[Cite as *Perry v. Ohio State Dental Bd.*, 2009-Ohio-4329.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

R. THOMAS PERRY, D.D.S. Appellee	:	C.A. CASE NO. 22857
vs.	:	T.C. CASE NO. 2005CV7444
THE OHIO STATE DENTAL BOARD Appellant	:	(Civil Appeal From Common Pleas Court)

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O P I N I O N

Rendered on the 21st day of August, 2009.

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GRADY, J.

{¶ 1} Appellant, The Ohio State Dental Board ("the Board"), appeals from a judgment of the trial court overruling the Board's order suspending the license of Appellee, R. Thomas Perry, D.D.S., for failing to conform to the acceptable standards of

the dental profession during his June 24, 2003 surgery on Patient 1.

{¶ 2} Dr. Perry has been in the private practice of oral and maxillofacial surgery in Dayton since September of 1989. He performed a total mouth extraction on Patient 1 on June 24, 2003, at Dr. Perry's office. Approximately two and one-half hours into the procedure, Patient 1 went into cardiac arrest. Dr. Perry performed CPR and a rescue squad was called. Patient 1 was transported to Kettering Medical Center, where he died. The County Coroner conducted an autopsy and concluded that the cause of death was dilated cardiomyopathy with arteriosclerotic cardiovascular disease and oral surgery requiring general anesthesia contributing.

{¶ 3} On June 2, 2004, the Board charged Dr. Perry with providing dental care that failed to conform to the acceptable standards of the dental profession. In particular, the Board stated that Dr. Perry "failed to properly evaluate Patient #1 prior to administering the general anesthesia and misclassified Patient #1 as an ASA II patient. Furthermore, [Dr. Perry] improperly used anesthetic and emergency drugs and improperly managed Patient #1's cardiac arrest."

{¶ 4} After an administrative hearing, the Board's Hearing Examiner recommended that the Board find the charges to be true,

except for the management of the cardiac arrest, and recommended that Dr. Perry's license be suspended indefinitely for eighteen months. The Board modified the recommendation to order an eighteen month suspension, with twelve months stayed, followed by five years of probation. The Board imposed conditions for reinstatement, including 100 hours of continuing education.

{¶ 5} Dr. Perry appealed the Board's order to the Montgomery County Court of Common Pleas pursuant to R.C. Chapter 119. On July 2, 2008, the trial court overruled the Board's order, finding that a number of the Board's findings of fact and conclusions of law were not supported by reliable, probative, and substantial evidence. The Board filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 6} "THE LOWER COURT APPLIED THE INCORRECT STANDARD OF REVIEW IN CONSIDERING WHETHER THE BOARD'S ORDER WAS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE."

SECOND ASSIGNMENT OF ERROR

{¶ 7} "THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO AFFORD DUE DEFERENCE TO THE BOARD'S RESOLUTION OF EVIDENTIARY CONFLICTS, IN HOLDING THAT THE BOARD'S DECISION WAS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE."

THIRD ASSIGNMENT OF ERROR

{¶ 8} "THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO AFFORD DUE DEFERENCE TO THE BOARD'S EXPERTISE IN THE TECHNICAL REQUIREMENTS OF THE DENTAL PROFESSION, IN HOLDING THAT THE BOARD'S DECISION WAS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE."

FOURTH ASSIGNMENT OF ERROR

{¶ 9} "THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE BOARD'S ORDER WAS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE."

FIFTH ASSIGNMENT OF ERROR

{¶ 10} "THE LOWER COURT ERRED IN FAILING TO APPLY THE PLAIN LANGUAGE OF R.C. 4715.30(A)(7), BY REQUIRING PROOF OF INJURY TO A PATIENT IN ORDER TO SHOW A VIOLATION OF THE STANDARD OF CARE."

SIXTH ASSIGNMENT OF ERROR

{¶ 11} "THE LOWER COURT ERRED IN INTERPRETING R.C. 4715.30(A)97), AND IN FAILING TO AFFORD DUE DEFERENCE TO THE BOARD, BY FINDING THAT DR. PERRY'S CONDUCT DID NOT VIOLATE THE STANDARD OF CARE OF THE DENTAL PROFESSION."

