

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

James E. Lundeen, Sr., M.D.,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-629 (C.P.C. No. 11CV-16295)
State Medical Board of Ohio,	:	(ACCELERATED CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on January 17, 2013

James E. Lundeen, Sr., M.D., pro se.

*Michael DeWine, Attorney General, Katherine J. Bockbrader,
and Henry G. Appel, for appellee.*

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, James E. Lundeen, Sr., M.D., appeals from a judgment of the Franklin County Court of Common Pleas affirming the order of appellee, State Medical Board of Ohio ("the board"), permanently revoking his license to practice medicine in Ohio. For the reasons that follow, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} In 1965, appellant received his license to practice medicine in the state of Ohio. By order dated May 11, 2011, the board found there was clear and convincing evidence of multiple violations of the Medical Practices Act as codified in R.C. Chapter 4731, and that appellant's continued practice presented a danger of immediate and

serious harm to the public. Therefore, pursuant to R.C. 4731.22(G), the board summarily suspended appellant's license to practice medicine.¹

{¶ 3} Appellant was provided a notice of opportunity for hearing alleging that over an approximate 34-year period he violated the standard of care with respect to 26 patients by the improper treatment and prescribing of controlled substances and other drugs of abuse. Specifically, the notice alleged that as to these 26 patients, appellant (1) failed to conduct appropriate physical examinations and failed to record objective physical-examination findings, (2) excessively and inappropriately prescribed narcotic analgesics and other drugs of abuse without regard to indications of possible addiction, drug abuse or diversion, (3) often prescribed increasing dosages of narcotics that were not supported by, or with no documentation of, an objective change in the medical status of the patient, and (4) utilized medical management and/or treatment that was not appropriate to the patients' diagnoses and/or their clinical situation.

{¶ 4} The administrative hearing took place over several days, to wit: August 22, 24-26, 29-30, September 27-28, 30, and October 5-7, 13, 2011. Among the evidence presented during the hearing was the testimony of two patients and the board's expert witness John W. Cunningham, M.D. Appellant did not appear at the hearing to testify, but, instead, provided a written statement that included his position and arguments. Appellant's statement, however, was not signed, made under oath, nor subject to examination.

{¶ 5} On November 18, 2011, the hearing examiner issued a 358-page report and recommendation ("hearing examiner's report"). The hearing examiner's report contained a detailed summary of the evidence as well as findings of fact and conclusions of law. The hearing examiner found numerous departures from the minimal standards of care and that "[t]he pattern of violations continued for many years and affected numerous patients." (Hearing examiner's report, 357.) The hearing examiner also noted appellant's failure to acknowledge that his prescribing practices were flawed. The hearing examiner

¹ R.C. 4731.22(G) allows the board to suspend an individual's certificate to practice without a prior hearing if it has been determined that there is clear and convincing evidence that an individual has violated division (B) of R.C. 4731.22, and that the individual's continued practice presents a danger of immediate and serious harm to the public.

ultimately concluded the violations by appellant were so pervasive and serious that the public in Ohio could not be adequately protected by anything less than a permanent revocation of appellant's license to practice medicine in Ohio. After consideration at its December 14, 2011 meeting, the board adopted the hearing examiner's report and ordered that appellant's license to practice medicine in Ohio be permanently revoked.

{¶ 6} In accordance with R.C. 119.12, appellant filed an appeal in the Franklin County Court of Common Pleas. In the trial court, appellant challenged the testimony of the board's expert witness, Dr. Cunningham, and argued that due to actions of the Ohio Bureau of Workers' Compensation, he was precluded from fully participating in the administrative hearing. Appellant also argued the Ohio Attorney General's office improperly prosecuted his case and improperly interjected in the board's deliberations. Additionally, appellant argued that the board refused to enforce its subpoenas thereby precluding him from obtaining exculpatory evidence. Lastly, appellant asserted he was denied procedural and substantive due process. Regarding this last assertion, appellant set forth no specific due process violations, but, rather, stated in his brief to the trial court, "[h]undreds of procedural and substantive due process errors were committed during the Board's investigation, hearing, and deliberations. [Appellant] does not waive any of those violations as grounds to vacate the Board Order." (March 22, 2012 Brief, 14.) By judgment rendered June 28, 2012, the trial court addressed each of appellant's arguments and found all to be without merit.

II. ASSIGNMENTS OF ERROR

{¶ 7} Appellant now appeals and presents the following two assignments of error for our consideration:

1. The trial court lacked judicial authority and subject matter jurisdiction and/or exceeded its authority to preside over the proceedings in this matter. Thus, any judgments entered in this matter by the trial court are null and void.
2. The statutes utilized by the State Medical Board of Ohio (RC 4731.22 (B) (2), 4731.22 (B)(6) and 4731.22 (B)(20)) are unconstitutional "as-applied" to a disciplinary action

culminating in a permanent medical license revocation, as they impose strict liability in the absence of a *mens rea* requirement, resulting in a penalty which is both harsh and stigmatic.

(Emphasis sic.)

