[Cite as *Gelesh v. State Med. Bd. of Ohio*, 2010-Ohio-4378.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gary C. Gelesh,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-169 (C.P.C. No. 09CV-07-10873)
State Medical Board of Ohio,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 16, 2010

Dinsmore & Shohl, LLP, Eric J. Plinke and *Gregory P. Mathews*; *Lambert & MacDonald, Co., LPA*, *John D. Lambert* and *Ida L. MacDonald*, for appellant.

Richard Cordray, Attorney General, and *Kyle C. Wilcox*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P. J.

{¶1} This is an appeal from the January 25, 2010 judgment of the Franklin County Court of Common Pleas affirming the State Medical Board's ("Board") June 11, 2009 order. The Board found that Gary C. Gelesh, D.O., had violated R.C. 4731.22(B)(6) in that he departed from, or failed to conform to, minimal standards of care of similar

practitioners under the same or similar circumstances, whether or not actual injury to a patient was established. For the reasons that follow, we affirm.

{¶2} At approximately 9:00 p.m. on February 7, 2002, a terminally ill 88-year-old patient ("Patient 1") with severe abdominal pain was transported from her assisted living facility to the emergency department of Akron General Medical Center. Previously, the patient had executed a do not resuscitate/comfort care only ("DNR/CC") directive. Appellant, Gary C. Gelesh, D.O., was the attending physician that evening and in charge of Patient 1's care. Dr. Gelesh ordered narcotics to alleviate the patient's pain, but even with increasingly large doses of morphine, at 1:05 a.m., on February 8, 2002, Patient 1 was still in extreme pain.

{¶3} Dr. Gelesh testified that he conveyed a verbal order for a benzodiazepine, either Versed or Ativan, to Denise Orndorf, R.N. Orndorf heard the order as one for 60 mg. of Anectine. Orndorf testified that she did not know what Anectine was, but she looked it up in a reference book and realized that Anectine was the brand name for succinylcholine. Succinylcholine is a neuromuscular blocking agent that paralyzes skeletal muscles including the respiratory muscles. It is used to paralyze the respiratory muscles to facilitate endotracheal intubation. If the drug is administered without respiratory support, the patient ceases breathing and dies.

{¶4} After retrieving the medication, Orndorf consulted with other nurses in the charting area, and they told her "Don't give that," to which Orndorf responded, "I wasn't going to." Orndorf returned to Patient 1's bedside and handed either the vial and an empty syringe, or a syringe containing Anectine to Dr. Gelesh. There was conflicting testimony: first, as to whether the nurse ever asked Dr. Gelesh if Anectine was the

medication he wanted; and second, whether Dr. Gelesh heard the question and did not answer or whether he did not hear the question. At 1:20 a.m., Dr. Gelesh administered the drug himself without confirming what it was. Patient 1 died within three minutes of receiving the medication.

{¶5} The Board issued a notice of opportunity for hearing pursuant to R.C. 119.07 to Dr. Gelesh on May 18, 2005. The notice alleged that Dr. Gelesh had departed from the minimal standards of care with respect to the administration of Anectine to Patient 1.

{¶6} Dr. Gelesh sought statutory immunity from professional disciplinary action on the grounds that he was providing comfort care under R.C. Chapter 2133, the "Modified Rights of the Terminally Ill Act and the Dnr Identification and Do-Not-Resuscitate Order Law." The Franklin County Court of Common Pleas denied the requested relief indicating that Dr. Gelesh had an adequate remedy by appeal of the Board's actions and decisions. This court affirmed the common pleas court's decision in *State ex rel. Gelesh v. State Med. Bd.,*172 Ohio App.3d 365, 2007-Ohio-3328.

{¶7} On March 8, 2006, the Board issued a second notice of opportunity for hearing. The factual allegations were the same, but the notice added language that Dr. Gelesh acted "in bad faith, and/or outside the scope of your authority, and/or not in accordance with reasonable medical standards." The notice also denied that Dr. Gelesh's claim for immunity was proper.

{¶8} A hearing began on October 16, 2006. At the outset, the State announced that it intended to show that Dr. Gelesh intentionally killed Patient 1 by administering excessive amounts of morphine and by intentionally administering Anectine. The hearing

examiner decided that evidence and argument concerning excessive morphine and intent to kill was outside the scope of the hearing notice. Accordingly, the hearing examiner excluded the evidence and argument.

