

FILED

January 26, 1999

**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS
DOCKET NO.

IN THE MATTER OF THE SUSPENSION)	
OR REVOCATION OF THE LICENSE OF)	Administrative Action
)
MARCO PELOSI, II, M.D.)	ORDER DENYING APPLICATION
)
TO PRACTICE MEDICINE AND SURGERY)	FOR TEMPORARY SUSPENSION
IN THE STATE OF NEW JERSEY)	
_____)	

This matter was opened to the New Jersey State Board of Medical Examiners upon the application for a temporary suspension of respondent's license to practice medicine brought by Attorney General Peter Verniero by James F. Lafargue, Deputy Attorney General. An Order to Show Cause was signed by Bernard Robins, M.D., Board President, on September 3, 1998. The Verified Complaint filed simultaneously with the Order to Show Cause alleged that on August 7, 1998, respondent, a gynecological surgeon, engaged in improper conduct immediately prior to the performance of a vaginal hysterectomy on patient M.L. Specifically, it was alleged that on that date, following a laparoscopic cholecystectomy performed by another surgeon, respondent took the patient's gallbladder which had just been removed and inserted it in her vagina at least twice. It is further alleged that respondent took both video and still photographs of the surgical procedures and the positioning of the gallbladder. The complaint, at paragraph 11' further alleged that on occasions prior to August 7, respondent had "acted towards the nurses and other professional staff in an

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unprofessional manner." All of the conduct was alleged to constitute gross, repeated malpractice, professional misconduct and to evidence a lack of good moral character. In addition, it was asserted that the proofs would palpably demonstrate a clear and imminent danger to the public health, safety and welfare. Supporting the application was a certification from Margie N. Feczko, R.N., an operating room nurse present when the conduct occurred on August 7 and witness to incidents of alleged unprofessional conduct, as well as the statement of Allis Yodice who on August 7 was the Administrator of Surgical Services to whom the incident was reported.

A preliminary answer to the complaint was filed on September 9, 1998 by respondent's counsel Agnes J. Rymer, Esq., of DeCotiis, Fitzpatrick and Gluck, generally denying each and every allegation of wrongdoing. (A more detailed answer was filed after the return date of the Order to Show Cause on September 16.) On September 9, counsel for respondent also filed a brief. Therein respondent, while denying misconduct, acknowledged that the gallbladder was placed by the vaginal opening. On page two of the brief, it was asserted:

The plan for surgery included possible removal of the patient's gallbladder through the vaginal opening prior to the vaginal hysterectomy. The patient knew that the gallbladder might be removed from the vaginal opening or from the umbilical opening, and knew that, either way, the procedure would be redocumented by video and photographs. At the end of the first part of the surgery, the decision was made to remove the gallbladder through the umbilical opening instead of through the vaginal opening. Immediately thereafter, the vaginal opening was prepared for the vaginal hysterectomy. Solely to illustrate to surgeons and gynecologists the

ability to remove an enlarged gallbladder through a vaginal opening in a dual gallbladder/vaginal hysterectomy procedure, the sterile gallbladder was photographed in proximity to the prepared vaginal opening. The purpose was to show the size of the vaginal opening in relation to the just-removed gallbladder. The photographs took only a few minutes and the vaginal hysterectomy was accomplished thereafter.

At the hearing Deputy Attorney General Lafargue presented the matter on behalf of the Attorney General; respondent was represented by Ms. Rymer. At the outset, respondent made a motion to dismiss for a variety of asserted procedural defects. First, respondent suggested that the filing of the complaint had been premature and that the entire matter should be referred to an investigative committee if the Board had concerns about his conduct. N.J.S.A. 45:1-22 provides authorization for the Attorney General to bring a temporary suspension application when he deems the proofs to be sufficient and additional investigation not necessary. In such instances, the Board properly fulfills its role by reviewing matters to determine if the statutory burden has been met.

Next respondent contended that the matter should be dismissed because the complaint was "not duly verified." It has always been the Board's practice to look to assure that the allegations are supported by verifications and never in the context of an emergent application has the Board exalted form over substance. This complaint is "verified" in the sense required by N.J.S.A. 45:1-22.

