Final Order No. DOH-17-0654-FOF-MQA
FILED DATE - APR 18 2017
Department of Health
By: Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 2015-17616
2015-18000
2015-19442
2015-20428
DOAH CASE NO.: 16-3127PL
LICENSE NO.: ME0099126

OSAKATUKEI O. OMULEPU, M.D.,

Respondent.
_____/

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on April 7, 2017, in Fort Lauderdale, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Exceptions to the Recommended Order, and Response to Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A, B, and C, respectively) in the above-styled cause. Petitioner was represented by John Wilson, Assistant General Counsel. Respondent was represented by Monica Felder Rodriguez, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULING ON MOTION TO RELINQUISH JURISDICTION FOR EXTRAORDINARY CIRCUMSTANCES

The Board reviewed the Respondent's Motion to Relinquish Jurisdiction for Extraordinary Circumstances and DENIED Respondent's Motion.

RULING ON EXCEPTIONS

The Board reviewed and considered the Respondent's Exceptions to the Recommended Order and ruled as follows:

1. Respondent's Exception 1 to Paragraphs 16 and 25 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

2. Respondent's Exception 2 to Paragraphs 49 and 86 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

3. Respondent's Exception 3 to Paragraph 52 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

4. Respondent's Exception 4 to Paragraph 53 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions, for the reasons stated orally by the Petitioner, and because the Board does not have the necessary substantive jurisdiction to address the Fifth Amendment self-incrimination issue and evidentiary issues raised by Respondent.

5. Respondent's Exception 5 to Paragraph 54 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

6. Respondent's Exception 6 to Paragraph 56 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

7. Respondent's Exception 7 to Paragraph 57 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

8. Respondent's Exception 8 to Paragraph 58 of the Recommended Order is denied for the reasons set forth in the

Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

9. Respondent's Exception 9 to Paragraphs 59 and 60 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

10. Respondent's Exception 10 to Paragraphs 63, 64, 87, 88, and 89 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner, and because the Board does not have the necessary substantive jurisdiction to address the Fifth Amendment self-incrimination issue raised by Respondent.

11. Respondent's Exception 11 to Paragraph 84 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

12. Respondent's Exception 12 to Paragraph 85 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

13. Respondent's Exception 13 to Paragraphs 69, 92 and 93 of the Recommended Order is denied for the reasons set forth in the Petitioner's Response to Respondent's Exceptions and for the reasons stated orally by the Petitioner.

14. Respondent's Exception 13 to Paragraph 100 of the Recommended Order is granted for the reasons set forth in Respondent's written exceptions and the reference to the finding of aggravated factors as set forth in Rule 64B8-8.001(3)(h), Florida Administrative Code, is stricken.

RULING ON PETITIONER'S EXCEPTIONS AND RESPONDENT'S MOTION TO STRIKE EXCEPTIONS

The Board reviewed the Petitioner's Exceptions and the Respondent's Motion to Strike Petitioner's Exceptions and voted to GRANT the Respondent's Motion to Strike Petitioner's Exceptions.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order and, as amended in paragraph 14 on the ruling on the exceptions in this order, are approved, adopted and incorporated herein by reference.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Administrative Law Judge be REJECTED. The Board finds that the following facts justify an increase in the severity of Respondent's penalty:

1. This matter involved similar injuries to two different patients that occurred within the span of a single day that both required hospitalization. (Recommended Order Findings of Fact paragraphs 18-29)
2. The severe nature of injuries to patient D.M. involving multiple perforations of her liver. (Recommended Order Findings of Fact paragraph 29)

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

Respondent's license to practice medicine in the State of Florida is hereby REVOKED.

RULING ON MOTION TO BIFURCATE AND RETAIN JURISDICTION TO ASSESS COSTS

Upon review of the Petitioner's Motion to Bifurcate and Retain Jurisdiction to Assess Costs, the Board GRANTED the Petitioner's Motion and will consider a Motion to Assess Costs at a future meeting.

(NOTE: SEE RULE 64B8-8.0011, FLORIDA ADMINISTRATIVE CODE. UNLESS OTHERWISE SPECIFIED BY FINAL ORDER, THE RULE SETS FORTH THE REQUIREMENTS FOR PERFORMANCE OF ALL PENALTIES CONTAINED IN THIS FINAL ORDER.)

RULING ON MOTION TO STAY PENALTY

At the hearing in this matter, counsel for Respondent made an *ore tenus* Motion to Stay the penalty in this matter. The Board denied the Respondent's Motion.

DONE AND ORDERED this 18th day of April, 2017.

BOARD OF MEDICINE

for
Claudia Kemp, J.D., Executive Director
For Magdalena Averhoff, M.D., Chair

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by **Certified Mail** to OSAKATUKEI O. OMULEPU, M.D., 19311 SW 31st Court, Miramar, Florida 33029; to Monica Felder Rodriguez, Esquire, Rodriguez & Perry, P.A., 7301 Wiles Road, Suite 107, Coral Springs, Florida 33067; to Mary Li Creasy, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; by email to Louise Wilhite-St. Laurent, Deputy General Counsel, Department of Health, at Louise.Stlaurent@flhealth.gov; and by email to Edward

A. Tellechea, Chief Assistant Attorney General, at Ed.Tellechea@myfloridalegal.com this 18th day of April, 2017.

Brigel Sanders

Deputy Agency Clerk

O. Arulepra

7014 2120 0003 8706 8951

[redacted]

Monica Felder Rodriguez, Esq.

7014 2120 0003 8706 9149

[redacted]

MEMORANDUM

DATE: April 18, 2017

TO: Adrienne C. Rodgers, J.D. Bureau Chief
Bureau of Health Care Practitioner Regulation

FROM: Claudia J. Kemp
Executive Director, Board of Medicine

SUBJECT: Delegation of Authority

This is to advise you that while I am out of the office April 18, 2017 the following Program Operations Administrator is delegated to serve as Acting Executive Director for the Board of Medicine.

Crystal Sanford Program Operations Administrator (850) 245-4132

CK/rh
cc:
Sylvia Sanders
Staff, Board of Medicine
Board and Council Chairs

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

v.

OSAKATUKEI O. OMULEPU, M.D.,

Respondent.
_____/

DOAH CASE NO. 16-3127PL
DOH CASE NOS.
2015-18000, 2015-9442,
2015-20428, 2015-7616

MOTION TO RELINQUISH JURISDICTION FOR EXTRAORDINARY CIRCUMSTANCES

Respondent, by and through undersigned counsel, requests that the Board relinquish jurisdiction of this matter back to the Division of Administrative Hearings (DOAH) for the reasons set forth below:

1) A hearing was held in the above-referenced case on October 24-25, 2016. At that hearing, the Department's expert, Dr. Scott Greenberg, testified regarding the meaning of the language in the informed consent forms signed by the patients in these cases. He specifically testified that the informed consent form at issue in that case did not include injuries to abdominal organs.

2) Approximately six weeks later, on December 7, 2016, Dr. Greenberg was deposed in conjunction with another case involving the same

parties. At the December 7, 2016, deposition, Dr. Greenberg was asked again about the meaning of the language in an identical informed consent form. His answer at the December 7, 2016 deposition was in complete and direct conflict with the answer he gave regarding identical informed consent language during the October 24-25, 2016 DOAH hearing.

3) On December 8, 2016, the Department filed its Proposed Recommended Order asking the judge to make a finding of fact based on the hearing testimony of Dr. Greenberg. Although clearly pertinent, and potentially exculpatory to this case, the Petitioner did not disclose to the Administrative Law Judge that this expert had changed his opinion during the December 7 deposition, which appears to be required under Florida Ethics Rules 4-3.3 and 4-3.8, which require candor before a tribunal and for a lawyer to take reasonable remedial measures if he knows that he has offered material evidence and learns of its falsity.

4) The Administrative Law Judge issued a Recommended Order in this case on January 6, 2017. In her Recommended Order, the Judge made a finding that the language in the consent forms does not include the injuries sustained by the patients, as proposed by the Department, based solely on the testimony of Dr. Greenberg.

5) Respondent filed an exception to this finding, and contacted Petitioner to see if it would agree not to contest this exception based on the subsequent testimony of its expert.

6) Petitioner did not respond to counsel for Respondent, but filed responses to Respondent's exceptions on February 13, contesting the exception despite the change in its expert's opinion about the meaning of the informed consent form.

7) This information represents a substantial change in the evidence in this case, which was not known on the date of the hearing, and which may materially affect the fact-finding of the Administrative Law Judge in this case, including the finding of the existence of the standard of care violations.

8) Although Rule 1.540(b) of the Florida Rules of Civil Procedure does not govern procedure in cases pending under Chapter 120, Florida Statutes, it is nevertheless useful to look to the language of that rule for guidance when trying to address a situation like the one presented by this motion in which a party to a disciplinary proceeding faces the possibility of being denied fundamental fair play and basic due process. In pertinent part, Rule 1.540(b) offers the following types of relief:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or a proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or Extrinsic), misrepresentation, or other misconduct of an Adverse party (Emphasis added)

9) The change in Dr. Greenberg's opinion testimony is at least "newly discovered evidence". It certainly would appear to be unfair and a denial of due process for the Respondent in this case to be subjected to disciplinary action on the basis of expert opinion that has since been receded from.

10) This matter is currently scheduled to be before the Board at its meeting in April. Respondent believes that if jurisdiction of this matter is relinquished, this issue may be able to be resolved prior to the date of the hearing, but to provide the information to the Administrative Law Judge, jurisdiction of the case must be relinquished back to DOAH.

11) Petitioner has been contacted about this motion and objects.

WHEREFORE, Respondent requests that the Board relinquish jurisdiction of this case back to the Division of Administrative Hearings for the limited purpose of requesting the case be reopened to accept the subsequent testimony of the Department's expert on the scope of the language in the consent form.

Sincerely,

RODRIGUEZ & PERRY, P.A.
Attorneys for Respondent
7301 Wiles Road, Suite 107
Coral Springs, FL 33067
Off: (305) 670-9800
Fax: (305) 670-9933

Monica L. Felder Rodriguez
Florida Bar No. 986283

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Relinquish Jurisdiction has been furnished to Assistant General Counsel John Wilson at john.wilson@flhealth.gov, Claudia Kemp, J.D., Executive Director, Board of Medicine at Claudia.kemp@flhealth.gov; Rebecca.hewett@flhealth.gov and via U.S. Mail to Agency Clerk c/o General Counsel, Department of Health, 4052 Bald Cypress Way, Bin #A-02, Tallahassee, FL 32399 on this 17th day of February, 2017.

Monica L. Felder Rodriguez

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

OSAKATUKEI O. OMULEPU, M.D.

Respondent.

/

DOAH CASE NO.: 16-3127PL
DOH CASE NO.: 2015-19442
DOH CASE NO.: 2015-17616
DOH CASE NO.: 2015-18000
DOH CASE NO.: 2015-20428

MOTION TO STRIKE EXCEPTIONS

COMES NOW, Respondent, Osak Omulepu, M.D., through undersigned counsel, and files this Motion to Strike Exceptions late filed by Petitioner, for the reasons set forth below:

1. A Recommended Order was filed in this case on January 6, 2017.
2. Unless a party requests an extension of time to file Exceptions, and such request is granted, exceptions to a Recommended Order are due no later than 15 days after the filing of a Recommended Order.
3. On January 19, 2017, Respondent asked Petitioner whether it objected to an extension of time for him to file exceptions to the Recommended Order. Petitioner objected to that motion.
4. The Respondent then filed a Motion for Extension of Time for him to file exceptions with the Board of Medicine (noting Petitioner's objection). Petitioner filed a response to the Motion, vehemently opposed to giving Respondent an extension of time to file exceptions in the above-referenced

matter. At no time did Petitioner indicate it planned to file exceptions, or request an extension of time to file such exceptions.

5. Respondent's request for an extension of time to file exceptions was granted. Note again, this was not a joint request, and no separate request for an extension was made by Petitioner.
6. On February 2, 2017, Petitioner filed exceptions to the Recommended Order.
7. In light of the fact Petitioner never requested an extension of time to file exceptions, Petitioner's deadline for filing exceptions was January 23, 2017.
8. Petitioner's exceptions are thus untimely, and must be stricken or rejected.

WHEREFORE, Petitioner's Exceptions to the Recommended Order are untimely and this Motion to Strike Exceptions should be granted.

Respectfully submitted,

RODRIGUEZ & PERRY, P.A.
Attorneys for Respondent
7301 Wiles Road, Suite 107
Coral Springs, FL 33067
Off: (305) 670-9800
Fax: (305) 670-9933

Monica L. Felder Rodriguez
Florida Bar No. 986283

DEPARTMENT OF HEALTH v. OSAKATUKEI O. OMULEPU, M.D.
DOAH CASE NO.: 16-3127PL
DOH CASE NO.: 2015-19442
DOH CASE NO.: 2015-17616
DOH CASE NO.: 2015-18000
DOH CASE NO.: 2015-20428

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Strike has been furnished to Assistant General Counsel John Wilson at john.wilson@flhealth.gov, on this 6th day of February, 2017.

Monica L. Felder Rodriguez

RODRIGUEZ & PERRY
P.A.

Monica L. Felder Rodriguez*
Pamela I. Perry

*Board-certified in Health Law

February 8, 2017

Agency Clerk
c/o General Counsel
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, FL 32399

RE: ***DOAH CASE NO. 16-3127PL***
DOH CASE NOS. 2015-17616, 2015-18000, 2015-19442, 2015-20428

To whom it may concern,

Please find a Motion To Strike Exceptions filed on behalf of Respondent in the above referenced matter.

Sincerely,

Monica L. Rodriguez

MLR:jgs

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STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

PETITIONER,

v.

OSAKATUKEI O. OMULEPU, M.D.,

RESPONDENT.
_____/

DOAH CASE NO. 16-3127PL
DOH CASE NOS. 2015-17616, 2015-18000, 2015-19442, 2015-20428

PETIIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER

The State of Florida, Department of Health (Petitioner), by and through its undersigned attorney and pursuant to section 120.57, Florida Statutes (2016), and Rule 28-106.217, Florida Administrative Code, hereby files the following Response to Respondent's Exceptions to the Recommended Order (RO) filed January 6, 2017, in the above-styled cause.

Petitioner's General Response

The Board of Medicine is vested by the laws of Florida with the authority to interpret and apply such laws, regulations, and policies as are applicable to programs within the Board's regulatory sphere. The Board may reject or modify an Administrative Law Judge's (ALJ) Recommended Order as provided in section 120.57(1)(l), Florida Statutes (2016), which provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule,

> the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.
>
> (emphasis added).

According to section 120.57(1)(l), the Board may reject or modify the findings of fact if the Board first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The Board is "not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion." Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985); see also Rogers v. Dep't of Health, 920 So. 2d 27, 31 (Fla. 1st DCA 2005). "An ALJ's findings cannot be rejected unless there is no competent, substantial evidence from which the findings could reasonably be inferred." Prysi v. Dep't of Health, 823 So. 2d 823, 825 (Fla. 1st DCA 2002).

In its review of the record, the Board is not permitted to resolve conflicts, judge the credibility of witnesses, or draw inferences from the evidence. These actions are at the sole discretion of the Administrative Law Judge. Similarly, the Board may not reevaluate

the quantity or quality of the evidence presented at the final hearing. The only evaluation that the Board is authorized to make is whether the evidence is competent and substantial. See Martuccio v. Dep't of Prof'l Regulation, Bd. of Optometry, 622 So. 2d 607, 609 (Fla. 1st DCA 1993), citing Heifetz, 475 So. 2d 1277; Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996).

Competent substantial evidence was defined by the Florida Supreme Court in the following way:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be *reasonably inferred*. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.... We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that *a reasonable mind would accept it as adequate to support the conclusion reached*. To this extent the 'substantial' evidence should also be 'competent.'

DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)(emphasis added, internal citations omitted).

Therefore, "[i]f the administrative law judge's findings are supported by competent substantial evidence, the agency cannot reject them even to make alternate findings that are also supported by competent substantial evidence." Resnick v. Flagler Cty. Sch. Bd., 46 So. 3d 1110, 1112-13 (Fla. 5th DCA 2010)(citing Gross v. Dep't of Health, 819 So. 2d 997, 1002 (Fla. 5th DCA 2002)). "An agency abuses its discretion when it improperly rejects an administrative law judge's findings." Resnick 46 So. 3d at 1113.

However, when findings of fact become matters of opinion and such opinions include policy considerations over which the Board has special responsibility, the Board is permitted to reject or modify them notwithstanding the fact that they are called findings of fact. Sch.

Bd. of Leon Cty. v. Hargis, 400 So. 2d 103 (Fla. App. 1981). Therefore, the standard to be applied by the Board when deciding the validity of exceptions to findings of fact includes 1) whether the record, taken as a whole, establishes a basis of fact from which the facts at issue can be reasonably inferred; 2) whether the evidence relied on to sustain the facts is sufficiently relevant and material that a reasonable mind would accept it as supporting the conclusion reached; and 3) whether the Board has special reasonability in these matters such that it has special insight which must be considered.

However, if a finding of fact in a RO is improperly labeled by an ALJ, the label should be disregarded and the item treated as though it were properly labeled as a conclusion of law. Battaglia Props. v. Fla. Land & Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). Issues determined by ordinary methods of proof including the weighing of evidence and judging credibility are findings of fact, while issues resolvable only by policy determination are conclusions of law. Holmes v. Turlington, 480 So. 2d 150 (Fla. 1st DCA 1985).

In order to reject or modify a conclusion of law, the Board must: a) state with particularity its reasons for rejecting or modifying such conclusions of law; and b) make a finding that the substituted conclusion of law is as or more reasonable than that which was rejected or modified. Id. See also Barfield v. Dep't of Health, 805 So. 2d 1008 (Fla. 1st DCA 2001); Pan Am World Airways v. Fla. Pub. Serv. Comm'n, 427 So. 2d 716 (Fla. 1983); Humana, Inc. v. Dep't of HRS, 492 So. 2d 388, 392 (Fla 4th DCA 1987); Bayonet Point Regional Medical Center v. Dep't of HRS, 516 So. 2d 995 (Fla. 1st DCA 1987).

An agency may adopt the ALJ's findings of fact and conclusions of law, and reduce or increase the recommended penalty of the ALJ in its Final Order. Crim. Just. Stds. & Training Comm'n v. Bradley, 596 So. 2d 661, 663 (Fla. 1992).

> [I]t is a primary function of professional disciplinary boards to determine the appropriate punishment of the misconduct of the professionals it regulates. As long as the statute under which a professional agency operates provides guidelines for imposing penalties, the agency complies with section 120.57(1)[(l)], and the increased penalty falls within the guidelines established by its statute, a professional board or agency has the discretion to increase the recommended penalty.

Id. Based on the foregoing requirements of law and argument below, Petitioner requests that the Board of Medicine (Board) deny Respondent's Exceptions to the Recommended Order.

Petitioner's General Response to the Sufficiency of the Administrative Complaint

In order to impose discipline against a licensee, section 120.60(5), Florida Statutes, requires an agency to serve the licensee with an administrative complaint which affords reasonable notice of the facts or conduct which warrant the intended action.

Petitioner was charged in the Second Amended Administrative Complaint (AC) with medical malpractice under section 458.331(1)(t), Florida Statutes. As referenced in paragraph 31 of the AC, section 456.50(1)(g), Florida Statutes, defines medical malpractice as the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure. The AC further states, in paragraphs 34 and 38, that Respondent fell below the standard of care when he repeatedly punctured Patient D.M.'s liver and Patient N.F.'s small bowel. The AC provided Respondent

with reasonable notice of the allegation that his treatment of the respective patients, specifically related to his puncturing of Patient D.M.'s liver and Patient N.F.'s small bowel, was below the standard of care.