SEVENTH ASSIGNMENT OF ERROR

{¶ 12} "THE LOWER COURT ERRED IN HOLDING THAT THE EXISTENCE OF CONFLICTING OPINION RENDERS THE TESTIMONY OF A STATE'S EXPERT

UNRELIABLE."

{¶ 13} The appeal by Dr. Perry to the trial court from the Board's administrative proceeding is governed by R.C. Chapter 119. R.C. 119.12 provides, in part:

{¶ 14} "The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law."

{¶ 15} "In an appeal from a medical board's order, a reviewing trial court is bound to uphold the order if it is supported by reliable, probative, and substantial evidence, and is in accordance with law. R.C. 119.12; *In re Williams* (1991), 60 Ohio St.3d 85, 86, 573 N.E.2d 638, 639. The appellate court's review is even more limited than that of the trial court. While it is incumbent on the trial court to examine the evidence, this is not a function of the appellate court. The appellate court is to determine only if the trial court has abused its discretion, i.e., being not merely an error of

judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. Absent an abuse of discretion on the part of the trial court, a court of appeals may not substitute its judgment for those of the medical board or a trial court. Instead, the appellate court must affirm the trial court's judgment." *Pons v. Ohio State Medical Board* (1993), 66 Ohio St.3d 619, 621 (citations omitted).

{¶ 16} The Supreme Court has defined reliable, probative, and substantial evidence:

{¶ 17} "(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." *Bartchy v. State Board of Education*, 120 Ohio St.3d 205, 2008-Ohio-4826, at _39 (citation omitted).

{¶ 18} "[T]he Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body,

which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. However, the findings of the agency are by no means conclusive.

{¶ 19} "Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate or modify the administrative order. Thus, where a witness' testimony is internally inconsistent, or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight. Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order." *University of Cincinnati v. Conrad* (1980), 63 Ohio St.3d 108, 111-12.

{¶ 20} Although the Board identified seven assignments of error on page iv of its brief, the bulk of the Board's brief argues that the trial court abused its discretion by overruling the Board's findings that Dr. Perry had (1) failed to properly evaluate Patient 1 prior to administering the general anesthesia, (2) misclassified Patient 1 as an ASA II rather than ASA III patient, and (3) improperly used anesthetic and

emergency drugs. We will address each of these three arguments.

{¶ 21} In order to determine whether the trial court abused its discretion in overruling certain findings of fact and conclusions of law of the Board, we must examine (1) the findings of fact made by the Board, (2) the evidence in support of and contrary to these findings, and (3) the trial court's stated rationale for overruling these findings.

The Board's Findings of Fact

{¶ 22} The key findings of fact identified by the Board as the basis for its decision to suspend Dr. Perry include the following:

{¶ 23} "5. During Patient 1's first visit on April 10, 2003, [Dr. Perry's] staff took his vital signs and medical history, which [Dr. Perry] later reviewed with Patient 1. [Dr. Perry's] office records for Patient 1 (State's Exhib. P. 50) state the following for medical history: moderate to chronic asthma with medications stable; shortness of breath; and other conditions. Another notation by staff indicates that Patient 1's asthma was severe. At the initial visit, Patient 1 provided a list of seven (7) medications that he was taking at the time for asthma, including an inhalant. (State's Exhib., p. 61). [Dr. Perry] made an independent evaluation and diagnosis of Patient 1 at the initial visit and determined that Patient 1 had rampant

caries, periodontal disease and multiple abscesses. [Dr. Perry] took panographic x-rays on the initial visit.

{¶ 24} "6. In his initial meeting with Patient 1 and in a follow up meeting, [Dr. Perry] asked Patient 1 several questions about his history of asthma. These questions included such issues as: how long Patient 1 had asthma; the symptoms; medications taken; previous pulmonary tests; the number of breakthrough episodes; and whether Patient 1 had ever been to an emergency room because of the asthma. Neither the questions or Patient 1's responses were included in [Dr. Perry's] records of Patient 1.

