

COMMONWEALTH OF MASSACHUSETTS
BOARD OF REGISTRATION IN MEDICINE

MIDDLESEX, ss

Adjudicatory Case No. 2022-007
(RM-22-0051)

In the Matter of)
)
Darius M. Ameri, M.D.)
_____)

FINAL DECISION AND ORDER

Procedural History

This matter arose from a 2020 decision in a malpractice action brought by the estate of a patient, Patient A, on whom Darius Ameri, M.D. (Respondent) performed hernia repair surgery in 2013. The verdict for the estate included the jury's special verdict that the Respondent was grossly negligent in his treatment of Patient A.

On February 3, 2022, the Board issued Statement of Allegations (SOA) charging the Respondent with gross negligence¹ and committing malpractice² with respect to his treatment of Patient A.³ In August 2023, Complaint Counsel filed a Motion for Summary Decision,⁴ relying on the jury's special verdict.⁵ The Respondent filed Opposition to the Motion for Summary Decision arguing that there is newly discovered evidence and that the Board cannot rely on the jury's special verdict in this administrative, disciplinary matter.

On November 30, 2022, Administrative Magistrate James Rooney (Magistrate) issued a Recommended Decision ruling on the Motion for Summary Decision, and ruling, too, on the merits of the Board's SOA charges.

On December 29, 2022, the Respondent submitted Objections to the Recommended Decision (Objections). The Board determines that the Objections are limited to issues fully and

¹ Gross negligence is a basis for Board discipline pursuant to M.G.L. c. 112, sec. 5, eighth par. (c) and 243 CMR 1.03(5)(a)3.

² Malpractice is a basis for Board discipline pursuant to M.G.L. c. 112, sec 61.

³ Complaint Counsel is Rachel Shute. Attorney Megan Grev Pimentel represents the Respondent.

⁴ When a Party is of the opinion that there is no genuine issue of fact relating to one or more of the claims, he may move for summary decision as to the claim(s). 801 CMR 1.01(7)(h).

⁵ *Parsons v. Ameri*, 97 Mass.App.Ct. 96 (2020). Following a six-day trial, the jury found, by a preponderance of the evidence that the Respondent was grossly negligent in his performance of hiatal hernia surgery on Patient A.

adequately addressed by the Magistrate in the Recommended Decision.⁶ On February 9, 2023, the Parties submitted Memoranda on Disposition.

The Board has reviewed the Recommended Decision, the Objections, and the Memoranda on Disposition. On the basis of its review, the Board adopts the Recommended Decision, which is attached hereto and incorporated by reference.

Discussion

The Board has considered both the care the Respondent rendered to Patient A and the Board's ability to rely on a jury's special verdict as to gross negligence and bar re-litigation of the issue in an administrative disciplinary proceeding.

With respect to the care rendered to Patient A, the record indicates that, in 2013, the Respondent performed laparoscopic hiatal hernia surgery on Patient A. He chose to repair the hernia using a medical device called the Ethicon Securestrap, or "tacker", which is used to attach prosthetic material to soft tissue. The Respondent used the tacker in direct contraindication to the manufacturer's instructions, which cautioned that a minimum tissue thickness is required to use the tacker and cautioned against using the tacker in the vicinity of the pericardium.

Two days after surgery, an echocardiogram showed the presence of excess fluid in the pericardium near where the tacks were placed, and Patient A's heart rate was very elevated and irregular. Patient A went into cardiac arrest and died on August 3, 2013.

In a malpractice action brought by Patient A's estate in 2015, the judge submitted to the jury the question whether the Respondent's conduct was grossly negligent with instructions as to the definition of gross negligence. The jury was asked whether the Respondent acted negligently in his treatment of Patient A and whether his negligence was a substantial contributing factor contributing to her death. The jury answered both questions affirmatively.

Judge Liebensperger stated,

The jury's finding of gross negligence was reasonably justified by the evidence that the Respondent proceeded to use the tacker in this surgery despite the explicit contraindication. It could reasonably be found that he voluntarily

⁶ The Board has noted the Respondent's Objections and has provided an adequate statement of reasons for its decision; the Board is not required to answer each specific objection in its decision. *Arthurs v. Board of Registration in Medicine*, 383 Mass. 289, 418 N.E.2d 1236 (1981).

subjected Patient A to an obvious risk when there were alternatives to the use of the tacker. ...A jury, having concluded that use of the tacker was negligent, could find that the Respondent's testimony that he regularly uses the tacker for similar hiatal repair surgery suggests that the Respondent was indifferent to the risks and persistently engaged in negligent conduct. Consequently, the jury's finding of gross negligence should not be disturbed.⁷

The Respondent filed an appeal of the judge's order with the Appeals Court, which, in its February 26, 2020 opinion and order, affirmed the jury's special verdict that the Respondent's use of the tacker amounted to gross negligence.

With respect to the Board's reliance on the jury's special verdict in its Motion for Summary Decision, the Board clarifies:

- this matter meets the three requirements for a party to invoke issue preclusion, namely: 1) the issue before the civil and administrative forums is identical; 2) there was a finding adverse to the party against whom it is being asserted; and 3) the "issue on which preclusion is sought has been the 'product of full litigation and careful decision'." *See Miles v. Aetna Casualty & Surety Co.*, 412 Mass. 424, 427 (1992);
- the issue before the Board and before the jury was gross negligence, and the trial judge gave the "standard [gross negligence] charge" to the jury describing "gross negligence as 'substantially and appreciably' greater than ordinary negligence....[a]mong other measures, gross negligence includes...persisting in a palpably negligent course of conduct over a period of time;"
- the trial court made a finding adverse to the Respondent and that finding was affirmed by the Appellate Court;
- the standard of proof, "a preponderance of the evidence," was the same in the civil case as in an administrative proceeding, and
- the six-day jury trial, the trial court's denial of a motion for a new trial or judgment notwithstanding the verdict, and the Court of Appeals affirmation of the trial court decision reflect that the outcome was the "product of full litigation and careful decision."

