’s report. (St. Ex. 23)

The Joint Committee notified Dr. Hayes of its decision by letter dated March 7, 1994. The letter informed Dr. Hayes of his appeal rights and further advised him that in any appeal he would have the burden of proving, by clear and convincing evidence, that he possessed the requisite character and moral fitness for admission to the practice of law. (St. Ex. 24)

5. Dr. Hayes appealed the decision of the Joint Committee to the Appeals Subcommittee of the Joint Admissions Committee of the Cleveland Bar Association and the Cuyahoga County Bar Association [Appeals Subcommittee]. The Appeals Subcommittee disapproved Dr. Hayes’ application on April 29, 1994. (St. Ex. 26 at 6)
6. Dr. Hayes appealed the decision of the Appeals Subcommittee to the Board of Commissioners on Character and Fitness of the Supreme Court of Ohio [Board of Commissioners], which appointed a three-member panel [Panel] to hear the matter. The hearing before the Panel took place on September 19, 1994, and November 30, 1995. Dr. Hayes was represented by counsel and presented his testimony and the testimony of five other witnesses to attest to his character and fitness to practice law. The Bar Association presented five witnesses. Testimony was presented both for and against granting Dr. Hayes’ application for admission to the bar. Dr. Hayes’ testimony before the Panel was made under oath. (St. Ex. 26 at 6, 12, and 25; Board Exhibits E and H)
7. At the conclusion of the hearing, the Panel issued a 29 page Report and Recommendation that was filed with the Board of Commissioners on January 24, 1997. After summarizing the evidence presented during the hearing, the Panel specified nine conclusions concerning Dr. Hayes’ fitness to sit for the Ohio Bar examination. The first four are relevant to the present matter. The Panel concluded that:
 - Dr. Hayes “is not truthful;”
 - Dr. Hayes “has repeatedly lied under oath;”
 - Dr. Hayes “lied to each group reviewing him including this Panel, the Appeals Subcommittee and the interviewers of the Joint Admissions Committee of the Cleveland/Cuyahoga County Bar Association, as well as in each deposition or transcript introduced into evidence at the panel hearing;” and

- Dr. Hayes “purposefully omitted relevant information from his Bar Application.”

Based upon its nine conclusions, the Panel recommended “that Dr. Mark Hayes never be allowed to sit for the Ohio Bar Examination.” The Panel indicated that its conclusions had been “[b]ased on the evidence placed before it, including the documents and testimony, and after observing the demeanor of the Applicant and the other witnesses.” (St. Ex. 26 at 34)

8. Among the evidence adduced at the Panel hearing was the following:

- Dr. Hayes had been involved in a case styled *Lombardi v. Sutter Corporation*, in the Stark County Court of Common Pleas. Dr. Hayes was a witness in that case who was to be deposed by an attorney, Joseph Feltes, who represented the Sutter Corporation. Dr. Hayes failed to appear for his deposition and, when he subsequently did appear, he failed to respond to appropriate questions. The Court held Dr. Hayes in contempt and rendered a monetary judgment against him. (St. Ex. 26 at 15)

In order to collect the judgment, Attorney Feltes took the deposition of Dr. Hayes. In the deposition, Dr. Hayes, who was under oath, was asked the following questions by Mr. Feltes:

Q. Who is Susan Haire?

A. I don't know.

After additional questioning, Dr. Hayes admitted that Susan Haire is the person he was living with. Moreover, Dr. Hayes' Application indicated that he had known Ms. Haire for 22 years. In addition, Dr. Hayes was evasive in his answers to questions concerning his rent, his car payments, and his tuition. (St. Ex. 16 at 17; St. Ex. 26 at 18)

When asked by a member of the Panel whether his answers were untruthful, Dr. Hayes responded as follows:

A. It's not untruthful. Its simply an evasive answer, that's all, because the person who was asking it was not asking for proper purposes. If he is unethical, I have the right to answer him untruthfully, not only do I have a right, I have a duty to oppose him. Are you aware of that Sir?

Q. No, I'm not aware of that.

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- A. Then you should read the Nuremberg, you should read Geneva and Hague, we signed onto those agreements. Its federal law.

(St. Ex. 26 at 19) Responding to additional questions regarding his truthfulness in the deposition, Dr. Hayes told the Panel that even though he had been under oath, he had had no duty to tell the truth and had a duty, arising from the Nuremberg hearings and the Hague, to oppose Attorney Feltes. (St. Ex. 26 at 22)

- The Panel stated that Dr. Hayes was evasive in responding to questions concerning the management of his clinics. The Panel said that Dr. Hayes “could not remember how often he went to the clinic, whether people were there, where he saw patients, whether anyone told him about [two floods that had separately destroyed records at two of Dr. Hayes’ clinics], [or] whether he was even in the country then * * *.”
- The Panel stated that Dr. Hayes was vague about the number of credit cards he had defaulted on and was vague about his finances in general. The Panel indicated that Dr. Hayes was particularly vague regarding his participation in various clinics, who worked at those clinics, and whether any taxes were due. The Panel indicated that

Dr. Hayes first stated that Sue Haire had no position with his companies. It was then pointed out that she had responded to an NCBE request as the controller of Parma Podiatry Clinic. Dr. Hayes then stated she had also worked for the North Abbe Podiatry Clinic. He said she managed them but was not an employee of the corporation and stated that she could have been paid through another corporation for her services.

(St. Ex. 26 at 21-24)

- The Panel stated that “Application Questions 13(d) (credit card revocations) and 13(e) (debts 90 days delinquent) were answered affirmatively but no particulars were revealed, and the applicant was requested at the conclusion of testimony to provide that information to the panel.” (St. Ex. 26 at 10)

Nevertheless, the Panel stated that “Dr. Hayes never provided this Panel a full picture of his debts, nor did Dr. Hayes give full, complete and accurate information about who worked at his clinics.” (St. Ex. 26 at 23)

9. On or about January 24, 1997, the Board of Commissioners, by unanimous vote, adopted the Panel’s report and recommended that Dr. Hayes’ application for admission to the practice of law be disapproved and that he not be permitted to reapply. (St. Ex. 26 at 5)

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10. On February 18, 1998, the Supreme Court of Ohio adopted the findings of fact, conclusions and recommendations of the Board of Commissioners and stated that Dr. Hayes was unfit to practice law. The Court disapproved Dr. Hayes' application to register as a candidate for admission to the Ohio bar, and ordered that he never be admitted to the practice of law in Ohio. (St. Ex. 26 at 2-4; St. Ex. 27)

LEGAL ISSUES

Dr. Hayes argued through his counsel, Mr. Recker, that his substantive and procedural due process rights would be violated if the Board bases an action against his podiatry license on the underlying Supreme Court action. Mr. Recker argued that the Supreme Court's action was based on a finding that Dr. Hayes had failed to meet his burden of proving that he possessed the necessary character and fitness to sit for the Ohio bar, and that the Supreme Court had had no burden of proof. Mr. Recker further argued that Dr. Hayes had never been accused of dishonesty in the underlying action, and that at no time during the underlying proceedings had he been given the opportunity to defend against such charges. Mr. Recker noted that the Joint Committee, which had been the first authority to recommend denial of Dr. Hayes' request to sit for the Ohio bar, did not find that Dr. Hayes had committed a crime; had made false statements, including omissions; or had committed acts involving dishonesty, deceit, fraud or misrepresentation. Accordingly, Mr. Recker argued that Dr. Hayes had not had any reason to defend against such charges later in that process.

Mr. Recker further argued that the Report and Recommendation of the Panel is a summary of conclusory opinions and findings of fact, and that there was no transcript or evidence created upon which Dr. Hayes could base an appeal. Accordingly, Mr. Recker argued that it would be unfair and would violate Dr. Hayes' due process rights for the Board to base an action upon this document.

The State argued in response that the underlying matter had been extensively litigated. The State further argued that Dr. Hayes had been present throughout the underlying proceedings, had been represented by counsel, and had testified and presented witnesses on his behalf to the Panel. Moreover, the State argued that the Board may base an action upon findings of fact which were ultimately adopted by the Supreme Court of Ohio.

Based upon the arguments of the respective parties and a review of the documents presented as evidence, it is found that the Respondent's arguments are not persuasive. It is evident that Dr. Hayes' truthfulness was an issue in the Panel's hearing, and that Dr. Hayes had had an opportunity to defend himself concerning that issue. Further, the fact that the Supreme Court did not find that Dr. Hayes had committed acts constituting perjury or falsification does not prevent this Board from making such a determination based upon the acts underlying the Supreme Court's findings. Moreover, the Board may reasonably base an action upon findings made by the Supreme Court of Ohio, which is the ultimate authority of law in this state.

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FINDINGS OF FACT

On February 18, 1998, the Supreme Court of Ohio issued an Order which adopted the findings of fact, conclusions and recommendation of its Board of Commissioners on Character and Fitness; disapproved the application of Mark W. Hayes, D.P.M., to register as an applicant for admission to the bar of Ohio; and ordered that Dr. Hayes never be admitted to the practice of law in Ohio. The Supreme Court's Order was based in part on the following findings of fact of its Board of Commissioners:

1. Dr. Hayes "is not truthful";
2. Dr. Hayes "has repeatedly lied under oath";
3. Dr. Hayes "lied to each group reviewing him including this Panel, the Appeals Subcommittee and the interviewers of the Joint Admissions Committee of the Cleveland/Cuyahoga County Bar Association, as well as in each deposition or transcript introduced into evidence at the panel hearing"; and
4. Dr. Hayes "purposefully omitted relevant information from his Bar Application."

Dr. Hayes' testimony before the Panel was made under oath.

CONCLUSIONS OF LAW

1. The acts, conduct, and/or omissions of Mark W. Hayes, D.P.M., underlying the findings adopted by the Supreme Court of Ohio, as set forth in the Findings of Fact, above, individually and/or collectively, constitute "publishing a false, fraudulent, deceptive, or misleading statement," as that clause is used in Section 4731.22(B)(5), Ohio Revised Code.
2. The acts, conduct, and/or omissions of Dr. Hayes underlying the findings adopted by the Supreme Court of Ohio, as set forth in the Findings of Fact, above, individually and/or collectively, constitute "[c]ommission of an act that constitutes a felony in this state regardless of the jurisdiction in which the act was committed," as that clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: Section 2921.11, Ohio Revised Code, Perjury, a felony of the third degree. Section 2921.11, Ohio Revised Code, provides, in part, as follows:
 - (A) No person, in any official proceeding, shall knowingly make a false statement under oath or affirmation, or knowingly

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swear or affirm the truth of a false statement previously made, when either statement is material.

- (B) A falsification is material, regardless of its admissibility in evidence, if it can affect the course or outcome of the proceeding. * * *

R.C. 2921.11 The evidence indicates that, while under oath, Dr. Hayes provided the Panel with evasive and conflicting testimony concerning his podiatry clinics and his credit status. Dr. Hayes' ability to manage his financial affairs was a material issue in the Panel's determination whether to recommend approval of Dr. Hayes' application to register for admission to the bar of Ohio. Accordingly, the evidence supports a conclusion that Dr. Hayes committed acts that would constitute perjury in his testimony before the Panel.

3. The acts, conduct, and/or omissions of Dr. Hayes underlying the findings adopted by the Supreme Court of Ohio, as set forth in the Findings of Fact, above, individually and/or collectively, constitute "[c]ommission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act involves moral turpitude," as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13, Ohio Revised Code, Falsification.

Section 2921.13, Ohio Revised Code, has been amended numerous times; nevertheless, it has consistently stated, since its inception in 1974, that it is a misdemeanor for a person to knowingly make a false statement when such a statement is made in any official proceeding. The Supreme Court's finding that Dr. Hayes had lied to numerous groups reviewing his Application, including the Panel of the Board of Commissioners, supports a conclusion that Dr. Hayes' conduct violated this statute, as does his omission of information from his Application. Moreover, under all of the circumstances of this case, which included lying under oath before the Panel, the evidence is sufficient to conclude that such conduct involved moral turpitude.

PROPOSED ORDER

It is hereby ORDERED that:

1. The certificate of Mark W. Hayes, D.P.M., to practice podiatric medicine and surgery in the State of Ohio shall be SUSPENDED for an indefinite period of time, but not less than 90 days.
2. The State Medical Board shall not consider reinstatement of Dr. Hayes's certificate to

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practice unless all of the following minimum requirements have been met:

- a. Dr. Hayes shall submit an application for reinstatement, accompanied by appropriate fees.
 - b. Upon submission of his application for reinstatement, Dr. Hayes shall provide acceptable documentation of successful completion of a course or courses dealing with personal ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the biennial registration period(s) in which they are completed.
 - c. In the event that Dr. Hayes has not been engaged in the active practice of podiatric medicine and surgery for a period in excess of two years prior to application for reinstatement, the Board may exercise its discretion under Section 4731.222, Ohio Revised Code, to require additional evidence of his fitness to resume practice.
3. Upon reinstatement, Dr. Hayes's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least five years:
- a. Dr. Hayes shall not request modification of the terms, conditions, or limitations of probation for at least one year after imposition of these probationary terms, conditions, and limitations.
 - b. Dr. Hayes shall obey all federal, state, and local laws, and all rules governing the practice of podiatric medicine in Ohio.
 - c. Dr. Hayes shall appear in person for interviews before the full Board or its designated representative within three months of the date in which probation becomes effective, at three month intervals thereafter, and upon his request for termination of the probationary period, or as otherwise requested by the Board.

If an appearance is missed or is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled. Although the Board will normally give him written notification of scheduled appearances, it is Dr. Hayes's responsibility to know when personal appearances will occur. If he does not receive written notification from the Board by the end of the month in which the appearance should have occurred, Dr. Hayes shall immediately submit to the Board a written request to be notified of his next scheduled appearance.

- d. Dr. Hayes shall submit quarterly declarations under penalty of Board disciplinary action or criminal prosecution, stating whether there has been compliance with all

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the conditions of probation. The first quarterly declaration must be received in the Board's offices on the first day of the third month following the month in which probation becomes effective, provided that if the effective date is on or after the 16th day of the month, the first quarterly declaration must be received in the Board's offices on the first day of the fourth month following. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.