The AC also provided Respondent with reasonable notice of violations alleged under section 458.331(1)(m), Florida Statutes. Paragraphs 10, 18, 25, and 30 of the AC state that the Respondent documented using a tumescent solution with a concentration of one part epinephrine per 4 million units for each patient's procedure. Paragraphs 56, 62, 68, and 74 state that Respondent failed to accurately document the epinephrine concentration used in each patient's procedure.

Some conflict in the facts alleged in the charging document are inevitable when Petitioner charges alternative violations. Petitioner argued that Respondent's records were the best evidence of what epinephrine concentration was used during the procedures and recommended the ALJ find that Respondent practiced below the standard of care by using a concentration of one part epinephrine per 4 million units. The ALJ determined, based on evidence offered by the Respondent, that he actually used a concentration of at least one part epinephrine per 4 million units.

The amount of epinephrine used by Respondent was a fact at issue in the hearing. The AC provided reasonable notice to Respondent that Petitioner intended to pursue discipline under section 458.331(1)(m), Florida Statutes, should the factual findings deviate from what was documented in his records.

General Response to Complaints that Certain Facts were not Alleged in the Administrative Complaint

The Department's governing statutes do not require the inclusion of every piece of evidence that may be introduced during a disciplinary proceeding in an administrative complaint. As Respondent admits, there is no law that requires the Department include every piece of evidence it seeks to introduce in the administrative complaint. As such, it was not a violation of the Respondent's due process rights for this evidence to be considered by the ALJ.

Section 120.569(2)(g), Florida Statutes, provides "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible. . ." Here, the ALJ found that the evidence introduced into the record was relevant, material, and not unduly prejudicial. The Board has no authority to remove individual findings of fact from the RO on the grounds that they were not explicitly stated on the face of the AC.

General Response to References to section 766.102

Section 458.331(1)(t), Florida Statutes, only requires the Board give great weight to section 766.102, Florida Statutes, in enforcement actions. It is not binding, per se.

Section 766.102(2)(a), Florida Statutes, requires a malpractice claimant to prove an injury is not a necessary or reasonably foreseeable outcome of a procedure, had the procedure been carried out within the standard of care. The fact that a negative outcome

to a surgical procedure is known to have occurred does not make it necessary or reasonably foreseeable. While Respondent's experts label organ punctures as "known complications," the record is devoid of any evidence that these physicians believe organ puncture is a reasonably foreseeable outcome of a routine liposuction procedure. The ALJ considered this defense and rejected it as a matter of fact in paragraphs 46 through 61 of the RO. These findings are supported by competent, substantial evidence and should not be disturbed.

Section 766.102(3)(b), provides that the existence of an injury does not create an inference or presumption of negligence against a healthcare provider. It does not prevent the ALJ from giving injury evidence great weight and using it in conjunction with other direct or circumstantial evidence to find a practitioner fell below the standard of care.

Response to Exception No. 1: Paragraphs 16 and 25.

Paragraphs 16 and 25 of the RO state:

> 16. Because Patient D.M. disclosed her prior pregnancies to Respondent, Respondent knew, or should have known, that Patient D.M. had a potentially weak or thin abdominal wall.
>
> 25. Because Patient N.F. disclosed her prior pregnancies to Respondent, Respondent knew, or should have known, that Patient N.F. had a potentially weak or thin abdominal wall.

Petitioner realleges and incorporates its General Response to the Sufficiency of the AC and General Response to Complaint that Certain Facts were not Alleged in the AC.

The remainder of Respondent's argument in this exception requests that the Board re-weigh the evidence and place greater weight on Respondent's "intended purpose" than the finding of the ALJ, which is impermissible. The ALJ's finding was supported by

competent, substantial evidence, including the testimony of Respondent's expert, who admitted in cross examination that a potentially weak abdominal wall was something that the surgeon should be aware of and consider in the course of treatment. (T. Vol. 2, p. 152) The ALJ clearly found Respondent's "intended purpose" less credible than Petitioner's position.

The ALJ's finding that Respondent knew or should have known Patient D.M.'s and N.F.'s potentially weak abdominal walls is based on written pre-operative records bearing Respondent's signature. (P. Exh. 9, p 19; P. Exh. 5, p. 5) Because the ALJ's findings in paragraphs 16 and 25 are supported by competent, substantial evidence, they should not be disturbed.

Response to Exception No. 2: Paragraphs 49 and 86

Paragraphs 49 and 86 of the RO state:

> 49. After Patient N.F.'s hospitalization, her mother confronted Respondent who admitted that he "messed up," and suggested that his instrument "cuts through muscle and fat like butter," and may have contributed to the perforation.
>
> 86. An organ puncture during liposuction is not a per se act of medical negligence. Nevertheless, in this case, Respondent admitted to Patient N.F.'s mother that he "messed up" and sliced through Patient N.F.'s small bowell with his cannula like it was "butter." This exceedingly rare complication occurred in not one, but two, of Respondent's procedures, on the same day.[1]

Petitioner realleges and incorporates its General Response to Complaints that Certain Facts were not Alleged in the AC.

[1] Respondent takes exception only to the second sentence of paragraph 86.

Respondent argues the ALJ's findings are not supported by clear or convincing evidence. Under Section 120.57(1)(l), the proper evidentiary standard for these exceptions is competent and substantial evidence. The ALJ's factual findings in paragraphs 49 and 86 are supported by competent, substantial evidence and should not be disturbed.

Witness R.D. testified that Respondent admitted that he "messed up" Patient N.F.'s procedure and that he used a tool that "cuts through muscle and fat like it's butter." (T. Vol. 1, p. 48-50) The ALJ permitted the testimony into evidence and relied on it in making these findings. Witness R.D.'s testimony about her conversation with Respondent went unrebutted by any other evidence.

The ALJ's findings do not mischaracterize Witness R.D.'s testimony. Nothing in the record indicates that Respondent limited his admission to R.D. to a single injury or technique. The competent, substantial evidence in the record indicates that Respondent made a general admission that his own surgical mistakes caused D.M.'s dire complications. Respondent's true intent is to have the Board re-weigh the evidence and assign less weight to D.M.'s testimony than the findings of the ALJ, which is impermissible.

Response to Exception No. 3: Paragraph 52

Paragraph 52 of the RO states:

> 52. Respondent was responsible for ensuring that the cannula used during liposuction procedures was manipulated with precision and extreme care to avoid contact with the patients' internal organs.

Petitioner realleges and incorporates its General Response to the Sufficiency of the AC and General Response to Complaint that Certain Facts were not Alleged in the AC.

Paragraph 52 simply states the ALJ's finding as to the standard of care for surgeons performing liposuction near internal organs. The ALJ's finding is supported by portions of both parties' experts' testimony. (T. Vol. 2, p. 165; R. Exh 1, p. 75; T. Vol. 1, p. 152-157) Because the ALJ's finding is based on competent, substantial evidence, this exception should be denied.

Response to Exception 4: Paragraph 53

Paragraph 53 of the RO states:

> 53. In order for the cannula to come into contact with an internal organ (with the exception of the heart and lungs), Respondent pushed the cannula at an inappropriate angle through a thick layer of muscle called the abdominal wall. The tough abdominal wall has a noticeably different consistency than the soft layers of subcutaneous fat. As surgeon is required to operate with a level of skill and care to be able to discern between subcutaneous fat and muscle tissue while passing the cannula through the patient.

Petitioner realleges and incorporates its General Response to the Sufficiency of the AC and General Response to Complaints that Certain Facts were not Alleged in the AC.

Paragraph 53 continues to explain the standard of care for surgeons performing liposuction in the abdominal region. The ALJ's finding is based on the testimony of both Petitioner's and Respondent's experts, all of which constitutes competent, substantial evidence. (T. Vol. 2, p. 166; T. Vol. 1, p. 154) Respondent did puncture the organs of both patients during their procedures. (T. Vol. 2, p. 162) The ALJ credited the testimony of Petitioner's Expert, who stated that a perforation of the liver or bowel can only happen if the cannula is angled towards the patient and pushed through the abdominal wall. (T. Vol. 1, p. 154). Respondent seeks to have the board re-weigh evidence and credit his

own experts' testimony over Petitioner's. Doing so is inappropriate and this exception should be denied.

The ALJ's finding in paragraph 63 that "...it is not possible to tell with certainty what transpired," does not contradict the findings in paragraph 53. The clear and convincing evidence standard does not require absolute certainty. Rather, the evidence must be of such weight that it produces a firm belief or conviction in the trier of fact as to the truth of the allegations. While no expert could testify about what happened in the operating room with absolute certainty, the ALJ properly found that clear and convincing evidence supported the conclusion that the Respondent pushed the cannula at an inappropriate angle through the abdominal wall. That conclusion is supported by competent, substantial evidence, and should not be disturbed.

Response to Exception No. 5: Paragraph 54

Paragraph 54 of the RO states:

> 54. The standard of care in Florida requires surgeons to use extreme care to ensure that the abdominal wall is not [breached]. This is especially true when the patient's medical history suggests the possibility of a thin abdominal wall.

Petitioner realleges and incorporates its General Response to the Sufficiency of the AC and General Response to Complaints that Certain Facts were not Alleged in the AC.

Respondent's expert admitted in cross examination that he employs surgical techniques designed to prevent breaching the abdominal wall in any procedure and that the risk of breaching the abdominal wall is increased in patients whose abdominal wall is

potentially thin. (T. Vol. 2, p. 152-153) Therefore, competent, substantial evidence exists to support the ALJ's finding in paragraph 54 and it should not be disturbed.

Response to Exception No. 6: Paragraph 56

Paragraph 56 of the RO states:

> 56. In fact, Respondent's world-renowned BBL expert, Dr. Medieta explained, "I'm constantly thinking trying to avoid, so it is constantly on my mind in terms of what I am trying to avoid, so I'm always angling my cannula and making sure that I'm on the right plane."

Paragraph 56 of the RO is a direct quote from one of Respondent's expert witnesses. (R. Exh. 1, p. 47) Respondent does not dispute the accuracy of the quotation. Respondent seeks to have the board re-weigh the evidence and assign greater weight to one portion of the expert's testimony than assigned by the ALJ. This is impermissible. Additionally, the portion of the testimony the Respondent wishes the ALJ afforded greater weight to merely contained the anecdotal experience of other surgeons performing liposuction procedures. This type of testimony has no bearing whatsoever on whether or not Respondent fell below the standard of care in this case. The ALJ is the fact finder charged with determining what evidence is relevant, credible, and will be incorporated into the RO. As a result, Respondent's exception should be denied.

Response to Exception No. 7: Paragraph 57

Paragraph 57 of the RO states:

> 57. Dr. Mendieta admitted that although perforating an internal organ is a "known complication" related to liposuction, it can result from medical negligence.

The ALJ's finding is based on competent, substantial evidence and should not be disturbed. Paragraph 57 of the RO paraphrases the deposition testimony of one of Respondent's expert witnesses. (R. Exh. 1, p. 50-53) Again, Respondent does not dispute the accuracy of the statement. The ALJ is not required to use Respondent's expert testimony exclusively to support Respondent's arguments. The expert's testimony was entered as evidence and accurately referenced in the RO. Respondent seeks to have the Board re-weigh the evidence and assign greater weight to one portion of the expert's testimony than assigned by the ALJ. Doing so is inappropriate, and this exception should be denied.

Response to Exception No. 8: Paragraph 58

Paragraph 58 of the RO states:

> 58. Respondent argues he is absolved of any responsibility for the puncture of internal organs because Patients D.M. and N.F. signed consent forms that included the risk of "damage to deeper structures, including nerves, blood vessels, muscles, and lungs."

Petitioner realleges and incorporates its General Response to References to Section 766.102.

This finding is merely a recitation of the evidence in the case and not a conclusion of law. The ALJ does not mischaracterize Respondent's argument. His claim remains that a finding of malpractice (responsibility) is precluded (absolved) because any outcome referenced on the consent form is per se reasonably foreseeable. This interpretation is not only unsupported by the evidence, but would allow physicians to define medical

malpractice out of existence simply by listing all negative results of malpractice as "known."

The ALJ's inclusion of the language written in the consent forms for each patient is an appropriate finding of fact and is based on competent, substantial evidence. (P. Exh. 5, p.43; P. Exh. 9, p. 44) Respondent's exception should be denied.

Response to Exception No. 9: Paragraphs 59 and 60

Paragraphs 59 and 60 of the RO state:

> 59. Significantly, the informed consent forms for liposuction signed by the patients did not include damage to the liver, small bowel, or other intra-abdominal organs.
>
> 60. Petitioner's expert, Dr. Greenberg, explained that the language in the consent form does not contemplate damage to internal organs shielded by the abdominal wall, and a lay person would be unlikely to make such an inference.

The ALJ's findings are supported by competent, substantial evidence and should not be disturbed.

Petitioner's expert clearly explained the rationale for his opinion:

> It doesn't even mention bowel perforation and I think that that's because it is not something that most plastic surgeons as we're sitting down with the patient and they ask what are the complications that can occur during this procedure, it's not something off the top of our heads we say that can happen. Can it happen? Yes. But I think that there clearly had to be some technical error for that -- there clearly has to be some technical error for that to occur. (T. Vol. 2, p. 75)

Additionally, the patients' consent forms do not specifically reference any organs shielded by the abdominal wall. (P. Exh. 5, p. 43; P. Exh. 9, p. 44) While Respondent

may have discussed the risks of surgery with the patients, there is no evidence in the record as to what, if any, clarification Respondent made.

Respondent's true request seeks to have the Board re-weigh the evidence and assign greater weight to Respondent's expert opinion on the meaning of "deeper structures" than the ALJ did. Doing so is impermissible. Because paragraph 58 is supported by competent, substantial evidence, Respondent's exception should be denied.

Response to Exception No. 10: Paragraphs 63, 64, 87, 88, and 89

Paragraphs 63, 64, 87, 88, and 89 state:

> 63. As noted by all three experts, absent being present during the procedure, having it well documented in the notes, or talking with Respondent, it is not possible to tell with certainty what transpired. Respondent asserted his Fifth Amendment Privilege against self-incrimination, instead of clarifying any of the disputed issues.
>
> 64. Based on the foregoing, Petitioner demonstrated by clear and convincing evidence that the puncture of the patients' internal organs was the result of Respondent's violation of the standard of care and improper angling of the cannula during the procedures.
>
> 87. Respondent's assertion of his Fifth Amendment Privilege against self-incrimination permits the fact-finder to draw adverse inferences from his silence. Baxter v. Palmigiano, 425 U.S. 308 (1976).
>
> 88. The only inference that can be drawn is that Respondent violated the standard of care and committed malpractice by the reckless and improper angling of the cannula for these two procedures, resulting in the perforation of internal organs.
>
> 89. Petitioner proved by clear and convincing evidence that Respondent violated section 458.331(1)(t) by puncturing Patient D.M.'s liver multiple times and Patient N.F.'s small bowel.

Petitioner incorporates by reference its General Response to the Sufficiency of the AC and References to Section 766.102.

The Respondent first argues that it was inappropriate for the ALJ to make any findings of fact that Respondent should have performed the surgery in a certain way or that he performed the surgery in a certain way because there were no facts in the AC to support these contentions. These arguments are without merit. The Respondent cites to Trevisani v. Department of Health to support her contention that there was no competent substantial evidence to support the ALJ's findings. 908 So. 2d 1108 (2005). However, this case is factually distinguishable from Trevisani. In Trevisani, the ALJ found that the cause of the patient's injury was unknown and therefore it was impossible to determine if they resulted from an act or omission of the Respondent. Here, the ALJ rejected Respondent's contention that it is impossible to determine if any deviation from the standard of care contributed to the patients' injuries, finding that the testimony of Petitioner's expert in paragraph 85 established that fact. In particular contrast with Trevisani, where the cause of injury to the patient could not be determined, it is undisputed in this case that Respondent punctured Patient N.F.'s and Patient D.M.'s organs with his cannula.

The Respondent next argues that the ALJ departed from the essential requirements of law by drawing negative inferences from Respondent's silence. Respondent relies on Vining v. Florida Real Estate Commission for this argument. In Vininig, a statute required a person licensed by the real estate commission to file a sworn answer to any complaint served upon him by that commission. 281 So. 2d 487 (Fla. 1973). The Florida Supreme Court held that such a statute was unconstitutional because it violated a person's right against self-incrimination. Id. at 491. The Court based its

holding on its finding that administrative proceedings that may result in deprivation of livelihood are penal in nature, and as such, are protected by the Fifth Amendment. Id. at 491-92.

The United States Supreme Court addressed a similar issue in Baxter v. Palmigiano. 425 U.S. 308 (1976). In Baxter the respondent was advised of his right to remain silent in a prison disciplinary proceeding, but was warned that his silence could potentially be used against him. Id. at 312. The Court overturned the lower court's ruling that the privilege against self-incrimination barred adverse inferences from silence in penal proceedings. The Court found:

> Our Conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil action when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a party to a Civil cause." Id. at 318 (citations omitted).

The Court further clarified that, even though the objection to allowing adverse inferences from silence in penal proceedings is genuinely rooted Fifth Amendment policy:

> It has little to do with a fair trial and derogates rather than improves the chances for accurate decisions. Thus, aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause. Id. at 319 (citations omitted).

This is not a criminal case. Respondent successfully raised his privilege against self-incrimination by refusing to answer discovery requests, refusing to answer deposition questions, and electing not to testify at his Final Hearing. The Fifth Amendment provides no further protection to a litigant outside of criminal court.

Response to Exception No. 11: Paragraph 84

Paragraph 84 of the RO states:

> 84. However, the allegations certainly put the Respondent on notice that his admitted multiple punctures to the internal organs in these two patients was a basis upon which the Petitioner sought to discipline his license. Respondent could have used interrogatories or the deposition of Petitioner's expert to discern detailed ultimate facts regarding how Petitioner believed the negligence to have occurred.

Petitioner realleges and incorporates its General Response to the Sufficiency of the AC and General Response to Complaints that Certain Facts were not Alleged in the AC.

The ALJ's comment on the Respondent's discovery opportunities did not improperly shift the burden of proof to the Respondent. There is nothing nefarious about the ALJ highlighting the purpose of the discovery process. Because the ALJ's comment on discovery did not depart from the essential requirements of law, Respondent's exception should be denied.

Response to Exception No. 12: Paragraph 85

Paragraph 85 of the RO states:

> 85. The clear and convincing testimony of the experts was that organ punctures during liposuction are exceedingly rare complications which do not occur in the absence of recklessness in the placement of the cannula, and insufficient attention to the feel of the procedure itself as the cannula passes through fat, tissues, muscles, and the abdominal wall.

The ALJ's summary of her factual findings as to the expert testimony in the case was based on competent, substantial evidence and should not be disturbed.

Paragraph 85 summarizes the ALJ's factual determination of the totality of the experts' opinions in this case. The ALJ weighed the credibility of each witness and found that organ punctures, such as the ones involved in this case, are rare complications that do not occur in the absence of negligence. (T. Vol. 1, p.151-158, 167-168; T. Vol. 2, p. 64-68) The ALJ gave less weight to the Respondent's expert's testimony that even well-respected surgeons have punctured internal organs during liposuction. Again, Respondent seeks to have the Board re-weigh the evidence and overturn the implicit finding that Respondent's expert testimony was less credible than Petitioner's expert testimony. Doing so is impermissible and Respondent's exception should be denied.

To the extent that paragraph 85 contains conclusions of law, Respondent's exception should be denied because the alternate conclusion proposed by the Respondent is not as or more reasonable than that of the ALJ.

