No: C045502

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

ROBERT SINAIKO, M.D.,

Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF SACRAMENTO

Respondent,

MEDICAL BOARD OF CALIFORNIA,

Real Party in Interest.

Appeal from Judgment of the Superior Court for the County of Sacramento

(The Honorable Ronald Robie)

AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER

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I. INTRODUCTION

From amicus California Medical Association's (CMA's) perspective, a major issue in this case is whether the Medical Board of California's disciplinary process contains adequate safeguards to prevent the erroneous deprivation or restriction of the fundamental right of a physician to practice medicine, and thus whether the Board properly safeguards the ability of the physician to maintain trusted relationships with patients that are so essential to the provision of quality care. The California Medical Association is extremely concerned that the Medical Board has not properly safeguarded against an improper deprivation here. Among other things, the Medical Board:

(1) dismissed more than ten highly qualified physician experts testifying on behalf of Dr. Sinaiko as being of "questionable credibility" without an analysis as to why their testimony was allegedly "not based on generally accepted scientific and medical principles as required by such cases as *Daubert v. Merrell Dow Pharmaceutical, Inc....*"; and

(2) improperly turned clinical debate into a disciplinary action.

To the degree the Superior Court also ignored or minimized the testimony of these witnesses and failed thereby to remand the case for a new hearing, the result is likewise erroneous.

II. NEGLIGENCE CANNOT BE FOUND, LET ALONE DISCIPLINE BE IMPOSED, IF THERE IS A REPUTABLE MINORITY OF THE PROFESSION THAT BELIEVES THE PRACTICES AT ISSUE WERE APPROPRIATE

California's Book of Approved Jury Instructions (BAJI), used in civil court cases, provides:

> Where there is more than one recognized method of diagnosis or treatment, and no one of them is used exclusively and uniformly by all practitioners with good standing, a physician is not negligent if, in exercising his best judgment, he selects one of the approved methods, which later turns out to be a wrong selection, or one not favored by certain other practitioners. (BAJI Instruction No. 6.03; emphasis added.)

The Board's Decision in this case dismissed Dr. Sinaiko's expert witnesses as a group with a wave of the hand. One infers from this that Dr. Sinaiko's methods of diagnosis or treatment

are not "generally" approved within the medical community. The medical community is indeed split into "factions" regarding the methods employed by Dr. Sinaiko. An opinion by the Medical Board in such a case should not bring the appearance that the Medical Board is deciding which "faction" within medicine will be tolerated by the state's physician disciplinary body. That was, however, precisely how the administrative hearing below appeared to proceed. Instead, the Medical Board should prove by clear and convincing evidence exactly why the methods of diagnosis and treatment at issue in the case were below the standard of care, which necessarily includes showing why they were not supported by the respondent physician's patently reputable experts. The Board's Decision in this case failed utterly in that task, and the Superior Court ruling below does not rectify that problem.

III. NEITHER THE SUPERIOR COURT NOR THE MEDICAL BOARD ESTABLISH THE PROPRIETY OF DISCIPLINE BY CLEAR AND CONVINCING EVIDENCE

In order for a physician to be found guilty of unprofessional conduct or other violation of the Medical Practice Act, the Medical Board must establish by clear and convincing evidence to a reasonable certainty that the respondent physician was guilty of the charges alleged in the Medical Board's Accusation. The Superior Court's decision in this case does not clearly show that the Medical Board met its burden in its findings against Dr. Sinaiko. As discussed in Dr. Sinaiko's Petition for Writ of Mandate, experts evaluating whether Medical Board charges against a physician's practices are valid must evaluate those practices not based solely on the question whether they are "generally accepted" in the profession, but also whether the practice is acceptable under one or more methods of diagnosis or treatment recognized by a reputable minority of the profession. Further, the ruling below appears to leave unanswered just what standard the Medical Board must follow in future cases of this nature. The ramifications of this error are amply briefed in Dr. Sinaiko's papers to this court, and CMA will not repeat those arguments here.

The administrative hearing below lasted 26 days. Many experts were brought to the stand by both sides. Resolution of this case rested heavily, if not entirely, on expert

testimony. As the Superior Court noted, however, "For an unexplained reason, the Board completely disregarded the testimony of Petitioner's experts, finding them all 'credible in their fields,' but 'not qualified' for the purposes of the hearing. (*See* "Tentative Ruling for September 12, 2003," which became the final ruling of the court below, p.8.) The testimony of more than ten expert witnesses for Dr. Sinaiko, each highly qualified, were simply dismissed with a cryptic comment by the administrative law judge that they were:

> " . . . of questionable credibility in that their testimony was not based on generally accepted scientific and medical principles as required by such cases as *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579." (ALJ Decision, paragraph 79.)

The Board, in its ruling after reconsideration, appears to have accepted the ALJ's finding, when it stated that Doctor Sinaiko's experts, "while credible in their fields, were not qualified to provide expert testimony as to the matters at issue." (Board Decision at ¶77.) As Dr. Sinaiko argues in his Petition for Writ of Mandate, however, application of the notion of "generally accepted scientific and medical principles" is entirely inappropriate in a Medical Board disciplinary proceeding in matters that may well find acceptance by a reputable minority of the profession, as represented by the witnesses called to testify on Dr. Sinaiko's behalf.

The record in this case reflects the following experts for Dr. Sinaiko:

1. Philip R. Lee, M.D., twice assistant Secretary for Health and former Chancellor of UCSF, among many other prestigious posts.

2. Glen Elliott, M.D., Chief of Adolescent and Child Psychiatric at Langley Porter Psychiatric Institute, UCSF; researcher in the area of pediatric psychiatric conditions including ADHD, author of numerous scientific articles, senior associate editor of the Journal of Child and Adolescent Psychopharmacology.