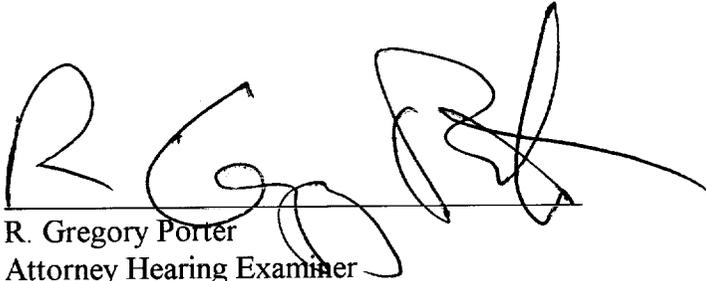
- e. At the time of submission of each renewal application for each biennial registration period occurring during the period of probation, Dr. Hayes shall submit acceptable documentation of Category I Continuing Medical Education credits completed. At least five hours of such C.M.E. for each registration period, to be approved in advance by the Board or its designee, shall relate to personal or professional ethics.
 - f. Within 30 days of the effective date of this Order, Dr. Hayes shall provide a copy of this Order to all employers or entities with which he is under contract to provide podiatric services or is receiving training, and the Chief of Staff at each hospital where Dr. Hayes has privileges or appointments. Further, Dr. Hayes shall provide a copy of this Order to all employers or entities with which he contracts to provide podiatric services, or applies for or receives training, and the Chief of Staff at each hospital where Dr. Hayes applies for or obtains privileges or appointments.
 - g. In the event that Dr. Hayes should leave Ohio for three consecutive months, or reside or practice outside the State, Dr. Hayes must notify the Board in writing of the dates of departure and return. Periods of time spent outside Ohio will not apply to the reduction of this probationary period, unless otherwise determined by motion of the Board in instances where the Board can be assured that probationary monitoring is otherwise being performed.
 - h. If Dr. Hayes violates probation in any respect, and is so notified of that deficiency in writing, such period(s) of noncompliance will not apply to the reduction of the probationary period.
 - i. If Dr. Hayes violates probation in any respect, the Board, after giving him notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of his certificate.
4. Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Hayes's certificate will be fully restored.

This Order shall become effective 30 days from the date of mailing of notification of approval by

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the State Medical Board of Ohio. In the 30 day interim, Dr. Hayes shall not undertake the care of any patient not already under his care.



R. Gregory Porter
Attorney Hearing Examiner



State Medical Board of Ohio

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EXCERPT FROM THE DRAFT MINUTES OF FEBRUARY 10, 1999

REPORTS AND RECOMMENDATIONS

Dr. Steinbergh announced that the Board would now consider the findings and orders appearing on the Board's agenda. The Board has been unable to confirm service of the report and recommendation concerning Bharesh Dedhia, M.D. That matter will therefore not be considered this month.

Dr. Steinbergh asked whether each member of the Board had received, read, and considered the hearing record, the proposed findings, conclusions, and order, and any objections filed in the matter of Mark W. Hayes, D.P.M. A roll call was taken:

ROLL CALL:	Mr. Albert	- aye
	Dr. Bhati	- aye
	Dr. Heidt	- aye
	Dr. Somani	- aye
	Dr. Egner	- aye
	Mr. Browning	- aye
	Dr. Stienecker	- aye
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Dr. Steinbergh	- aye

Dr. Steinbergh 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. Bhati	- aye
	Dr. Heidt	- aye
	Dr. Somani	- aye
	Dr. Egner	- aye
	Mr. Browning	- aye
	Dr. Stienecker	- aye
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Dr. Steinbergh	- aye

In accordance with the provision in Section 4731.22(C)(1), Revised Code, specifying that no member of

the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of these matters.

Dr. Steinbergh 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 Report and Recommendations shall be maintained in the exhibits section of this Journal.

MARK W. HAYES, D.P.M.

Dr. Steinbergh directed the Board's attention to the matter of Mark W. Hayes, D.P.M. She advised that objections were filed to Hearing Examiner Porter's Report and Recommendation and were previously distributed to Board members.

DR. SOMANI MOVED TO APPROVE AND CONFIRM MR. PORTER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF MARK W. HAYES, D.P.M. DR. AGRESTA SECONDED THE MOTION.

Dr. Steinbergh stated that she would now entertain discussion in the above matter.

Dr. Stienecker stated that he would have to agree that the process that required three years on the part of the Bar Association to refuse Dr. Hayes sitting for the Board probably provided reasonable cause from their standpoint to deny him the right to sit for the Bar. The record shows that Dr. Hayes was argumentative, evasive, expressed intention to vengefully use the law, and he demonstrated a poor history of debt responsibility.

Dr. Stienecker referred to the Report and Recommendation, noting that it states that the Joint Committee on Bar Admissions "did not find that Dr. Hayes had committed or been convicted of a crime, had made any false statement, including omissions, or had committed acts involving dishonesty, fraud, deceit or misrepresentation." Those sections were left blank on the Joint Committee's report. (St. Ex. 23)"

Dr. Stienecker continued that thereafter the appeals committee of the Bar apparently took this to the Board of Commission on Character of the Supreme Court. It took fourteen months to convene and finish, and another fourteen months to report. From this the Board is left with a charge of publishing a false, deceptive and misleading statement, an act constituting a felony and a misdemeanor in the course of practice, involving moral turpitude. Dr. Stienecker stated that he doesn't recall that this was in the course of his practice of podiatry. If this, in fact, constituted a felony, it seems unusual that the Supreme Court would not have acted upon it. However, Dr. Stienecker also added that he understands that the Court does not have the authority to do that.

Dr. Stienecker stated that what was alluded to, but not really developed, in reference to this matter was the doctor's extensive malpractice history. Looking at that malpractice history, many of the cases were dismissed by the plaintiffs. There were questions of current competency, physical impairment, continuing education, etc., since he hadn't practiced since 1990. Those are the things relating to the Board's mandate. They were suggested, but not really pursued in the evidence and the questioning.

Dr. Stienecker stated that he is left with an individual with an impugned character. He may be an unsavory, vindictive, antagonistic, perhaps even perjurous, loose cannon to the legal profession, but Dr. Stienecker stated that he's not convinced that a 90-day suspension by the Board and an ethics course requirement is either necessary or sufficient. Dr. Stienecker stated that this is a situation where there is deep concern as to whether or not this man can practice podiatry. He would be inclined to remand this matter to the Secretary and Supervising Member to develop a citation on that basis.

Dr. Egner stated that she agrees completely with Dr. Stienecker, noting that there are a lot of red flags in this record. She can't find anything reassuring here. Dr. Hayes did not attend his hearing. There was no testimony from him. The malpractice cases were mentioned but not looked into. She is unsure as to whether it should be sent back to the Secretary and Supervising Member or to the Hearing Examiner, but she doesn't feel that the Board can act on what it has in front of it today.

Dr. Somani stated that he has one major concern in this case. This is a gentleman who has been practicing medicine. At the same time he wants to become an attorney. He applies and during the course of that application, there is a lot of evidence that he hasn't spoken the truth. There is no evidence as to whether or not he is a good podiatrist. That's not the question here. The real question is whether or not he has the appropriate moral character to continue practicing as a podiatrist. The evidence before the Board is that the Supreme Court decided that Dr. Hayes lied. Therefore it becomes a case to judge whether he should be allowed to continue to practice. Dr. Somani agreed that the Board may want to remand this matter to decide whether or not it is appropriate, but there is enough evidence that Dr. Hayes does not have the moral character that the Board wants from its physicians.

Dr. Buchan agreed with Dr. Somani, stating that there is evidence here that speaks to the record. He reviewed the case thoroughly and felt that, of these 34 civil actions, two were business issues, one was a personal injury, two were collections filed by the bank. That leaves 29 that are malpractice issues. Unquestionably Dr. Hayes lied under oath. He was not truthful. Dr. Buchan referred to the Order written by Chief Justice Thomas J. Moyer, who suggests that Dr. Hayes is never to be admitted to the practice of law in the state of Ohio. That is strong and very harsh language. Dr. Buchan stated that he fails to see why the practice of medicine should hold itself to any different standard than the practice of law. Based upon that, he is in total agreement with the Findings of Fact in this case, and feels that a revocation is reasonable and in order.

Dr. Heidt stated that this is a very unique case. There was no specific misdemeanor, no felony. There were

no specific problems in the practice that the Board can see. There's nothing here that says that the Board can revoke because of what it knows about his practice.

DR. HEIDT MOVED TO REFER THE MATTER BACK TO THE SECRETARY AND SUPERVISING MEMBER FOR A FULL INVESTIGATION TO SEE IF THERE WERE ANY PROBLEMS IN THE PRACTICE.

Dr. Steinbergh asked whether there is further discussion.

Mr. Bumgarner stated that what the Board has before it is a matter that must be brought to some resolution. What he is hearing from the Board is that it may want to dismiss this matter without prejudice. The Board can do that, but it can't stop a hearing process in the middle and refer it back for investigation of something not originally charged. The Board can remand this matter back to the hearing officers to take additional evidence, but that evidence would have to be in line with the charges originally brought. No charges have been brought with respect to the adequacy of the licensee's practice. The Board already has an issue before it that has to do with the person's having allegedly made statements or committed actions in violation of the Medical Practices Act. The Board can go forward on the original charges and come to a resolution, it can refer the charges back to the Hearing Examiner, or it can dismiss the charges with or without prejudice. If dismissed "with prejudice", the matter will never come back to the Board on the current charges. If the Board is really saying that it doesn't find an action based on the charges in front of it, it ought to dismiss this action. The action of investigating this person's capability and competency to practice podiatry within the minimal standards is a wholly different question that must be part of another complaint and another case. That's not the matter before the Board now.

Dr. Steinbergh stated that she honestly finds that, ethically, there are enough grounds to permanently revoke this physician's license.

Dr. Agresta stated that Dr. Hayes was obviously given the opportunity to come to the hearing to present his case, but he didn't show up.

Ms. Strait stated that Dr. Hayes appeared through counsel.

Dr. Agresta stated that if the Board remands the matter to get more information, Dr. Hayes probably won't come. He added that, after listening to the discussion, he sees no reason to prolong the agony. He would rather err in saying that the license should be revoked if he is going to err in this case. The Bar did something equivalent to revocation in this case.

DR. HEIDT WITHDREW HIS MOTION.

Dr. Heidt stated that he doesn't feel that there is enough information to revoke.

Dr. Somani stated that the Board is not discussing the physician's ability to practice, it's talking about the moral and ethical standards that physicians must maintain. That is the issue. There is evidence that Dr. Hayes lied and made misstatements. Chief Justice Moyer's strong opinion indicates that.

Dr. Egner stated that if the Board looks at the issue of publishing false, deceptive and misleading statements, there is evidence that Dr. Hayes did those things. Revocation is within the guidelines for this, and she would agree to revocation.

DR. BUCHAN MOVED TO AMEND THE PROPOSED ORDER IN THE MATTER OF MARK W. HAYES, D.P.M., TO IMPOSE THE PERMANENT REVOCATION OF HIS LICENSE, EFFECTIVE IMMEDIATELY. DR. AGRESTA SECONDED THE MOTION.

Dr. Heidt stated that he will agree that Dr. Hayes is an unsavory guy. He just doesn't see enough here to support revocation. He needs more information.

Dr. Buchan stated that it didn't surprise him when the Chief Justice spoke so harshly in his order that someone of this sort, of this moral character or lack thereof, just might be involved in 34 civil action cases. Because of that, he's done with this fellow and he thinks the Board needs to vote for revocation.

Dr. Heidt stated that he thinks the Board needs more information. If the Board needs a complaint to investigate his practice, he will submit one.

A vote was taken on Dr. Buchan's motion to amend:

VOTE:	Mr. Albert	- abstain
	Dr. Bhati	- aye
	Dr. Heidt	- nay
	Dr. Somani	- aye
	Dr. Egner	- aye
	Mr. Browning	- nay
	Dr. Stienecker	- nay
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Dr. Steinbergh	- aye

The motion carried.

DR. BUCHAN MOVED TO APPROVE AND CONFIRM MR. PORTER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER, AS AMENDED, IN THE MATTER OF MARK W. HAYES, D.P.M. DR. BHATI SECONDED THE MOTION.

EXCERPT FROM THE DRAFT MINUTES OF JANUARY 13, 1999
IN THE MATTER OF MARK W. HAYES, D.P.M.

VOTE:	Mr. Albert	- abstain
	Dr. Bhati	- aye
	Dr. Heidt	- nay
	Dr. Somani	- aye
	Dr. Egner	- aye
	Mr. Browning	- nay
	Dr. Stienecker	- nay
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Dr. Steinbergh	- aye

The motion carried.



State Medical Board of Ohio

June 10, 1998

Mark W. Hayes, D.P.M.
19876 Henry Road
Fairview Park, Ohio 44126

Dear Doctor Hayes:

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

- (A) On or about February 18, 1998, the Supreme Court of Ohio issued an Order which disapproved your application for admission to the practice of law in Ohio and precluded you from ever practicing law in Ohio. This Order was based in part on findings of fact that:
- 1) you were not truthful;
 - 2) you repeatedly lied under oath;
 - 3) you lied to each group reviewing you, including the Panel, the Appeals Subcommittee, and the interviewers of the Joint Admissions Committee of the Cleveland/Cuyahoga County Bar Association, as well as in each deposition or transcript introduced into evidence at the Panel hearing; and
 - 4) you purposefully omitted relevant information from your Bar application.

Copies of the Order and the Findings of Fact and Recommendation of the Board of Commissioners on Character and Fitness of the Supreme Court of Ohio are attached hereto and fully incorporated herein.

The acts, conduct, and/or omissions underlying findings 1-4, as alleged in paragraph (A) above, individually and/or collectively, constitute "publishing a false, fraudulent, deceptive, or misleading statement," as that clause is used in Section 4731.22(B)(5), Ohio Revised Code.

Mailed 6/10/98

Further, the acts, conduct, and/or omissions underlying findings 1-4, as alleged in paragraph (A) above, individually and/or collectively, constitute “[c]ommission of an act that constitutes a felony in this state regardless of the jurisdiction in which the act was committed,” as that clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: Section 2921.11, Ohio Revised Code, Perjury.

Further, the acts, conduct, and/or omissions underlying findings 1-4, as alleged in paragraph (A) above, individually and/or collectively, constitute “[c]ommission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act involves moral turpitude,” as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13, Ohio Revised Code, Falsification.

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

You are further advised that you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before 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 (30) days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, suspend, refuse to register or reinstate your certificate to practice podiatry or to reprimand or place you on probation.