Response to Exception No. 13: Paragraphs 69, 92, and 93

Paragraphs 69, 92, and 93 of the RO state:

> 69. The record supports by clear and convincing evidence that Respondent signed or approved these records and bears responsibility for their accuracy. However, Respondent reviewed and signed the medical records, all of which omitted the additional ampule of epinephrine that was purportedly added, without correcting the apparent discrepancy.
>
> 92. Petitioner proved by clear and convincing evidence that Respondent failed to create or keep medical records that accurately reflected the amount of epinephrine administered to Patients L.L., D.M., N.F., and P.N.
>
> 93. As a result, Petitioner proved by clear and convincing evidence that Respondent violated section 458.331(1)(m).

Petitioner realleges and incorporates its General Response to the Sufficiency of the AC and General Response to Complaints that Certain Facts were not Alleged in the AC.

The ALJ's determination that Respondent bore responsibility for the inaccurate documentation of epinephrine concentration is based on competent, substantial evidence. The surgical records for each patient's procedure show that Respondent was actively involved with their creation. (P. Exh. 2, P. Exh. 5, P. Exh. 9, P. Exh. 11) They bear his signature at every stage of the process. There is no additional evidence necessary to prove the records in evidence were created by Respondent.

Respondent argues, through his expert, that he is not responsible for records documenting his own procedure bearing his own signature. (T. Vol. 2, p. 90-91) The ALJ's ruling made it clear that this explanation was not credited and the Board cannot not re-weigh the evidence and change the ALJ's credibility determination. As to the legal conclusions in Paragraphs 62, 92, and 93, Respondent's alternative conclusion is not as or more reasonable than the ALJ's. Based on the foregoing, Respondent's exception should be denied.

WHEREFORE, Petitioner respectfully requests that the Board of Medicine reject Respondent's exceptions and accept the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommended Penalty.

Respectfully submitted,

/s/John Wilson
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(F) (850) 245-4662

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to Counsel for Respondent, Monica Felder Rodriguez, by email at monica@rplawfirdm.com, this 13th day of February, 2017.

/s/John Wilson
John Wilson, Assistant General Counsel
Assistant General Counsel

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

PETITIONER,

v.

OSAKATUKEI O. OMULEPU, M.D.,

RESPONDENT.
_____/

DOAH CASE NO. 16-3127PL
DOH CASE NOS. 2015-17616, 2015-18000, 2015-19442, 2015-20428

PETIIONER'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE

Petitioner Department of Health (Department) files this Response to Respondent's Motion to Strike before the Board of Medicine (Board). Petitioner requests Respondent's Motion to Strike be denied for the reasons stated below:

1. A Recommended Order was filed in this case on January 6, 2017. The natural deadline for both parties to file exceptions was January 23, 2017.
2. On January 19, 2017, Respondent moved for an extension of time to file exceptions. Petitioner objected to the request.
3. The Department received notice that the Board granted Respondent's request later that day via email[1]. No formal order on the motion was ever issued.
4. Kristen Summers, formerly lead counsel for Petitioner in this case, resigned her position with the Department effective January 25, 2016.

[1] Counsel of Record for Petitioner was not copied on this email.

5. The transition of responsibility to co-counsel and the lack of a formal, written order on Respondent's Motion for Extension of Time lead to some confusion as to the filing deadline for Petitioner's Exceptions.
6. Logic seemed to dictate that the filing deadline should be the same for both parties so that neither side had an extended opportunity to review the other party's exceptions before filing their own.
7. Additionally, Respondent needed an extension of time to prepare his exceptions. Had Petitioner filed its exceptions on January 23, 2017, Respondent would have had to use the same ten-day time period to Respond to Petitioner's Exceptions and complete his own exceptions, mandating that both Respondent's Exceptions and Respondent's Response to Petitioner's Exceptions be due at the same time.
8. Principles of fairness to both parties resulted in Petitioner's understanding that its exceptions were not due until the same date as Respondent's Exceptions were due, given the extension granted by the Chair for the Board of Medicine.
9. While Section 120.57(1)(k), Florida Statutes (2016), and Rule 28-106.217, Florida Administrative Code, set a fifteen-day filing window for exceptions, the Board should not strike Petitioner's Exceptions given the above circumstances without considering whether the late filing was due to excusable neglect. *Hamilton Co. Bd. Of Co. Comm'ns v. Dep't. of Env. Reg.*, 587 So.2d 1378 (Fla. 1st DCA 1991).

WHEREFORE, Petitioner requests the Board to deny Respondent's Motion to Strike on the grounds that the delay in filing was the result of excusable neglect and consider

Petitioner's Exceptions to the Recommended Order at the next regularly scheduled Board of Medicine meeting.

Respectfully submitted,

/s/ John Wilson
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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Respondent's Motion to Strike has been provided via electronic mail to Counsel for Respondent, Monica Felder-Rodriguez, Esq., at monica@rplawfirm.com this 9th day of February, 2017.

Respectfully submitted,

/s/ John Wilson
John Wilson
Assistant General Counsel

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

v.

OSAKATUKEI O. OMULEPU, M.D.,

Respondent.
_____/

DOAH CASE NO. 16-3127PL
DOH CASE NOS. 2015-17616, 2015-18000, 2015-19442, 2015-20428

RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

COMES NOW, Respondent, Osak Omulepu, M.D., by and through undersigned counsel, and files these Exceptions to the Recommended Order in the above-referenced cases.

INTRODUCTION TO THESE EXCEPTIONS

The Recommended Order concluded that Dr. Omulepu violated Section 458.331(1)(t), Florida Statutes, because he fell below the standard of care by perforating a patient's bowel and puncturing a patient's liver during liposuction, and also concluded that Dr. Omulepu violated Section 458.331(1)(m), Florida Statutes, by failing to keep adequate medical records because the amount of epinephrine used in this case was incorrectly documented in the records that were prepared by others regarding acts they performed. Despite repeated objections (and the filing of a Motion in Limine), the Administrative Law Judge (ALJ) in this

case (a) allowed evidence and testimony in this case that was outside the scope of the allegations in the Second Amended Administrative Complaint (AC), (b) made findings of fact outside the scope of the allegations in the AC, (c) made findings of fact that are not based on competent, substantial evidence, (d) made findings of fact for which there is no clear and convincing evidence, and (e) made improper negative inferences against Dr. Omulepu based on his decision not to testify in this matter. The ALJ's admission of evidence that was not alleged in the AC, including hearing testimony from the patients and others regarding events outside the scope of the AC, clearly prejudiced and influenced her decisions in this case, resulting in a denial of due process for Respondent. These issues form the crux of most of the exceptions filed below.

As noted above, many of the facts found in the Recommended Order were not alleged in the Administrative Complaint, and basing findings of fact on conduct not alleged violates the Administrative Procedures Act. By failing to allege acts or omissions that the Department believes establish a violation of statutes, but attempting to prove those unalleged acts and omissions at trial, Respondent was denied reasonable notice of the facts or conduct warranting disciplinary action. *Cottrill v. Dep't of Insurance*, 685 So.2d 1371, 1372 (Fla. 1st DCA 1996). It is well-established that a physician may not be disciplined for an offense not charged in the complaint." *Tresvani v. Dep't of Health*, 908 So. 2d

1108, 1109 (Fla.1st DCA 2005); see also, *Gonzalez v. Department of Health*, 120 So.3d 234, 237 (Fla. 1st DCA 2013) (reversing where Department of Health considered matters not alleged in complaint; noting that "[a]dministrative hearing boards may not consider matters not formally charged in the administrative complaint in imposing disciplinary sanctions without violating due process.") (citing *Chrysler v. Dep't of Prof'l Regulation*, 627 So.2d 31, 34-35 (Fla. 1st DCA 1993) (finding harmful error when administrative board discussed unrelated civil malpractice case held in another state but not addressed in the administrative complaint).

Finally, it is important to note that a number of exceptions concern findings in the Recommended Order that either mischaracterize witness testimony, or incompletely quote testimony to support findings and inferences in the Recommended Order. Respondent requests that the Board carefully review the record for the testimony and evidence that purportedly supports these findings of fact to determine whether they truly support the findings of fact and conclusions of law made by the ALJ.

The Board's Review Requirements Under Chapter 120, Florida Statutes

In considering the Recommended Order of the Administrative Law Judge (ALJ) herein, the Board of Medicine is confined solely to the review of the record as established at the formal hearing. *Ong v. Department of Professional*

Regulation, 565 So. 2d 1384, 1387 (Fla. 5th DCA 1990). Thus, the Board is not authorized to receive additional evidence other than that already presented and considered by the ALJ. *Id.* Nor can the Board discipline a licensee for matters not charged in the Administrative Complaint. See *Trevisani v. Dep't of Health*, 936 So. 2d 790, 795 (Fla. 1st DCA 2006); *Ghani v. Dep't of Health*, 714 So. 2d 1113, 1114 (Fla. 1st DCA 1998).

Standard of Review of a Recommended Order

Section 120.57(1)(k), Florida Statutes, authorizes the submission of exceptions to a Recommended Order. In reviewing a Recommended Order of an ALJ, the Board of Medicine ("the Board") must evaluate the individual findings of fact and conclusions of law under a "competent, substantial evidence" standard. §120.57(1)(1), Florida Statutes. Competent substantial evidence is defined as that evidence supporting an ultimate finding which is sufficiently relevant and material such that a reasonable mind would accept as adequate to support the conclusions reached. *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1959).

In keeping with the requirement of a "competent substantial evidence" review, the Legislature has authorized the Board to reject any finding of fact set forth in a Recommended Order, when upon its review of the entire record before the ALJ, the Board determines that there is a lack of competent, substantial evidence upon which to base the particular finding of fact. *Id.*; see also *Heifetz v.*

Department of Business Regulation, 475 So. 23 1277, 1281-1282 (Fla. 1st DCA 1985); *Gross v. Department of Health*, 819 So. 23 997, 1000-1001 (Fla. 1st DCA 2002). In so doing, however, the Board may not reweigh the evidence presented, may not judge the credibility of the witnesses, and may not otherwise interpret the evidence to fit its desired ultimate conclusions. *Heifetz*, supra; *Gross*, supra.

In addition, the Board is authorized to reject or modify the conclusions of law over which it has substantive jurisdiction and to reject or modify interpretation of administrative rules over which it has substantive jurisdiction. §120.57(1)(1), Florida Statutes.

SUMMARY OF EXCEPTIONS TO FINDINGS OF FACT

The errors and omissions in the Recommended Order are so many, and are so intertwined and convoluted, that Respondent believes it is appropriate and will be helpful to present a summary of the nature of and the basis for the many specific exceptions to both the findings of fact and the conclusions of law in the Recommended Order.

Summary of Exceptions to Findings of Medical Malpractice

Respondent will first summarize multiple concerns with the two findings of medical malpractice made in this case which we believe compel dismissal of the malpractice violations found in this case.

First, the AC on its face does not allege malpractice. The AC alleges simply that an injury occurred - bowel perforation and liver puncture - which all experts in this case agreed is a known complication of liposuction, and that the standard of care required Respondent not to have caused that injury. The simple fact an injury occurred does not create any inference or presumption of negligence. Section 766.102 (3)(b), Florida Statutes. To prove negligence, the Petitioner was required to allege and prove that the injury was proximately caused by a breach of the standard of care. Petitioner did no such thing. There is no allegation that Respondent acted negligently in this case, what he may have done that was negligent, or that such negligent conduct caused the injuries in these cases. In the absence of any allegations of negligent conduct by Respondent, the malpractice violations must be dismissed.

Second, there is no clear and convincing evidence in this case upon which a finding of negligence can be based. Although the ALJ makes a finding of fact that Respondent angled the cannula down negligently to cause these injuries, she notes in the Recommended Order that all the experts agreed it was not possible to tell with certainty what transpired. Rather than making this finding based on competent, substantial evidence (after admitting clear and convincing evidence of negligence did not exist), the ALJ made this finding because she made a negative inference that is what must have occurred because Respondent invoked his fifth

amendment privilege not to testify. See, paragraphs 87-88 of the Recommended Order. This negative inference does not constitute competent, substantial evidence, and thus the finding of violations of medical malpractice must be dismissed.

Third, it was clearly erroneous for the ALJ to have made any negative inferences from the fact Respondent elected not to testify in this matter. The law is clear that this is a penal proceeding, and licensees have the same right against self-incrimination as provided in criminal cases. The ALJ even cites the premiere case supporting that legal right in paragraph 71 of the Recommended Order (*Vining v. Fla. Real Estate Comm'n,* 281 So.2d 487, 491 (Fla. 1973). The law is also clear that no inference of guilt may be made from one's exercise of the right to remain silent. *Horne, Comm'n of Education v. Buhmeyer*, 2003 WL 223220030 (Fla. Div. Admin. Hrgs. 2003); *Marston v. State*, 136 So.3d 563 (Fla. 2014). Allowing a jury or judge to find a defendant or respondent must have committed acts alleged because he or she did not deny them essentially decimates the protection the Fifth Amendment provides. It follows that making a negative inference in this circumstance is a clear constitutional violation. The ALJ determined a negative inference could be made based on a case involving discipline of prison inmates in a

federal case.[1] In that case, the Supreme Court of the United States found that the prison disciplinary proceedings were civil, not criminal (penal), proceedings, that no criminal proceedings were pending, and that if the prisoners declined to testify, their silence could be used against them. This case is entirely different. This is a penal proceeding as noted in *Vining*, and the laws and protections provided to defendants in criminal cases apply in licensure discipline cases. Even in the case cited by the ALJ, the Court acknowledges that in penal proceedings, no inference of guilt may be made, stating "The Court has plainly ruled that it is constitutional error under the Fifth Amendment to instruct a jury in a criminal case that it may draw a negative inference of guilt from a defendant's failure to testify about facts relevant to his case." *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976). It was clear error for the judge to make negative inferences from the Respondent's invocation of his Fifth Amendment privilege, and any findings of fact or conclusions of law made as a result of that inference must be dismissed (which includes both standard of care violations).

[1] Note that the suggestion of a negative inference was initially raised by Petitioner for the first time in its Proposed Recommended Order, citing the case the ALJ cites. See Petitioners Proposed Recommended Order (PRO), PP 90. As this was first brought up in the Petitioner's PRO, Respondent did not have an opportunity to address it earlier.

Summary of Exceptions to Findings of Medical Records Violations

Similar issues are present with respect to the medical records violations that were found in this case. First, there is no factual allegation in the AC upon which a finding of a violation may be based. The AC alleged Respondent used a certain amount of epinephrine, and that he documented use of that same amount of epinephrine. See, PP 9-10, 17-18, 24-25, and 29-30 of the AC. There is no allegation the Respondent documented anything incorrectly. In the absence of a factual allegation to support a violation, these charges must be dismissed.

Second, there is no clear and convincing evidence upon which a finding of a violation may be made. The AC alleges Respondent failed to create or maintain accurate records. The ALJ found that the circulators prepared the tumescent solution, and documented the medications used to prepare the tumescent solution in the records. There is no finding that Respondent created the records at issue. He had no firsthand knowledge of the contents of the tumescent solution prepared by the nurses, and was not in a position to document what medications were put into the solution. Rather, although there is no such allegation in the AC, the ALJ found that Respondent was responsible for confirming the accuracy of the records created by the circulators. This is not an acceptable basis upon which a finding of a violation may be made. In the absence of competent, substantial evidence that

Respondent created the records at issue, there can be no finding of a medical records violation, and the medical records violations must be dismissed.

Summary of Exceptions to the Admissibility of Evidence and Testimony Outside the Scope of the Administrative Complaint for the Purposes of Aggravation

At the outset of the hearing, Respondent objected to the admission of any evidence or testimony outside the scope of the AC. It was clear from the Petitioner's list of exhibits and witnesses that it intended to introduce evidence and testimony unrelated to any facts in the AC. and which would be extremely prejudicial to Respondent if heard or reviewed. This included testimony from the patients in these cases and the patient's hospital records. The Petitioner argued that the evidence should be allowed because it goes to possible aggravating factors in the case, and that evidence of aggravating factors is not required to be pled in the AC. When it was evident the ALJ intended to allow Petitioner to put on this evidence, Respondent requested the hearing be bifurcated, so that any evidence of injuries would be heard only if a specific finding of a violation was made. This request was denied.

Respondent was unable to find any case law on this issue, but submits that when an agency wants to establish that the conduct of a licensee in a particular AC caused specific injuries in an effort to increase the penalty imposed in a particular case, those injuries and the causation required to make that determination must be

alleged in the AC so the licensee has notice of the Agency's intent to rely on findings related to these injuries when a penalty is assessed, and the failure to include such factual allegations in the AC violates a licensee's right to due process. See, *Cottrill v. Dep't of Insurance*, 685 So.2d 1371, 1372 (Fla. 1st DCA 1996); *Tresvani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla.1st DCA 2005); *Gonzalez v. Department of Health*, 120 So.3d 234, 237 (Fla. 1st DCA 2013); *Chrysler v. Dep't of Prof'l Regulation*, 627 So.2d 31, 34-35 (Fla. 1st DCA 1993).

As the testimony of the patients and the hospital records were offered solely to prove injuries for the purposes of aggravation that were not alleged in the AC, this testimony and evidence should not have been allowed, and any findings related to that testimony or evidence should be excluded.

EXCEPTIONS TO FACTS AND CONCLUSIONS OF LAW RELATED TO MEDICAL MALPRACTICE

Exception No. 1: Paragraphs 16 and 25

Respondent takes exception to the findings of fact in paragraphs 16 and 25 because these findings of fact were not alleged in the Administrative Complaint, and should be stricken. These paragraphs state:

> 16. Because Patient D.M. disclosed her prior pregnancies to Respondent, Respondent knew, or should have known, that Patient D.M. had a potentially weak or thin abdominal wall.

25. Because Patient N.F. disclosed her prior pregnancies to Respondent, Respondent knew, or should have known, that Patient N.F. had a potentially weak or thin abdominal wall.

The only allegations in the Administrative Complaint relevant to these findings are in paragraphs 11 and 19 of the AC, which state:

11. During the procedure, Respondent repeatedly punctured Patient D.M.'s liver.

19. During the procedure, Respondent repeatedly perforated Patient N.F.'s small bowel.

The corresponding violation alleged is discussed in paragraphs 33 and 37 of the Administrative Complaint, where it states that the standard of care requires Respondent not to puncture a patient's internal organs, and in paragraphs 35 and 38 of the AC, where it states it is a violation of the standard of care to have injured these organs.

Thus, the AC alleges that the simple fact that the patients' organs were damaged is below the standard of care. There is no allegation that Respondent performed the surgery negligently, or incorrectly, that he should have treated this patient differently for any reason, or that the patient suffered injuries that required treatment as a result of the alleged violation of the standard of care.

With respect to these findings, the fact these patient had children (and the fact they both had prior abdominal surgery) was raised during the hearing to discuss how the known complication of damage to internal organs can occur

during liposuction in the absence of negligence, citing factors present in this case that made it possible for the Respondent to have entered the abdominal cavity without being aware he had done so. T. Vol. 2, p. 129-130, 132-137. This was offered in response to the testimony from Petitioner's expert witness that you can always feel the abdominal wall, and should know any time the abdominal wall is penetrated, and that Respondent must have angled the cannula improperly to have caused damage to internal organs. The testimony was also offered to counter the Petitioner's allegation in the Administrative Complaint that any injury to internal organs is below the standard of care.

Instead of using that testimony for its intended purpose, the ALJ (at the behest of the Department in its Proposed Recommended Order) manipulated that testimony instead to make a negative finding (or at least a negative inference) that was not alleged in the AC in this case that Respondent had an even higher duty to use extraordinary care with these patients because of their prior pregnancies. In fact, none of the experts testified as found in this paragraph.