Respondent also urged that the matter be dismissed or adjourned in that it was precipitated on short notice, being served on the Friday before the Wednesday meeting with an intervening holiday weekend. Clearly the Attorney General moved quickly to bring this matter before the Board and the Board will not find that the length of time between service and the return date forecloses the application. Respondent has been provided with notice and an opportunity to be heard, as required by applicable principles of due process. The Board will, however, recognize that in these circumstances there is a need to be flexible in the proceeding.

In addition, respondent alleges that the complaint that was served was incomplete in that it referenced photographs that were not available. While it would have been preferable for respondent to have been provided with photographs as part of the filed papers, counsel has advised that there was an opportunity to see the pictures before the proceeding and, in any event, the pictures only document that which respondent has essentially acknowledged.

Finally, respondent, through counsel, vehemently objects to the characterization of his motivations as described in the letter brief which apparently was inadvertently not served in advance of the proceeding. Again, while it would have been preferable had appropriate service been made, we do not find that this omission unduly prejudiced respondent. The characterization set forth in the Attorney General's brief is little more than the type of argument that might be presented orally during the course

of a hearing. Respondent's counsel is fully capable of and did, in fact, reply.

In support of the motion to dismiss respondent provided the Board with a 13 page summary of the investigation of a fact-finding committee at Bayonne Hospital, comprised of Bhava Mekala, M.D., Richard E. Marki, M.D., and Madeline Zak, D.O. which had apparently been charged to look into the incident on August 7. In addition, certain handwritten notations from Ms. Feczko, as well as an inter-office memo from Allis Yodice were provided. Although the state objected to the Board's reliance on these documents, they were accepted for purposes of the motion. Upon consideration of all of the arguments made, the Board determined to deny the motion to dismiss and allowed the state to move forward with its case.

At the hearing the state presented the photographs at issue which are P-1 and P-2. The patient record relating to M.L.* was admitted as P-3 and a resolution of the Executive Committee of Bayonne Hospital (rejecting the report of the fact-finding committee - which had been provided to the Board in support of motion) was admitted as P-4. The Attorney General presented the testimony of Margie Feczko, R.N., Allis Yodice and William Torres, an operating room technician.

Essentially, the underlying facts are not in dispute. On August 7, 1998 in between the performance of a cholecystectomy and

* The exhibits were not formally marked by a court reporter. Some do bear informal notations on the reverse side. If any dispute arises as to the documentation upon which this decision rests, questions should be addressed to the Executive Director of the Board as the custodian of the record.

hysterectomy, respondent took the gallbladder which had just been removed from the patient and positioned it in or at the vagina for the purposes of taking pictures. Nurses Feckzo and Yodice were disturbed by respondent's actions during the interval between the surgeries and the taking of the pictures. Neither testified that the respondent made any lewd comments or remarks which could be construed as disrespectful to the patient. The medical record itself reflects that the patient had been informed "about the possibility of performing both procedures in a combined simultaneous surgery." Indeed, Ms. Feckzo testified that she had heard that the patient, upon learning of the picture-taking, was reported to have remarked that it was "cool." By the letter brief submitted, respondent asserts there is a research purpose justifying the positioning of gallbladder alongside the vaginal opening.

Picture-taking in the operating room is, of course, an accepted, and oft-times necessary, activity when it reflects what is transpiring. The positioning of gallbladder in such a way as to make it appear that a different surgical procedure took place however would appear to be deceptive and contrived. Notwithstanding that the Board finds it difficult to fathom why the pictures admitted herein have any research value when the surgical procedure which it purports to portray was not undertaken, we are not prepared to find that respondent's conduct rises to the level of a palpable demonstration of a clear and imminent danger. We are also troubled by the issues of informed consent, since the forms

contained in the medical record do not appear to include the intention that respondent asserts. We are equally troubled by the allegations of the demeanor in the O.R. But on the basis of the record before it, the Board is unwilling to conclude that there is a need to curtail respondent's practice. Respondent's motion is a dismissal is denied, the charges continue to pend and will await a plenary hearing.

ACCORDINGLY, IT IS ON THIS 26 DAY OF ~~OCTOBER, 1998,~~ *JANUARY 1999*
HEREBY ORDERED THAT:

The Attorney General's application for a temporary suspension is denied. The matter will be referred to the Office of Administrative Law for the conduct of a plenary hearing.

NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

By: _____

Bernard Robins MD
Bernard Robins, M.D.
Board President