{¶ 25} "7. [Dr. Perry] concluded that Patient 1's asthma was stable based on questioning him.

{¶ 26} "8. [Dr. Perry] did not schedule Patient 1 for any pulmonary evaluation, EKG, chest x-ray or other preoperative examinations or tests prior to doing the full mouth extraction. [Dr. Perry] did not request to review any previous medical records from Patient 1's physician(s) or the records of Patient 1's visits to a pulmonary specialist in 1999 and 2000.

{¶ 27} "***

{¶ 28} "11. [Dr. Perry] classified Patient 1 as an ASA class II at the initial visit due to [Dr. Perry's] belief that his asthma was mild to moderate and well-controlled by medication.

{¶ 29} "***

{¶ 30} "14. Among the anesthetic drugs [Dr. Perry] administered to Patient 1 for the surgery were 800 mg. of fentanyl, 3% concentration of Forane[], each of which is at the maximum amount which should be given in an office setting. Also Patient 1 was given at least two (2) 10 mg. doses of lebetalol in response to two (2) hypertensive episodes occurring at approximately 9:30 a.m. and 10:30 a.m. Fentanyl and Forane are strong respiratory depressants which when used in combination have a multiplicative effect. Forane also is a strong cardiac depressant, which when given along with fentanyl increases the tendency for blood pressure to fall. Lebetalol is contraindicated for patients with airways disease such as asthma and can cause cardiac depression. The effects of lebetalol also remain in the body for hours.

{¶ 31} "15. During the surgery, Patient 1 had two (2) hypertensive episodes at approximately 9:30 a.m. and 10:30 a.m. during which his blood pressure readings were between 155/95 and 165/100. Neither of these episodes are recorded in Patient 1's charts because they did not occur on the interval when those blood pressure readings were taken. For both episodes, Patient 1 was given 10 mg. of lebetalol and both times Patient 1's blood pressure to [sic] returned to the normal range.

{¶ 32} "***

{¶ 33} "24. The standard of care in Ohio requires an oral surgeon and indeed all medical professionals to properly evaluate a patient prior to administering any anesthetic drugs or instituting any procedures. This requires taking an appropriate medical history from a patient, analyzing that history in accordance with anticipated dental procedures and likely drugs needed therefor. If further testing is necessary to determine whether a patient can safely undergo a procedure or tolerate drugs to be administered, such testing must be pursued to comply with the standard of care.

{¶ 34} "25. In the instant matter, I find that [Dr. Perry] and his staff took an adequate medical history; however, [Dr. Perry] failed to follow up on and/or appreciate certain conditions and symptoms of Patient 1, or his characteristics, which would warrant further testing before proceeding with the administration of anesthetics or the procedure itself. [Dr. Perry's] own records, for which he acknowledges responsibility, indicated that Patient 1 had moderate or severe asthma and that he was taking no fewer than seven (7) asthma medications therefor. Such factors, along with Patient 1's age, weight and reported instances of shortness of breath, indicate that the prudent course would have been for [Dr. Perry] to require

preoperative testing or a work up prior to proceeding. Such testing would include, at a minimum, pulmonary testing, an EKG and a chest x-ray. Indeed, [Dr. Perry] even admitted that if he were performing this surgery at Kettering Medical Center, where he has privileges, he would have been required to do a preoperative work up of Patient 1. Although [Dr. Perry] did some questioning of Patient 1 about the nature and severity of his asthma, the factors and notations in Patient 1's record should have warranted additional testing before undertaking intubated general anesthesia on him.

{¶ 35} "26. [Dr. Perry] failed to properly evaluate Patient 1 prior to the administration of general anesthesia and violated the standard of care for dentists in the state of Ohio.

{¶ 36} "27. Patients who have a mild systemic disease should be classified as an ASA II and may have dental procedures requiring general anesthesia in a certified oral surgeon's private office. Those patients with severe systemic disease should be classified as an ASA III and procedures requiring general anesthesia must be performed in a hospital setting for the safety of the patient.