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Anand G. Garg, M.D.
Secretary

AGG/bjs
Enclosures

CERTIFIED MAIL #P 152 983 071
RETURN RECEIPT REQUESTED

COMPUTER
The Supreme Court of Ohio

FILED

FEB 18 1998

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

87-128

1998 Term

In re Application of
Mark W. Hayes.

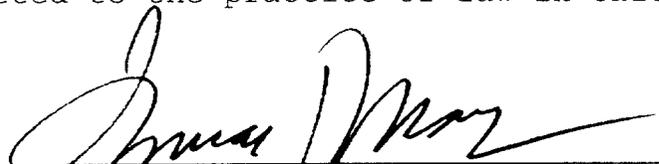
Case No. 97-407

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ON REPORT BY THE BOARD OF
COMMISSIONERS ON CHARACTER
AND FITNESS OF THE SUPREME
COURT, No. 112

O R D E R

On February 21, 1997, the Board of Commissioners on Character and Fitness filed its report in the Office of the Clerk of this Court recommending that applicant, Mark W. Hayes, be disapproved and that he not be permitted to reapply for admission to the practice of law in Ohio. Mark W. Hayes filed objections to the Board's report. Upon consideration thereof,

IT IS ORDERED by the Court that, consistent with the opinion rendered herein, Mark W. Hayes' application for admission to the practice of law in Ohio be disapproved, and that he is never to be admitted to the practice of law in Ohio.


THOMAS J. MOYER
Chief Justice

I HEREBY CERTIFY this document to
be a true and accurate copy of the
original document on file with the
Clerk of the Supreme Court of Ohio.

MARCIA J. MENGEL, Clerk
by Jo Ella Jones Deputy,
on this 5th day of May, 1998.

and to follow the dictates of his physician. As the board found, respondent's failure to do so was the direct cause of the majority of these disciplinary violations. Respondent's violation of DR 2-107(A)(2) occurred after respondent's condition was under control. Therefore, respondent is hereby suspended from the practice of law for two years. Costs taxed to respondent.

Judgment accordingly.

MOYER, C.J., DOUGLAS, RESNICK, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

F. E. SWEENEY, J., dissents and would adopt the recommendation of the board.

IN RE APPLICATION OF HAYES

[Cite as *In re Application of Hayes* (1998), 81 Ohio St.3d 88.]

Attorneys at law—Application to register as candidate for admission to the practice of law—Application denied when applicant found to be unfit for the practice of law—Applicant forever precluded from taking the bar examination.

(No. 97-407—Submitted December 2, 1997—Decided February 18, 1998.)

ON REPORT by the Board of Commissioners on Character
and Fitness of the Supreme Court, No. 112.

On July 28, 1993, Mark W. Hayes ("applicant") filed an application to register as a candidate for admission to the bar of Ohio. Applicant was interviewed in October 1993, and the Joint Committee on Bar Admissions of the Cleveland and Cuyahoga Bar Associations decided not to recommend his admission to the practice of law. Applicant appealed to the Appeals Subcommittee of the Bar Associations' Committee, which confirmed the original decision to disapprove the application. Applicant then appealed to the Board of Commissioners on Character and Fitness of the Supreme Court ("board"), which appointed a three-person panel to hear the matter.

After hearings in September 1994 and November 1995, the panel found that applicant was not truthful, that he repeatedly lied under oath, that he lied to each group interviewing him, including the board's panel, as well as in depositions and transcripts introduced into evidence, and that he purposefully omitted relevant

information from his Bar Application. Further the panel found that applicant saw himself as the focus of a conspiracy by the Sutter Corporation, attorneys, and court reporters and took retaliatory action against those he perceived as his enemies, that he has no sense of obligation to the judicial system or those connected with it, that he does not handle his finances in conformity with standards required of attorneys, that he has demonstrated a willingness to subvert the judicial process in ways that cannot be tolerated, and that his attitudes, which are pervasive and ingrained, are wholly inimical to the practice of law. The panel concluded that applicant was unfit for the practice of law and recommended that he never be allowed to sit for the Ohio Bar Examination. The board adopted the findings, conclusions, and recommendation of the panel.

Warren Rosman and Robert Archibald, for the Cleveland and Cuyahoga County Bar Associations.

Michael E. Banta, for applicant.

Per Curiam. We have thoroughly reviewed the record. The findings of fact, conclusions, and recommendation of the board have ample support, and we hereby adopt them. Applicant is unfit to practice law, and his application to register as a candidate for admission to the bar of Ohio is disapproved. Applicant is never to be admitted to the practice of law in Ohio.

Judgment accordingly.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

KEY, APPELLANT, v. MITCHELL, WARDEN, APPELLEE.

[Cite as *Key v. Mitchell* (1998), 81 Ohio St.3d 89.]

Appellate procedure—Appeal dismissed when not properly perfected pursuant to S.Ct.Proc.R. II(2)(A)(1).

(No. 97-1836—Submitted January 21, 1998—Decided February 18, 1998.)

APPEAL from the Court of Appeals for Trumbull County, No. 96-T-5548.

In 1986, the Summit County Court of Common Pleas convicted appellant, Phillip R. Key, of complicity to commit aggravated robbery and sentenced him to

The Supreme Court of Ohio

ORIGINAL

I HEREBY CERTIFY this document to be a true and accurate copy of the original document on file with the Clerk of the Supreme Court of Ohio.

BEFORE THE BOARD OF COMMISSIONERS

ON CHARACTER AND FITNESS OF

THE SUPREME COURT OF OHIO

MARCIA J. MENGEL, Clerk

by Jo Ella Jones, Deputy,

on the 5th day of May, 1998

In re: Application of
Mark W. Hayes

Case No. 112

97-0407

FINDINGS OF FACT AND
RECOMMENDATION OF THE BOARD OF
COMMISSIONERS ON CHARACTER AND
FITNESS OF THE SUPREME COURT OF
OHIO

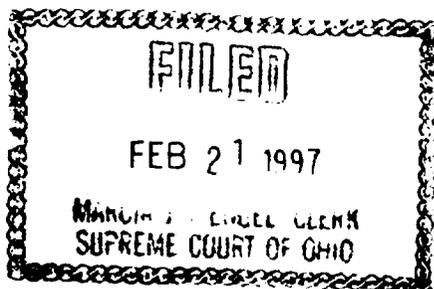
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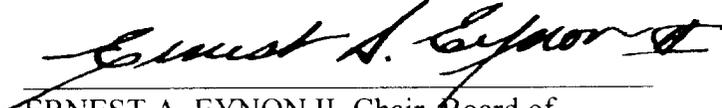
This matter is before the Board of Commissioners on Character and Fitness pursuant to the appeal filed by the applicant, Mark W. Hayes, in accordance with Gov. Bar R. I, Sec. 12(B).

A duly appointed panel of three Commissioners on Character and Fitness was impanelled for the purpose of hearing testimony and receiving evidence in this matter. The Panel filed its report with the Board on January 24, 1997.

Pursuant to Gov. Bar R. I, Sec. 12(D), the Board of Commissioners on Character and Fitness of the Supreme Court of Ohio considered this matter on January 24, 1997. By unanimous vote, the Board adopts the panel report as attached, including its findings of fact. The panel report is attached hereto and made a part of the Board's report.

Therefore, the Board of Commissioners on Character and Fitness recommends that the applicant, Mark W. Hayes, be disapproved, and that he not be permitted to reapply for admission to the practice of law in Ohio.




ERNEST A. EYNON II, Chair, Board of
Commissioners on Character and Fitness
for the Supreme Court of Ohio

against Dr. Hayes entitled Ursic v. Hayes, Case No. CV 260447 in the Cuyahoga County Court of Common Pleas, which case had not been revealed on any filing by Dr. Hayes or by the NCBE Report. Mr. Jacobson sought to obtain a copy of the testimony of Dr. Hayes and Mr. Rosman was uncertain when the same would be available, and suggested that Mr. Jacobson contact the panel chairman. Subsequently Mr. Jacobson placed a phone call to Ernest Eynon, panel chair. Mr. Eynon advised Mr. Jacobson that the proceedings were confidential at present, that should an action be filed with the Supreme Court, the materials would then be made a public record; however, until that time, which might not occur, all matters involving the application including the existence of the proceedings were confidential.

During that conversation Mr. Jacobson indicated that he was uncomfortable testifying since the case he filed against Dr. Hayes was pending, and he indicated he did not feel it would be appropriate for him to be testifying in this case while actively litigating against Dr. Hayes on behalf of his client. Mr. Jacobson's thoughts were related in correspondence from the panel chair advising the other panel members and Warren Rosman and Michael Banta of the circumstances of the contact, and in which letter it was suggested that while perhaps pleadings from Mr. Jacobson's case could suffice to present the relevant facts, any decision to refrain from calling Mr. Jacobson as a witness was within the province of the bar association and the applicant.

The applicant then filed a motion to disqualify the panel because of such contact, and asserted that the applicant's right to confidentiality had been breached. The panel chair reviewed the motion and found that the contact resulted from the investigatory proceedings and that no prejudice was sustained by the Applicant as a result of Mr. Jacobson's contact with either Mr. Rosman or with Mr. Eynon, the panel denied the motion to recuse themselves.

FACTS

Patton Letter

On February 27, 1991 Joseph M. Patton, an attorney in North Olmsted, Ohio, wrote the Supreme Court a five page letter [attached hereto] discussing an incident he had with Dr. Mark Hayes who identified himself as a first year student at the University of Akron School of Law. Mr. Patton had written Dr. Hayes seeking payment of a bill of \$1,852.95 for work performed by a Michael Jerman for Dr. Hayes, and requested that Dr. Hayes contact him to discuss the matter.

Mr. Patton advised that Dr. Hayes called him on February 1, 1991 and after explaining his client's claim, Mr. Patton asked Dr. Hayes for his side of the story, which Mr. Patton characterized as a fusillade of denunciations, including calling him a thief and an idiot and accusing Mr. Patton of propounding a nuisance suit and acting in concert with his client to defraud Hayes. He indicated he would seek Rule 11 sanctions if any suit were ever brought, and under any circumstance Dr. Hayes stated he would make sure the litigation was protracted so that plaintiff and his counsel would be hurt by the lawsuit. Mr. Patton asked Dr. Hayes to put everything in writing so he could discuss it with his client, to which Dr. Hayes agreed, but then changed his mind and said that he would rather be sued as it would be good practice for him while he was in law school. Dr. Hayes then attempted to intimidate Mr. Patton by calling the transaction an adhesion contract, an illegal contract, and asserting a conspiracy and abuse of process.

Mr. Patton thereafter called his client who was not in and left a message, explaining some of the recent contact with Dr. Hayes and asking him to call. Within a half hour Dr. Hayes had called back and restarted the first conversation, indicating that he had recently won a

products liability suit in Lorain, Ohio and that he was going to use what he learned in that action to subvert the justice system in this action, and since he had been disabled from a golf cart accident, he had plenty of free time, and intended to "screw" Patton's client.

Forty minutes later Dr. Hayes again called Mr. Patton indicating he was really looking forward to the litigation and screwing his client, and hoped that Patton was handling the matter on a contingency fee so that he could be screwed too. After that conversation ten minutes went by before a fourth call, when Dr. Hayes started on an even greater tirade indicating that he had already contacted witnesses to testify against Mr. Patton's client. He said he was also going to "screw Jerman at work" by contacting his co-workers and supervisors claiming that he was moonlighting for Dr. Hayes while on their payroll. Hayes indicated he was "going to have some fun with the system while Jerman pays". Although Mr. Jerman felt that Hayes owed the \$2,000, since Patton was to be paid on an hourly basis, he decided not to pursue litigation, at least through Mr. Patton.

Application

Two years later Mark W. Hayes filed his Application on July 28, 1993, indicating that he was born in 1948 in Cleveland and received a B.S. in 1976 from Case Western Reserve University. He graduated from the Ohio College of Podiatric Medicine in Dayton in 1982. He attended a semester in 1988 at the University of Akron Law School and then in August 1990 entered the evening program, receiving his law degree December 18, 1993. He received an honorable discharge from the Army and holds podiatry licenses for Ohio and Pennsylvania.

Issues

The Application revealed a number of civil or administrative actions, criminal or quasi-criminal actions, citations for contempt of court, suits against a business in which he was

an owner, revoked credit cards, debts more than 90 days past due, and questions regarding the possible unauthorized practice of law. It also indicated that Dr. Hayes had been treated or counseled for mental or emotional or nervous disorders. These resulted from panic attacks and nervousness from a post concussion syndrome originating from an automobile accident for which according to Dr. Hayes, the treatment was successful and he had been asymptomatic since June, 1989.

Unauthorized Practice

The unauthorized practice of law issues arose when a corporation of which Dr. Hayes was the sole shareholder, North Abbe Podiatry, Inc. was sued by a patient (Mellott). Dr. Hayes was instructed by the judge that he could not represent his corporation, which he saw simply as protecting his interests as a sole shareholder, and he withdrew at the judge's request.

Failure to Provide Information

Application Questions 13(d) (credit card revocations) and 13 (e) (debts 90 days delinquent) were answered affirmatively but no particulars were revealed, and the applicant was requested at the conclusion of testimony to provide that information to the panel.

Civil Actions

The Application identified 34 civil actions, one misdemeanor, one civil contempt and a divorce. Of the 34 civil actions, Dr. Hayes filed two on claims involving business issues, and one for personal injury. Two actions were collections filed by banks on debts (one was paid and the other dismissed), and one was filed by a mortgagor on a house sold under V.A. loan assumption where the buyer defaulted before bringing the debt current and discharging it, thereby resulting in dismissal of the litigation. The other actions were malpractice suits, most of which were settled, with the payments at the filing of the application, totaling in excess of \$250,000.

Criminal Charge

A 1988 disturbing the peace charge was explained by Dr. Hayes who alleged he was thrown out of a bar for wearing tennis shoes. When the bouncer asked Dr. Hayes to leave, Dr. Hayes requested his cover charge of \$4.00 be returned and also he inquired why the other third of the patrons weren't being thrown out since they were wearing tennis shoes. He was arrested and released at the police station and the matter dismissed on his not guilty plea the following Monday.

Eviction Action

The eviction action was the result of an assignment of leased space from one of Dr. Hayes's podiatry practices to another medical practice; and that practice then defaulted under its lease. The matter was resolved by an agreed payment from the defaulting tenant.