{¶9} After the hearing officer submitted her report and recommendation, the State moved to submit the excluded evidence to the Board for a ruling on admissibility. The Board heard argument from counsel and agreed to consider the additional evidence. The matter was remanded to allow Dr. Gelesh the opportunity to rebut the evidence.

{¶10} The hearing officer issued a report and recommendation on remand dated May 12, 2009. The hearing officer found that: (1) Dr. Gelesh did not intentionally order succinylcholine for Patient 1; (2) Dr. Gelesh did not order morphine for the purpose of causing Patient 1's death; and (3) Dr. Gelesh carried out his treatment of Patient 1 in good faith from beginning to end. However, the report also concluded that Dr. Gelesh did not verify or confirm the medication Anectine before he administered it, and that his failure to do so constituted a "departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established." R.C. 4731.22(B)(6). The hearing examiner recommended a stayed suspension of Dr. Gelesh's medical license and a period of probation.

{¶11} The Board took up the matter at its meeting of June 10, 2009. After discussion, the Board voted to confirm the hearing officer's findings of fact and conclusions of law, but to substitute an order that no further action be taken.

{¶12} Dr. Gelesh appealed the Board's order to the Franklin County Court of Common Pleas. On appeal, Dr. Gelesh argued that his due process rights were violated,

that the finding that he had deviated from the standard of care was reversible error, and that additionally he was entitled to statutory immunity since he was providing comfort care to Patient 1.

{¶13} The court of common pleas found the decision and order to be supported by reliable, probative, and substantial evidence, and in accordance with law. This appeal followed with Dr. Gelesh assigning the following as error:

> [I.] The court erred in failing to invalidate the Board's order after it found that the Board had not complied with R.C. 119.07.
>
> [II.] The court erred in finding that the Board did not deprive Appellant of due process after it found that the Board had not complied with R.C. 119.07.
>
> [III.] Although the court was correct in finding that the Board inappropriately prosecuted an administrative action and sought to prove factual claims that were not contained in the notice of opportunity for hearing, the court erred in finding that the Board's conduct was not a denial of due process.
>
> [IV.] The court erred in finding that Board's Order was supported by substantial, probative, and reliable evidence.
>
> [V.] Although the court was correct in finding that the issues of intent to kill and excessive morphine were not in the notice of opportunity for hearing, the court erred in finding that the Board's conduct following issuance of the Amended Report and Recommendation and the remand hearing were in compliance with the due process clauses of the United States and Ohio Constitutions.
>
> [VI.] Although the court was correct in finding that the Board should have allowed Appellant to introduce evidence of the cause of death of the patient at issue, it erred in finding that this error was "de minimus."
>
> [VII.] The court erred in finding that the Board acted lawfully when it failed to grant immunity to Appellant under R.C. Chapter 2133.

{¶14} Pursuant to R.C. 119.12, when a trial court reviews an order of an administrative agency, it must consider the entire record to determine if the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. If a party appeals the trial court's decision to affirm, reverse, vacate, or modify the agency's order, the appellate court must determine whether the trial court abused its discretion in its examination of the record for reliable, probative, and substantial evidence. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. On questions of law, an appellate court's review is plenary. *Univ. Hosp., Univ of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶15} Reliable, probative, and substantial evidence has been defined as follows:

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

Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571. (Footnotes omitted.)

{¶16} The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶17} With this standard in mind, we address Dr. Gelesh's assignments of error.

{¶18} Assignments of error one, two, three, and five relate to R.C. 119.07 and due process concerns. Thus, they will be discussed together. It is axiomatic that due process

requires that one with a protected interest is entitled to notice and an opportunity to be heard in order to preserve the individual's rights under the due process clauses of the Ohio and United States Constitution. *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652.

{¶19} R.C. 119.07 sets forth the procedural and statutory requirements for notice and the opportunity to be heard for a licensee in an administrative proceeding. Such notice "shall include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing if the party requests it within thirty days." Id. Additionally, R.C. 119.07 provides that "[t]he failure of an agency to give the notices for any hearing required by sections 119.01 to 119.13 of the Revised Code in the manner provided in this section shall invalidate any order entered pursuant to the hearing."

{¶20} Dr. Gelesh contends that the second notice was defective because the assistant attorney general introduced allegations and evidence that were not contained in the notice. The State sought to prove that Dr. Gelesh had intentionally sought to hasten the death of Patient 1 by administering excessive amounts of morphine and that he sought to kill the patient by intentionally administering Anectine. Dr. Gelesh reasons that the State's attempt to expand the scope of the proceedings by adding these additional charges was outside the scope of the notice and therefore a violation of R.C. 119.07. Dr. Gelesh cites R.C. 119.07 for the proposition that the court of common pleas should have invalidated the Board's order because the notice was defective.