{¶ 37} "28. From [Dr. Perry's] records on Patient 1 and various characteristics he possessed, it is clear that Patient 1's asthma was not mild, but moderate to severe as stated in

[Dr. Perry's] records. This coupled with symptoms as shortness of breath would have, at a minimum, required extensive preoperative testing before potentially classifying Patient 1 as an ASA II.

{¶ 38} "29. Based on the factors in [Dr. Perry's] records and the fact that no additional testing was completed nor were any previous medical or pulmonary records examined, it was inappropriate to classify Patient 1 as an ASA II. Based on information known to [Dr. Perry] at the time, Patient 1 should have been classified as an ASA III and [Dr. Perry] should have performed the surgery in a hospital setting.

{¶ 39} "30. [Dr. Perry's] classification of Patient 1 as an ASA II violated the standard of care for dentists in the state of Ohio.

{¶ 40} "31. The standard of care regarding an oral surgeon's use of anesthetic and emergency drugs requires that he/she consider, among other things, the appropriateness of the drug for a particular patient, the amounts which can be given safely, and the drugs' interaction with other drugs already given or anticipated to be given in the procedure. As noted in Finding of Fact No. 14 hereof, [Dr. Perry] administered to Patient 1 fentanyl and Forane, two strong respiratory depressants, in their maximum amounts, which

together have a multiplicative effect. As noted, the effects of Forane, a strong cardiac depressant, along with fentanyl increases the tendency for blood pressure to fall. Additionally, lebetalol was inappropriate for Patient 1 even in small doses and can also cause cardiac depression. These factors, when considering Patient 1's condition, made the use of such drugs, in those amounts and in combination with each other inappropriate and outside the standard of care for dentists in the state of Ohio in these circumstances."

Evaluation of Patient 1

{¶ 41} The Board concluded that Dr. Perry violated the standard of care set forth in Finding of Fact No. 24 "by failing to properly evaluate Patient 1 prior to administering the general anesthesia." The Board relied in particular on Findings of Fact Nos. 5, 6, 7, 8, 24, 25, and 26 as support for this conclusion. The Board's conclusion is supported by reliable, probative, and substantial evidence, including Dr. Perry's records and the testimony of the Board's expert, Dr. John Yagiela.

{¶ 42} Dr. Yagiela, who is an expert in anesthesiology and is a faculty member at the UCLA School of Dentistry, testified that Dr. Perry's records indicated that Patient 1 suffered from moderate to severe asthma and shortness of breath and that

Patient 1 was a large, overweight man. (Tr. 371-72.) He explained that shortness of breath may be an indication of a cardiac condition. (Tr. 375.) Dr. Yagiela noted that Patient 1 was taking several medications for his asthma. (Tr. 371-72.) He testified that the many potentially troublesome conditions and symptoms of Patient 1 should have led to a more extensive pre-surgical work up by Dr. Perry, including a pulmonary function test, EKG, and chest x-ray. (Tr. 374-76.)

{¶ 43} Dr. Perry testified that he asked Patient 1 "a boatload of questions" about his asthma, but failed to record the responses to many of these questions in Patient 1's medical chart. (Tr. 72, 108.) Although he did not conduct independent testing to determine the severity of Patient 1's asthma, Dr. Perry believed that Patient 1's asthma was well-controlled based on the patient's responses to the various questions Dr. Perry asked. (Tr. 118-19.) Dr. Perry noted that Patient 1 said that his "lungs are fine" and that Patient 1's last occasion for shortness of breath was some months before his surgery. (Tr. 495-98.) Dr. Perry dismissed a notation in Patient 1's chart that he suffered from moderate to chronic asthma, because this notation was made by a member of Dr. Perry's office staff rather than by Dr. Perry. (Tr. 147.)

{¶ 44} Dr. Richard Candela, Dr. Robert Campbell, and Dr.