Civil Contempt

Judge Haas of the Stark County Court of Common Pleas issued a civil contempt finding [attached] in the case of Lombardi vs. Sutter Biomedical. Dr. Hayes was the treating physician but was not originally sued. He refused to give professional opinions according to the information on his Application. Hayes appealed the contempt citation in the Lombardi case but since no transcript of proceedings was transmitted, the appeal was dismissed because of the presumption of regularity in the proceedings below. In that action Mr. and Mrs. Lombardi sued the Sutter corporation, alleging that the metatarsal joint implanted by Dr. Hayes failed and injured Mrs. Lombardi.

Admissions Committee Findings

The Joint Admissions Committee found that the applicant did not provide complete and accurate information either on his Application or in his presentations before it; and only as a

result of intense questioning did he ever concede the need to be, or would he even give the appearance of an effort to be, forthright. It found Dr. Hayes had a record of neglect of financial responsibilities, and found Dr. Hayes would use the legal system to create conflict, not resolve conflict, and that he would abuse the legal system in an attempt to punish those he disliked.

The Committee stated that Dr. Hayes was evasive in answering questions or in providing explanations, and that he consistently blamed others or impugned the integrity of individuals and their attorneys who opposed his views or had simply been on the other side of litigation with him. Upon each occasion that Dr. Hayes was reviewed by the Joint Admissions Committee, Dr. Hayes was never able to establish by clear and convincing evidence that he possessed present character and fitness to take the bar examination, resulting in his disapproval.

PANEL HEARING

Applicant's Case

All of the foregoing issues were the subject of inquiry by the Panel. The applicant presented his testimony and that of five other witnesses to attest to his character and fitness.

The first witness was Gary Banas, a lawyer retained by the insurance company that insured podiatrists, to defend an action brought against Dr. Hayes. He represented Dr. Hayes in only one case and the case was settled by the home office without any involvement of his that he could recall. Mr. Banas was not sure of the name of the insurance company that hired him, did not remember the name of the plaintiff in that case, and recalled only one meeting with Dr. Hayes. He recalled that the case was settled directly by the insurance company, but was unsure if any depositions were ever taken. He did not remember the name of the plaintiff's lawyer. He assumed the insurance company was properly able to settle the case directly, but had not reviewed his file nor was he sure that there is still a file in existence to review.

Attorney Glen W. Morse was next called. He had hired Mark Hayes as an expert witness in various cases, although Dr. Hayes never had to testify, as all cases were resolved short of a trial. He found Dr. Hayes to be smart, competent, and helpful in providing testimony, making it understandable and indicating appropriate research and familiarity with medical journals and texts. He testified that Dr. Hayes had an excellent memory, as demonstrated by his relation of facts and expert opinions, as well as in other aspects of dealing with him, and that his communication was clear and precise. He did review the Motion for Protective Order prepared by Dr. Hayes and filed in the Scott case [attached], and stated that if Dr. Hayes were to practice with him for a couple of years, "he won't do that kind of crap.... It's inappropriate in pleadings". He admitted that he had not been told of the law suits that Dr. Hayes had been a party to and knew nothing of Dr. Hayes's financial situation.

James Inman, the Interim Dean of the College of Business Administration at the University of Akron, was called to testify about the character of Mark Hayes. He roomed with Dr. Hayes on their trip to Russia sponsored by the University of Akron. Based upon that contact over those ten days he believed Dr. Hayes had present character and fitness.

Howard Lazar, a member of the Michigan Bar and Executive Director of the National Certification Board for Podiatric Surgeons, next testified. He found Dr. Hayes to be a very intelligent surgeon with a good reputation with whom he served on the Board of the American Council on Certified Podiatric Physicians and Surgeons. He also attempted to enlighten the Panel on the aspects of a schism in the podiatric medicine certification area. He related that the older podiatry association was out to get the younger podiatry association and its members and that the older association was "a bunch of good ol' boys who happened to put together an organization and grandfathered themselves in to determine who is going to practice and who is not going to practice and that is what they are all about."

Lazar believed that Dr. Hayes was being denied an opportunity to sit for the bar exam because of a question regarding his moral character raised by an attorney who defended the Sutter implant, and that in writing some pleadings on his own behalf Dr. Hayes made some injudicious comments about opposing counsel. He observed that Dr. Hayes had an excellent command of facts, skillfully applied his intelligence and memory, and could always properly and adequately respond to questions.

He believed that Dr. Hayes had present character and fitness to practice law. He admitted that he actually had been with Dr. Hayes for only two or three hours each spring during a seminar given over a several day period. "We just don't have that close a relationship." He was asked by Dr. Hayes to testify, but not told the nature of the hearing until the weekend before this hearing.

Daniel Solomon, M.D., is an anesthesiologist. He testified that he was familiar with Dr. Hayes and had known him for more than 15 years. He was also a business partner with Dr. Hayes in attempting to train personnel overseas. He believed Dr. Hayes had an admirable capacity for intuitive reasoning. Neither he nor others he knew ever found Dr. Hayes to be deficient in memory or incoherent or unclear in his speaking or thinking. He believed Dr. Hayes had the highest moral and ethical character and commented that Dr. Hayes had always repaid money he borrowed from him, but was not otherwise aware of his financial condition.

Dr. Hayes then testified. In addition to the factual information reported above, he testified that he had implanted 60 artificial Sutter LaPorta great toe implant devices, a silicon prosthetic or artificial joint, over two to three years. Within a few years after being implanted, they began to fail. He served as an expert witness in many cases, and also found that Dow joints did not fail so frequently. Early in this experience there was a deposition in a case for

a patient taken by attorney Joseph Feltes. Dr. Hayes believed an exhibit he had prepared was thereafter used by Feltes's client's expert in a text book that he wrote.

Hayes was thereafter subpoenaed to testify in the Lombardi case by attorney Feltes as a fact witness and treating physician. Dr. Hayes believed that Mr. Feltes kept insisting that Hayes give opinion testimony when his research was not complete. Hayes also claimed that since he was not called as an expert, he was not required to give opinion testimony. Hayes asserted that Feltes had ex parte communications with the court, causing the court improperly to find him in contempt for refusing to answer deposition questions. In addition he accused the court reporter, one Gary Prather, of doctoring transcripts in conjunction with Feltes. Judge Haas held Hayes in contempt and rendered judgment for monetary damages.

Thereafter judgment debtor collection efforts were undertaken in which Dr. Hayes testified that after he had been injured, he did not really work for a while and that what money he had was from loans from friends, from grants for investigating the Sutter implant, and insurance policy proceeds, as well as a worker's compensation \$20,000 lump sum award, which he stated he used to repay those from whom he had borrowed money. He also was the owner of four private podiatry practices but testified he did not remember or know what he received from the corporations, and also blamed some of the failure to be able to answer on a "flood", that supposedly destroyed his office records.

Although Feltes asked him during his deposition who was in charge of the various clinics, Hayes stated that Feltes "never bothered to be very specific, so he didn't ask who was clinically in charge, who was in charge of the business. So there really wasn't any way to answer his question if asked. I don't know what he was referring to, and I told him so." Hayes admitted that he told Feltes an automobile he had was "probably" provided by his corporation.

In a suit brought against Dr. Hayes, he interpleaded the Sutter Corporation for providing a defective device. He then filed a "New Third Party Complaint and Request for Leave Instanter" [attached] alleging claims against Joseph Feltes the attorney, which he determined was appropriate because after reading the ethics rules he felt "they applied to Mr. Feltes and all attorneys should avoid the appearance of impropriety, and if they are to be called as a witness in a case, they have to exclude themselves", and "furthermore, we all understand what the Fourteenth Amendment says about due process and an opportunity to be heard".

Dr. Hayes complained that Joe Feltes appeared to him to be a "ringleader" of those he saw as out to get him, because the insurance companies had hired Feltes to defend all Sutter implant Ohio malpractice actions, and the insurance companies were settling the claims over the objection of Hayes, which resulted in each suit against Hayes appearing on a national list of suits, which listing impacted his ability to obtain malpractice insurance. Hayes justified his pleadings as a result of the foregoing conspiracy.

Some of Hayes's pleadings are attached in which he alleges or refers to marital problems of Mr. Feltes. When asked to explain why he had done this he stated:

I had to do a complete investigation of Mr. Feltes because I knew that the United States government had signed on--if you read Hague and also Nuremberg, I had absolutely no duty to aid and abet an errant attorney in his unethical behavior.... I had no duty so I did investigate Mr. Feltes. I found he was a drug user. His family held an intervention for him. His colleagues knew he was a drug user. I found out he refused to be tested at the time of his intervention, and six months later he did submit to drug testing, after which the tracing could not be found, and I realized when you put that in a frame of reference along with his unethical behavior and having my deposition drawings published without credit and without my permission that I was dealing with a very unethical attorney and possibly a criminal.

Dr. Hayes testified to the Panel about what he called a flood at the North Abbe Clinic. He testified it had occurred when workers repairing the roof took off the old roof and didn't cover it over the weekend when it rained. The office had:

several inches of water in it, and this, of course, saturates the air a hundred percent so that humidity rises, and any bacteria that would normally be--bacteria, molds and things like that, that would normally be inhibited by a lack of moisture, suddenly are able to grow and proliferate.

Initially, the adjuster came out from the insurance company, and he only addressed the obvious damages and failed to address the fact that beneath the paper, the drywall was all moldy and that the records started to grow mold on them. And then there was some cases of the--a South Carolina school, the mold was coming through the vents, and we found that the vents were also moldy, so the whole place became contaminated. And, finally, we had an expert come in, in September, I believe after we had a similar--October, something like that, maybe even November--and found that this--they started tearing off the paper and found all this mold underneath, and everything else. They said we've got to bury everything which we did.

Ms. Richards: I'm sorry, when did the rain occur?

The Witness: The rain occurred in April or May. Seems like it's May, 1992. But the extent of the damage wasn't known until the fall of 1992.

Ms. Richards: This is--I am sorry, tell me again the name of the clinic.

The Witness: North Abbe Podiatry.

Q. Was there also a flood at Parma Podiatry?

A. Yes there was a flood at Parma Podiatry in the fall of 1992.... A water softener valve...was defective.... It blew out over the weekend, and as a result water filled the clinic, and we had the same kind of damage that we had at North Abbe.

Dr. Hayes specifically admitted that when he was answering deposition questions from Mr. Feltes regarding the collection of the contempt judgment he frequently provided vague answers "because I am under no duty to aid and abet an unethical attorney who is most likely criminal and who is using his own unethical behavior, and possibly criminal behavior, to injure me." Dr. Hayes stated that Feltes "was defaming me, slurring me and spreading a lot of untruths about me, using the information that he gained, he would misconstrue it to different parties and use it as a way to discredit me and to defame me."

In the contempt hearing in the Lombardi case issues, Judge Haas ordered Hayes to pay \$1,500 to the Sutter Corporation for reimbursement of legal fees and the sum of \$1,000 to counsel for the plaintiffs. He found:

The actions of Dr. Hayes in this case, especially when his present status as a law student is considered, demonstrate a disdain and disrespect for the legal system in general, and this court in particular.... There was no justifiable excuse for Dr. Hayes' ongoing efforts to frustrate the discovery process. His responses were not answers but his attempts to protect his own interests.

Dr. Hayes was asked to explain his responses to specific questions in that deposition,

such as:

Q. Who is Susan Haire.

A. I don't know.

After some further sparring, Dr. Hayes admitted that Susan Haire is the person he then and now lives with. Further interrogation revealed that in response to a question "Do you pay rent right now" by Mr. Feltes. The answer was "I pay my share."

Q. To whom do you pay rent?

A. I pay it to Sue.

Q. How much is that per month?

A. I don't know.

He also stated that he owned a 1989 Mazda that he bought in December of 1989. The payments were made, but he didn't know how much the payments were, nor if the payments were made every month. To the question, "Does anybody make payments for you," he answered "I don't know." He rationalized this behavior "because I don't trust Mr. Feltes, and I think he's a criminal." When asked about the payment of his school tuition he said "Third party pays the tuition for me." He stated he didn't know whether he paid any portion of the tuition nor how

long he had been paying the tuition. He testified before the panel that the foregoing "were evasive answers. Mr. Feltes set out to destroy me personally and professionally and nearly succeeded." Dr. Hayes was asked if the foregoing was an example of a false answer and he responded: "I had no duty to aid and abet him in his unethical and possible criminal behavior." When asked if his answer was untruthful, he said:

A. It's not untruthful. It's simply an evasive answer, that's all, because the person who was asking it was not asking for proper purposes. If he is unethical, I have the right to answer him untruthfully, not only do I have a right, I have a duty to oppose him. Are you aware of that sir?

Q. No I'm not aware of that.

A. Then you should read the Nuremberg, you should read Geneva and Hague, we signed onto those agreements. It's federal law."

The "Motion for Protective Order" in Scott v. Sutter Corp., Cuyahoga County Court of Common Pleas, Case No. 91-217619 CV, prepared and filed by Dr. Hayes in February 1993 during his third year of law school and after he had completed a civil procedure class, was entered as an Exhibit. In it Hayes alleged that he should not have to appear as a witness because opposing counsel (Feltes) was unstable, that Mrs. Feltes had alleged that Mr. Feltes abused his family and children in the Stark County public record (Domestic Relations case pleadings), that Mrs. Feltes alleged that Mr. Feltes allegedly hid and conveyed assets to the detriment of his family, that because of bias a visiting judge had to issue a restraining order preventing Mr. Feltes from conveying his known assets, that Mr. Feltes committed adultery with a runner at his law firm, that an intervention was held because of Feltes's illegal drug usage and bizarre and abusive behavior, that Mr. Feltes refused to submit to drug testing, that Mrs. Feltes was afraid of Mr. Feltes, and that Mr. Feltes had slandered Dr. Hayes. The motion was stricken sua sponte by the court as inflammatory.

Dr. Hayes defended this pleading, including the allegations of adultery by opposing counsel, saying that he was simply repeating Mrs. Feltes's allegations and that opposing counsel's character was in question and Dr. Hayes's First Amendment rights allowed him to plead such allegations. Since, "if he doesn't respect his marriage vows he doesn't respect his duties as an attorney." When asked if it was possible that Mr. Feltes was just representing a client, Dr. Hayes stated:

No. And, if he is, he's employing unethical and possibly criminal methods by causing patients to be injured. And, if that is so--especially, in the cases of intervention, his colleagues knew of it. He should have been brought before the Bar. His colleagues are in violation of Ethics Codes. You know it and I know it. His character is what's in question here.