{¶21} In *Althof v. Ohio State Bd. of Psychology*, 10th Dist. No. 05AP-1169, 2007-Ohio-1010, a psychologist alleged a due process violation when the notice from the board

of psychology alleged that he engaged in sexual intercourse with patients, but it did not allege that he engaged in "inappropriate behavior" and "sexually intimate contact." Id. at ¶5. The psychologist claimed that the board had found that he engaged in "inappropriate behavior" when he was specifically charged with having sexual intercourse. He claimed his due process rights were violated when the board considered conduct other than sexual intercourse.

{¶22} This court found that the notice provided fair warning that the psychologist was accused of sexual misconduct with his patients, and that the psychologist's due process rights to reasonable notice and a fair hearing were not violated. Id. at ¶29.

{¶23} Similarly, in *Macheret v. State Med. Bd. of Ohio*, 10th Dist. No. 09AP-849, 2010-Ohio-3483, a physician was charged with engaging in sexual conduct with a patient without first terminating the physician-patient relationship. The physician argued that the Board violated his right to due process when it increased the hearing examiner's proposed sanction based on uncharged conduct (the physician's self-professed habit of exchanging hugs and air kisses with his patients) that was not included in the notice he received. This court found no due process violation because the Board disciplined the physician only for the violations charged in the notice and only considered the uncharged misconduct in setting the appropriate sanction. Id. at ¶28.

{¶24} The case of *Singer v. State Med. Bd. of Ohio* (Sept. 26, 1991), 10th Dist. No. 90AP-1204, 1991 WL 224968, is also instructive. In that case, Dr. Singer was on notice pursuant to R.C. 4731.22(A) and (B)(5) that he was charged with committing fraud on his license renewal application. The Board's notice referenced R.C. 4731.22(B)(6) (failure to conform to minimal standards of care), but Dr. Singer argued that the notice

violated due process because he was unable to determine that one of the allegations was that his current practice was below standard. Therefore, he argued that he was not able to refute the charge by presenting testimony by experts and patients that his current practice performance was satisfactory. This court concluded that "[t]he hearing examiner clearly considered Singer's current standard of practice to be relevant, although it was never directly addressed, Singer was not given notice that the issue would be raised, and no evidence was presented." On appeal, this court found that any possible error with regard to the notice could have been found harmless in light of the fact that R.C. 4731.22(A) enabled the Board to revoke Dr. Singer's license on the sole basis that he committed fraud in his license renewal application. Id.

{¶25} In the present case, it is undisputed that Dr. Gelesh was notified that he was charged with departing from the minimal standards of care with respect to the administration of Anectine. The second notice added a claim that he had acted in bad faith, and/or outside the scope of his authority, and/or not in accordance with reasonable medical standards, and that statutory immunity under R.C. Chapter 2133 was therefore, not appropriate.

{¶26} With respect to allegedly administering excessive morphine, the hearing officer struck argument and evidence related to the additional allegations. The hearing officer reasoned that the notice contained no mention of morphine at all. Only after the Board took up the matter pursuant to R.C. 119.09 was the issue of excessive morphine considered by the hearing officer and the Board.

{¶27} R.C. 119.09 permits the Board, through its hearing officer, to make evidentiary determinations, but if the hearing officer refuses to admit certain evidence, the

party offering the evidence (in this case the State) may make a proffer. After the hearing examiner submits her report and recommendation, the Board may then order additional testimony to be taken or permit the introduction of further documentary evidence.

{¶28} Here, the proffered evidence was relevant for the purpose of determining whether Dr. Gelesh's conduct was in bad faith or outside the scope of his authority, allegations specifically alleged in the second notice of hearing. Dr. Gelesh was aware that his state of mind was at issue in the case after he asserted statutory immunity from disciplinary proceedings because he was rendering comfort care to a terminally ill patient. Whether Dr. Gelesh was rendering comfort care in good faith or intentionally hastening the demise of Patient 1 became an issue once Dr. Gelesh raised the affirmative defense of statutory immunity pursuant to R.C. 2133.11. Therefore, it was not unreasonable or outside the scope of the notice for the Board to examine the entire course of care for Patient 1. Moreover, the evidence only was considered after Dr. Gelesh was given the opportunity to rebut such evidence.