The law is clear (and was cited in paragraph 74 the Recommended Order) that the facts used to prove a violation must be alleged in the Administrative Complaint. See, *Trevisani v. Dept. of Health*, 908 So.2d 1108 (Fla. 1st DCA 2005), and other cases cited above. The factual findings made in paragraphs 16

and 25 were clearly not in the Administrative Complaint and should be rejected and deleted, or amended to state the following:

> 16. As a result of Patient D.M.s prior pregnancies, it is possible that Respondent encountered little to no resistance from the abdominal wall, or that there was already a hole in the abdominal wall, which would explain the injury the patient sustained and why the injury was not suspected at the time of the surgery.
>
> 25. As a result of Patient N.F.'s prior pregnancies, it is possible that Respondent encountered little to no resistance from the abdominal wall, or that there was already a hole in the abdominal wall, which would explain the injury the patient sustained and why the injury was not suspected at the time of surgery.

Exception 2: Paragraphs 49 and 86

Respondent takes exception to paragraphs 49 and 86 of the Recommended Order, which state as follows:

> 49. After Patient N.F.'s hospitalization, her mother confronted Respondent who admitted that he "messed up," and suggested that his instrument "cuts through muscle and fat like butter," and may have contributed to the perforation.
>
> 86. Nevertheless, in this case, Respondent admitted to Patient N.F.'s mother that he "messed up" and sliced through Patient N.F.'s small bowel with his cannula like it was "butter."

Respondent files an exception to these paragraphs of the Recommended Order, as these findings do not constitute clear and convincing evidence because they mischaracterize the witness' testimony, are unrelated to any allegation in the Administrative Complaint, do not support the violation alleged. The implication of

these statements are prejudicial to the Respondent, and should be stricken from the Order.

It is important to note that the Respondent performed two separate procedures on this patient – liposuction and fat transfer. The Department in this case alleged that Respondent caused two separate injuries to Patient N.F. – the bowel perforation during liposuction and an injury to her sciatic nerve during the fat transfer (although the Department's expert testified this injury could also have been caused during the liposuction – see R. Exh. 4, p. 86). It is absolutely impossible to know from this witness' testimony which procedure was being discussed – the liposuction or the BBL, which medical device the parties were discussing – the device for liposuction or for fat transfer, and what Respondent was referring to when he allegedly said he "messed up" – the perforation or the injury to the sciatic nerve.

In fact, the testimony from this witness is that Respondent explained to her that he was using a new device (testimony which was not supported by the testimony in this case, so is not a finding of fact), which the witness testified the Respondent said cuts through muscles and fat like butter. T. pg. 49. There is no indication which device is being discussed, and it is clear that the witness is talking about why her daughter is having trouble walking (a second separate injury alleged in the AC), and not about the bowel injury. The ALJ assumes from the testimony

that the device referred to is a liposuction cannula, but there is no clear testimony or evidence that this was the device being discussed, as different cannulas were used for various parts of the procedure.

The witness later testifies, in response to another question about whether Respondent admitted he made a mistake, that Respondent said he "messed up." Again, there was no testimony regarding what Respondent may have been referring to when he allegedly made this statement. In fact, it is more likely than not that the witness was discussing the weakness in the patient's legs when she questioned Respondent, as she was asking him why he didn't see her or do more after she presented to the office complaining of being unable to walk. See T. Vol. 1, pgs. 47-50. The relevant parts of this testimony are as follows:

> Q What did that conversation with Dr. Omulepu involve?
>
> R.D. He – I asked him – first I spoke to him on the phone. And we made arrangements to meet at the hospital. And when – because I told him I wanted to look him in his eyes when he told me what he did to my daughter. And he when got to the hospital, we were outside. And he when got to the hospital, we were outside. He was back there with my daughter and I asked him can we go down to the patient lounges and speak. I'm sorry – and speak. So we went down to the patient's lounge and I asked him again, what did you do to my daughter, what happened. And he told me that he was trying to figure out that himself. He said the only thing he could think of, he got a new tool and I said what do you mean you got a new tool? He said that he –
>
> R.D. He described the difference in the two tools. The new tool compared to the old tool. The old tool had a safety mechanism on it or something that he said that if you went too deep, I guess it set off

> an alarm. And the new tool that he was using is used on morbidly obese. My question to him being, why did you use it on my daughter because she's not even my size. And then he continued to explain this device. It cuts through muscles and fat like its butter. And I'm looking at him and so I asked him I said so, when my daughter told you she couldn't walk, what did you do? You didn't even bother to come to the back to the clinic to even check on her. You left that up to some nurses. And when even when she wasn't getting any better with the fluids that they were giving her, you didn't – ya'll didn't even bother to –
>
> Q Ms. RD, during that conversation with Dr. Omulepu, did he admit that he made a mistake?
>
> R.D. Yes. He say I messed up. I messed up. That's all I can say is I messed up.

Further, assuming that the references were to the injury to Patient N.F.'s bowel, a doctor admitting he caused an injury does not equate to an admission that he acted negligently. Nothing in the testimony of this witness indicates that Respondent admitted that he acted outside the standard of care during the procedure, either by failing to perform the procedure with care, or by angling the cannula incorrectly.

The ALJ goes further than the witness testimony to state in this finding of fact that the statement that one of the instruments used "cuts like butter" may have contributed to the perforation. This was not the testimony by this witness, and is a conclusion the ALJ made independently.

The testimony did not clearly describe an admission by Respondent that he damaged the patient's bowel, nor is it clear when he allegedly stated he "messed up" that he was referring to the bowel injury, and not the other injury the mother was addressing (to the sciatic nerve). Thus, this testimony does not constitute clear and convincing evidence of negligence in this case. In the absence of competent, substantial evidence of negligence in this case (and in the absence of allegations of negligence), the ALJ is clearly trying to find some basis for finding a violation exists in this case, improperly contorting evidence to support a violation. These paragraphs should be rejected and deleted.

Exception 3: Paragraph 52 – Facts Related to Damage to Internal Organs

Respondent takes exception to the finding of fact in paragraph 52 because this finding is unrelated to the allegations in the AC. This paragraph states:

> Respondent was responsible for ensuring that the cannula used during liposuction procedures was manipulated with precision and extreme care to avoid contact with the patient's internal organs.

This finding purports to set forth the standard of care that must be followed during liposuction procedures, but there is no similar factual allegation in the AC. Similarly, there is no factual allegation in the AC that Respondent failed to use precision or extreme care during these procedures. The allegation in the AC is simply that it is below the standard of care, in and of itself, to damage a patient's

internal organs. Respondent was not put on notice that he would be accused of failing to use precision or extreme care at the hearing.

The law is clear (and was cited in paragraph 74 of the Recommended Order) that the facts used to prove a violation must be alleged in the Administrative Complaint. See, *Trevisani v. Dept. of Health*, 908 So.2d 1108 (Fla. 1st DCA 2005), and other cases cited above. If the Petitioner believed Respondent acted negligently in this case, rather than alleging that any injury to organs is a violation of the standard of care, it was obligated to put the Respondent on notice of this in the AC by stating specifically how Respondent's conduct was negligent.[2] As the facts in this paragraph are not alleged in the AC, this paragraph should be rejected and deleted.

Exception 4: Paragraph 53 – Facts Related to Damage to Internal Organs

Respondent takes exception to the findings of fact in paragraph 53 because these findings are outside the scope of the allegations in the AC and are not based on competent, substantial evidence.

Paragraph 53 of the Recommended Order states:

> In order for the cannula to come into contact with an internal organ (with the exception of the heart and lungs), Respondent pushed the cannula at an inappropriate angle through a thick layer of muscle called the abdominal wall. The tough abdominal wall has a noticeably

[2] Note that not only is the AC devoid of specific conduct that would constitute negligence, but Petitioner's expert stated on several occasions that the simple fact an injury occurred to internal organs is negligent, and that the fact this injury occurred, in and of itself, is a violation of the standard of care. See R. Exh. 4, p. 78-79, T. Vol. I, p. 168. This is the factual allegation Respondent defended against at the hearing.

> different consistency than the soft layers of subcutaneous fat. A surgeon is required to operate with a level of care and skill to be able to discern between subcutaneous fat and muscle tissue while passing the cannula through the patient.

The ALJ's own analysis of the evidence in the record of this case led her to observe, at paragraph 63 of her Recommended Order, that:

> As noted by all three experts, absent being present during the procedure, having it well-documented in the Respondent's notes, or talking with Respondent, it is not possible to tell with certainty what transpired.

Having thus evaluated the quality of the evidence before her, it defies logic and common sense and ignores the deficiencies in the evidence for the ALJ, having concluded that it is not possible to tell what transpired, to also make a finding of fact that "Respondent pushed the cannula at an inappropriate angle through a thick layer of muscle called the abdominal wall." There is no allegation, and no evidence, that the Respondent pushed a cannula at the wrong angle. All findings of fact in a case of this nature must be supported by "clear and convincing evidence." It is hard to imagine anything further from clear and convincing than evidence from which it is not possible to tell with certainty what transpired.

As noted in part in paragraph 62 of the Recommended Order, Respondent's expert, Dr. Mendieta, testified that damage to a patient's internal organs is a known complication of liposuction that occurs in the best of hands. He was asked whether one could negligently perforate an organ, and stated as reflected in paragraph 62 of

the Recommended Order. See, R. Exh., p. 52-53. He certainly did not testify that is what occurred in this case. To the contrary, he testified that everything was done in this case the way it should have been done, and there is no basis for finding that Respondent did anything incorrectly. *Id.* In fact, Dr. Mendieta testified that he once had a bowel perforation case that was investigated by the Board of Medicine and dismissed. See, R. Exh. 1, p. 13, 47, 51, 78.

As noted by the ALJ in the conclusions of law in paragraph 72 of the Recommended Order, "[c]lear and convincing evidence requires that the evidence must be ...precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." If it is not possible to tell with certainty what transpired, evidence does not meet the lower "preponderance of the evidence" standard, much less the "clear and convincing evidence" standard required in this case.

The finding of fact then goes on to say that the cannula went through a thick layer of muscle called the abdominal wall, that this layer of muscle is noticeably different than subcutaneous fat, and that a surgeon must operate with the level of care and skill to be able to discern between subcutaneous fat and muscle. Again, this is not a factual allegation in the Administrative Complaint, and Respondent

was not put on notice that this was believed by Petitioner to be the standard of care, such that he would be required to defend against this allegation.

In making this finding, although not specifically stated, the ALJ is finding that the Respondent was negligent and did not operate with the level of care and skill required by failing to discern between subcutaneous fat and muscle. This is an inappropriate finding in the absence of similar factual allegations to put the Respondent on notice that he is being accused of this negligent conduct.

The law is clear (and was cited in paragraph 74 the Recommended Order) that the facts used to prove a violation must be alleged in the Administrative Complaint. See, *Trevisani v. Dept. of Health*, 908 So.2d 1108 (Fla. 1st DCA 2005), and other cases cited above. As this factual allegation regarding the standard of care was not in the AC, it should be rejected and deleted.

Furthermore, this factual finding is not based on competent, substantial evidence. In paragraphs 16 and 25 of the Recommended Order, the ALJ found that Patients D.M. and N.F. had, or potentially had, a weak or thin abdominal wall. It is axiomatic that the ALJ, upon making a finding based on clear and convincing evidence that a patient had or potentially had a thin abdominal wall, cannot later make a finding a patient had a thick abdominal wall. She reiterates that finding in the following paragraph of the Recommended Order (paragraph 54).

For the reasons set forth above, there is no clear and convincing evidence to support the findings in paragraph 53 and it should be rejected and deleted.

Exception 5: Paragraph 54 – Facts Related to Damage to Internal Organs

Again, this paragraph purports to set forth the standard of care in Florida, as in paragraphs 52 and 53, stating:

> The standard of care in Florida requires surgeons to use extreme care to ensure that the abdominal wall is not [breached]. This is especially true when the patient's medical history suggests the possibility of a thin abdominal wall.

Again, this fact is not alleged in the Administrative Complaint, nor it is based on the evidence or testimony in this case, and thus this finding is not based on competent, substantial evidence.

In making this finding, although not specifically stated, the ALJ is finding that the Respondent did not use sufficient care during the procedure so as to violate the standard of care. This is an inappropriate finding in the absence of similar factual allegations in the AC to put the Respondent on notice that he is being accused of this negligent conduct. There was also no evidence presented that Respondent failed to use extreme care in these cases.

Regarding the finding of a medical history suggesting a thin abdominal wall, see Exception 1 above. In addition, there was no testimony offered at the hearing to support a finding of fact regarding the standard of care in Florida when a

patient's medical history suggests a finding of a thin abdominal wall, so this sentence is also not supported by competent, substantial evidence in this case.

As this finding of fact was not alleged in the AC, and it is not supported by clear and convincing evidence, it should be rejected and deleted.

Exception 6; Paragraph 56 – Damage to Internal Organs

In paragraph 56 of the Recommended Order, the ALJ cites testimony from Dr. Mendieta, Respondent's expert, who the ALJ describes and accepts as a world-renowned BBL expert as follows:

> "I'm constantly thinking bowel, bowel, bowel perforation or I'm constantly thinking trying to avoid, so it is constantly on my mind in terms of what I am trying to avoid, so I'm always angling my cannula and making sure that I'm on the right plane.

Respondent files this exception not because he disputes that Dr. Mendieta made these statements, but because the statements are not a complete and accurate representation of this testimony. The rationale for this finding of fact is not clear, but it was obviously used to support other findings made by the ALJ. However, a complete review of the testimony in this case shows Dr. Mendieta was responding to a question about negligent use of a cannula, and his answer clearly does not support that injury to internal organs constitutes a violation of the standard of care. See, R. Exh. 1, p. 46-48. Importantly, the next line after the passage cited above shows that no matter how careful a surgeon is, these known complications may

occur, when he states: "But it still happened to me." A copy of the relevant portion of Dr. Mendieta's testimony follows:

> Q And what is the standard for the appropriate use of a cannula?
>
> A I think every physician has got their own priority. It is like asking what is the appropriate hammer to use? Everybody has got different philosophies, different ideas. So there is no standard, really.
>
> Q And what is the risk of misusing a cannula?
>
> A A burn to the skin, obviously organ injury, structural injury, burns –
>
> Q Is there anything that a surgeon can do to minimize these risks?
>
> A Well, I'm thinking because there are certain patients that are a little bit of a higher risk to getting these things – to getting these injuries that you might be a little bit more conservative on your – in your—in your care. But even then, no matter how safe you are, sometimes you'll still – these complications will happen. That's why we call them complications. For example, people that have like in the valen dream, you know I really went through everything in my head, because you absolutely feel horrible. I went through my head and reviewed everything that I could. I know that people who have a very lax or loose abdomen – sometimes you really can't, because they're so loose that you really can't tell what plane you're in. And you can accidentally be in there and not even know it. Some people have very hard, dense fat. So there is a tremendous amount of resistance. Imagine trying to push a closed locked door. And when you finally open it, it kind of over-opens it because you had so much force to do that you can accidentally go through the fascia. People that have a very high rib cage – and all these kind of people, I might angle my cannula a little bit differently, probably use more of a pinch technique whenever I'm doing liposuction. Those are probably a few of the safeguards that I'm constantly thinking bowel, bowel, bowel perforation or I'm constantly thinking trying to avoid, so it is constantly on my mind in terms of what I'm trying to avoid, so I'm always angling my cannula and making sure that I'm on the right

> plane. But it still happened to me. And I talked to a lot of my buddies and presidents of the Society who actually he had had a bowel perforation himself. And most of these bowel perforations go unrecognized for several days, which is fascinating. I don't know why, but – so what I found was that there was a lot of this bowel perforation that goes under-reported. It was a lot more common by my conversations with my colleagues that I respected who do this a lot. And that was a little bit surprising to me, because the literature had some cases in it and everything, but I was surprised at how many people, when I told them my story, they said – they came up to me afterwards and – like I said, I lecture, so I'm very honest. I'm talking about complications and all that kind of stuff. So people will afterwards come up to me and talk to me. So that's how. That's how I kind of found it interesting.

This Board should not allow a finding of fact that clearly is being mischaracterized and misused to support other findings of fact or conclusions of law. It appears the ALJ used this statement, in the absence of any other evidence or testimony on this issue, to support her finding of fact that Respondent did not use care during the procedure when it is intended to show that this injury occurs no matter how careful one is when angling the cannula, and the finding should be corrected to counter this misuse of testimony.

For the reasons set forth above, this paragraph should be amended to state:

> Respondent's world-renowned BBL expert, Dr. Mendieta described how an internal organ can be damaged, in the absence of negligence, and despite the best efforts of the surgeon. In fact, he admitted that one of his patients had a bowel perforation, despite his best efforts to prevent such an injury, and that a number of other highly respected surgeons have had similar complications. It is clear from the testimony in this case that damage to internal organs is a known complication that can occur in the absence of negligence.

See R. Exh. 1, p. 46–48, 50-51.

Exception 7: Paragraph 57 – Damage to Internal Organs

In this paragraph, the ALJ makes a finding that causes an inference that is unsupported by the evidence. The paragraph states as follows:

> Dr. Mendieta admitted that although perforating an internal organ is a "known complication" related to liposuction, it can result from medical negligence.

Again, the Respondent does not dispute the accuracy of this statement, but the statement is taken out of context, and is being used improperly to support a finding of negligence. This finding is based on testimony in R. Exh. 1, at pages 50-53, which states:

> Q Okay. Did the respondent fall below the standard of care by perforating D.M.'s liver?
>
> A Well, I mean it is a complication. It is something that is known it can happen. And it happens to all. It happens to the best of us. I mean, I'm considered one of the world's expert in this. And it happened. One of my other buddies what also a world's expert, it happened to him.
>
> Q Okay.
>
> A You feel terrible when something like this happens. But I don't know how to quite answer that because it is a complication that is known, so when it happens, nobody wants it to happen. And it is something that is devastating. But it can happen.
>
> Q But in the inverse of that, if it is a known complication, it is possible for it to occur without medical negligence. Right?
>
> A Correct.

Q But is the inverse also popular – possible that someone can do medical negligence and cause a known complication?

A Sure.

Q Okay. So even though it is a known, it is possible that he did something wrong?

A That would be hard to ascertain without having a conversation with him, just from what I read.

Q But it is possible?

A Well, anything is possible in this world, yeah.

Q But hypothetically, if this was not respondent – if you were just talking about bowel perforations or liver perforations in general?

A Well, I think you are going to find guys that are very dogmatic. And they'll say that anytime you have any complication, that is below the standard of care – because nobody should be getting complications. But the problem is that complications do occur in the best of hands. So, just because he had the complication, it doesn't mean it was medical negligence. But now you're asking me in this particular case, did he commit the medical negligence. And from what I've reviewed, everything was done according to that – that anybody who is in practicing medicine would be – plastic surgery would be doing. So, based on the review of the records, I did not see anything that would lead me to conclude that there was medical negligence.

Q How would one negligently perforate an internal organ?

A I think grabbing that cannula and shoving it deep, angling it downwards where you are purposely trying to injure would be my – my guess. I mean, other than that, if you're doing your liposuction the way you usually do it and you're taking precautions – and again, I didn't talk – I didn't talk to him so I don't know all the little nuances

that I was telling you about. But yeah, I think that would – if you are purposely trying to harm the patient.

Q But that wouldn't necessarily be reflected in the records that you reviewed?

A No.

Q So, there's no real way of knowing unless you were –

A That's right.

Q -- there and talked to him?

A Yes, that's what I mean, yeah.

Clearly, Dr. Mendieta's conclusion was that just because Respondent had this complication, it does not mean he was negligent, and that there was nothing in the records that would lead him to believe there was medical negligence in this case.