In another case, after Dr. Hayes had graduated from law school, he sought to prohibit counsel for a party from acting on behalf of that party because they "have tripartite identities that include that of government officials, members of the legal profession, and private persons...Beyond that, and if Hayes had his way, he would like to be held to the standard that Joseph Feltes was held to for the past six years." He further pled that "Hayes could not help but notice that transactions of this sort are commonly associated with extortion rackets and couldn't imagine that they are accepted as part of the legitimate practice of law in our State." Dr. Hayes testified that he believes extortion is composed of two parts:

One part is the contingency fee, the other part is the entertainment of a nuisance suit. In other words, you can file a nuisance suit with a contingency arrangement, and then pressure the defendant to pay money, merely on the basis of a nuisance that is created. That's what extortion is, I can tell you.

When the management of his clinics was reviewed before the Panel, Dr. Hayes was as evasive in responding as he had been in the judgment debtor examinations. He could not remember how often he went to the clinic, whether people were there, where he saw patients, whether anyone told him about the floods, whether he was even in the country then, and who

the people were who might have worked at the offices that stated that the records were destroyed. Dr. Hayes stated he did not know who actually was controlling the North Abbe office. Dr. Hayes had stated that Dr. Magy was the individual presently in charge, but was not sure if he was there in 1992. And then upon further examination Dr. Hayes admitted that he had stated Dr. Magy contracted pneumonia while at North Abbe and since he had previously testified that the contraction of pneumonia caused him to destroy all of the records, admitted Dr. Magy had to be at North Abbe.

In the Terhoke case, which was not listed on his filings with the Supreme Court, Dr. Hayes attempted to name the expert for Sutter Biomedical as a Third Party Defendant asserting claims for "New Negligence", and "Extraordinary Negligence" and when asked if he just made the terms up as he went along, Dr. Hayes stated:

Sir, the world is changing. It's becoming international, not national. If we only restrict ourselves to what we learned in text books in college, none of us would progress. We have to look at things differently every day that surround everything in the legal system, put it before the court, let the trier of fact look at it and make a decision, or let the judge make a decision, but that's the way our system works. To say that just because I used this and I didn't find it in a law school class is absurd. It's just totally ridiculous. And to say it has anything to do with my character is even more farfetched.

Dr. Hayes could not testify how many credit cards he had defaulted on, but did not believe at the time of the testimony he had any active cards although he had had perhaps ten credit cards. He believes only one was cancelled. The others he believes just expired. As to other issues, Dr. Hayes admitted he did not furnish information requested in response to questions 13 (d) and (e) of his Application and also did not list the \$1,800 debt to Michael Jerman Joe Patton had discussed in his letter filed two years before Dr. Hayes filed his Application to the Supreme Court. This was:

because there is no debt. I don't owe him anything. If he wanted to sue, he could--he should have, if he thought he had a case. I don't think he has anymore. It's been a number of years. It's not owed, it's forgotten. He did shoddy work, he didn't get paid for it, it's done, it's a wash.

Dr. Hayes upon interrogation by the panel members again stated that even though he was under oath, he had no obligation to answer questions from Joe Feltes truthfully, and asserted he had a duty to oppose Feltes arising from "the Nuremberg hearings and the Hague."

I think the Hague was very clear that every citizen has a firm duty to oppose irresponsibility or criminal or unethical government officials, at the very least, to speak out against it and perhaps, if ordered to engage in "immoral behavior", to oppose that, to refuse to do so.

Defining immoral behavior Hayes stated:

I think herding six million Jews to a gas chamber can fall into immorality. I think taking people in the night without charges, and carting them off to concentration camps in Siberia is the state run amuck. I think the people who tried to oppose, were sent along to those concentration camps. The reason it got so out of control was because there was no opposition in the start.

In attempting to relate those statements to his conduct, Dr. Hayes said:

that a Federal Judge recently stated that when you have one side [obeying] the Marquis of Queensbury Rules and the other side using the tactics of a street fight, it is not a level playing field.... Mr. Feltes was very successful in preventing any of that from happening and his attempts to employ clearly out of bounds tactics to destroy me and to become personally involved on behalf of his clients to be as a common citizen or not as a lawyer is appalling. I mean absolutely appalling.

When asked about his lax payment of bills, Dr. Hayes stated that because he was disabled he had to rely upon other people to pay his bills, and that Sue Haire wrote checks for him and paid his bills. He did admit that his school loan was not current, and that he was negotiating to pay off some credit card bills. He didn't know how many of his credit card bills were in arrears, or how many credit cards he had, and stated he didn't have any source of income as of the hearing date, but has some monies due under an insurance claim from the flood and some workers' compensation claim funds due him. When asked to explain who was negotiating the

repayment of debts for his credit cards, Dr. Hayes answered "Sue Haire is probably negotiating on my behalf."

He admitted to being on at least two mortgages, but not owning the property which the mortgages encumbered. One was rental property next to one of his clinics and the other was the house in which he lived with Sue Haire. He eventually admitted both properties were in the name of Sue Haire.

Dr. Hayes at first stated that Sue Haire had no position with his companies. It was then pointed out she had responded to an NCBE request as the controller of Parma Podiatry Clinic. Dr. Hayes then stated she also worked for the North Abbe Podiatry clinic. He said she managed them but was not an employee of the corporation and stated she could have been paid through another corporation for her services. He wasn't sure if taxes were due and he would have to check. When asked with whom he would check, he responded the IRS.

Hayes stated that the reason he did not pay a \$70 bill for an x-ray, was because the doctor who charged him for the x-ray refused to treat him further and since he felt it was malpractice not to continue to treat him, and the time for bringing a malpractice action had expired, he wanted the doctor to sue him so he could use it as a defense.

Dr. Hayes never provided this Panel a full picture of his debts, nor did Dr. Hayes give full, complete and accurate information about who worked at his clinics.

When asked if he dealt with the medical records after they were contaminated, he stated "No, the records were destroyed in the flood. No one would leaf through those records. All of the other documents on the computer were destroyed. The computer crashed, that's what we lost." Dr. Hayes admitted that he never contacted patients to tell them that their records were in bad shape to ask if they might want to preserve them themselves even if he could not preserve them as a result of the financial expense.

Dr. Hayes was asked how he decided to undertake his behavior in the Feltes deposition, and responded that he could determine whether an opposing counsel was acting unethically.

A. If a court orders me to answer a question, I have the absolute duty to answer it. An attorney has not the power of the court to unilaterally act to force me to answer a question that I think is improper, being asked for improper purposes; that's the due process right to raise that before the court and have the court make a decision. Mr. Feltes was acting as a court. I have seen it where an attorney feels free to interject a subpoena duces tecum without the court.

Q. You chose simply to lie under oath?

A. I did not lie. I would never say anything I couldn't stand up and attest to. I would never do that. There is nothing in any of these records to show that I was lying about anything. I have taken great pains to document everything I do, whether I'm in litigation or researching a research project.

When then asked why he didn't tell Mr. Feltes the names of the employees, Hayes stated that he wasn't working at the clinics and he didn't know them at that time. "I didn't answer vaguely. I didn't know. I wasn't in the clinics for two or three years. I wasn't in the clinics. It is not a vague answer, it is just answering truthfully."

When asked to explain the letter sent by attorney Patton and to explain his actions, Dr. Hayes said "I simply said I am prepared to defend myself. I need a Social Security Number and I will defend myself under the law, there is nothing wrong with that." When asked what claim he had to assert against Mr. Patton personally, Hayes stated that he wasn't aware of any particular claim against him, but he would definitely look for one. When asked if he believed that defense attorneys look for claims against the opposing attorney he stated:

No, I don't think that they usually do. That's not a very good thing. There is a lot of support in the Ohio Legislature for tort reform. I'm a dissident, no question about it. I do not agree with a lot of policies that have been implemented in Ohio in the area of the tort, the administration of tort law. That's a political statement. I think you know my right to free speech, I have the right to say it. It doesn't mean I'd act against the law or uphold the law.

When asked why he did not pay Jerman for the work, Hayes stated:

The reason we did not pay the bill was because Mr. Jerman insisted on being paid under the table and we refused. We were waiting for him to send us his Social Security Number and that is when he went to Mr. Patton.

Q. Are you saying then that you did owe Mr. Jerman the money but simply couldn't have paid him because you didn't have his Social Security Number.

A. We would have once we had his Social Security Number.

Later he stated that he felt that he didn't owe any money because they were not satisfied with the work. After all of the foregoing, Hayes admitted that he was not sure whether he needed a social security number to file a 1099 for the work that Mr. Jerman should have been paid for.

Bar Association Case

In addition to the interrogation of Dr. Hayes, the Bar Association presented five witnesses. The first witness was John Corrigan, Probate Judge for Cuyahoga County, and previously a general division Common Pleas judge who served as an interviewer of Dr. Hayes along with Terry Kapp in October, 1993. Judge Corrigan and Mr. Kapp thereafter reviewed notes and met and discussed what they should report of the interview with Dr. Hayes before finally submitting their report in January, 1994. Judge Corrigan was very disturbed by the Hayes interview and felt that it was better to think about what had happened before submitting the Report. It is his belief his comments would have been stronger and a lot worse if he had written a report immediately following the interview. As it was he described Dr. Hayes as "a loaded gun ready to go off, scary". Judge Corrigan found that Dr. Hayes:

had a lot of very strange ideas, what the law was and what it should be and how he could use it to his benefit in these treaties and so forth....it was bizarre. I wouldn't be surprised if Dr. Hayes has already had some medical attention. I didn't know this, but I wouldn't be, if you told me that, I wouldn't be surprised. As I say, I make my living doing this.

I don't think he is prepared to be a lawyer, and I don't know how good of a doctor he is when you look at his past, his background. Apparently he hasn't done a real good job there.

He is interested in making money, as I recall, and he had many offices and other people working for him.

The more I think about this the more it is coming back and I think he blamed other doctors for the malpractice his corporation was involved. That could have been part of his response to that. As I say he had a response to every question....Dr. Hayes has an explanation for everything. He didn't make a lot of sense but he did have an explanation, yes.

Both interviewers found Dr. Hayes not to be truthful and not candid, and thought Dr. Hayes was flippant even though the interview took place in the Judge's chambers and lasted approximately an hour. It was Judge Corrigan's opinion that the basic reason Dr. Hayes "wanted to be a lawyer [was] so he could sue lawyers and to go after those who had come after him."

It was Judge Corrigan's recollection that the information contained on the Application was contradicted by information from the NCBE report, and that Dr. Hayes had at first even denied any problem as mentioned in the letter from Joe Patton.

Dr. Hayes was the first applicant Judge Corrigan had rejected in his many years of service on the Admissions Committee.

The Cleveland Bar Association next called Otha Jackson who is on the Appeal Subcommittee of the Joint Admissions Committee. Mr. Jackson found Dr. Hayes's attitude to be unlike any other applicant he had ever witnessed. He related that Dr. Hayes indicated in his appearance that if he were not able to take the Bar and practice law, he would feel compelled to file actions against individuals, including lawyers located in Lorraine County, although Mr. Jackson was unable to ascertain their exact connection with Dr. Hayes, as they appeared unconnected to the application process.

This statement or threat to sue was repeated several times by Dr. Hayes. Several members posed questions to ascertain Dr. Hayes's thinking, but Dr. Hayes provided rambling, unresponsive answers. The Appeals Committee believed that the applicant's intent was to use the law as a sword "brandished for personal vendetta.... This was a person who had very, very little respect for lawyers. I was shocked. I couldn't understand why a person who had that lack of respect for lawyers, and that was expressed again and again, would want to be a lawyer. It was incongruous to me." In addition to those individuals, Mr. Jackson understood Dr. Hayes to imply "that the Committee might be sued if indeed his application was not successful."

The Bar Association next called Joseph Feltes, a partner with Buckingham, Doolittle & Burroughs in the Canton office, and a member of the Bar since 1978. He had represented Sutter Biomedical as a defense attorney in medical malpractice cases and products claims against Sutter. He had contact with Dr. Hayes as an expert witness and treating physician for plaintiffs. This representation work represented normal products liability defense work, although the involvement with Dr. Hayes was quite unusual. Sometimes Dr. Hayes wouldn't show up for depositions, other times he showed up and was not prepared. This behavior resulted in Feltes's filing a motion to compel and to show cause in which the plaintiff's counsel joined, in the Lombardi case before Judge John Haas. This resulted in a finding of contempt and the court ordered Dr. Hayes to pay fees and expenses for Joe Feltes and Sutter's Chicago co-counsel who had come to the deposition. That order was affirmed by the Court of Appeals and Feltes undertook efforts to collect although Hayes frustrated the judgment debtor exam.

He described the judgment debtor's examination where "Dr. Hayes was under oath, was a real exercise, not only of evasion, but I would have to say I believe Dr. Hayes lied under oath." Dr. Hayes told him that he would pay rent or a share of rent, "then later said he didn't

pay rent, didn't pay bills, and didn't file tax returns because he had no money." He was evasive on the amount and extent of disability payments and was simply "not being straight during the debtors examination."

Mr. Feltes related that Dr. Hayes filed a Motion for Protective Order in the Scott case and reviewed the allegations in the Third Count which had nothing to do with the merits of taking or prohibiting the deposition of Dr. Hayes. Before he could respond, Judge Friedland sua sponte struck the motion.

Mr. Feltes related that after the Philblad case had been settled and the parties had determined to dismiss the action, he filed a motion to dismiss all cross-claims including the one he filed. At that point, Dr. Hayes who had then graduated from law school, tried to bring Feltes in personally as a third party. That document was Exhibit E in the panel hearing and is attached. Hayes admitted that this "New Third Party Complaint" was filed because the case had been settled. The pleading claims that settlement of the case on behalf of Feltes's client was an ex parte act and violated Hayes's Fourth and Fourteenth Amendment rights, and also asserted that Mr. Feltes was a "government official acting ultra vires. The doctrine of Res Ipsa Loquitur applies to all the allegations."

Feltes described dealing with Dr. Hayes as always difficult. Mr. Feltes recalled that Dr. Hayes asked \$400 to produce his one page curriculum vitae, an amount that counsel and the court felt was excessive. The Sutter implants after extraction were or had been subjected to destructive testing before being turned over to Feltes, even though on at least one occasion a request had been made before such failure testing was undertaken. In another case an infection was alleged, and the pathologist lab reports were important. Dr. Hayes put the slides on glass in a business envelope and put it through a postage meter. By the time Mr. Feltes received the

slides, all that was left were shards of glass which were totally unusable. In the Scott case and another case, the medical records themselves had been destroyed. Unfortunately the records of interest to Mr. Feltes were at the two separate podiatry offices that each had sustained "floods".