3. Henrick Blum, M.D., Dean of the School of Medicine at UC Berkeley; past president, American Public Health Association.

4. Vincent Marinkovich, M.D., board certified in Allergy and Immunology, and Pediatrics; Associated Clinical Professor of Pediatrics at Stanford University School of Medicine.

5. Carol Jessop, M.D., board certified in Internal Medicine; Assistant Professor of Medicine at UCSF School of Medicine; currently Chief of Inpatient Medicine at Alta Bates Hospital, Berkeley, California.

6. Fred Blackwell, M.D., board certified, American Board of Orthopedic Surgery; City Physician, City of Oakland.

7. Jeffrey Silvers, M.D., board certified, American Board of Infectious Diseases, American Board of Infection Control, and American Board of Internal Medicine; Chief of Infectious Diseases at San Leandro Hospital; Medical Director of Quality Improvement at San Leandro Hospital.

8. Deborah Sedberry, M.D., board certified by American Board of Pediatrics; private practice, developmental and behavioral pediatrics; Director of Pediatric Pain Management Services at Children's Hospital, Oakland; Assistant Clinical Professor, Department of Pediatrics, UCSF.

9. Paul Radensky, M.D. (University of Pennsylvania), JD (Harvard Law School, Magna Cum Laude); board certified by the American Board of Internal Medicine; partner in health law development at McDermott, Will & Emery in Miami, Florida.

10. Jack Pulec, M.D., board certified by American Board of Otolaryngology; Editor-in-Chief, Ear, Nose & Throat Journal; member, Editorial Review Board, Otolaryngology—Head and Neck Surgery; Council member of the American Academy of Otolaryngologic Allergy.

It is astonishing that so many experts with such strong credentials should be dismissed by the Medical Board as "not qualified to provide expert testimony as to the matters at issue" without substantial further assessment in the Board's decision. How and why are they not qualified? Only a failure to understand that "generally accepted" medical professional practices may be insufficient to establish a standard of care violation can explain the Board's action here. To simply state that a long list of apparently highly qualified experts were "unqualified" without explaining how their entire body of testimony was for naught, avoids the Board's responsibility to arrive at a verdict by clear and convincing evidence. This lack of substantiation casts doubt on the credibility of the Board's process of review and on the entire hearing process itself.

In this instance, with the Superior Court's ruling affirming the Board's discipline against Dr. Sinaiko, that discipline is no longer based on the Board's own analysis of the expert testimony for and against him. Instead, the Superior Court has supplanted the ALJ and the Board in fully weighing and balancing the evidence elicited after hearing. This result should be viewed as highly suspect by this court. The Medical Board *itself* should be held to carefully weigh the evidence in this case using *the proper standard,* and to impose discipline only if the evidence shows by clear and convincing evidence that the physician acted improperly. The Superior Court should not perform those functions on behalf of the Board in order to sustain the Board's imposition of discipline.

Further, Dr. Sinaiko's point is well-taken that if the Board's experts were all questioned in the context of a standard that rigidly and erroneously required "general acceptance" by the profession of his patient care methods, then the Board experts' testimony which the Superior Court relied upon to affirm the discipline should be held as highly suspect as well. The case should be remanded to the Board for a new hearing to permit evidence that Dr. Sinaiko's practices were not only acceptable by a reputable minority of the profession, but also whether they were appropriate (or not) within that context.

Somehow, this case was important enough for the Medical Board to spend $99,000[1] of its resources before the hearing, and spend 26 days (and even *more* money) in the hearing itself. It is not too much for the medical community to expect the Medical Board to issue written decisions in such cases that are thorough and that unequivocally demonstrate the Medical Board has complied with its mandate to present clear and convincing evidence of the unprofessional conduct alleged against the respondent physician. It is appropriate, therefore, for this court to remand the case back to the Medical Board with instructions for rehearing. Indeed, if the Medical Board is free to dismiss an accused physician's witnesses with cavalier statements that they are "not credible" or "not qualified" without articulating any basis for that

[1] Upon the Medical Board's reconsideration of the case, a reduced cost recovery of $49,000.00 was imposed against Dr Sinaiko, still a huge figure.

conclusion, it is unclear how physicians can ever defend themselves successfully against Medical Board accusations. For this reason alone, the Superior Court should have remanded the case for hearing before the Medical Board.

CONCLUSION

For all the foregoing reasons, we urge this Court to take appropriate steps as necessary to inspire the public and the medical community to have confidence that Medical Board discipline imposed is Medical Board discipline deserved. We respectfully request this court to remand the case for rehearing before the Medical Board so evidence may be presented and weighed whether Dr. Sinaiko's practices were not only acceptable by a reputable minority of the profession (as evidenced by his witnesses' testimony), but also whether those practices were appropriate (or not) within that context.

Dated: August 17, 2004

Respectfully submitted,
California Medical Association
CATHERINE I. HANSON
GREGORY M. ABRAMS

By:_____
Gregory M. Abrams
Attorneys for *Amicus Curiae*
California Medical Association

Certification Under Section 14 of the California Rules of Court

I, Gregory M. Abrams, am an attorney at law licensed to practice before all courts of the State of California. I am Counsel of Record for amicus curiae herein, the California Medical Association. I hereby certify that the word counting feature on the computer word processing program with which this brief was written indicates that the actual text of this brief, excluding the cover page and addresses of counsel, the Table of Authorities, the Table of Contents, this certification, and the Proof of Service, is 1,839 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and that this Declaration was executed on August 17, 2004, in San Francisco, California.

_____

Gregory M. Abrams

Attorney for Amicus Curiae
California Medical Association