⁷ *See* Recommended Decision at pp. 9-10.

The Board further adds that:

- the Massachusetts Supreme Judicial Court (SJC) has affirmed the Board's ability, to avoid relitigating out-of-state discipline, where that discipline was "for reasons substantially the same" as those for which Massachusetts licensees may be disciplined. See Haran v. Board of Registration in Medicine, 398 Mass. 571 (1986); and
- the SJC has upheld the use preclusion in an administrative disciplinary proceeding when the disputed issue was previously adjudicated in a civil matter. See Bar Counsel v. Board of Bar Overseers, 420 Mass. 6, 10-11 (1995).

The Board acknowledges the Respondent's claim that there is "newly discovered evidence" bringing into question the Respondent's negligence. However, it has no bearing on the issue before the Board since:

- a request for a new trial based on newly discovered evidence that may alter the outcome of the jury verdict should be raised before the Superior Court;⁸
- the power to grant a new trial rests solely within the discretion of the trial judge. Wojcicki v. Caragher, 447 Mass. 200, 209 (2006);⁹ and
- even if the Respondent were to file a motion for new trial in the Superior Court, the Board is not required to wait until the physician has exhausted his appellate options before it can take action against his license to practice medicine.¹⁰

Sanction

The Board may discipline a physician upon proof satisfactory to a majority of the Board that he engaged in conduct that places into question the Respondent's competence to practice medicine, including gross negligence on a particular occasion. "[Gross negligence] amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights

⁸"No motion for new trial has been filed in the Superior Court based on Dr. Zuckerman's letter."

⁹ "A new trial ought not be granted unless on a survey of the whole case it appears to the judge that otherwise a miscarriage of justice would result." Id. at 216. (quotations omitted).

¹⁰ See e.g., Board of Registration in Medicine v. Greineder, Docket No.: RM-00-238 (Mass. Div. of Admin. Law App. August 27, 2001) (allowing motion for summary decision where physician was in the process of appealing his conviction for homicide); Board of Registration in Medicine v. Mukherjee, Docket No.: RM-07-247 (Mass. Div. of Admin. Law App., July 17, 2007)(denying physician's motion to stay administrative proceeding while he awaited the results of his criminal appeal).

of others.” *Hellman v. Board of Registration in Medicine*, 404 Mass. 800, 804 (1989) quoting *Altman v. Aronson*, 231 Mass. 588, 591 (1919).

“When determining the appropriate sanction in a substandard care case, the Board takes into consideration the degree of deviation from the standard of care, the number of patients involved, and mitigating circumstances.” *In the Matter of Ernes Osei-Tutu, M.D.*, Board of Registration in Medicine, Adjudicatory Case No. 2007-004 (Final Decision & Order, February 25, 2009 (physician who committed multiple acts of negligence toward one patient was reprimanded and fined \$7,500).

The civil malpractice jury found the Respondent to be grossly negligent in his treatment of Patient A, who ultimately died days after surgery. The civil gross negligence verdict permits the Board to find that the Respondent engaged in conduct that places into question his competence to practice medicine.

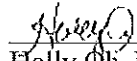
The Board considers, as a mitigating circumstance, that the Respondent completed a clinical skills assessment by Board-approved entity, LifeGuard, more than six months prior to the Board’s issuing the SOA. The report, which evaluates the Respondent’s surgical knowledge and judgments favorably, states that: 1) the Respondent had already ceased using the Ethicon Secure Strap in diaphragmatic hiatal hernia repairs at the time of the assessment; and 2) the Respondent fully understands the responsibility that accompanies surgical judgement and technique, and he recognizes that both simple and high-tech surgical instruments can provide great patient benefit or can be potentially hazardous depending on where and how they are used in any surgical situation.

In consideration of the Respondent’s use of a device in explicit contraindication of the manufacturer’s instructions on Patient A, and in consideration of a mitigating factor, the Respondent’s having completed a clinical skills assessment and received a favorable assessment, prior to the Board’s issuing its SOA, the Board hereby imposes a REPRIMAND as the sanction in this matter.

The Respondent shall provide a complete copy of this Final Decision and Order, with all exhibits and attachments within ten (10) days by certified mail, return receipt requested, or by hand delivery to the following designated entities: any in- or out-of-state hospital, nursing home, clinic, other licensed facility, or municipal, state, or federal facility at which he practices medicine; any in- or out-of-state health maintenance organization with whom he

has privileges or any other kind of association; any state agency, in- or out-of-state, with which he has a provider contract; any in- or out-of-state medical employer, whether or not he practices medicine there; the state licensing boards of all states in which he has any kind of license to practice medicine; the Drug Enforcement Administration - Boston Diversion Group; and the Massachusetts Department of Public Health Drug Control Program. The Respondent shall also provide this notification to any such designated entities with which he becomes associated in the year following the date of imposition of this reprimand. The Respondent is further directed to certify to the Board within ten (10) days that he has complied with this directive. The Board expressly reserves the authority to independently notify, at any time, any of the entities designated above, or any other affected entity, of any action it has taken. The Respondent has the right to appeal this Final Decision and Order within thirty (30) days, pursuant to G.L. c. 30A, §§14 and 15, and G.L. c. 112, § 64.

Date: May 11, 2023



Holly Oh, M.D.
Vice Chair