III. STANDARD OF REVIEW

{¶ 8} In an administrative appeal, pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. *Levine v. State Med. Bd.*, 10th Dist. No. 10AP-962, 2011-Ohio-3653, ¶ 12; *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87 (1985). The Supreme Court of Ohio has defined the concepts of reliable, probative, and substantial evidence as follows:

- (1) "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.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

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

{¶ 9} The standard of review is more limited on appeal to this court. Unlike the trial court, this court does not determine the weight of the evidence. *Levine* at ¶ 13. In reviewing the court of common pleas' determination that the commission's order was supported by reliable, probative, and substantial evidence, this court's role is confined to determining whether the court of common pleas abused its discretion. *Id.* 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*, 5 Ohio St.3d 217, 219 (1983). However, on the question of whether the commission's order was in accordance with the law, this court's review is plenary. *Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

IV. DISCUSSION

{¶ 10} On appeal, appellant seemingly abandons all of the arguments made in the trial court and asserts two arguments not previously raised in these proceedings. It is

well-established that " '[a] party generally waives the right to appeal an issue that could have been, but was not, raised in earlier proceedings.' " *Abunku v. State Med. Bd.*, 10th Dist. No. 11AP-906, 2012-Ohio-2734, ¶ 34, quoting *Jain v. State Med. Bd.*, 10th Dist. No. 09AP-1180, 2010-Ohio-2855, ¶ 10. Appellant could have raised the issues he asserts for the first time on appeal, i.e., improper use of certified mail and constitutionality of portions of the Medical Practices Act, before the board as well as the trial court. However, a review of the record indicates appellant did not raise these allegations below.

{¶ 11} Appellant asserts that the arguments raised in his first assignment of error are not subject to waiver. Here, appellant contends the board's order of May 11, 2011, that summarily suspended his medical license, as well as the board's November 18, 2011 notice, that contained the hearing examiner's report and notified him that the report would be considered at the board's December meeting, are void because in both instances the board used certified mail rather than registered mail as is required by R.C. 119.07. It is appellant's position that because these notices are void, the board was left without subject-matter jurisdiction over these proceedings and the subsequent actions taken by the board are void. Therefore, appellant contends that, though raised for the first time on appeal, these arguments are not subject to waiver. Regardless of appellant's flawed conclusion that the board lacked subject-matter jurisdiction, most notably appellant's argument fails because the board's use of certified mail was not improper.

{¶ 12} Regarding summary suspensions, R.C. 119.07 provides that if a license is suspended without a prior hearing "notice of the agency's order shall be sent to the party by registered mail." However, R.C. 4731.22(G)(2) requires that the board "issue a written order of suspension by certified mail or in accordance with [R.C.] 119.07." With respect to the November 18, 2011 notice, R.C. 119.09, states, in relevant part, that a copy of a report and recommendation shall be "served upon the party or the party's attorney or other representative of record, by certified mail."

{¶ 13} Moreover, R.C. 1.02(G) provides, " '[r]egistered mail' includes certified mail and 'certified mail' includes registered mail." *See also Schindler Elevator Corp. v. Tracy*, 84 Ohio St.3d 496, 498 (1999) (pursuant to R.C. 1.02(G), "registered mail" and "certified mail" are interchangeable terms); *Reichart-Spaeth v. Ohio Counselor & Social*

Worker Bd., 2d Dist. No. 18521 (Mar. 16, 2001) (though R.C. 119.07 requires use of registered mail, pursuant to R.C. 1.02(G), use of certified mail is sufficient).

{¶ 14} Consequently, we conclude there is no merit to appellant's contention that the board's use of certified mail in these instances rendered void all subsequent action taken by the board and left the board without subject-matter jurisdiction over the proceedings. Accordingly, we overrule appellant's first assignment of error.

{¶ 15} In his second assignment of error, appellant argues that the board's disciplinary statute, as codified in R.C. 4731.22, is unconstitutional as applied to him because it lacks a mens rea requirement. Appellant, however, fails to provide any argument or legal authority to support his conclusory assertion.

{¶ 16} The burden of affirmatively demonstrating error on appeal rests with the party asserting error. *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 392 (10th Dist.2006), citing App.R. 9; App.R. 16. Pursuant to App.R. 16(A)(7), an appellant must present his or her contentions with respect to each assignment of error presented for review and the reasons in support of those contentions, including citations to legal authorities. According to App.R. 12(A)(2), we may disregard an assignment of error if an appellant fails to cite to any legal authority in support of an argument as required by App.R. 16(A)(7). *See, e.g., In re C.C.*, 10th Dist. No. 04AP-883, 2005-Ohio-5163, ¶ 80; *Hall v. Tucker*, 161 Ohio App.3d 245, 263, 2005-Ohio-2674; *State v. Martin*, 12th Dist. No. CA99-01-003 (July 12, 1999); *Meerhoff v. Huntington Mtge. Co.*, 103 Ohio App.3d 164, 169 (3d Dist.1995). "[F]ailure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Kremer v. Cox*, 114 Ohio App.3d 41, 60 (9th Dist.1996).

{¶ 17} Furthermore, as indicated previously, the argument contained in appellant's second assignment of error is being asserted for the first time on appeal. Appellant provides neither explanation nor reasoning as to why this argument has not been waived for failure to raise the argument in earlier proceedings. *Abunku*.

{¶ 18} Based on the above grounds, we overrule appellant's second assignment of error.

V. CONCLUSION

{¶ 19} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN and DORRIAN, JJ., concur.