Although it is inferred in the finding of fact in paragraph 57, Dr. Mendieta did not find any evidence in this case that would suggest Respondent committed medical negligence in this case. For this reason, the finding of fact is incomplete and misleading, and should not be used to support the finding at the end of this section of the Recommended Order that Respondent violated the standard of care by damaging the patient's internal organs.

Rather, this finding of fact should be amended to accurately reflect the testimony of Dr. Mendieta and the context of the testimony he gave, with the amendment stating as follows:

> Dr. Mendieta admitted that although perforating an internal organ is a "known complication" related to liposuction, it can result from medical negligence. However, no such evidence of medical negligence was present in this case.

Exception 8: Paragraph 58 – Damage to Internal Structures

Respondent files an exception to paragraph 58 of the Recommended Order as it mischaracterizes Respondent's argument in this case. Paragraph 58 states:

> Respondent argues he is absolved of any responsibility for the puncture of internal organs because Patients D.M. and N.F. signed consent forms that included the risk of "damage to deeper structures, including nerves, blood vessels, muscles, and lungs."

In his PRO, Respondent argued that the injuries to patients' internal organs were known risks of surgery that were disclosed to the patients as part of the informed consent process, and that Section 766.102, Florida Statutes, prevents a finding of medical malpractice against a physician in this circumstance. To make a finding of medical malpractice in this case, Section 766.102(2), Florida Statutes requires the Petitioner to allege and prove that the injury resulted from negligent medical intervention, and to also allege and prove that the injury was not within the necessary or reasonably foreseeable results of the procedure. See Respondent's Proposed Recommended Order, p. 26-28, 32-33 (citing the above statute), and 34-

36. As Petitioner failed to allege or prove such allegations, Respondent argued in his PRO and continues to argue here that the charges must be dismissed.

Regardless, this paragraph is not a factual finding, but a legal argument. The paragraph should be deleted from the findings of fact. It will be addressed further in the exceptions to the conclusions of law.

Exception 9: Paragraph 59 and 60 – Consent Issues

These paragraphs state, in essence, that the informed consent forms signed by D.M. and N.F. do not cover damage to intra-abdominal organs. They state as follows:

> 59. Significantly, the informed consent forms for liposuction signed by the patients did not include the damage to the liver, small bowel, or other intra-abdominal organs.
>
> 60. Petitioner's expert, Dr. Greenberg, explained that the language in the consent forms does not contemplate damage to internal organs shielded by the abdominal wall, and a lay person would be unlikely to make such an inference.

The consent forms for both patients are identical on this issue, and are the same forms used and promoted by the American Society of Plastic Surgery (their logo is on the forms). The relevant portion of the form includes as a surgical risk:

> Damage to Deeper Structures:
> There is the potential for injury to deeper structures including nerves, blood vessels, muscles, and lungs (pneumothorax) during any surgical procedure. The potential for this to occur varies according to the type of procedure being performed. Injury to deeper structures may be temporary or permanent.

P. Exh. 5, p. 43, P. Exh. 9, p. 44.

In addition to the consent forms, it is noted in the patient's operative reports that prior to surgery, Respondent discussed the risks of surgery with the patient, including injury to deeper and surrounding structures. P. Exh. 5, p. 2, P. Exh. 9, p. 16.

Both of these statements are based on the testimony of Petitioner's expert, Dr. Greenberg (see T. Vol. II, p. 75). However, this testimony is clearly not clear and convincing evidence, and should be disregarded, as it clearly contradicts the plain meaning of the language in the consent forms. Dr. Greenberg testified that deeper structures refers to only parts of the body in the subcutaneous space. He did not explain why he felt that deeper structures did not include abdominal organs, except to say that the consent should have specifically mentioned bowels if that was intended, as nerves, blood vessels and lungs are mentioned. As he does not adequately explain the basis for his opinion, which flies in the face of the plain language of the consent, this does not constitute clear and convincing evidence.

The term "deeper structures" is clear on its face, and includes deeper structures in the body. It is not required for the consent form to specifically list every deeper structure in the body for the deeper structures to be considered to be one of the risks that was disclosed to the patient. The consent form specifically lists nerves, blood vessels and lungs, likely because these are not typically

considered to be deeper structures, and thus had to be separately included to be covered. The fact these were specifically listed does not exclude any deeper structures not specifically listed.

For the reasons set forth above, Respondent requests that the Board find that Paragraphs 59 and 60 of the Recommended Order do not constitute clear and convincing evidence, amending paragraph 59 as follows, and deleting paragraph 60 in its entirety:

> 59. The informed consent forms for liposuction signed by the patients include damage to deeper structures, which includes intra-abdominal organs.

Exception 10: Paragraphs 63, 64, 87, 88, and 89

The Respondent takes exception to the second and third sentences of Paragraph 63 and to all of Paragraphs 64, 87, 88, and 89 of the Recommended Order, which paragraphs read as follows:

> 63. As noted by all three experts, absent being present during the procedure, having it well-documented in the Respondent's notes, or talking with Respondent, it is not possible to tell with certainty what transpired. Respondent refused to testify on his own behalf. Respondent asserted his Fifth Amendment Privilege against self-incrimination, instead of clarifying any of the disputed issues.
>
> 64. Based on the forgoing, Petitioner demonstrated by clear and convincing evidence that the puncture of the patients' internal organs was the result of Respondent's violation of the standard of care and improper angling of the cannula during the procedures.

87. Respondent's assertion of his Fifth Amendment Privilege against self-incrimination permits the fact-finder to draw adverse inferences from his silence. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

88. The only inference that can be drawn is that Respondent violated the standard of care and committed malpractice by the reckless and improper angling of the cannula for these two procedures, resulting in the perforation of internal organs.

89. Petitioner proved by clear and convincing evidence that Respondent violated section 458.331(1)(t) by puncturing Patient D.M.'s liver multiple times and Patient N.F.'s small bowel.

[Respondent takes exception to all of the underscored language in these paragraphs.]

For reasons that are set forth in greater detail below, Respondent takes exception to the last two sentences of Paragraph 63 of the Recommended Order because, although it is true that Respondent chose not to testify at the hearing, asserted his *Vining* right to remain silent, and did not volunteer to clarify disputed issues, it is a violation of his rights under *Vining* and is a denial of due process for the ALJ to draw attention to those choices made by the Respondent. It is an even greater denial of Respondent's *Vining* rights and right to due process when in following paragraphs the ALJ concludes that she can draw adverse inferences from the Respondent's decision to remain silent. It is totally destructive of those rights when the ALJ actually draws those adverse inferences and treats the Respondent's silence as substantive evidence of his guilt.

For reasons set forth here and in greater detail below, Respondent takes exception to Paragraph 64 because it contains allegations that are not in the Administrative Complaint, it contains statements that are incorrect, statements that are illogical, and statements which are not supported by the record in this case. The most obvious illogical aspect of Paragraph 64 is the assertion that, "based on the forgoing," there is clear and convincing evidence that the Respondent committed malpractice. The "forgoing" that is referenced in Paragraph 64 are the statements in Paragraph 63 to the effect that everyone agrees "it is not possible to tell with certainty what transpired" and that the Respondent decided to remain silent. It is totally illogical and contrary to common sense for the ALJ to conclude that on a record in which one cannot tell with certainty what transpired one can add silence to the record and end up with clear and convincing evidence.

Again, there was no allegation in the AC that Respondent performed the procedure negligently – it alleges only that the fact he had this injury was below the standard of care (per se negligence), and the Respondent may not be charged with conduct not alleged in the AC. Thus, it is inappropriate to make any findings of fact that Respondent should have performed the surgery in a certain way (with extreme care and precision) or that he performed the procedure in a certain way (by angling the cannula down), because no such facts were alleged in the AC. See, *Cottrill v. Dep't of Insurance*, 685 So.2d 1371, 1372 (Fla. 1st DCA 1996);

Tresvani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla.1st DCA 2005); *Gonzalez v. Department of Health*, 120 So.3d 234, 237 (Fla. 1st DCA 2013); *Chrysler v. Dep't of Prof'l Regulation*, 627 So.2d 31, 34-35 (Fla. 1st DCA 1993).

Importantly, the ALJ agrees that the fact an organ puncture occurred, in and of itself, is NOT an act of medical negligence. In paragraph 86 of the Recommended Order, the ALJ finds:

> An organ puncture during liposuction is not a per se act of medical negligence.

With this finding of fact, the violations in the AC must be dismissed, because that is the only violation alleged in the AC. As noted above, it is inappropriate and prejudicial for the ALJ or Board to allow findings of fact based on specific acts of alleged misconduct, because Respondent was not put on notice that he was being charged with performing the procedure in a manner inconsistent with the standard of care. Rather, he was on notice that the Petitioner believed the fact he injured a patient's internal organs was, in and of itself, a violation of the standard of care. If the Petitioner wanted to prove that Respondent performed the procedure negligently by, for example, having incorrectly angled the cannula, due process requires Respondent be so notified. In addition to the cases cited above, see *Fox v. Board of Osteopathic Medical Examiners*, 366 So.2d 515 (Fla. 1st DCA 1979).

Once the ALJ agreed that the injuries did not constitute a violation of the standard of care in and of themselves, to find a violation, the ALJ had to make a

finding the procedure was performed negligently - despite the fact no specific acts of negligence were alleged in this case (another fact with which the ALJ agrees in paragraph 83 of the Recommended Order, but then ignores). Again, as noted above, the ALJ does not make findings of negligence based on the evidence, which she admits are insufficient to make such a determination. Rather the ALJ bases findings of negligence on the negative inference she makes from Respondent's decision not to testify, which was clearly error, as discussed below. It is a violation of due process both to make specific findings of negligence that were not based on the allegations in the AC, and to base those findings on the fact Respondent failed to testify to defend against the allegations.

For reasons set forth in greater detail below, Respondent takes exception to Paragraphs 87 and 88 because the statements in these two paragraphs are incorrect conclusions of law that are inconsistent with, and contradict, the holding in *State ex rel. Vining v. Florida Real Estate Commission*, 281 So.2d 487 (Fla., 1973). Again, adverse inferences from silence are not permissible in a license discipline proceeding in Florida.

For reasons set forth in greater detail below, Respondent takes exception to Paragraph 89 because it is an untrue conclusion that is not supported by the record in this case.

In *Vining*, the Florida Supreme Court quoted the following from *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967):

> 'We said in *Malloy v. Hogan*: 'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement--the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' 378 U.S. at 8, 84 S.Ct. at 1493, 12 L.Ed.2d at 659.
>
> 'In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'

The *Vining* court then went on to add the following in its own words:

> In our judgment, logic and reason demand that the rationale of *Spevack* be applied not only to disbarment proceedings, but as well to other types of administrative proceedings which may result in deprivation of livelihood. Certainly, threatened loss of professional standing through revocation of his real estate license is as serious and compelling to the realtor as disbarment is to the attorney. In succinct terms, it is our view that the right to remain silent applies not only to the traditional criminal case, but also to proceedings 'penal' in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood. *Spevack v. Klein*, supra; *Stockham v. Stockham*, 168 So.2d 320 (Fla.1964).

Id. at 491.

It is clear from the foregoing that a Respondent in a penal type proceeding such as this one cannot be compelled to provide evidence in support of the prosecution against himself and cannot be penalized for exercising his right to remain silent. The law is also clear that no inference of guilt may be made from

one's exercise of the right to remain silent. *Horne, Comm'n of Education v. Buhmeyer*, 2003 WL 223220030 (Fla. Div. Admin. Hrgs. 2003); *Marston v. State*, 136 So.3d 563 (Fla. 2014). This point is also made in the very case upon which the ALJ here bases her misguided conclusion that she is permitted to make adverse inferences based on the Respondent's silence. In *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976), at pages 318 and 319, the Court stated:

> Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a party to a civil cause." 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961). In criminal cases, where the stakes are [Page 319] higher and the State's sole interest is to convict, *Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context. (Emphasis added.)

The essence of the holding in *Baxter* is that the Court has concluded that the prison disciplinary proceedings at issue in that case are more like civil cases than like criminal cases. Accordingly, the Court concluded that the adverse inferences that are permissible in civil litigation are applicable to prison proceedings like the ones at issue in *Baxter*. But the holding in *Baxter* is inapplicable to license discipline proceedings in Florida because in *Vining* the Florida Supreme Court held that these types of proceedings are analogous to criminal proceedings and that those who are

Respondents in these types of cases are entitled to the same Fifth Amendment protections as are available to defendants in criminal cases. Thus, *Baxter* is inapplicable. *Vining* controls. The Respondent was denied due process by the ALJ's use of adverse inferences and he cannot be found guilty on the basis of adverse inferences drawn from his silence.

The effect of this inference was to shift the burden to the Respondent to prove he was not negligent, instead of requiring the Petitioner to prove the facts of this case. If a judge or jury is allowed to make a negative inference of guilt any time a defendant or respondent elects not to testify under the Fifth Amendment, there really is no protection afforded by this important constitutional right.

The law goes further to provide that agencies cannot adopt and apply a legal presumption against a licensee in the absence of specific authorization by the Legislature. *McDonald v. Dep't of Prof. Reg.*, 582 So.2d 660 (Fla. 1st DCA 1991). In *McDonald*, the Department of Professional Regulation urged the Board of Real Estate to adopt a legal presumption that effectively shifted the burden of proof to the licensee. In overturning an order imposing discipline, the Court stated:

> Under the principle of strict construction applicable to disciplinary statutes and the principles set forth in the cases cited above, it follows that without any provision for a legal presumption in the disciplinary statutes, the agency lacks authority to adopt a legal presumption that effectively relieves it from having to prove specific acts of misconduct and shifts the burden of proving innocence to the licensee. We have found no such statutory provision authorizing DPR or the Board to adopt or apply any presumption like that applied in this case. Thus,

> DPR, in urging the Board to adopt the presumption, and the Board, in applying the presumption to support the finding of guilt, greatly exceeded their statutorily delegated authority under Florida law.

Id. at 664. The Legislature in Florida has not authorized an agency to make a negative inference against a licensee who invokes his or her right not to testify in administrative proceedings. To the contrary, the law clearly forbids such an inference.

Because *Vining* and later cases following *Vining* are the controlling case law on this issue, it was error for the ALJ to draw attention to the fact that the Respondent chose to remain silent, it was further error for the ALJ to draw adverse inferences from the Respondent's silence, and it was an erroneous denial of due process for the ALJ to conclude that adverse inferences drawn from the Respondent's silence constituted clear and convincing evidence of malpractice. The ALJ erred further in Paragraph 88 where she concludes that "the only inference that can be drawn" is an inference of malpractice. Quite to the contrary, on the record in this case the only proper inference that can be drawn from the totality of the evidence is that there is no competent substantial evidence that the injuries to the organs of Patient D.M. and/or Patient N.F. were caused by any act of malpractice of the Respondent.

In addition to the arguments set forth above, Respondent would like to point out that the facts of this case are very similar to those in the *Trevisani* case. In

this case, the ALJ agreed that without more information, "it is not possible to tell with certainty what transpired." It is thus impossible to know exactly how the injury occurred, and without knowing how the injury occurred, it is impossible to determine whether any act or omission of the Respondent was or was not a departure from the applicable standard of care. There certainly was no evidence or testimony presented that Respondent performed this surgery differently than he did the other thousands of times he performed it, or even differently than he did on the other two patients in these cases, who did not have similar injuries. So we are to assume that although he usually does the procedure correctly, here he did it in a different manner? Based on what evidence?

In the *Trevisani* case, the Petitioner alleged that Dr. Trevisani fell below the standard of care by injuring a patient's forehead and thigh during a liposuction procedure. The operative report describing what happened during surgery was missing in that case. The Recommended Order in that case, which was adopted by the Board and is part of the Final Order in this case, states:

> 47. Without an operative note (or some other form of detailed information regarding the manner in which the surgical procedures at issue were performed) it is virtually impossible to reach a reliable determination as to what caused the injuries on the patient's left thigh and forehead. On the basis of the record in this case, the causes of the forehead and thigh lesions observed on Patient F. V. on February 7, 1997, are unknown. Because the causes are unknown, it is also unknown whether such lesions were caused by act or omission by Respondent. And, because no specific act or omission by Respondent has been identified as the cause of either lesion, it is impossible to

> determine whether any such unidentified act or omission, if any, might or might not have constituted a departure from the applicable standards of care.
>
> 66. ....Although the expert witness testimony in this case contains several different opinions as to what might have been the cause of the injury to the patient's left thigh, none of the experts could identify any specific act or failure to act, by Respondent that, in fact, was clearly the cause of the injury. Specifically, there is no clear and convincing evidence that during the liposuction procedure ..... there was anything improper about the manner in which Respondent performed the liposuction procedure.

The order goes on to discuss, in footnote 17, that:

> Both of the expert witnesses who testified on behalf of Petitioner candidly admitted that they did not really know what had happened to cause the two lesions. Dr. Barnett thought the thigh lesion was "most likely" caused by rough handling of the liposuction instruments, but conceded there were other possible causes, some of which might not be a deviation from the applicable standard of care. Dr. Mayl candidly stated that he did not have sufficient information upon which to form an opinion as to what caused the subject lesions. He also stated he did not have enough information to state whether Respondent deviated from the standard of care in any of the ways alleged in the Amended Administrative Complaint. Dr. Mayl also opined that even if Dr. Barnett's causation theory were to be correct, Respondent's handling of the liposuction instruments still might not be a departure from applicable standards of care. In Dr. Mayl's words, such complications are not "entirely preventable."

The facts in this case are similar – there is no indication that Respondent performed the procedure negligently, and the ALJ admits that. Although there is no evidence to support it, Petitioner's expert surmises as to how the injuries must have occurred, speculating that the Respondent incorrectly angled the cannula. Respondent's experts provided a number of other reasons the injuries could have

occurred in the absence of negligence, which is why organ injuries are a rare, but known complication of liposuction. The ALJ and Board in *Trevisani* correctly concluded that evidence of the type described in the foregoing quotations was not clear and convincing evidence of any act of malpractice. The ALJ in this case should have reached the same conclusion because in this case there is no competent substantial evidence of any action or failure to act by the Respondent that was described by any expert witness as a deviation from any applicable standard of care. And it must follow logically that if there is no competent and substantial evidence of malpractice, there is certainly no clear and convincing evidence of malpractice.

Finally, in order to find Respondent guilty of a violation of medical malpractice pursuant to Section 458.331(1)(t), Florida Statutes, Petitioner must allege and prove all the elements of malpractice required under Chapter 766.102, Florida Statutes. Although these requirements were cited by the ALJ in paragraph 75 – 78 of the Recommended Order, the ALJ then essentially ignores them. Section 766.102(2)(a), Florida Statutes, states that in order to prove a breach of the prevailing standard of care, the Petitioner must identify the standard of care, allege and prove that the Respondent breached this standard of care, and show that the injury was not within the necessary or foreseeable results of the procedure when

the intervention was taken with informed consent. *Haas v. Zaccaria*, 659 So.2d 1130 (Fla. 4th DCA 1995).

Furthermore, Section 766.012(3)(b) states:

> The existence of a medical injury does not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider.

Clearly, the existence of a medical injury cannot create any inference or presumption of negligence. As the Petitioner did not identify the standard of care nor did it allege a breach of the standard of care in the AC, but simply alleged the injury was per se a violation of the standard of care, and the injury was reasonably foreseeable as a known complication, there is no basis for a finding of a violation in this case.