Mr. Feltes related that he had used Gary Prather as a court reporter but not exclusively and recalls Dr. Hayes tendering page after page of alleged inaccuracies, although he did not believe that Prather has ever reported inaccurately. Mr. Feltes also related that Dr. Hayes wanted to charge the original court reporting service \$100 an hour for his time to correct the inaccuracies and mistakes he claimed. Because of an argument between Prather and Dr. Hayes mid-deposition, Feltes had to obtain another court reporting service so there could be no allegation that the court reporter was biased. Mr. Feltes went from Hilltop Reporting to Associated Court Reporters with which Prather is associated, and then a third court reporting service was retained because of the words exchanged between Dr. Hayes and Mr. Prather.

Mr. Feltes testified that his wife had filed a divorce action alleging he abused drugs and had undergone a family intervention. All concerned were supportive and felt especially bad that his long standing marriage was breaking up, since he is from a Catholic family, and this was the first divorce involving family members. The intervention was at his home in the evening and the next morning he went to a facility and had a drug screen which showed only caffeine traces from coffee.

Dr. Hayes obtained the divorce complaint and repeated the allegations of Ms. Feltes in Count 3 of the New Third Party Complaint he filed in the Scott case. Feltes also recounted an occasion when Dr. Hayes "began reading allegations from that complaint and taunting me about that." Mr. Feltes in reflecting on the activities of Dr. Hayes said that they were very hurtful and caused "me great concern about what kind of ulterior motive Dr. Hayes would have in using the judicial system as a vehicle for his own vendettas."

Mr. Prather was next called to testify and stated he had been a court reporter for over eighteen years. He related an event prior to a deposition when Hayes and Feltes were in a conversation. Hayes had a copy of the divorce complaint Mrs. Feltes had filed, and Hayes was asking Feltes about allegations in the complaint of drug abuse, child custody and other issues. This was perhaps the fourth deposition of Dr. Hayes that he had taken.

Prather related an event when he and Hayes were alone during a deposition break. Dr. Hayes was unhappy that the subpoena served by Prather had not been served at the law school as he had previously done. Mr. Prather said that it had been a fluke that he had served him there, as he just happened to see him at the law school, and he did not know Hayes's schedule. Dr. Hayes accused Prather of lying about that and so Prather got up and left telling Dr. Hayes that "You can mess with them, but don't mess with me. That was basically it", by which he meant that Hayes had been giving the lawyers "evasive answers". Mr. Prather stated that he simply picked up his recorder and made no threatening gestures, motions, or other words. He also stated that he did not receive deposition transcripts back from Hayes, although he recalled sending them to Dr. Hayes because Dr. Hayes indicated his back bothered him, and could not come to the court reporting office to sign the same.

When asked about a confrontation, Dr. Hayes stated that Mr. Prather stood next to him and, in addition to saying not to mess with him, raised his fist in a threatening fashion, and as if he were going to hit Hayes. Hayes also disputed Prather's assertion that he had not returned his deposition, and stated he did return the deposition with corrections and would provide those corrections from his computer records.

Hayes stated that Prather "cooked" depositions and when asked to provide an example of Prather's "cooking" a deposition, he said one of the counsel "was coughing and sweating and

making a lot of noise and that was not reflected in the depositions," and also claimed another example was that his drawing from his deposition appeared in Dr. Gerber's text book without indication that Dr. Hayes had made that drawing. He also indicated that Sutter represented its device as safe and "the people represented are currently being sued in federal court as antitrust". Dr. Hayes also indicated there were questions and answers that were not transcribed. He then stated that a particular question and answer didn't appear in the deposition taken by Hilltop Reporting Company. At this point Dr. Hayes then said he didn't recall who took the deposition, then stated he thought it was in Prather's depositions, and because Feltes employed Prather there was an attempt to harass him. Then Dr. Hayes stated that:

Mr. Prather was scheming to create as much chaos in my life, he attempts to contact all those people around me to subpoena me with their notice of deposition when, in fact, all he had to do was to come to my house, or the Akron Law School, or to call my house and say when do you want to pick it up because I am not averse to attending a deposition.

Mr. Prather testified that in order to serve Dr. Hayes, he simply followed instructions given to him by whoever ordered the deposition and asked that the subpoena be served. He recalled an attempt to serve Hayes at the law school was successful only by happenstance in that Dr. Hayes came along while Mr. Prather was standing in the hall. He also served him at his residence, and at the North Abbe office. Mr. Prather was unaware of allegations that his transcripts were improper or "cooked" and stated that he had never, nor would he ever, "cook" transcripts. Mr. Prather's only connection with Mr. Feltes was as a court reporter, approximately four times a year. There was no social contact.

The final witness called by the Bar Association was Joseph Patton who had been practicing law in Cleveland with his father in a general practice since passing the February 1990 bar examination. He identified the February 27, 1991 letter to the Supreme Court. Mr. Patton

stated that he waited about a month after the events described the letter to write the letter. He stated that it was a matter of very serious concern to him considering that he had been a member of the bar less than a year, and had just gone through law school and the bar examination. Mr. Patton said he wrote notes as Hayes was talking and wrote his letter using his notes. "It wasn't one phone call where someone was venting. The fact was it was four calls, and each time the man became more enraged in things he said.... In a matter of--it was definitely less than two hours, about an hour and a half."

His client had been an old client of his father's firm and met with Patton in his office. Patton reviewed all of the claims and saw videos depicting all the work completed and in place. A statement of five or six pages was prepared and the client signed it. Based upon that, Mr. Patton prepared a demand letter seeking payment of \$1,850.95.

Dr. Hayes responded claiming he was going to use the justice system to get his client and Patton individually, including an expressed hope that Patton had taken the case on a contingency fee basis so he "would get screwed too". Hayes in a subsequent call alleged that he was going to call the client's co-workers and supervisors, and accused Patton of being a "shyster attorney....making a demand on him that was fraudulent....in a conspiracy." He testified that Hayes in the next call asserted that Jerman was supposed to be working at Weldon Tool Company and Hayes had called his supervisor and was going to get Jerman fired from that job.

Although he threatened to sue Jerman and Patton, Hayes wouldn't write a letter explaining his dispute or his claims so Patton could tell Jerman the other side of the story. He recited that Hayes stated he had not only the experience of law school but a product liability suit in Lorraine County where he had learned a lot about the law and how "to gum up the works". Hayes indicated to Patton that he would seek Rule 11 sanctions because the claim was a

frivolous law suit and the claims were baseless, and that Patton was simply filing a suit to harass him, although there was no law suit yet filed. Hayes said he would use any methods to prolong the suit as retribution for bringing the action and against the client for having the audacity to bring it.

Although Patton's client brought him pictures and had records of the amount of time he had spent and a video tape of the work in its finished condition, and everything looked fine to Patton, he was never able to determine if there was a problem with the basement because Hayes would not respond in that regard. Patton stated that Hayes used the word "screw" three or four times with him, in claiming he was going to screw Patton's client, and screw anybody who disagreed with him. He simply:

wanted to go out there and punish. I am going to have some fun with the system while Jerman pays. It was clear to me, at least from what he said to me, the reason he was not making payment was because he was looking forward to litigation. He wanted me to sue him so he could punish me and punish Michael Jerman.

In respect to the 1099 issue, Patton recalled that Hayes asserted he intended to report more than the \$1,800 remaining on this work, but would include other work that Jerman had previously performed at the two locations for Susan Haire and Dr. Hayes.

Despite the fact that Jerman needed the \$1,800, when he was told by his attorney that it would cost him more than that to chase Hayes and respond to discovery motions in a trial, he simply dropped the case.

Conclusion

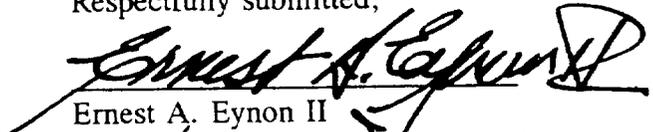
The Joint Admissions Committee requested that Dr. Mark Hayes's Application to take the bar examination be disapproved. The Applicant's counsel asserted Dr. Hayes could be a valuable asset to the bar because of his experiences and argued he be given the opportunity to sit for the bar.

RECOMMENDATION OF PANEL

Based upon the evidence placed before it, including the documents and testimony, and after observing the demeanor of the Applicant and the other witnesses, it is this Panel's conclusion that Dr. Hayes: 1) is not truthful, 2) that he has repeatedly lied under oath, 3) that he lied to each group reviewing him including this Panel, the Appeals Subcommittee and the interviewers of the Joint Admissions Committee of the Cleveland/Cuyahoga County Bar Association, as well as in each deposition or transcript introduced into evidence at the Panel hearing, 4) that he purposefully omitted relevant information from his Bar Application, 5) that he sees himself as the focus of a conspiracy by the Sutter Corp., attorneys, and court reporters and took retaliatory actions against those he perceived as enemies, 6) that he has no sense of obligation or duty to the judicial system or those connected with it, 7) that he does not handle his financial situation in conformity with the standards required for attorneys, 8) that he has demonstrated an ability and willingness to subvert the judicial process in ways that cannot be tolerated, and 9) that the attitude of Dr. Hayes is ingrained and pervasive and wholly inimical to the practice of law.

It is the recommendation of the Panel that Dr. Mark Hayes never be allowed to sit for the Ohio Bar examination.

Respectfully submitted,


Ernest A. Eynon II


Suzanne K. Richards


James R. Silver

RECEIVED

MAR 04 1991

ADMISSIONS OFFICE
SUPREME COURT OF OHIO

(216) 734-9494

Fax (216) 734-2600

Patton & Patton
Attorneys at Law
29203 Lorain Road
North Olmsted, Ohio 44070

Richard F. Patton
Joseph M. Patton

February 27, 1991

Supreme Court of Ohio
Board of Commissioners on Character & Fitness
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

Re: Dr. Mark W. Hayes
19876 Henry Road
Fairview Park, Ohio 44126

Subject: Suitability for Admission to
the Practice of Law.

Dear Commissioners:

I recently had professional contact with Dr. Mark W. Hayes, an alleged University of Akron law student, who said he will be taking the Ohio State Bar Examination this year. Based on these professional conversations, I felt it my duty to inform the Court that Dr. Hayes is not suited to practice Law in this or any other state. I base my beliefs on the statements made by Dr. Hayes, which follow.

I will briefly explain how I came to be involved with Dr. Hayes, and then list the statements he made to me that prompt this letter. I was retained by a client to collect a debt in the amount of \$1,852.95 that he claimed was owed to him by Dr. Hayes. After lengthy discussions with my client, and after obtaining a signed statement from him as to the facts underlying his claim, I determined he had a valid complaint against Dr. Hayes and his companion, Susan L. Haire. I prepared a letter to

Dr. Hayes and Ms. Haire, demanding payment of the sums due and mailed a copy of it to each of them. A copy of the letter is enclosed.

On February 1, 1991, at approximately 11:40 a.m., Dr. Hayes called my office and asked the reason for my letter. I explained to him my client's claim, and asked him for his side of the story. Dr. Hayes began a fusillade of denunciations against my client, including: "he's a thief, and so is his cabinetmaker buddy", "he's an idiot and starts things he can't finish". I assumed that Dr. Hayes was just venting his hostility toward my client, which I was willing to endure.

I was however, not prepared for the quick turn in events that Dr. Hayes directed toward me as an attorney. Dr. Hayes stated first that I was propounding a "nuisance suit". He claimed "that I, my client, his cabinetmaker buddy," were acting in concert to defraud him. I asked Dr. Hayes about his use of legal terminology, and he stated he was currently a law student at the University of Akron. He claimed he knew a thing or two about the justice system. It was then that Dr. Hayes began to exhibit what I consider to be very unstable conduct, rising to the level of his being unfit to enter the legal profession.

- 1.) Dr. Hayes stated he would seek Rule 11 sanctions against me if I brought suit against him.
- 2.) He also stated he would seek to ensure that the litigation would be protracted, even if it cost him money, to be sure that everyone would be hurt by the lawsuit.

Seeking to subdue Dr. Hayes' obvious fit of anger, I asked him to send me a letter outlining his claims against my client, so I could discuss them with my client and avoid a lawsuit. At first Dr. Hayes agreed, but then rapidly changed his mind, and said he preferred to be sued. He said a lawsuit would be " good

practice" for him while he was in law school. He stated he would seek assistance from his professors at the University of Akron in an attempt to prolong the suit as much as possible; hopefully until he graduated. Dr. Hayes' use of the terms "adhesion contract", "illegal contract", "conspiracy" and "abuse of process" which was without any basis in fact and was simply an attempt to subvert due process in a vain attempt to intimidate. With great persuasion was I able to get Dr. Hayes off the phone. I then attempted to contact my client concerning his allegations. My client was unavailable, so I left a message to have him contact me.

Dr. Hayes again called at approximately 12:03 p.m. He began where he left off in our first conversation. I asked him if he realized the import of his statements to me. He responded he had already won a products liability suit in Lorain, Ohio. He said he was going to use what he learned in the product liability case to subvert the justice system in this case. Dr. Hayes also said he was disabled from a golf cart accident in August, 1990. He claimed he was forced to abandon his podiatry practice. He stated further, he now had plenty of time to make sure that what had happened to him was now going to happen to my client, and anyone he felt deserved to "be screwed." I finally managed to get Dr. Hayes off the phone.

Before I could resume my work, he called back again at 12:46 p.m., February 1, 1991, and said he "was really looking forward to this", was "really looking forward to my client getting screwed". I asked him if he realized what he was saying to me. Dr. Hayes responded that "he sure did", and hoped I was retained on a contingency fee so that I would "be screwed too". Dr. Hayes sounded as if he was suffering from some sort of mental illness. The sheer volume and intensity of his complaints led me to believe that he was a time-bomb, waiting to be set off, and that he was indeed, "really looking forward to screwing the whole world!"