Joel Weaver testified on behalf of Dr. Perry. Dr. Candela is a cardiologist. He testified that EKGs and chest x-rays are "relatively insensitive" to a dilated cardiomyopathy condition and more likely than not would not lead to the diagnosis. (Tr. 594.) Further, he opined that a pulmonary exam prior to surgery would not have revealed Patient 1's heart disease. (Tr. 596.)

{¶ 45} Dr. Campbell is an oral and maxillofacial surgeon in private practice in Glen Allen, Virginia. Based on a review of Patient 1's medical records, Dr. Campbell opined that Patient 1's asthma was well-controlled with the medications he was taking. (Tr. 628.) He testified that Patient 1's responses to Dr. Perry's questions relating to his asthma justified, in part, Dr. Perry's decision that no further pre-operative medical examination was necessary prior to surgery. (Tr. 634-35.) Dr. Campbell concluded that Dr. Perry's pre-operative evaluation of Patient 1 was within the standard of care. (Tr. 635-36.)

{¶ 46} Dr. Weaver, a dentist anesthesiologist, reviewed Patient 1's medical records. Based on the medical history Patient 1 provided to Dr. Perry, Dr. Weaver opined that Dr. Perry had no reason to order any pre-operative medical evaluation of Patient 1. (Tr. 721-22.) He testified that Dr. Perry's pre-operative evaluation of Patient 1 was within the

standard of care. (Tr. 725.)

{¶ 47} Dr. Yagiela's testimony supports the Board's finding that Dr. Perry violated the standard of care for the practice of dentists by failing to properly evaluate Patient 1 prior to administering the general anesthesia. Drs. Weaver, Campbell, and Candela disagree with Dr. Yagiela's opinion. In short, the Board resolved this evidentiary conflict between the experts in favor of Dr. Yagiela's testimony.

{¶ 48} The trial court disagreed with the Board's findings and found that Findings of Fact Nos. 8, 25, and 26 were not based on reliable, probative, and substantial evidence. The trial court gave the following explanation as to why it was rejecting the Board's finding that Dr. Perry had failed to properly evaluate Patient 1:

{¶ 49} "Respondent did properly evaluate Patient 1 prior to the administration of general anesthesia based on the information he had acquired from the patient. Respondent read Patient 1's blood pressure, took his pulse, and asked how he was doing. (Tr. 516). Respondent listened to Patient 1's chest and heart and everything was clear. (Tr. 516.-517). Respondent checked Patient 1's ankles and reviewed his EKG pattern which was a normal sinus rhythm. (Tr. 517). No abnormalities were detected; drugs were then administered.

Id." July 2, 2008 Decision, p. 13.

{¶ 50} As the trial court points out, Dr. Perry did do a number of things in evaluating Patient 1. But the things Dr. Perry did not do is what led to the Board's finding that Dr. Perry failed to properly evaluate Patient 1. Dr. Yagiela explained why the standard of care required Dr. Perry to order more pre-operative testing given Patient 1's asthma, weight, and possible upper respiratory infection. This testimony is reliable, probative, and substantial evidence that supports the Board's finding.

{¶ 51} The trial court did not identify any legally significant reasons for discrediting Dr. Yagiela's testimony. *Conrad*. For example, the trial court stated that Dr. Yagiela relied too heavily on notations made in Patient 1's medical chart and questionnaire. The trial court noted that the information provided by Patient 1 in a questionnaire was stale by the time of the surgery and that the reference to "moderate to chronic" asthma on Patient 1's chart was made by an office employee rather than a physician. But the Board could properly find, based on Dr. Yagiela's testimony, that the notations in Patient 1's chart about moderate to chronic and severe asthma, made by an employee of Dr. Perry, weighed in favor of more pre-operative testing.

{¶ 52} The trial court should have deferred to the Board's decision to resolve an evidentiary conflict between experts in favor of Dr. Yagiela. The trial court abused its discretion in overruling the Board's conclusion that Dr. Perry violated the standard of care "by failing to properly evaluate Patient 1 prior to administering the general anesthesia."