{¶29} Dr. Gelesh argues that the admission of this evidence tainted the entire proceeding. We disagree. The hearing examiner took great pains to determine whether such evidence was germane to the case as set out in the second notice of hearing. The Board then considered the matter and, under its statutory purview, decided the evidence could have a bearing on their ultimate determination. Dr. Gelesh was given a full and fair opportunity to rebut the additional evidence, and he prevailed on his arguments. In fact, Dr. Gelesh was so successful in rebutting the State's theory, that the Board disagreed with the hearing examiner's recommendation and chose to impose no disciplinary sanctions. It is therefore apparent that the Board asked for, received a fuller picture of the

events of February 7 and 8, 2002, and agreed with the hearing examiner that Dr. Gelesh acted in good faith and did not intend to hasten the demise of Patient 1.

{¶30} As this court determined in *Macheret* and *Singer*, there was no due process violation because the only violation found was that charged in the notice. Therefore, as a matter of law, we conclude that, under the requirements of R.C. 119.07, Dr. Gelesh was provided with sufficient notice of the allegations against him. Nor is there a due process violation since he was given a fair opportunity to litigate the issues.

{¶31} Assignments of error one, two, three, and five are overruled.

{¶32} In his fourth assignment of error, Dr. Gelesh asserts the trial court abused its discretion when it found substantial, reliable, and probative evidence to support the Board's order. First, he contends that the State's expert, Dr. William Raymond Fraser, D.O., used the wrong standard under which to evaluate Dr. Gelesh's conduct. Dr. Gelesh contends that the issue was whether his conduct fell below the minimal standard of care, not what the best practice is.

{¶33} Dr. Fraser is Director of Emergency Medicine at Doctors Hospital in Columbus, Ohio. He is board certified in emergency medicine. In answer to a series of hypothetical questions, he set forth the minimal standard of care for the administration of medication in emergency medicine.

{¶34} Dr. Fraser testified that Dr. Gelesh's care of Patient 1 was appropriate except with regard to the administration of Anectine. Dr. Fraser then said that: "Any time there's verbal orders there's always the possibility of miscommunication, and I believe the best way to prevent that miscommunication from affecting patient outcomes is to verify the order yourself." (Tr. 216.)

{¶35} At that point, the hearing examiner spoke up as follows:

> I need to break in at this moment. Doctor, you said the best way to do that is a certain method. And today -- Well, during this entire hearing I'm not going to be looking at what the best practices are, I'm going to be looking at what the minimal standards are. And, counsel, if you could explore minimal standards, that would be appropriate.

(Tr. 216-17.)

{¶36} Doctor Fraser then testified as to the minimum standard of care as follows:

> I believe a minimum standard of care is to verify yourself; you simply ask the question, "What's in it.?"

(Tr. 217.) He then stated that the minimal standard of care requires the physician to know what the medication is that he is injecting. Id.

{¶37} The essence of Dr. Fraser's expert testimony was that the minimal standard of care requires a physician to have knowledge of what medication is in a syringe before personally administering the medication.

{¶38} Dr. Gelesh's expert was Gayle Galan, M.D., the chair of the emergency medical department at Southwest General Hospital in Cleveland, Ohio. Dr. Galan focused on a current requirement that a nurse verify a verbal order for medication at the time the order is given. Dr. Galan testified that this requirement was not in place in 2002. Dr. Galan was of the opinion that it is never acceptable to inject medication into a patient without knowing what it is, but that Dr. Gelesh had the right to depend on the nurse's expertise to bring him the medication that he asked for. Dr. Galan testified that adopting the standard proposed by Dr. Fraser would be impractical and render an emergency department non-functional.

{¶39} The Board and the hearing examiner agreed with Dr. Fraser. In fact, the Board questioned the opinions and knowledge of Dr. Galan. The Board is entitled to rely on its collective expertise in deciding whether there was a violation. In *Arlen v. State Med. Bd. of Ohio* (1980), 61 Ohio St.2d 168, 173, the Supreme Court of Ohio stated that "[t]his distinguished medical board is capable of interpreting technical requirements of the medical field and is quite capable of determining when certain conduct falls below a reasonable standard of medical care."

{¶40} The court of common pleas did not abuse its discretion in finding reliable, probative, and substantial evidence to support the Board's decision in the battle of the experts.