Accordingly, Paragraphs 63, 64, 87, 88, and 89 of the Recommended Order should be disregarded as erroneous and without support in the record and the Board's Final Order should not include any of the inferences mentioned in those paragraphs. Without those inferences there is nothing in the record that even comes close to clear and convincing evidence that the punctures of Patient D.M. and Patient N.F. were caused by any act of malpractice by the Respondent and therefore the charges in Count I and Count II of the Administrative Complaint

must be dismissed in their entirety. Paragraphs 87-88 of the Recommended Order should be deleted, and the other paragraphs should be amended to state:

> 63. As noted by all three experts, absent being present during the procedure, having it well-documented in the Respondent's notes, or talking with Respondent, it is not possible to tell with certainty what transpired.
>
> 64. Based on the forgoing, Petitioner failed to demonstrate by clear and convincing evidence that the puncture of the patients' internal organs was the result of Respondent's violation of the standard of care.
>
> 89. Petitioner failed to prove by clear and convincing evidence that Respondent violated section 458.331(1)(t) by puncturing Patient D.M.'s liver and Patient N.F.'s small bowel.

Exception No. 11: Paragraph 84

After acknowledging that the AC in this case does not allege that Respondent improperly angled the liposuction cannula, in paragraph 84 of the Recommended Order the ALJ states the following:

> However, the allegations certainly put the Respondent on notice that his admitted multiple punctures to internal organs in these two patients were a basis upon which the Petitioner sought to discipline his license. Respondent could have used interrogatories or the deposition of the Petitioner's expert to discern detailed ultimate facts regarding how Petitioner believed the negligence to have occurred.

Again, this clearly shows that the ALJ is improperly shifting the burden to the Respondent in this case. Rather than requiring the Petitioner to state how it believes Respondent violated the standard of care, Respondent is supposed to play twenty questions with DOH, making sure to ask the right questions to figure out

what they may be alleging he did incorrectly. This is completely contrary to the law, and even to the cases cited by the ALJ in the Recommended Order. See, *Cottrill v. Dep't of Insurance*, 685 So.2d 1371, 1372 (Fla. 1st DCA 1996); *Tresvani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla.1st DCA 2005); *Gonzalez v. Department of Health*, 120 So.3d 234, 237 (Fla. 1st DCA 2013); *Chrysler v. Dep't of Prof'l Regulation*, 627 So.2d 31, 34-35 (Fla. 1st DCA 1993).

If the Petitioner wanted to find Respondent guilty of falling below the standard of care for negligently performing liposuction because he improperly angled the cannula during the procedure, that needed to be stated in the Administrative Complaint. If that had been alleged, the Respondent would have presented evidence and called witnesses who were present in the operating room to testify as to how the procedure was performed. That, however, was not the allegation. The Respondent defended the allegations in the AC, and the findings by the ALJ that are outside the scope of the AC violate Respondent's right to due process.

For the reasons set forth above, the conclusion of law in paragraph 84 should be amended to state:

> As the administrative complaint does not allege that Respondent improperly angled the cannula during surgery, or that he committed any other negligent act that caused or contributed to the injuries sustained in these cases, there can be no finding that Respondent committed an act of medical malpractice in this case.

Exception No. 12: Paragraph 85

Respondent files an exception to the conclusion of law in paragraph 85 because it is clearly false. In this paragraph, the ALJ states:

> The clear and convincing testimony of the experts was that organ punctures during liposuction are exceedingly rare complications which do not occur in the absence of recklessness in the placement of the cannula, and insufficient attention to the feel of the procedure itself as the cannula passes through fat, tissues, muscles and the abdominal wall.

To the contrary, the testimony of all three experts was that damage to internal organs is a known complication of liposuction. Dr. Greenberg admitted both during his deposition and at the hearing that known complications are those that occur in the absence of negligence. R. Exh. 4, p. 20, T. Vol. 2, p. 61-62. He also admitted that organ damage is a known complication of liposuction. R. Exh. 4, p. 78-79, T. Vol. 2, p. 59. Although he acknowledges organ damage is a known complication of liposuction, Dr. Greenberg goes on to say that while complications can happen, there are some that should not occur, and organ damage is something that never occurs in the absence of negligence. R. Exh. 4, p. 78-79. T. Vol. 1, p. 152. Dr. Greenberg admits, however, that he has never before reviewed a case involving a bowel perforation, and is not aware of whether the Board agrees with his opinion that any time this complication occurs, it is automatically below the standard of care. T. Vol. 2, p. 62. Dr. Greenberg also agrees that bowel perforations are not a complication that must be reported to the Board as an

adverse incident (presumably because it is a known complication of certain procedures). T. Vol. 2, p. 67. After that Dr. Greenberg discusses how an injury to an internal organ would occur, stating the things noted in the paragraph above. T. Vol. 1, p. 152–155.

Although Dr. Greenberg made this statement during questioning by the Petitioner, on cross examination, he admitted that nothing in the evidence supports his opinion that the technique used during the liposuction was incorrect. T. Vol. 2, p. 69. In addition, when asked to confirm his opinion that the injuries must have occurred because Respondent angled the cannula improperly, he did not state that was clearly how the injury had occurred. To the contrary he stated:

> I believe that I said that that is likely what could have happened, yeah, yes.

This statement is clearly speculation. The ALJ agreed, finding in paragraph 63 the Recommended Order that is it clear that nobody knows what happened during these procedures.

Dr. Mendieta discusses known complications at length during his deposition, stating that even when surgeons do everything they can to minimize risk to a patient, complications sometimes occur even in the hands of the best doctors. He had this complication with a patient, and knows of other well-respected surgeons who have had this complication. R. Exh. 1, p. 46-48, 50-51. He specifically testified that as a known complication, it is something that can occur without

medical negligence. R. Exh. 1, p. 51, lines 12-15. He further testified that nothing in this case led him to a conclusion that there was medical negligence. R. Exh. 1, p. 52, lines 6-21.

Dr. Samson testified that organ damage is a known complication of liposuction at the hearing. He went on to discuss the definition of a known complication at length at the hearing, specifically stating that known complications are those that occur in the absence of negligence. T. Vol. 2, p. 95-96. Later in his testimony he again discussed that the fact this injury occurs, in and of itself, is not a violation of the standard of care because it is a known complication. T. Vol. 2, p. 128-130. Dr. Samson also testified that he found no reason to believe that the Respondent violated the standard of care during these surgeries. T. Vol. 2, p. 131-132. He goes on to discuss at length how the injuries could have occurred in the absence of negligence. T. Vol. 2, p. 132-136.

Finally, this conclusion of law is not based on the facts found in the Recommended Order. There is no finding of fact that each of the experts testified as noted in this paragraph.

For the reasons set forth above, Respondent requests this conclusion of law be rejected and deleted as it is not based on facts in the Recommended Order, and it is not based on competent, substantial evidence in this case.

EXCEPTIONS REGARDING MEDICAL RECORDS

Exception No. 13: Paragraphs 69, 92 and 93

These disputed paragraphs of the Recommended Order state:

> 69. The record supports by clear and convincing evidence that Respondent signed or approved these records and bears responsibility for their accuracy. However, Respondent reviewed and signed the medical records, all of which omitted the additional ampule of epinephrine that was purportedly added, without correcting the apparent discrepancy.
>
> 92. Petitioner proved by clear and convincing evidence that Respondent failed to create or keep medical records that accurately reflected the amount of epinephrine administered to Patients L.L., D.M., N.F. and P.N.
>
> 93. As a result, Petitioner proved by clear and convincing evidence that Respondent violated section 458.331(1)(m).

Respondent disputes these findings of fact and conclusions of law because 1) they are not based on any allegation in the AC; 2) they are not based on competent, substantial evidence; and 3) they are not even based on the facts that the ALJ found in her order.

First, the law is clear that a licensee may only be disciplined for conduct specifically alleged in the AC. The ALJ cites several cases on this in paragraph 74 of the Recommended Order. Unfortunately, the ALJ was not following this legal precedent when she made these findings. Before looking at any evidence or testimony presented in this case, the AC on its face does not allege any facts upon which these findings/conclusions may be made. There are only two sentences in

the AC (repeated for each patient) that are relevant to this violation. They are all identical, and state the following:

> Respondent used tumescent solution with a concentration of one part epinephrine per 4 million units.
>
> Respondent's medical records for Patient XX document that Respondent used tumescent solution with a concentration of one part epinephrine per 4 million units.

See paragraphs 9-10, 17-18, 24-25, and 29-30 of the AC. These allegations of fact do not support a medical records violation. The facts allege the Respondent's records document exactly what was used. In order to support a finding of a violation, the AC had to contain facts alleging that Respondent documented something incorrectly.

"Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint .... violates the Administrative Procedure Act. *Cottrill v. Dep't of Insurance*, 685 So.2d 1371, 1372 (Fla. 1st DCA 1996). As in this case, as in *Cottrill*, the administrative complaint contained references to statutory provisions that were alleged to have been violated, but did not allege any act or omission in violation of the statutes. The appellate court stated that "even though evidence was presented that might well support the recommended order's findings" that a violation occurred, the Department never pleaded the facts that constituted the violations, and those findings of a violation were reversed. As no facts were pled in this case that constitute a violation, no violation can be found.

Second, the ALJ makes no finding that Respondent created the medical records that inaccurately documented the concentration of epinephrine used because he did not create those records. The circulators were the ones who prepared the tumescent solution, and are the only ones with personal knowledge of the contents of the solution. They documented the contents of the medication they prepared. This is acknowledged by the ALJ in paragraphs 43–44 and 65-66 of the Recommended Order. In paragraph 44 of the Order, the ALJ discusses why the circulators did not document the amount of epinephrine used. The ALJ did not find that Respondent had a duty to create these records, where he did not create the tumescent solution, and where he had no personal knowledge of the contents of the solution. Therefore, there is no clear and convincing evidence upon which to find a violation of Section 458.331(1)(m), Florida Statutes.

Next, assuming it is legal to hold Respondent accountable for a record he did not create, and for which he has no personal knowledge, it is necessary to point out that there was no testimony or evidence presented at the hearing to establish that Respondent co-signed the records created by the circulators. There is a line at the bottom right of the Operating Room Record Form, where the circulators documented the medications used in the tumescent solution, for the surgeon's signature. No testimony or evidence was presented by anyone, including the circulators, to establish that Respondent signed the records (these records, or any

of the records in these cases). In addition, there certainly was no evidence presented that he reviewed the records or approved them.

In paragraph 68, the ALJ finds that Respondent is the physician who performed surgery on these patients (which was not in dispute), and then she goes on to find that the operative records for the surgeries performed bear at least similar signatures, some of which appear to read O.O. Omulepu. That does not constitute clear and convincing evidence that Respondent co-signed the notes written by the circulators. In fact, the ALJ never makes a finding that Respondent signed any of the documents in this case (again, because she could not make that finding, as no evidence was presented on this issue). Rather, she simply asserts in paragraph 69 that the record supports by clear and convincing evidence that Respondent signed or approved the records, and bears responsibility for their accuracy.

Further, even assuming that clear and convincing evidence was present to prove that Respondent co-signed the document at issue, the Operating Room Record Form, no evidence or testimony was presented to support a finding that in doing so, Respondent was assuming responsibility for the accuracy of the records. Certainly, there was no testimony to support this finding.

The only testimony presented about this was from Dr. Samson, who testified that in his opinion and experience, the circulators prepare the tumescent solution,

and they are responsible for documenting the composition of the solutions they prepare. He testified that recently, he has been told he must co-sign the records created by the circulators, which he does under protest, as he has informed them that is not his record. It is thus not a record he should change. He testified that in co-signing, he is not attesting to the accuracy of the records because that is supposed to be an independent recollection of something the circulators did, and is not something he did. T. Vol. 2, p. 90-91.

In the absence of testimony that Respondent was the one who signed any of the records at issue, and in the absence of testimony or evidence that by co-signing records, a doctor is confirming he has reviewed the record and thus becomes responsible for their accuracy, there is no clear and convincing evidence to support the findings in these paragraphs.

Finally, the allegation is that the Respondent failed to create or maintain accurate records. See paragraphs 56, 62, 68 and 74 of the AC. There was no evidence or testimony regarding failure to maintain records. This is also a requirement cited in a rule, not in the statute, and the ALJ did not find that the Respondent violated a rule (nor was this alleged in the facts of the AC). Thus, the only issue in this case is whether Respondent failed to create accurate records.

As noted in *Lester v. Dept. of Prof. Reg'l*, 348 So.2d 923 (Fla. 1st DCA 1977), a "statute must be strictly construed, and no conduct is to be regarded as

included within it that is not reasonably proscribed by it. Furthermore, if there are any ambiguities included such must be construed in favor of the applicant or licensee." Id. at 925. In this case, the ALJ seeks to hold Respondent accountable for documentation created by others, finding that he was responsible for reviewing and correcting any discrepancies in these records created by the circulators. That is not conduct that is included within the scope of Section 458.331(1)(m), Florida Statutes, and Respondent may not be found guilty of a violation of this statute based on the findings of fact in the AC.

For the reasons set forth above, paragraphs 69, 92 and 93 should be amended to state:

> 69. The evidence and testimony in this case fails to establish that Respondent created the records documenting the concentration of tumescent solution used in these cases, or that he was responsible for creating these records.
>
> 92. The Administrative Complaint in this case fails to alleged any facts that constitute a medical records violation. Thus, no medical records violation may be found in this case. Even if this violation were appropriately pled, Petitioner did not prove by clear and convincing evidence that Respondent failed to create or maintain medical records that accurately reflected the amount of epinephrine administered to Patients L.L., D.M., N.F., and P.N.
>
> 93. As a result, Petitioner failed to prove by clear and convincing evidence that Respondent violated section 458.331(1)(m).

AGGRAVATING FACTORS AND PENALTY

In paragraph 100, the ALJ discusses aggravating and mitigating factors she found in this case to support her penalty recommendation. The ALJ improperly found Subsection (h) of Rule 64B8-8.001(3), Florida Administrative Code, was an aggravating factor in this case. Subsection (h) of that rule states that it can be considered aggravation if a licensee **who is a records owner** commits a standard of care violation and fails to produce medical records. No evidence or testimony was provided regarding whether Respondent was a records owner in this case, but it is clear that the records were requested from and obtained from the clinics, not from Respondent. He is not the records owner of the records in these cases. Moreover, the records were kept and produced by the records owner. The finding that this is an aggravating factor in this case should be rejected and stricken, and any penalty adjusted accordingly.

RECOMMENDATION

The Respondent requests that a Final Order be entered finding that Respondent did not commit the violations alleged in the Second Amended Administrative Complaint, and dismissing the Complaint. If the exceptions are not accepted, and discipline is imposed for one or more violations, Respondent requests that the penalty be adjusted to reflect only any violations found in this case, and without the aggravating factor discussed above. Finally, Respondent

requests a separate hearing to discuss the costs of the investigation and prosecution of this case.

Sincerely,

RODRIGUEZ & PERRY, P.A.
Attorneys for Respondent
7301 Wiles Road, Suite 107
Coral Springs, FL 33067
Off: (305) 670-9800
Fax: (305) 670-9933

Monica L. Felder Rodriguez
Florida Bar No. 986283

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Exceptions has been furnished to Assistant General Counsel John Wilson at john.wilson@flhealth.gov, Claudia Kemp, J.D., Executive Director, Board of Medicine at Claudia.kemp@flhealth.gov; Rebecca.hewett@flhealth.gov and via U.S. Mail to Agency Clerk c/o General Counsel, Department of Health, 4052 Bald Cypress Way, Bin #A-02, Tallahassee, FL 32399 on this 1st day of February, 2017.

Monica L. Felder Rodriguez

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

PETITIONER,

DOAH Case No. 16-3127PL
DOH Case Nos. 2015-17616; 2015-18000; 2015-19442; 2015-20428

v.

OSAKATUKEI O. OMULEPU, M.D.,

RESPONDENT.
_____/

MOTION TO BIFURCATE AND RETAIN JURISDICTION TO ASSESS COSTS IN ACCORDANCE WITH SECTION 456.072(4), FLORIDA STATUTES (2016)

The Department of Health, by and through undersigned counsel requests the Board of Medicine ("Board") enter an Order bifurcating the issue of costs and retaining jurisdiction to assess costs, against Respondent for the investigation and prosecution of this case in accordance with Section 456.072(4), Florida Statutes (2016). Petitioner states the following in support of the request:

1. At its next regularly scheduled meeting, the Board will

take up for consideration the above-styled disciplinary action and will enter a Final Order therein.

2. Pursuant to Section 120.569(2)(1), Florida Statutes (2015), the final order in a proceeding heard by an administrative law judge, which affects a party's substantial interests, must be rendered within ninety days after a Recommended Order is submitted to an agency, unless the ninety days is waived by the Respondent.

3. The Administrative Law Judge's Recommended Order was submitted to the agency on or about January 6, 2017. Ninety days from this date is on or about April 7, 2017. The Board of Medicine Meeting is scheduled April 6-7, 2017.

4. Section 456.072(4), Florida Statutes (2016), states as follows:

> In addition to any other discipline imposed through final order, or citation, entered on or after July 1, 2001, pursuant to this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, the board, or the department when there is not board, shall assess costs related to the investigation and prosecution of the case. The costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there is

> no board, shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto... (emphasis added)

5. In order for the Board to assess costs against the Respondent, under the current case law, the Department is required to obtain an outside expert attorney opinion verifying the reasonableness of the time spent by the Departments attorneys on this matter or the amount of fees sought. *Georges v. Dep't of Health,* 75 So. 3d 759 (Fla. 2d DCA 2011).

6. In order for the Board to assess costs against the Respondent, under the current case law, the Department is also required to verify attorneys' time spent on a case and prepare supporting affidavits for the amount of attorneys' time sought to be recovered. *Georges v. Dep't of Health,* 75 So. 3d 759 (Fla. 2d DCA 2011).

7. There is insufficient time for the Department to verify its attorney's time spent on the case; prepare supporting affidavits for the amount of attorney's time sought to be recovered; and obtain an outside expert attorney opinion verifying the reasonableness of the time spent by the Department's attorney on this matter or the amount of fees sought.

8. The bifurcation of the issue of cost recovery by the Department to a later date will not cause any undue hardship to the Respondent as it will delay, rather than expedite, the date at which a final order on the assessment of cost would be entered against Respondent, and thus delay the date upon which any payment for costs would be due and owing.

9. Petitioner requests that the Board grant this motion, bifurcate the issue of assessment of costs and retain jurisdiction to assess costs against Respondent once the Department has obtained an outside expert attorney opinion verifying the reasonableness of the time spent by the Department's attorney on this matter or the amount of fees sought, obtains supporting affidavits for the amount of attorney's time sought to be recovered and brings a motion to assess costs before the Board of Medicine.

WHEREFORE the Department of Health requests that the Board of Medicine enter an Order bifurcating the issue of cost assessment and retaining jurisdiction to assess costs against Respondent.

[Signature Appears on Following Page]

Respectfully submitted,

John Wilson, Esquire
Assistant General Counsel
Florida Bar No. 84798
Florida Department of Health
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Telephone: (850) 245-4640 ext. 8167
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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing *Motion to Bifurcate and Retain Jurisdiction to Assess Costs in Accordance With Section 456.072(4), Florida Statutes (2016)* has been furnished to Respondent's Counsel, Monica Felder-Rodriguez, Esquire via U.S. Certified Mail at Rodriguez & Perry, P.A., 7301 Wiles Road, Suite 107, Coral Springs, Florida 33067 this 7th day of January, 2017.

John Wilson, Esquire
Assistant General Counsel

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Petitioner,

vs. Case No. 16-3127PL

OSAKATUKEI O. OMULEPU, M.D.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy in Fort Lauderdale, Florida, on October 26 and 27, 2016.

APPEARANCES

For Petitioner: Kristen M. Summers, Esquire
John Wilson, Esquire
Department of Health
Prosecution Services Unit
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399

For Respondent: Monica Felder-Rodriguez, Esquire
Rodriguez & Perry, P.A.
Suite 107
7301 Wiles Road
Coral Springs, Florida 33067

STATEMENT OF THE ISSUES

Whether Respondent, a licensed physician, committed record-keeping violations and repeated medical malpractice by committing three or more incidents of medical malpractice, as alleged in the Second Amended Administrative Complaint; and, if so, what is the appropriate penalty?