The ASA Classification

{¶ 53} The American Society of Anesthesiologists ("ASA") has established classifications for patients who are about to receive general anesthesia. An ASA class II classification encompasses a patient with mild to moderate systemic disease that is well-controlled. (Tr. 82.) An ASA class III classification includes a patient with a severe systemic disease. (Tr. 83.) It is undisputed that if Patient 1 was classified as ASA class III rather than class II, then the surgery performed by Dr. Perry should have taken place in a hospital rather than office setting. (Tr. 146.)

{¶ 54} The Board concluded that Dr. Perry fell below the standard of care by classifying Patient 1 as an ASA class II patient rather than an ASA class III patient. The Board relied in particular on Findings of Fact Nos. 5, 6, 7, 8, 11, 27, 28, 29, and 30. The Board's conclusion is supported by reliable, probative, and substantial evidence, including Dr. Perry's

records and the testimony of the Board's expert, Dr. Yagiela.

{¶ 55} Dr. Yagiela testified that he disagreed with Dr. Perry's decision to classify Patient 1 as ASA class II. Dr. Yagiela based his disagreement on Patient 1's significant asthma history, shortness of breath, and possible recent upper respiratory infection. (Tr. 374-76.) He believed these facts warranted an ASA III classification, which would have required the procedure to be performed in a hospital. Dr. Yagiela opined that Patient 1 had severe asthma based on Dr. Perry's own records and the number of medications Patient 1 was taking for asthma and complaints of shortness of breath. (Tr. 427-30.)

{¶ 56} Dr. Campbell testified that he agreed with Dr. Perry's classification of Patient 1 as ASA class II. He cited Patient 1's pulmonary tests from 1997-1999 as evidence that Patient 1's asthma was mild during that period. (Tr. 630-32.) Dr. Campbell opined that Patient 1's asthma was well-controlled by the four or five medications he was taking. (Tr. 628.)

{¶ 57} Dr. Weaver testified that he agreed with Dr. Perry's classification of Patient 1 as ASA class II because Patient 1's asthma was well-controlled with medication. (Tr. 720.) On cross-examination, Dr. Weaver stated that his belief that Patient 1's asthma was well-controlled was based on Dr. Weaver's conversations with Dr. Perry rather than on Dr. Perry's records

relating to Patient 1. (Tr. 764-65.)

{¶ 58} In overruling the Board's finding that Patient 1 should have been classified as ASA class III instead of class II, the trial court stated "[b]ased on the information known to [Dr. Perry] which he correctly, gathered, an ASA II classification was proper. Dr. Yagiela testified 'that a patient who recorded they had shortness of breath in the past, now I feel great, then he could probably classify that patient as ASA II.' (Tr. 376)." July 2, 2008 Decision, p. 14.

{¶ 59} Despite the trial court's inferences to the contrary, the Board's finding that Dr. Perry improperly classified Patient 1 as ASA II rather than ASA III is supported by the testimony of Dr. Yagiela. The testimony of Dr. Yagiela was based on his review of the medical records of Patient 1 and constitutes reliable, probative, and substantial evidence.

{¶ 60} The Board decided to resolve an evidentiary conflict between experts by crediting Dr. Yagiela's opinion over the opinions of the other physicians of record. The trial court failed to identify any legally significant reason to discredit Dr. Yagiela's testimony. *Conrad*. Based on the evidence before it, along with its expertise, the Board could properly credit Dr. Yagiela's testimony over the other physicians of record. Therefore, the trial court abused its discretion in overruling

the Board's conclusion that Dr. Perry improperly classified Patient 1 as ASA class II rather than ASA class III.

Type and Amount of Drugs Administered During Surgery

{¶ 61} The Board concluded that Dr. Perry violated the standard of care for the practice of dentists by improperly using anesthetic and emergency drugs on Patient 1. The primary drugs at issue were fentanyl, Forane, and lebatalol. In making its determination, the Board relied upon Findings of Fact Nos. 5, 6, 7, 8, 11, 14, 15, 27, 28, 29, 30, and 31. The Board's conclusion is supported by reliable, probative, and substantial evidence, including the records of Patient 1 and the testimony of Dr. Yagiela.