{¶41} Dr. Gelesh argues that the testimony of Orndorf was lacking in credibility because her investigatory statement contradicted her hearing testimony. The hearing officer tended to agree with Dr. Gelesh and discredited her testimony. Even after resolving such credibility issues in favor of Dr. Gelesh, the evidence still showed that Dr. Gelesh failed to confirm the medication he received and administered to Patient 1. Substantial, probative, and reliable evidence supported the Board's finding that Dr. Gelesh departed from the minimum standard of care. The court of common pleas did not abuse its discretion in overruling this assignment of error.

{¶42} The fourth assignment of error is overruled.

{¶43} In the sixth assignment of error, Dr. Gelesh argues reversible error exists because Dr. Gelesh was not allowed to introduce evidence of the cause of death of Patient 1.

{¶44} There was no autopsy of Patient 1, but the coroner determined the cause of death was respiratory arrest due to the administration of succinylcholine. (State's exhibit No. 5.) Dr. Gelesh sought to rebut that evidence with the testimony of Dr. Cyril H. Wecht, but was not permitted to do so. The hearing examiner believed that, pursuant to R.C. 313.19, the coroner's determination was conclusive and disallowed the introduction of the evidence.

{¶45} R.C. 313.19 provides that the coroner's verdict shall be the legally accepted cause of death, and states as follows:

> The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the Court of Common Pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death.

{¶46} The Supreme Court of Ohio, in the case of *Vargo v. Travelers Ins. Co.* (1987), 34 Ohio St.3d 27, stated:

> Further, it must be noted that while the coroner's factual findings are not conclusive, neither are they a nullity. The coroner is a medical expert rendering an expert opinion on a medical question. * * * Therefore, to rebut the coroner's determination, as expressed in the coroner's report and the death certificate, competent credible evidence must be presented.

Id. at 30.

{¶47} Despite the hearing examiner's erroneous interpretation of R.C. 313.19, we agree with the court of common pleas that such error is de minimus. Dr. Gelesh was found to have administered Anectine without confirming the drug he was injecting.

This deviation from the minimal standard of care of similar practitioners under the same or similar circumstances is a violation of R.C. 4731.22(B)(6), whether or not actual injury to a patient was established. The sixth assignment of error is overruled.

{¶48} The seventh assignment of error concerns immunity from professional disciplinary action for providing comfort care. R.C. 2133.11 provides that once an attending physician makes an initial determination that a patient is in a terminal condition to a reasonable degree of medical certainty and in accordance with reasonable medical standards, the physician may provide comfort care "for the purpose of diminishing the qualified patient's or other patient's pain or discomfort and not for the purpose of postponing or causing the qualified patient's or other patient's death, even though the medical procedure, treatment, intervention, or other measure may appear to hasten or increase the risk of the patient's death, if the attending physician so prescribing, dispensing, administering, or causing to be administered * * * [is] carrying out in good faith the responsibility to provide comfort care described in division (E)(1) of section 2133.12 of the Revised Code." Patient 1 was a "do not resuscitate/comfort care only" patient, and the Board acknowledged that Dr. Gelesh provided comfort care to her.

{¶49} Dr. Gelesh argues that the immunity provided by R.C. Chapter 2133 is not forfeited when the physician makes a good-faith mistake. The court of common pleas interpreted the statute differently and found that Dr. Gelesh's good-faith administration of comfort care "does not excuse a mistake in medication, especially one such as succinlycholine." (Decision on Merits of Appeal, at 15.)

{¶50} This court has stated that:

> By its express terms, R.C. 2133.11 provides immunity to a physician, acting in good faith and within the scope of his or her authority, for administering or causing to be administered any medication while carrying out the responsibility to provide comfort care.

Gelesh at ¶11.

{¶51} Here, Dr. Gelesh was in good faith providing comfort care to an elderly woman on the verge of death, and therefore, Dr. Gelesh was entitled to immunity up to and including the time when he was administering increasing doses of narcotics and, in particular, morphine. However, the administration of succinlycholine cannot be considered comfort care. It was a medication error and not in accordance with minimal standards of care. Nor did the Patient 1's DNR/CC directive provide authority to administer succinylcholine under these circumstances, particularly with no respiratory support. We do not believe that R.C. Chapter 2133 provides immunity under these circumstances despite the fact that Dr. Gelesh acted in good faith with respect to his treatment of Patient 1 from the time she arrived in the emergency department until her death. The trial court did not abuse its discretion in so ruling.

{¶52} The seventh assignment of error is overrruled.

{¶53} Based on the foregoing, appellant's seven assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.

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