PRELIMINARY STATEMENT

On June 8, 2016, Petitioner, Department of Health, filed an Amended Administrative Complaint seeking disciplinary sanction of the medical license of Respondent, Osakatukei Omulepu, M.D. Respondent filed a request for formal hearing, and the matter was referred to the Division of Administrative Hearings (DOAH) on June 8, 2016. On the same day, DOAH assigned Administrative Law Judge (ALJ) F. Scott Boyd to conduct the proceeding. This matter was transferred to the undersigned on June 15, 2016. The hearing was initially set for July 27, 28, and 29, 2016, and then rescheduled for October 26, 27, and 28, 2016. On October 5, 2016, Petitioner filed a Motion to Relinquish Jurisdiction for leave to amend the Amended Administrative Complaint. The Motion was denied; however, the ALJ and Respondent waived the provisions of section 120.569(2)(a), Florida Statutes (2016), allowing Petitioner to convene a probable cause panel to add additional counts for record-keeping violations. The Second Amended Administrative Complaint was filed on October 26, 2016.

The hearing was held as scheduled on October 26 and 27, 2016. At the hearing, Petitioner presented the testimony of seven witnesses: Patient L.L.; Patient P.N.; Patient D.M.; Patient N.F.; R.D., Patient N.F.'s mother; Lianys Blain; and Dr. Scott Greenberg, M.D., as an expert witness. Petitioner's Exhibits 2, 3 (pages 3, 41, 83, and 133 only), 5, 6 (pages 13, 84, and 85 only), 9, 10 (pages 307, 308, and 968 only), 11, 12 (page 25 only), 13, and 14 were admitted into evidence.

Respondent presented the testimony of Michel Samson, M.D., as an expert witness. Respondent's Exhibits 1, 4, 6 through 11, 14, 20, and 21 were admitted into evidence. Included in Respondent's exhibits were the deposition transcripts for Constantino Mendieta, M.D., Linda Mondragon, and Cassandra Salazar, which were provided in lieu of live testimony.

A two-volume Transcript of the proceeding was filed on November 18, 2016, and November 28, 2016. Both parties filed timely proposed orders which were given due consideration in the preparation of this Recommended Order. Unless otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. Petitioner is responsible for the investigation and prosecution of complaints against medical doctors licensed in the

state of Florida, who are accused of violating chapters 456 and 458 of the Florida Statutes.

2. Respondent is licensed as a medical doctor in Florida, having been issued license number ME 99126 on June 15, 2007.

3. Respondent is not board-certified in any specialty recognized by the Florida Board of Medicine.

4. Respondent has never had disciplinary action against his license to practice medicine.

5. In May 2015, Respondent performed cosmetic surgery procedures, including liposuction and fat injection procedures (commonly referred to as a "Brazilian Butt Lift" or "BBL"), at Vanity Cosmetic Surgery (Vanity), Encore Plastic Surgery (Encore), and Spectrum Aesthetics (Spectrum).

6. Liposuction is an elective cosmetic procedure that involves the removal of fat from a patient. Fat is removed with a cannula, or a long, thin, metal rod, attached to a suctioning device. The cannula is repeatedly passed through the patient's subcutaneous layer until the desired amount of fat is removed.

Facts Related to Patient L.L.

7. On May 2, 2015, Patient L.L., a 29-year-old female patient, contacted Vanity to undergo liposuction.

8. On May 2, 2015, prior to her procedure, Patient L.L. underwent bloodwork that revealed she had a normal hematocrit

level, normal hemoglobin level, and a normal red blood cell count.

9. Respondent determined that Patient L.L. was of sufficiently good health to undergo liposuction.

10. Respondent performed liposuction on Patient L.L. at Vanity on May 14, 2015.

11. Several hours after being discharged to a hotel, Patient L.L. experienced pain, weakness, elevated heart rate (tachycardia), and excessive bleeding. Patient L.L. presented to Homestead Hospital, where she was admitted for three days of post-operative care and monitoring. L.L.'s recovery took several months and resulted in her losing her job.

12. Upon admission, Patient L.L.'s hematology report revealed a low hematocrit, low hemoglobin, and a low red blood cell count, which signified severely diminished blood levels and necessitated her to be transfused with two units of blood and plasma.

Facts Related to Patient D.M.

13. On April 25, 2015, Patient D.M., a 31-year-old female patient, contacted Spectrum to undergo liposuction with gluteal fat transfer.

14. On April 29, 2015, prior to her procedure, Patient D.M. underwent bloodwork that revealed she had a normal hematocrit

level, normal hemoglobin level, and a normal red blood cell count.

15. Also prior to her procedure, Patient D.M. indicated in her medical questionnaire that she was pregnant approximately five times.

16. Because Patient D.M. disclosed her prior pregnancies to Respondent, Respondent knew, or should have known, that Patient D.M. had a potentially weak or thin abdominal wall.

17. Respondent determined that Patient D.M. was of sufficiently good health to be an appropriate candidate to undergo liposuction with gluteal fat transfer.

18. Respondent performed liposuction with gluteal fat transfer on Patient D.M. at Spectrum on May 15, 2015.

19. Following the surgery, Patient D.M. experienced extreme pain, resulting in her admission to Westchester Hospital.

20. Upon admission, Patient D.M.'s hematology report revealed a low hematocrit and low hemoglobin, which signified severely diminished blood levels and necessitated her to be transfused with three units of blood.

21. During an exploratory surgery, Patient D.M. was found to have several holes in her liver and damage to her chest and abdominal wall.

Facts Related to Patient N.F.

22. On February 4, 2015, Patient N.F., a 35-year-old female patient, contacted Spectrum to undergo liposuction with gluteal fat transfer.

23. On April 23, 2015, prior to the procedure, Patient N.F. underwent bloodwork that revealed she had a normal hematocrit level, normal hemoglobin level, and a normal red blood cell count.

24. Also prior to her procedure, Patient N.F. indicated in her medical questionnaire that she was pregnant at least twice.

25. Because Patient N.F. disclosed her prior pregnancies to Respondent, Respondent knew, or should have known, that Patient N.F. had a potentially weak or thin abdominal wall.

26. Respondent determined that Patient N.F. was of good health and an appropriate candidate to undergo liposuction.

27. Respondent performed liposuction with gluteal fat transfer on Patient N.F. at Spectrum on May 15, 2015.

28. Following the surgery, Patient N.F. experienced abdominal pain, weakness, and an inability to walk, resulting in her admission to Baptist Hospital.

29. During an exploratory surgery, Patient N.F. was found to have a hole in her small bowel (colon), which was leaking fluid into her abdominal cavity.[1/]

Facts Related to Patient P.N.

30. On May 16, 2015, Patient P.N., a 35-year-old female patient, was scheduled to undergo liposuction with gluteal fat transfer at Encore.

31. On May 4, 2015, prior to her procedure, Patient P.N. underwent bloodwork that revealed she had a normal hematocrit level, normal hemoglobin level, and a normal red blood cell count.

32. Respondent determined that Patient P.N. was of sufficiently good health and an appropriate candidate to undergo liposuction.

33. Respondent performed liposuction with gluteal fat transfer on Patient P.N. as scheduled.

34. Following the surgery, Patient P.N. experienced extreme pain and heavy bleeding, resulting in her admission to Memorial Regional Hospital.

35. Upon admission, Patient P.N.'s hematology report revealed a low hematocrit level, and low hemoglobin, which signified severely diminished blood levels and necessitated a blood transfusion.

Facts Related to Concentration of Tumescent Solution

36. Before harvesting Patients L.L.'s, D.M.'s, N.F.'s, and P.N.'s fat, Respondent infiltrated tumescent solution into the areas that were prepared to undergo liposuction.

37. Tumescent solution is a mixture of natural saline, epinephrine, and lidocaine and is used to decrease the risk of excessive bleeding caused by large-volume liposuction procedures.

38. Epinephrine, the active ingredient in tumescent solution, constricts blood vessels and reduces blood loss.

39. The minimum concentration of epinephrine in tumescent solution needed to achieve its intended purpose of reducing blood loss is 1:1,000,000.

40. This concentration was first popularized by Dr. Jeffrey Klein in 1965. After experimenting with several concentrations of epinephrine, Dr. Klein concluded that a 1:1,000,000 concentration of epinephrine appropriately balanced patient safety with effectiveness. The most dilute concentration of epinephrine Dr. Klein experimented with was 1:2,000,000.

41. Dr. Klein's concentration of epinephrine in tumescent solution of 1:1,000,000 is the standard concentration in the state of Florida for BBL procedures.

42. The medical records reflect that during each of the four procedures, Respondent used tumescent solution with an epinephrine concentration of 1:4,000,000. This concentration is too diluted to have the intended effect of restricting blood loss.

43. However, the tumescent solution was prepared by the circulators who assisted during the surgeries. The circulators

credibly testified that when preparing the tumescent solution, they used enough epinephrine to create at least a 1:1,000,000 concentration of epinephrine. The circulators prepared the tumescent solution by adding lidocaine with 1:100,000 epinephrine and one cubic centimeter (cc) of epinephrine to a one-liter (1000 cc) bag of normal saline.

44. The circulators explained that the additional epinephrine that was used was not documented in the patients' operating room records because there was no designated space on the form for this information.

45. In light of the circulators' credible testimony, no evidence was presented to support the conclusion that Respondent fell below the standard of care by using an inappropriate concentration of epinephrine in the tumescent solution. Further, there was no causal connection demonstrated between the patients' blood loss, a fairly common complication associated with BBL procedures, and the concentration of epinephrine used.

Facts Related to Damage to Internal Organs

46. During Patient N.F.'s liposuction procedure, Respondent used a cannula to remove 4,000 ccs of supernatant fat from Patient N.F.'s abdomen, waist, back, bra rolls, and flanks.

47. While manipulating the cannula, Respondent pushed the cannula through Patient N.F.'s abdominal wall and punctured her small bowel.

48. Because Respondent perforated Patient N.F.'s small bowel, Patient N.F.'s abdominal cavity was contaminated, and 10 to 15 centimeters of Patient N.F.'s bowel later had to be resected and removed.

49. After Patient N.F.'s hospitalization, her mother confronted Respondent who admitted that he "messed up," and suggested that his instrument "cuts through muscle and fat like butter," and may have contributed to the perforation.

50. During Patient D.M.'s liposuction procedure, Respondent used a cannula to remove 4,000 ccs of supernatant fat from Patient D.M.'s abdomen, waist, back, bra rolls, and flanks.

51. While manipulating the cannula, Respondent pushed the cannula through Patient D.M.'s abdominal wall, damaging her chest wall, and Respondent punctured her liver at least five times.

52. Respondent was responsible for ensuring that the cannula used during liposuction procedures was manipulated with precision and extreme care to avoid contact with the patients' internal organs.

53. In order for the cannula to come into contact with an internal organ (with the exception of the heart and lungs), Respondent pushed the cannula at an inappropriate angle through a thick layer of muscle called the abdominal wall. The tough abdominal wall has a noticeably different consistency than the soft layers of subcutaneous fat. A surgeon is required to

operate with a level of skill and care to be able to discern between subcutaneous fat and muscle tissue while passing the cannula through the patient.

54. The standard of care in Florida requires surgeons to use extreme care to ensure that the abdominal wall is not breeched. This is especially true when the patient's medical history suggests the possibility of a thin abdominal wall.

55. According to both Petitioner's and Respondent's experts the perforation of an internal organ during a liposuction procedure, even once, is an extremely rare incident.

56. In fact, Respondent's world-renowned BBL expert, Dr. Mendieta explained, "I'm constantly thinking bowel, bowel, bowel perforation or I'm constantly thinking trying to avoid, so it is constantly on my mind in terms of what I am trying to avoid, so I'm always angling my cannula and making sure that I'm on the right plane."[2/]

57. Dr. Mendieta admitted that although perforating an internal organ is a "known complication" related to liposuction, it can result from medical negligence.

58. Respondent argues he is absolved of any responsibility for the puncture of internal organs because Patients D.M. and N.F. signed consent forms that included the risk of "damage to deeper structures, including nerves, blood vessels, muscles, and lungs."

59. Significantly, the informed consent forms for liposuction signed by the patients did not include damage to the liver, small bowel, or other intra-abdominal organs.

60. Petitioner's expert, Dr. Greenberg, explained that the language in the consent form does not contemplate damage to internal organs shielded by the abdominal wall, and a lay person would be unlikely to make such an inference.

61. Dr. Greenberg credibly testified that it is a violation of the standard of care to damage a patient's internal organs during a liposuction procedure, regardless of whether it is a known complication.

62. Dr. Mendieta countered that the only way for a surgeon to violate the standard of care would be to either intentionally stab the patient, or to perform the surgery in such a reckless and careless manner, improperly angling the cannula, that damage to the surrounding structures is either inevitable or purposeful.

63. As noted by all three experts, absent being present during the procedure, having it well-documented in the Respondent's notes, or talking with Respondent, it is not possible to tell with certainty what transpired. Respondent refused to testify on his own behalf. Respondent asserted his Fifth Amendment Privilege against self-incrimination, instead of clarifying any of the disputed issues.

64. Based on the forgoing, Petitioner demonstrated by clear and convincing evidence that the puncture of the patients' internal organs was the result of Respondent's violation of the standard of care and improper angling of the cannula during the procedures.

Facts Related to the Alleged Medical Records Violation

65. The circulators at Vanity, Encore, and Spectrum Aesthetics testified that they prepared the tumescent solution that Respondent used during his liposuction procedures at Respondent's direction.

66. The circulators testified that when preparing the tumescent solution, they used enough epinephrine to create at least a 1:1,000,000 concentration of epinephrine. However, the additional epinephrine that was purportedly used was never documented in the patients' operating room records.

67. Respondent argues that it was the responsibility of the circulators who prepared the solutions or the facilities at which he operated that maintain the records, which bear responsibility for the accuracy of the records.

68. Respondent is the surgeon who performed the surgery on each patient. The operative records for each surgery bear the same signature in every signature block for "Surgeon Signature," "Physician Signature," "Osakatukei O. Omulepu, M.D.," and "Osak

Omulepu, MD." In most instances, the signature is clearly legible as O.O. Omulepu.

69. The record supports by clear and convincing evidence that Respondent signed or approved these records and bears responsibility for their accuracy. However, Respondent reviewed and signed the medical records, all of which omitted the additional ampule of epinephrine that was purportedly added, without correcting the apparent discrepancy.

CONCLUSIONS OF LAW

70. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

71. A proceeding to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Petitioner must therefore prove the charges against Respondent by clear and convincing evidence. Fox v. Dep't of Health, 994 So. 2d 416, 418 (Fla. 1st DCA 2008)(citing Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996)).

72. The clear and convincing standard of proof has been described by the Florida Supreme Court:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must

> be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

73. Disciplinary statutes and rules "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992).

74. The grounds proving Petitioner's assertion that Respondent's license should be disciplined must be those specifically alleged in the Second Amended Administrative Complaint. See e.g., Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Kinney v. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987); and Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842 (Fla. 2d DCA 1984).

Counts I through IV - Standard of Care Violations

75. Section 458.331(1)(t), Florida Statutes, provides that it is a violation for a medical doctor to commit medical malpractice, as defined in section 456.50, Florida Statutes. The

statute goes on to state that "the Board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph."

76. Section 456.50(1)(g) defines "medical malpractice" as the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure.

77. The "level of care, skill, and treatment recognized in general law related to health care licensure" means the standard of care specified in section 766.102, Florida Statutes.

78. Subsections (1), (2), and (3)(b) of section 766.102 state (in relevant part):

> (1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 766.202(4), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.
>
> (2)(a) If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was

not within the necessary or reasonably foreseeable results of the surgical, medicinal, or diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.

(b) The provisions of this subsection shall apply only when the medical intervention was undertaken with the informed consent of the patient in compliance with the provisions of s. 766.103.

(3)(b) The existence of a medical injury does not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider.

79. The Second Amended Administrative Complaint alleges the following violations of the standard of care:

1. Failing to use the proper concentration of epinephrine in the tumescent solution used during surgery. (D.M., N.F., L.L. and P.N.)

2. Failing to inject the proper amount of fatty tissue. (D.M.)

3. Injecting fat into the sciatic nerve. (N.F.)

4. Puncturing or perforating internal organs. (D.M. and N.F.)

80. For all four patients, the Second Amended Administrative Complaint alleges Respondent used tumescent solution with a concentration of one part per 4 million units. At the hearing,

evidence and testimony was provided from all of the circulators involved in these cases. The evidence and testimony was clear that the tumescent solution used by Respondent was always prepared the same way--one cc of epinephrine was added to each liter of saline, creating a tumescent solution with a concentration of at least one part per million of epinephrine. This is the concentration Petitioner alleges should have been used, and Respondent did not fall below the standard of care with respect to the amount of tumescent solution used in these procedures.

81. The Second Amended Administrative Complaint alleges that Respondent injected 1250 ccs of fat into Patient D.M.'s buttocks bilaterally, and that the standard amount of fatty tissue injected is approximately 500 ccs. No evidence was presented to support this allegation. To the contrary, the evidence in this case establishes that it is within the standard of care for surgeons who routinely do this procedure to inject 1500 ccs or more of fat into each side of the buttocks. The Respondent did not fall below the standard of care by injecting 1250 ccs of fat into Patient D.M.

82. The Second Amended Administrative Complaint states that the Respondent injected fatty tissue into Patient N.F.'s sciatic nerve, and that this was below the standard of care. The evidence did not establish that fatty tissue was injected into the

patient's sciatic nerve, and thus there is no evidence to support this allegation.

83. Finally, the Second Amended Administrative Complaint alleges that Respondent fell below the standard of care by puncturing or perforating internal organs (Patients D.M. and N.F.). Respondent asserts that these minimal allegations are insufficient to put him on notice of the nature of the alleged violation. Respondent correctly points out that nothing in the administrative complaint specifically alleges that Respondent improperly angled the cannula.

84. However, the allegations certainly put the Respondent on notice that his admitted multiple punctures to internal organs in these two patients was a basis upon which the Petitioner sought to discipline his license. Respondent could have used interrogatories or the deposition of the Petitioner's expert to discern detailed ultimate facts regarding how Petitioner believed the negligence to have occurred.

85. The clear and convincing testimony of the experts was that organ punctures during liposuction are exceedingly rare complications which do not occur in the absence of recklessness in the placement of the cannula, and insufficient attention to the feel of the procedure itself as the cannula passes through fat, tissues, muscles and the abdominal wall.

86. An organ puncture during liposuction is not a per se act of medical negligence. Nevertheless, in this case, Respondent admitted to Patient N.F's mother that he "messed up" and sliced through Patient N.F.'s small bowel with his cannula like it was "butter." This exceedingly rare complication occurred in not one, but two, of Respondent's procedures, on the same day.

87. Respondent's assertion of his Fifth Amendment Privilege against self-incrimination permits the fact-finder to draw adverse inferences from his silence. Baxter v. Palmigiano, 425 U.S. 308 (1976).

88. The only inference that can be drawn is that Respondent violated the standard of care and committed malpractice by the reckless and improper angling of the cannula for these two procedures, resulting in the perforation of internal organs.

89. Petitioner proved by clear and convincing evidence that Respondent violated section 458.331(1)(t) by puncturing Patient D.M.'s liver multiple times and Patient N.F.'s small bowel.

Count V - Repeated Medical Malpractice

90. As discussed herein, Petitioner failed to demonstrate by clear and convincing evidence that Respondent committed repeated medical malpractice by committing three or more incidents of medical malpractice on Patients D.M., N.F., L.L., and/or P.N. Accordingly, Respondent did not violate

section 458.331(1)(t), Florida Statutes (2014), by committing repeated medical malpractice.