{¶ 62} Dr. Yagiela testified that the 800 micrograms of fentanyl given to Patient 1 was excessive considering that the surgery was performed in an outpatient setting. (Tr. 379.). He noted that fentanyl tends to impair breathing more in a patient with asthma and is particularly troublesome because Patient 1 was also administered a high concentration of Forane. (Tr. 379, 382.) Dr. Yagiela stated that both fentanyl and Forane are strong respiratory depressants in their own right but in combination get even stronger and have a multiplicative effect. (Tr. 382, 388.) He testified that Forane is a strong cardiac depressant and, along with the fentanyl, increases the

tendency for blood pressure to fall. Dr. Yagiela opined that the combination of these drugs was excessive, and, when these drugs are administered to a patient with a cardiac and/or respiratory condition, the drugs become dangerous. (Tr. 388.). Therefore, Dr. Yagiela testified that Dr. Perry's conduct fellow below the standard of care. (Tr. 398-99.)

{¶ 63} Dr. Yagiela also testified that Dr. Perry's use of lebetalol on Patient 1 was inappropriate because it blocks the effects of any drugs used for asthma and adds to cardiac depression. He opined that it is a violation of the standard of care to administer lebetalol to an asthmatic patient in response to supposed spikes in blood pressure without first determining what is the cause of the spikes in blood pressure and exhausting other means to correct the spikes in blood pressure. (Tr. 394, 399.)

{¶ 64} On cross-examination, Dr. Yagiela acknowledged that the amount of lebetalol given to Patient 1 was small but stated that he would have used a beta-blocker with effects lasting only five to ten minutes rather than lebetalol, whose effects last for hours and makes the heart less efficient. (Tr. 456-58, 468.)

{¶ 65} Dr. Candela testified on behalf of Dr. Perry. On cross-examination, Dr. Candela conceded that lebetalol can

cause bronchoconstriction and is contraindicated for asthmatic patients. (Tr. 605.)

{¶ 66} Dr. Campbell testified that Dr. Perry's use of Forane and the amount of Forane used was appropriate given that Patient 1 did not receive any nitrous oxide. (Tr. 638-40.) Dr. Campbell opined that the amount of fentanyl was not excessive. He believed that Dr. Perry's use of lebetalol was proper, despite Patient 1's asthma, because Forane is a "very potent" bronchodilator, which was given to Patient 1 nearly an hour before the first dose of lebetalol. (Tr. 641, 644.)

{¶ 67} Dr. Weaver testified that lebetalol is not the drug of choice to use on an asthmatic patient, but that Dr. Perry did not deviate from the standard of care by using lebetalol on Patient 1, because he used a small amount and the benefits of the drug outweighed the potential risks. (Tr. 772.) Dr. Weaver noted that Dr. Perry did not properly chart Patient 1's blood pressure readings during the surgery. (Tr. 749-50.) Consequently, Dr. Perry's actions in administering lebetalol were not as supported as they could have been. (Tr. 787-88.)

{¶ 68} The trial court overruled the Board's findings on this issue because "There is conflicting expert testimony and nothing concrete to support this finding of fact. As noted earlier clinical judgment must be used in these types of

situations and should not be judged in hindsight." July 2, 2008 Decision, p. 15.

{¶ 69} While we agree with the trial court that there was conflicting expert testimony in this case and that clinical judgment should not be judged in hindsight based solely on whether an injury ultimately occurs, it does not necessarily follow that the Board's findings of fact and conclusions of law were not supported by reliable, probative, and substantial evidence. Rather, the testimony of Dr. Yagiela, along with key concessions by Dr. Candela and Dr. Weaver that lebetalol is contraindicated for asthmatic patients, constitute reliable, probative, and substantial evidence for the Board's findings and conclusions. Therefore, the trial court abused its discretion in overruling the Board's findings and conclusions.

{¶ 70} The Board's assignments of error are sustained. The judgment of the trial court will be reversed and the cause is remanded for further proceedings consistent with this Opinion.

DONOVAN, P.J. and FROELICH, J., concur.

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