Whatever doubts I had about the mental stability of Dr. Hayes were erased by his fourth call to my office at 12:55 p.m., February 1, 1991. I asked him to please refrain from his harassing phone calls. Dr. Hayes sounded as if he did not hear my voice. He began his last tirade by saying that: he had already contacted witnesses to testify against my client; he was attempting to contact fellow employees of my client in an effort to "screw him at work"; and he claimed he would seek to "screw" my client by contacting my client's supervisors at work and claiming that my client did work for Dr. Hayes while on their payroll. I again attempted to get Dr. Hayes off the phone. He was laughing and again stated how he was "really looking forward to this", and how he was "going to have some fun with the system while my client pays". At this point I hung up on Dr. Hayes, and have not heard from him again.

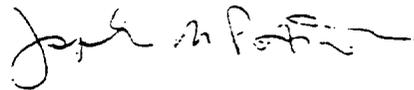
I informed my client of Dr. Hayes' statements, and the possible cost of fighting a barrage of delay inducing measures set forth by him. My client was very upset, and stated he chose not to sue Dr. Hayes, even though Dr. Hayes owed the money totalling approximately two-thousand dollars (\$2,000.00).

I have delayed sending this letter to the Supreme Court because I wanted to reflect on the possible consequences to Dr. Hayes. I feel the people he could hurt as an attorney more than justified this report. It is not my intention to defame Dr. Hayes, but I cannot remain silent about his instability and disdain for our legal system in the Ohio Courts. I felt duty bound to report these incidents to prevent future and more insidious cases. I was taught at Cleveland-Marshall College of Law, that Dr. Hayes' conduct and attempts to subvert the justice system, fall far outside the bounds of ethical practice and must be reported.

I waited this long to contact the Court because I was not sure of what action to take. After much reflection I feel that I have no choice but to bring this matter to the Court's attention. I believe that the legal system in the United States, and specifically the State of Ohio should be protected against such behavior by its potential attorneys. After considering the damage a person like Dr. Hayes could inflict on the public, I feel I would be remiss in my duties if I allowed such an unstable person to be admitted to the practice of Law without first being examined by the Supreme Court with all the facts as to his dangerous propensities before the Court.

If the Court has any questions in this matter, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Joseph M. Patton".

Joseph M. Patton, Esq.

JMP

Encl.

Patton & Patton
Attorneys at Law
23203 Lorain Road
North Olmsted, Ohio 44070

Richard F. Patton
Joseph M. Patton

(216) 734-2424
Fax (216) 734-2600

January 30, 1991

Dr. Mark W. Hayes
19876 Henry Road
Fairview Park, Ohio 44126

Dear Dr. Hayes:

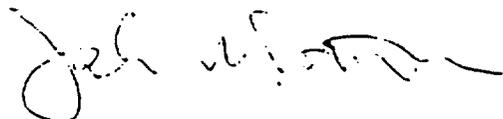
I represent Michael F. Jerman, the man you hired to perform work on properties you own at 19876 Henry Road, Fairview Park, Ohio, and 5271-73 Pearl Road, Parma, Ohio.

Mr. Jerman submitted a bill to you, for labor and materials he provided at your request, for the improvement of the above properties. At this time Mr. Jerman has not received payment on the amount due of EIGHTEEN HUNDRED FIFTY-TWO DOLLARS AND NINETY-FIVE CENTS (\$1,852.95). Mr. Jerman submitted the bill to you on or about April 14, 1990.

I hereby demand payment of the balance due Mr. Jerman. I will await your response until February 11, 1991. If I do not receive payment in the amount of EIGHTEEN HUNDRED FIFTY-TWO DOLLARS AND NINETY FIVE CENTS (\$1,852.95) by that date I will commence an action to procure payment of all sums due Mr. Jerman under Ohio law.

You may contact me at the above address, or phone between the hours of 9:00 a.m. and 5:00 p.m.

Very truly yours,



Joseph M. Patton, Esq.

JMP/lj

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

SEP 18 1991

HELEN J. GAROFALO
STARK COUNTY OHIO
CLERK OF COURTS

VINCENETTE LOMBARDI, et al.,
Plaintiffs

Case No. 89-1332-PL

JUDGE HAAS

VS

SUTTER CORPORATION,

Defendant

JUDGMENT ENTRY

This matter came on for hearing on a show cause order previously issued by this Court. Dr. Mark Hayes appeared at the hearing accompanied by his counsel. Counsel for plaintiffs and defendant also appeared at the hearing.

Having reviewed the record, and having heard the arguments of counsel and Dr. Hayes, this Court finds that the witness, Dr. Mark Hayes, has failed to show cause why he should not be held in contempt. It is very apparent that Dr. Hayes has his own agenda - a future book and/or litigation, and is not interested in providing the parties to this action with answers to appropriate questions concerning this case and his treatment of the plaintiff.

Dr. Hayes' responses, when he finally did appear for a deposition and when he was finally somewhat conversant with his patient's records, demonstrated that he was more concerned about not divulging information he wishes to incorporate into a book than with advancing the discovery process in this case.

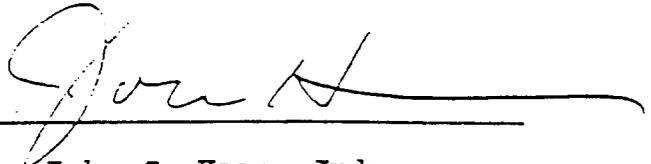
The actions of Dr. Hayes in this case, especially when his present status as a law student is considered, demonstrate a disdain and disrespect for the legal system in general and this Court in particular. This Court has been caused to expend valuable time addressing discovery matters which should have been resolved between and among counsel for Dr. Hayes, Dr. Hayes and counsel for the parties. There was no justifiable excuse for Dr. Hayes' ongoing efforts to frustrate the discovery process. His "responses" were not answers but his attempt to protect his own interests.

This Court is not persuaded that Dr. Hayes was improperly served or did not know about the deposition. His counsel knew of the date and time as did his office manager. To aggravate the situation, out of state counsel was caused to waste time attending what essentially amounted to a worthless session due to Dr. Hayes' lack of preparedness and desire to thwart any meaningful information being given to counsel.

The victim who suffered the most was counsel for the doctor's patient. He is not involved in any book to be published or subsequent litigation. His case and the defendant's case is here and now.

It is therefore Ordered that the witness, Dr. Mark Hayes, is in contempt of this Court. In addition to the sanctions ordered by entry dated September 5, 1991, this Court further orders the witness to pay the sum of Fifteen Hundred Dollars (\$1,500.00) to Sutter Corporation for reimbursement of legal fees and the sum of

One Thousand Dollars (\$1,000.00) to counsel for the plaintiffs, Mr.
Terry Bowers.



John G. Haas, Judge

Copies to:

Atty. Terry Bower
Atty. Joseph Feltes
Atty. Charles Wagner

IN THE COURT OF THE COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARGARET SCOTT, et al.)	Case Number 91-217619-CV
)	
Plaintiffs)	
)	
vs.)	Judge Carolyn Friedland
)	
SUTTER CORPORATION)	MOTION FOR PROTECTIVE
)	ORDER
Defendant)	
)	

Now comes Mark W. Hayes, DPM (Hayes), acting on his own behalf respectfully requests that this Court grant his motion for a protective order pursuant to Rule 26(c) Ohio Rules of Civil Procedure, for all of the following:

1st COUNT

1. Hayes asserts that the Sutter Corporation (Sutter), lacks standing to sue him for malpractice because it cannot legally assert the rights of the plaintiffs Margaret Scott, et al (Scott), on its own behalf.
 - a. Hayes asserts that defective products are subject to failure with or without negligence.
 - b. Hayes asserts that negligence is not a valid defense to strict liability claims.
 - c. Hayes asserts that negligence claims against the implant maker are inherently related to the design, manufacture, marketing, and warranties.
 1. If anything, findings of manufacture negligence in these create liability exposure to the learned intermediary.
 2. Sutters attempt to blame the treating doctors for their product defects or product associated negligence is bizarre and imposes an impossible burden on the named third party defendants.
 - d. Hayes offers that Sutter's third party impleading could be bifurcated to the conclusion of the plaintiffs case, in the interests of judicial economy and in fairness to the named third party defendants who hardly have the means to defend against Sutter's nuisance pleadings.

THE COURT OF THE COMMON PLEAS
CUYAHOGA COUNTY, OHIO

2. To the best of his knowledge, Hayes has not personally treated all of the plaintiffs named in this suit, nor any of them since before 1987.
3. Hayes is currently a 3rd year law student at Akron University School of Law.
4. Hayes has extensively researched silicone small joint implant failure and product liability, that includes the devices manufactured by the Sutter Corporation.
 - a. Hayes specifically performed this research to pursue claims against Sutter for breach of warranty to the learned intermediary. The resulting work product includes his thoughts, opinions, and conclusions, that pertain to the Sutter La Porta implant, both factually and legally.
 - b. Hayes performed this research with the specific intention to publish the results for the benefit of the legal, medical, and podiatry professions. His work was conducted in association with recognized non-profit educational institutions. see infra.
 - c. Hayes maintains that his work amounts to trade secrets and that it would be detrimental to his, and his corporate interests, if made known to the Sutter Corporation or other competitors.
5. Hayes is currently preparing to publish a treatise on the history of small joint silicone implants in association with the Akron Institute of Polymer Science. (Hayes is currently a research fellow at the institute.)
6. Hayes is currently preparing to publish a treatise on small joint silicone implant failure and product liability, in association with the Akron University School of Law. The paper will include references to the many failed Sutter La Porta great toe implants, as well as their manufacturer.
 - a. Hayes has many confidential contacts with relevant industry and government agencies that are necessary to research implant defects.
7. Hayes is currently acting as a plaintiff's expert in other product liability suits against Sutter that are based on La Porta great toe implant failures.
8. Hayes has not been personally or properly served with any subpoena or third party complaint by Sutter to date.

1 THE COURT OF THE COMMON P. AS
CUYAHOGA COUNTY, OHIO

2nd Count

1. Hayes sets forth all of the assertions contained in the 1st Count as completely written herein.
2. Hayes has acted as a fact witness in other Sutter La Porta implant product liability cases between 1990 and 1992.
 - a. Hayes offered opinion testimony during two of these depositions as a courtesy to Sutter's attorneys, and to help their client grasp the seriousness of the problem.
 - b. Specifically, Hayes graphically demonstrated that the Sutter La Porta implant could not be made safe through insertion techniques during a deposition in early 1990.
 1. Sutter then turned this information over to a named Sutter expert, (Joshua Gerbert, DPM), who improperly included the drawing in his publication 1 year later without reference. Gerbert, J.; Textbook of Bunion Surgery, Second Edition, p. 292 Futura Publishing Company, Inc. U.S.A 1991. (It is presumed that patients were injured as a result.)

3rd Count

1. Hayes sets forth all of the assertions contained in the 1st and 2nd Counts as completely rewritten herein.
2. It is Hayes's opinion that Sutter's attorney, Mr. Feltes is unstable, and undergoing significant personal problems that cause him to perceive Hayes as a personal adversary.
 - a. Jane Feltes has formally alleged that Mr. Feltes abused his family and his children; and these allegations are part of the Stark County public record.
 - b. Jane Feltes has formally alleged that Mr. Feltes attempted to hide and convey assets to the detriment of his family, and these allegations are part of the Stark County public record.
 1. Apparently these allegations were found to have merit because a visiting judge in Stark County issued a restraining order to prevent Mr. Feltes from conveying his known assets. (Jane Feltes said that she requested a visiting judge because she feared a biased forum).
 - c. Jane Feltes has formally alleged that Mr. Feltes committed adultery during their marriage, and these

allegations are part of the Stark County public record. (Jane Feltes related that Mr. Feltes committed adultery with a "runner" at his law firm during their marriage.)

- d. Jane Feltes has related that Mr. Feltes is now intentionally delaying compliance with the mutually agreed upon stipulation of their divorce settlement.
 - e. Jane Feltes has related that Mr. Feltes family held an "intervention" for him because his family and colleagues thought he was using illegal drugs based on his bizarre and abusive conduct.
 1. According to Jane Feltes, Mr. Feltes refused to submit to drug testing at the time of the "intervention", but apparently did undergo testing at a much later date.
 - f. Jane Feltes related a number of Mr. Feltes colleagues are "afraid of him" because of his bizarre conduct.
 - e. Jane Feltes related that Mr. Feltes is very adept at manipulating the legal system for own purposes and personal gain.
3. It is Hayes's opinion that Mr. Feltes has slandered him in the past, and will continue to slander him in his misguided attempts to defend his client's interests.
1. Hayes has recently heard through reliable third parties that Sutter's attorneys have referred to him as a "liar", and have alleged that Hayes attempted to date Sarah Olson, one of Sutter's attorneys.

4th Count

1. Hayes sets forth all of the assertions contained in the 1st, 2nd, and 3rd Counts as completely rewritten herein.
2. Hayes asserts that Mr. Feltes conspired with a plaintiff's attorney in Lombardi v. Sutter, to have Hayes found in contempt of court without the plaintiff's knowledge or consent.
 - a. The Lombardis' signed an affidavit to inform the court that they did not know, nor did they consent, to the initiation of an action against Hayes on their behalf. The also requested in the affidavit that their attorney cease and desist pursuing his action against Hayes. (This affidavit was presented to the Stark County court.)

IN THE COURT OF THE COMMON PLEAS
CUYAHOGA COUNTY, OHIO

5th Count

1. Hayes sets forth all of the assertions contained in the 1st, 2nd, 3rd, and 4th Counts as completely rewritten herein.
2. Hayes notes that Sutter requests the medical records for "each plaintiff" without naming any party, save Scott.
3. It is noted that Sutter requests the x-rays for "each plaintiff" without naming any party save Scott.
4. It is noted that Sutter requests photographs and photographic slides without specificity.
 - a. Many photographs and slides have been accumulated in preparation for the impending litigation and publication, Hayes would claim these items are excluded from discovery by the work product doctrine, journalist privilege, and trade secret exclusions. Hayes would however make these items available to the court in camera on request.
5. It is noted that Sutter requests correspondence with the FDA, and other government entities. Hayes maintains that this information falls within Title 27 sec. 2739.04 of the Ohio Revised Code, and its discovery is barred by the work product doctrine. Hickman v. Taylor, 329 U.S. 495, 512-513 (1946). Furthermore, Hayes asserts that Sutter has already been provided with all of the requested relevant correspondence that does not fall within the Code or Hickman. Id. Hayes will however make any relevant information available to the court in camera upon request.
6. It is noted that Sutter requests knowledge of destructive testing protocols. This request is improper because it attempts to gain discovery through this case that is currently in controversy in another.
 - a. In particular, Hayes recently advised the plaintiff's attorneys in another Sutter La Porta product liability case to demand specific destructive testing protocols from Sutter, since they failed to return 2 devices that were given to them for inspection.