Counts VI-IX - Medical Records Violations

91. Section 458.331(1)(m) provides that it is a violation for a physician to fail to keep legible, as defined by Department rule in consultation with the Board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title, who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

92. Petitioner proved by clear and convincing evidence that Respondent failed to create or keep medical records that accurately reflected the amount of epinephrine administered to Patients L.L., D.M., N.F., and P.N.

93. As a result, Petitioner proved by clear and convincing evidence that Respondent violated section 458.331(1)(m).

Penalty Assessment

94. Respondent has no prior discipline against his medical license.

95. Petitioner imposes penalties upon licensees consistent with disciplinary guidelines prescribed by rule. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

96. Penalties in a licensure discipline case may not exceed those in effect at the time the violations were committed. Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991). Id.

97. At the time of the incidents, Florida Administrative Code Rule 64B8-8.001(2)(t) provided that for a first-time offender committing medical malpractice, as described in section 458.331(1)(t), the prescribed penalty range was from one year probation to revocation or denial and an administrative fine from $1,000.00 to $10,000.00. The recommended penalty for a second violation of section 458.331(1)(t) ranged from two years of probation to revocation and an administrative fine from $5,000.00 to $10,000.00.

98. Rule 64B8-8.001(2)(m) provided that for a first-time offender failing to keep required medical records, as described in section 458.331(1)(m), the prescribed penalty range was from a reprimand to denial or two (2) years of suspension followed by probation, and an administrative fine from $1,000.00 to $10,000.00. The recommended penalty for a second violation of

section 458.331(1)(m) ranged from probation to suspension followed by probation or denial and an administrative fine from $5,000.00 to $10,000.00.

99. Rule 64B8-8.001(3) provided that, in applying the penalty guidelines, the following aggravating and mitigating circumstances should also be taken into account:

> (3) Aggravating and Mitigating Circumstances. Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:
>
> (a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;
>
> (b) Legal status at the time of the offense: no restraints, or legal constraints;
>
> (c) The number of counts or separate offenses established;
>
> (d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;
>
> (e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
>
> (f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
>
> (g) The involvement in any violation of Section 458.331, F.S., of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties

recommended above and impose suspension or revocation of licensure.

(h) Where a licensee has been charged with violating the standard of care pursuant to Section 458.331(1)(t), F.S., but the licensee, who is also the records owner pursuant to Section 456.057(1), F.S., fails to keep and/or produce the medical records.

(i) Any other relevant mitigating factors.

100. A significant aggravating factor is that Respondent's actions exposed Patients D.M. and N.F. to severe injury or death.[3/] Aggravating factor (c) applies because Petitioner established six separate offenses committed by Respondent. Additionally, under paragraph (h), Respondent was charged with violating the standard of care and it was found that he failed to keep adequate medical records. This is mitigated by Petitioner's prior nine years of discipline-free history.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final order finding that Respondent violated sections 458.331(1)(t) and 458.331(1)(m), Florida Statutes, as charged in Petitioner's Second Amended Administrative Complaint; imposing a fine of $14,000.00[4/]; issuing a reprimand against Petitioner for the record-keeping violations; placing Respondent on probation for a period of two years; and imposing costs of the investigation and prosecution of this case.

DONE AND ENTERED this 6th day of January, 2017, in Tallahassee, Leon County, Florida.

MARY LI CREASY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of January, 2017.

ENDNOTES

[1/] Petitioner's tendered expert, Dr. Scott Greenberg, was qualified to provide an opinion with regard to liposuction. However, the undersigned found that Dr. Greenberg was not an expert on the gluteal fat transfer procedure portion of the BBL. It is this portion of the procedure during which Petitioner alleges Respondent injured Patient N.F.'s sciatic nerve. Accordingly, Dr. Greenberg was prohibited from offering testimony on the gluteal fat transfer and there was no evidence presented upon which to make findings of fact regarding Patient N.F.'s nerve damage. Petitioner made a proffer of this testimony for the record.

[2/] Respondent's Ex. 1, Deposition transcript of Dr. Mendieta 47/15-20.

[3/] Respondent's suggestion, that Patient D.M.'s liver puncture and injury to her abdomen and chest wall were minor because there was no treatment provided, is rejected. D.M. endured significant pain. Just because repair was not possible does not render the injury less than serious.

[4/] The penalty includes $5,000.00 each ($10,000.00 total) for the malpractice committed against Patients D.M. and N.F., plus

$1,000.00 each for the four record-keeping violations. Although the recommended penalty for the second through fourth record-keeping violations range from $5,000.00 to $10,000.00, the undersigned does not believe assessing the higher penalty serves a deterrent effect because these four violations all occurred within a 48-hour period. Additionally, it should be noted that the Second Amended Complaint, which included the record-keeping counts for the first time, was not filed until the morning of the final hearing.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK

STATE OF FLORIDA
DEPARTMENT OF HEALTH CLERK: Linda Leonard

DATE 10-26-16

DEPARTMENT OF HEALTH,

Petitioner,

v.

DOH Case Nos. 2015-19442; 2015-20428; 2015-17616; 2015-18000

OSAKATUKEI O. OMULEPU, M.D.,

Respondent.
_____/

SECOND AMENDED ADMINISTRATIVE COMPLAINT

Petitioner, Department of Health, files this Second Amended Administrative Complaint before the Board of Medicine against Respondent, Osakatukei O. Omulepu, M.D., and in support thereof alleges:

1. Petitioner is the state agency charged with regulating the practice of medicine pursuant to Section 20.43, Florida Statutes, and Chapters 456 and 458, Florida Statutes.

2. At all times material hereto, Respondent was a licensed physician within the state of Florida, having been issued license number ME 99126.

3. At all times material hereto, Respondent did not hold any certifications from specialty boards recognized by the Board of Medicine.

4. Respondent's address of record is 4300 N. University Drive, Suite A202, Lauderhill, Florida 33351.

5. At all times material hereto, Respondent was contracted to perform office surgeries at West Dade Surgery Center d/b/a Vanity Cosmetic Surgery (Vanity Cosmetic), located at 8506 S.W. 8th Street, Miami, Florida 33144; Florida Aesthetic Surgery Center d/b/a Encore Plastic Surgery (Encore), located at 1738 West 49 Street, Hialeah, Florida 33012; and Spectrum Image, Inc. d/b/a Spectrum Aesthetics Center for Cosmetic Surgery (Spectrum Aesthetics), located at 51 SW 42nd Ave, Miami, FL 33134.

Facts Related to Patient D.M.[1]

6. On or about May 15, 2015, Patient D.M., a 31 year-old female, presented to Respondent at Spectrum Aesthetics and underwent liposuction with bilateral fat transfer to the gluteal areas.[2]

7. During the procedure, the Respondent injected tumescent solution[3] into Patient D.M.

---

[1] Department of Health Case No. 2015-19442.
[2] Commonly referred to as a "Brazilian Butt Lift."
[3] A combination of a diluted anesthetic agent and epinephrine (a vasoconstrictor used to slow the absorption of, and therefore prolong the action of, the anesthetic agent). The tumescent technique, as opposed to "dry liposuction," involves the injection of tumescent solution into the patient's fatty deposits to reduce the amount of blood lost during the procedure.

8. The standard concentration for tumescent solution, used for liposuction procedures, is approximately one part epinephrine per 1 million units.

9. Respondent used tumescent solution with a concentration of one part epinephrine per 4 million units.

10. Respondent's medical records for Patient D.M. document that Respondent used tumescent solution with a concentration of one part epinephrine per 4 million units.

11. During the procedure, Respondent repeatedly punctured Patient D.M.'s liver.

12. Respondent injected Patient D.M.'s buttocks with 1,250 cubic centimeters (cc) (bilaterally) of fatty tissue.

13. The standard amount of fatty tissue injected into a buttocks during this procedure is approximately 500cc.

Facts Related to Patient N.F. [4]

14. On or about May 15, 2015, Patent N.F., a 35 year-old female, presented to Respondent at Spectrum Aesthetics and underwent liposuction with bilateral fat transfer to the gluteal areas.

[4] Department of Health Case No. 2015-20428.

15. During the procedure, the Respondent injected tumescent solution into Patient N.F.

16. The standard concentration for tumescent solution, used for liposuction procedures, is approximately one part epinephrine per 1 million units.

17. Respondent used a tumescent solution with a concentration of one part epinephrine per 4 million units.

18. Respondent's medical records for Patient N.F. document that Respondent used tumescent solution with a concentration of one part epinephrine per 4 million units.

19. During the procedure, Respondent repeatedly perforated Patient N.F.'s small bowel.

20. Respondent injected fatty tissue into Patient N.F.'s sciatic nerve.

Facts Related to Patient L.L. [5]

21. On or about May 14, 2015, Patient L.L., a 29 year-old female, presented to Respondent at Vanity Cosmetic and underwent liposuction of her stomach, planks, and abdomen.

[5] Department of Health Case No. 2015-17616.

22. During the procedure, the Respondent injected tumescent solution into Patient L.L.

23. The standard concentration for tumescent solution, used for liposuction procedures, is approximately one part epinephrine per 1 million units.

24. Respondent used tumescent solution with a concentration of one part epinephrine per 4 million units.

25. Respondent's medical records for Patient L.L. document that Respondent used tumescent solution with a concentration of one part epinephrine per 4 million units.

Facts Related to Patient P.N.[6]

26. On or about May 16, 2015, Patient P.N., a 35 year-old female, presented to Respondent at Encore and underwent liposuction with bilateral fat transfer to the gluteal areas.

27. During the procedure, the Respondent injected tumescent solution into Patient P.N.

---

[6] Department of Health Case No. 2015-18000.

28. The standard concentration for tumescent solution, used for liposuction procedures, is approximately one part epinephrine per 1 million units.

29. Respondent used tumescent solution with a concentration of one part epinephrine per 4 million units.

30. Respondent's medical records for Patient P.N. document that Respondent used tumescent solution with a concentration of one part epinephrine per 4 million units.

Section 458.331(1)(t), Florida Statutes

31. Section 458.331(1)(t), Florida Statutes (2014), subjects a licensee to discipline for committing medical malpractice as defined in Section 456.50(1)(g), Florida Statutes. Section 456.50(1)(g), Florida Statutes (2014), states medical malpractice means the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure. Section 766.102, Florida Statutes (2014), provides that the prevailing standard of care for a given healthcare provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

Count I- Patient D.M.

32. Petitioner re-alleges and incorporates paragraphs 1 through 13 and 31 as if fully set forth herein.

33. At all times material hereto, the prevailing standard of care required Respondent to treat Patient D.M. in the following manner:

a. Use the proper concentration of epinephrine in the tumescent solution used for the procedure;

b. Not puncture Patient D.M.'s internal organs; and/or

c. Inject the proper amount of fatty tissue into Patient D.M.'s buttocks.

34. Respondent fell below the standard of care in his treatment of Patient D.M. in one or more of the following ways:

a. By failing to use the proper epinephrine concentration in the tumescent solution used for the procedure;

b. By injecting an improper amount of fatty tissue into Patient D.M.'s buttocks; and/or

c. By repeatedly puncturing Patient D.M.'s liver.

35. Based on the foregoing, Respondent violated Section 458.331(1)(t), Florida Statutes (2014).

Count II- Patient N.F.

36. Petitioner re-alleges and incorporates paragraphs 1 through 5, 14 through 20, and 31 as if fully set forth herein.

37. At all times material hereto, the prevailing standard of care required Respondent to treat Patient N.F. in the following manner:

a. Use the proper concentration of epinephrine in the tumescent solution used for the procedure;

b. Not puncture Patient N.F.'s internal organs; and/or

c. Not inject fatty tissue into Patient N.F.'s nerves.

38. Respondent fell below the standard of care in his treatment of Patient N.F. in one or more of the following ways:

a. By failing to use the proper concentration of epinephrine in the tumescent solution used for the procedure;

b. By injecting fatty tissue into Patient N.F.'s nerves; and/or

c. By repeatedly puncturing Patient N.F.'s small bowel.

39. Based on the foregoing, Respondent violated Section 458.331(1)(t), Florida Statutes (2014).

Count III- Patient L.L.

40. Petitioner re-alleges and incorporates paragraphs 1 through 5, 21 through 25, and 31 as if fully set forth herein.

41. At all times material hereto, the prevailing standard of care required Respondent to treat Patient L.L. in the following manner:

a. Use the proper concentration of epinephrine in the tumescent solution used for the procedure.

42. Respondent fell below the standard of care in his treatment of Patient L.L. in one or more of the following ways:

a. By failing to use the proper concentration of epinephrine in the tumescent solution used for the procedure.

43. Based on the foregoing, Respondent violated Section 458.331(1)(t), Florida Statutes (2014).

Count IV- Patient P.N.

44. Petitioner re-alleges and incorporates paragraphs 1 through 5 and 26 through 31 as if fully set forth herein.

45. At all times material hereto, the prevailing standard of care required Respondent to treat Patient P.N. in the following manner:

a. Use the proper concentration of epinephrine in the tumescent solution used for the procedure.

46. Respondent fell below the standard of care in his treatment of Patient P.N. In one or more of the following ways:

a. By failing to use the proper concentration of epinephrine in the tumescent solution used for the procedure.

47. Based on the foregoing, Respondent violated Section 458.331(1)(t), Florida Statutes (2014).

Count V

48. Petitioner realleges and incorporates paragraphs 1 through 47 as if fully set forth herein.

49. Section 458.331(1)(t), Florida Statutes, subjects a licensee to discipline for committing repeated medical malpractice as defined in Section 456.50. A person found by the board to have committed repeated medical malpractice based on Section 456.50, may not be licensed or continue to be licensed by this state to provide healthcare services as a medical doctor in this state.

50. Respondent committed repeated medical malpractice by committing three or more incidents of medical malpractice on Patients D.M., N.F., L.L., and/or P.N.

51. Based on the foregoing, Respondent violated Section 458.331(1)(t), Florida Statutes (2014), by committing repeated medical malpractice.

Count VI

52. Petitioner realleges and incorporates paragraphs 1 through 30 as if fully set forth herein.

53. Section 458.331(1)(m), Florida Statutes (2014), provides that it is a violation to fail to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

54. Rule 64B8-9.003(2), Florida Administrative Code, provides that a licensed physician shall maintain medical records in English, in a legible manner and with sufficient detail to clearly demonstrate why the course of treatment was undertaken.

55. Rule 64B8-9.003(3), Florida Administrative Code, provides that the medical records shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of records or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient.

56. Respondent violated Section 458.331(1)(m), Florida Statutes (2014), and/or Rule 64B8-9.003, Florida Administrative Code, by failing to create or maintain accurate documentation of the concentration of epinephrine used during Patient D.M.'s procedure

57. Based on the foregoing, Respondent violated Section 458.331(1)(m), Florida Statutes (2014), and/or Rule 64B8-9.003, Florida Administrative Code.

Count VII

58. Petitioner realleges and incorporates paragraphs 1 through 30 as if fully set forth herein.

59. Section 458.331(1)(m), Florida Statutes (2014), provides that it is a violation to fail to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

60. Rule 64B8-9.003(2), Florida Administrative Code, provides that a licensed physician shall maintain medical records in English, in a legible

manner and with sufficient detail to clearly demonstrate why the course of treatment was undertaken.

61. Rule 64B8-9.003(3), Florida Administrative Code, provides that the medical records shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of records or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient.

62. Respondent violated Section 458.331(1)(m), Florida Statutes (2014), and/or Rule 64B8-9.003, Florida Administrative Code, by failing to create or maintain accurate documentation of the concentration of epinephrine used during Patient N.F.'s procedure

63. Based on the foregoing, Respondent violated Section 458.331(1)(m), Florida Statutes (2014), and/or Rule 64B8-9.003, Florida Administrative Code.

Count VIII

64. Petitioner realleges and incorporates paragraphs 1 through 30 as if fully set forth herein.

65. Section 458.331(1)(m), Florida Statutes (2014), provides that it is a violation to fail to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

66. Rule 64B8-9.003(2), Florida Administrative Code, provides that a licensed physician shall maintain medical records in English, in a legible manner and with sufficient detail to clearly demonstrate why the course of treatment was undertaken.

67. Rule 64B8-9.003(3), Florida Administrative Code, provides that the medical records shall contain sufficient information to identify the

patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of records or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient.

68. Respondent violated Section 458.331(1)(m), Florida Statutes (2014), and/or Rule 64B8-9.003, Florida Administrative Code, by failing to create or maintain accurate documentation of the concentration of epinephrine used during Patient L.L.'s procedure

69. Based on the foregoing, Respondent violated Section 458.331(1)(m), Florida Statutes (2014), and/or Rule 64B8-9.003, Florida Administrative Code.

Count IX

70. Petitioner realleges and incorporates paragraphs 1 through 30 as if fully set forth herein.

71. Section 458.331(1)(m), Florida Statutes (2016), provides that it is a violation to fail to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

72. Rule 64B8-9.003(2), Florida Administrative Code, provides that a licensed physician shall maintain medical records in English, in a legible manner and with sufficient detail to clearly demonstrate why the course of treatment was undertaken.

73. Rule 64B8-9.003(3), Florida Administrative Code, provides that the medical records shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results; test results; records of drugs

prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of records or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient.

74. Respondent violated Section 458.331(1)(m), Florida Statutes (2014), and/or Rule 64B8-9.003, Florida Administrative Code, by failing to create or maintain accurate documentation of the concentration of epinephrine used during Patient P.N.'s procedure

75. Based on the foregoing, Respondent violated Section 458.331(1)(m), Florida Statutes (2014), and/or Rule 64B8-9.003, Florida Administrative Code.

WHEREFORE, Petitioner respectfully requests the Board of Medicine enter an order imposing one or more of the following penalties: permanent revocation or suspension of Respondent's license, restriction of practice, imposition of an administrative fine, issuance of a reprimand, placement of Respondent on probation, corrective action, refund of fees billed or collected, remedial education, and/or any other relief the Board of Medicine deems appropriate.

SIGNED this 26th day of October, 2016.

Celeste Philip, M.D., M.P.H.
State Surgeon General and
Secretary of Health

for [signature] 91244
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PCP: October 26, 2016
PCP Members: Mark Avila, M.D., Sarvam TerKonda, M.D.; Brigitte Goersch

NOTICE OF RIGHTS

Respondent has the right to request a hearing to be conducted in accordance with Section 120.569 and 120.57, Florida Statutes, to be represented by counsel or other qualified representative, to present evidence and argument, to call and cross-examine witnesses and to have subpoena and subpoena duces tecum issued on his or her behalf if a hearing is requested.

A request or petition for an administrative hearing must be in writing and must be received by the Department of Health within 21 days from the day Respondent received this Administrative Complaint, pursuant to Rule 28-106.111(2), Florida Administrative Code. If Respondent fails to request a hearing within 21 days of receipt of this Administrative Complaint, Respondent waives the right to request a hearing on the facts alleged in this Administrative Complaint pursuant to Rule 28-106.111(4), Florida Administrative Code. Any request for an administrative proceeding to challenge or contest the material facts or charges contained in this Administrative Complaint must conform to Rule 28-106.2015(5), Florida Administrative Code.

Mediation under Section 120.573, Florida Statutes, is not available to resolve this Administrative Complaint.

NOTICE REGARDING ASSESSMENT OF COSTS

Respondent is placed on notice that Petitioner has incurred costs related to the investigation and prosecution of this matter. Pursuant to Section 456.072(4), Florida Statutes, the Board of Medicine shall assess costs related to the investigation and prosecution of a disciplinary matter, which may include attorney hours and costs, on Respondent in addition to any other discipline imposed.