6th Count

1. Hayes sets forth all of the assertions contained in the 1st, 2nd, 3rd, 4th, and 5th Counts as completely rewritten

IN THE COURT OF THE COMMON PLEAS
CUYAHOGA COUNTY, OHIO

herein.

2. It is noted that Sutter requests that Hayes be ordered to pay Sutter's expenses.
 - a. Hayes asserts that Sutter's attorney Mr. Feltes is accustomed to substituting constructive service for that considered best under the circumstances.
 - i. Hayes anticipates that Sutter's attorney Feltes will then attempt to use his staged service and the party's lack of response to discredit them, and improperly penalize them by requesting sanctions.
 - b. Mr. Feltes knew that Hayes was a student at Akron University, (see supporting memorandum), and has been able to obtain his schedule in the past by way of the close association that exists between his firm and the school. He certainly knew or should have known that Hayes was at the school every Monday and Wednesday since he attends between the hours of 8:30 a.m. and 4:30 p.m. More to the point, Feltes has served Hayes there in the past.
3. Hayes asserts that he would have entered an earlier motion for a protective order had received proper notice as required by the Mullane standard. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

7th Count

1. Hayes sets forth all of the assertions contained in the 1st, 2nd, 3rd, 4th, 5th, and 6th Counts as completely rewritten herein.
2. The "Supporting Memorandum" is very characteristic of the tactics preferred by Mr. Feltes. He can't seem to understand that it is the implant that is on trial in a strict products liability action, and the implant maker where there are allegations of design, manufacturing, marketing, and warranty negligence. His attempts to make the treating physicians the issue is bizarre considering the ever increasing number of reported Sutter La Porta great toe implant failures.
3. Hayes offers that Mr. Feltes would do well to focus on defending the many strict liability and negligence allegations that have been made against the Sutter La Porta great toe implant and its maker's, rather than attempting to discredit the responsible physicians who are now forced to assume Sutter's duty to provide post-sale warnings to implanted patients.

IN THE COURT OF THE COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Protective Order Request

In view of all of the above, Hayes respectfully asks this court to grant his motion for a protective order, and to stipulate the following:

1. That the court grant Hayes qualified immunity to restrict his testimony to that of a fact witness in those cases where he personally treated stipulated plaintiffs. It should be noted that he is not a named expert in this case, and that Sutter has misused his expertise in the past to the presumed detriment of the patients.
2. That Hayes's invocation of work product, journalist privilege, and trade secrets be recognized to protect the public interest, as well as his legal rights and legitimate business interests.
3. That the court recognize the privilege that exists between Hayes and other plaintiffs pursuing claims against Sutter to protect their legal rights and legitimate property interests.
4. That the court protect Hayes from having to reveal his research sources to the Sutter Corporation as they relate to Sutter La Porta great toe implant failures. Hayes argues that allowing Sutter access to their identities will inhibit the free flow of information that now exists in the public interest, and chill his 1st Amendment rights to free expression.
5. That the proposed deposition be conducted by an attorney other than Mr. Feltes to promote interparty co-operation, efficiency, and judicial economy. Specifically, Hayes does not wish to continue the personal animosity that Mr. Feltes first initiated and now thrives on. This should not impose a hardship on Sutter given the number of attorneys they already assigned to the cases, and the size of their firms.
6. Hayes requests that Sutter not be granted any expenses or costs because Hayes was never properly served as required by the Mullane standard, and the duces tecum subpoena was directed by the court.
7. Hayes requests that if he is required to give expert testimony, he be compensated for his time at a reasonable rate since his inclusion in the suit is now nothing more than a sham to gain discovery that Sutter is not otherwise entitled to.

IN THE COURT OF THE COMMON PLEAS
CUYAHOGA COUNTY, OHIO

8. Hayes respectfully requests that the proposed deposition dates be set on Tuesday, Thursday, or Friday, since he attends law school at Akron during the day on Mondays and Wednesdays. He also asks that they be scheduled after the third week in March because he will be unable to properly prepare before them. (Hayes is currently required to present three cases over the next three weekends to complete his Trial Advocacy II course.)
9. Hayes stands ready to co-operate with the court in any way to efficiently adjudicate this case. He only asks that the court recognize in equity that he does not possess the monetary or resources of the Sutter Corporation. It should be noted that Sutter's insensitivity and unresponsiveness to rectifying the Sutter La Porta implant's defects have caused Hayes to incur enormous expense in meeting duties to his patients that were caused by and forced upon him by Sutter's shortfalls.

Hayes further sayeth nought.

Respectfully submitted,

Mark William Hayes
Mark William Hayes, DPM
Pro Se.
19876 Henry Road
Fairview Park, Ohio 44126
(216) 333-0007

CERTIFICATE OF SERVICE

14 A copy of the foregoing was sent by regular mail this day of February, 1993 to:

Ms. Sarah Olson
Mr. Robert L. Shuftan
Mr. Joseph J. Feltes
c/o Buckingham, Doolittle & Burroughs
624 Market Avenue, North
Canton, Ohio 44702

Mr. Charles E. Wagner
Mr. Willard E. Bartel 1610 Euclid Avenue
1610 Euclid Avenue
Cleveland, Ohio 44115

IN THE COURT OF THE COMMON PLEAS
LORAIN COUNTY, OHIO

JEAN PIHLBLAD, ET AL.)	Case Number. 92 CV 109044
Plaintiffs)	
)	
)	
SUTTER CORPORATION)	JUDGE JANAS
Defendant)	
vs.)	
MARK W. HAYES, D.P.M., J.D.)	NEW 3RD PARTY COMPLAINT/ REQUEST FOR LEAVE INSTANTER
Defendant/ Third Party Plaintiff)	
vs.)	
JOSEPH FELTES, ESQ. C/O BUCKINGHAM, DOOLITTLE, ETC. 624 Market Street, North Canton, Ohio 44702)	JURY TRIAL REQUEST CONTAINED HEREIN
New Third Party Defendant)	

Now comes the defendant/3rd party plaintiff Mark W. Hayes, D.P.M., J.D. (Hayes), acting pro se. to respectfully request leave to implead Joseph Feltes, Esq. (Feltes), in the above captioned complaint. This third party complaint if drafted and filed in accordance with the Ohio Rules of Civil Procedure, and Hayes has researched the relevant facts and law to form a good faith belief that it has merit.

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COUNT I.

1. Feltes is an attorney who is licensed to practice law in the State of Ohio, an officer of the Court and a government official.
2. The Sutter Corporation hired Feltes to defend itself in the above captioned action.
3. Feltes is an alleged drug user and his family held an intervention to encourage him to seek professional help at a time after he began defending Sutter in their many suits.
4. Feltes colleagues knew of the intervention yet did not report him to the Ohio State Bar Association to comply with their Code of Ethics.
5. OUM & Associates (OUM), is the malpractice insurer in this case and has a duty to defend and indemnify Hayes for any podiatry malpractice that are claimed against him and that a court might find he committed.
6. Feltes has acted in conflict of interest to the detriment of Hayes in the past when he defended Sutter against Hayes while his partner G. Banas settled another claim for OUM without bothering to provide Hayes with legal counsel.
7. Hayes is named as a defendant in the above captioned case and is currently seeking to bring actions against OUM, the Sutter Corporation, Dr. Guido La Porta and Mr. Timothy Wollaeger as third party defendants.
8. Feltes, OUM agent David McGrath and plaintiff attorney Frank Giaimo entered into settlement negotiations without including Hayes or his attorney Jeffery Van Wagner in the above captioned case prior to September 23, 1993. (See attached letter dated September 23, 1993.)
9. Feltes, OUM agent David McGrath and plaintiff attorney Frank Giaimo fashioned a mysterious settlement agreement on the basis of the negotiations referenced in item 8 without including Hayes or his attorney Mr. Jeffery Van Wagner. (See attached letter dated September 23, 1993.)
10. Feltes, McGrath and Giaimo executed the agreement referenced in item 9 and OUM proceeded to report Hayes to the National Practitioners Data Bank.
11. Hayes vigorously objected to their conduct and communicated it to OUM through his attorney Jeffery Van Wagner. (See attached letter dated October 19, 1993.)
12. On or about October 23, 1993, a patient of Hayes reported that Pihlblad openly bragged at a local health spa that the Sutter Corporation gave her \$50,000.00 to

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settle the above captioned case.

13. Hayes reported this incident to OUM and Giaimo through his attorney Jeffery Van Wagner. (See attached letter dated November 1, 1993.)
14. OUM did pay Philblad \$17,500 to settle the above captioned case on behalf of Hayes in accordance with their illicit settlement negotiations and the subsequent agreement that is referenced in items 8, 9 & 10.
15. Again, Hayes vigorously objected to the negotiations and subsequent agreement, and communicated his objections to OUM through his attorney Jeffery Van Wagner.
16. The illicit negotiations and subsequent settlement agreement referenced in items 8, 9 & 10 did cause Hayes and North Abbe Podiatry, Inc. to be improperly reported to the National Practitioners Data Bank.
17. The negotiations, settlement agreement and OUM's refusal to defend Hayes caused him and North Abbe Podiatry, Inc. to suffer personal and professional property losses that include, but are not limited to damage to his podiatry license and practice.
18. These damages referenced in item 17 arise directly from the illicit negotiations, subsequent settlement agreement and OUM's failure to defend Hayes, not the plaintiff's allegations.
19. The losses referenced in item 18 are, and were not subsidized by OUM's payments to Philblad to date.
20. Feltes initiated and participated in the illicit settlement negotiations and subsequent settlement agreement referenced in items 8, 9 & 10, and thereby directly prevented Hayes from exercising his XIV Amendment due process rights to notice and an opportunity to be heard.
21. Feltes initiated and participated in the illicit settlement negotiations and subsequent settlement agreement referenced in items 8, 9 & 10, and thereby directly prevented Hayes from exercising his XIV Amendment due process rights and consequently caused him to incur damage to his podiatry license and practice.
22. Feltes initiated and participated in the illicit settlement negotiations and subsequent agreement, and thereby caused Hayes to experience anxiety, emotional distress and humiliation.
23. Feltes initiated and participated in the illicit settlement negotiations and subsequent agreement, and thereby caused Hayes to incur injury to his professional reputation,

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standing in the community and the loss of the good will of his patients.

24. Feltes initiated and participated in the illicit settlement negotiations and subsequent agreement, and thereby caused him to be slandered by the plaintiff Pihlblad at the health spa.
25. The settlement negotiations stipulated in Count I are not privilege because of illegality, and because they were conducted in violation of this defendant's due process rights.

COUNT II.

26. Hayes reavers all of the allegations stipulated in Count I of this complaint.
27. Feltes illicitly conspired with David McGrath of OUM to file a motion to dismiss the counterclaims of Hayes against the Sutter Corporation in the above captioned case, and OUM agreed to prevent Van Wagner from opposing it on behalf of Hayes even though he has good and valid defenses and affirmative claims against the Sutter Corporation.
28. OUM did instruct Jeffery Van Wagner to not oppose the motion stipulated in item 27 even though Hayes has good and valid defenses and affirmative claims against the Sutter Corporation. (See attached letter dated January 27, 1994.)
29. Feltes and McGrath conspired to execute a motion to dismiss the counterclaims of Hayes unopposed, and did execute the conspiracy and motion to deprive Hayes of his XIV Amendment due process rights to notice and an opportunity to be heard.
30. Feltes and McGrath did conspire and execute the motion stipulated in item 29 and thereby caused Hayes to experience anxiety, emotional distress, and humiliation.
31. The settlement negotiations stipulated in Claims I & II are not privileged because of illegality, and because they were conducted in violation of this defendant's due process rights.

CLAIM III.

32. Hayes reavers all of the allegations stipulated in Counts I & II of this complaint.
33. Hayes prays for equitable relief from this Court as it sees fit on the basis of Feltes shocking behavior as an officer of it, and as a government official acting *ultra vires*. Specifically, Feltes has acted with a reckless disregard for the United States Constitution, the laws of the State of Ohio and the dignity of this Court to deprive this defendant of his legal rights; all in the interest of a client who designed,

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manufactured and sold a particularly defective silicone great toe implant.

COUNT IV.

34. Hayes reavers all of the allegations stipulated in Counts I, II & III.
35. Hayes asserts that the doctrine of *Res Ipsa Loquitur* applies to all of the allegations contained in Counts I, II, III & IV of this complaint even though he may not employ it as a sole legal basis to prove any particular allegation contained herein.

WHEREFORE, PREMISES CONSIDERED, Hayes respectively prays that upon trial he recover damages in full against Feltes for each of its causes of action described herein, for pre-judgment interest, for reasonable attorney's fees, for costs of court, for indemnification and contribution for all claims lost against Jean Pihlblad, the Sutter Corporation, Timothy Wollaeger, and Dr. Guido La Porta, and for all further relief as the court and the trier of fact sees fit.

Defendant demands a trial by a jury of his peers and further sayeth naught.

Respectfully submitted,

Mark William Hayes, D.P.M., J.D.
Pro se. 3rd party Plaintiff
19876 Henry Road
Fairview Park, Ohio 44126
(216) 333-0007

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by regular U.S. mail this _____ day of February,
1994 to:

Jeffery Van Wagner
1300 East 9th Street
Cleveland, Ohio 44114

Mr. Frank P. Giaimo, Esq.
55 Public Square, Suite 2020
Cleveland, Ohio 44113

Dr. Arnold T. Magy
c/o North Abbe Podiatry, Inc.
1134 North Abbe Road
Elyria, Ohio 44035

Mr. Joseph J. Feltes, Esq.
c/o Buckingham, Doolittle & Burroughs
624 Market Avenue, North
Canton, Ohio 44702

Ms. Sarah L. Olson
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
Chicago, Illinois 60606-1229

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REQUEST FOR SERVICE INSTANTER

To The Clerk:

Please serve a copy of this third party complaint with summons upon the named third party defendant Joseph Feltes, at the address set forth in the caption, by certified U.S. mail, (return receipt requested) .

Respectively requested this _____ day of February, 1994.

Mark William Hayes, D.P.M. Pro se.
Third Party Plaintiff
19876 Henry Road
Fairview Park, Ohio 44126
(216) 333-0007