STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 10-10047PL
MARK N. SCHEINBERG, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on March 22, 2011, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Shirley L. Bates, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a physician specializing in obstetrics and gynecology, committed medical

malpractice in delivering a baby and/or failed to maintain medical records justifying the course of the mother's treatment; if so, whether Petitioner should impose discipline on Respondent's medical license within the applicable penalty guidelines or take some other action.

PRELIMINARY STATEMENT

On September 24, 2011, Petitioner Department of Health issued a two-count Third Amended Administrative Complaint ("Complaint") against Respondent Mark N. Scheinberg, M.D. The Department alleged that Dr. Scheinberg had committed medical malpractice in connection with the delivery of a baby, and that he had failed to maintain medical records justifying the course of the mother's treatment. Dr. Scheinberg denied the charges and timely requested a formal hearing. On November 2, 2011, under a Motion to Re-Open Case, the Department referred the matter to the Division of Administrative Hearings, where an Administrative Law Judge was assigned to preside in the matter.

The final hearing took place on March 22, 2011. Both parties were represented by counsel. The Department's lone witness was John Busowski, M.D., who testified as an expert in obstetrics and gynecology. The Department's Exhibits 1 through 7 and 10 were admitted into evidence without objection. Official recognition was taken of the Department's Exhibits 8 and 9.

Dr. Scheinberg offered no exhibits and called two witnesses: Adam Ostrzenski, M.D., and Sandra Ventura, R.N., each of whom gave expert opinion testimony.

The final hearing transcript, comprising two volumes, was filed on April 21, 2011. An unopposed motion requesting that the deadline for filing proposed recommended orders be enlarged to May 13, 2011, was granted. Each party timely filed a Proposed Recommended Order, and these have been carefully considered.

FINDINGS OF FACT

1. At all times relevant to this case, Respondent Mark N. Scheinberg, M.D., was licensed to practice medicine in the state of Florida. He is board-certified in obstetrics and gynecology.

2. Petitioner Department of Health (the "Department") has regulatory jurisdiction over licensed physicians such as Dr. Scheinberg. In particular, the Department is authorized to file and prosecute an administrative complaint against a physician, as it has done in this instance, when a panel of the Board of Medicine has found that probable cause exists to suspect that the physician has committed a disciplinable offense.

3. Here, the Department alleges that Dr. Scheinberg committed two such offenses——namely, medical malpractice and failure to keep records justifying the course of treatment——in

connection with the vacuum-assisted vaginal delivery of an infant born to Patient L.G. on February 2, 2005, at West Boca Medical Center. The crux of this case (though not the sole issue) is whether, as the Department contends, the standard of care required Dr. Scheinberg to perform a Caesarean section ("C-section") on L.G. due to the passage of time, instead of allowing her to continue to labor for approximately 13 hours and, ultimately, deliver vaginally.

4. The events giving rise to this dispute began on February 1, 2005, at around 11:00 a.m., when L.G., whose pregnancy was at term, checked into the hospital after having experienced ruptured membranes. At 12:30 p.m. that day, L.G. signed a form bearing the title "Authorization for Medical and/or Surgical Treatment," which manifested her consent to a vaginal delivery or C-section together with, among other things, "such additional operations or procedures as [her physicians might] deem necessary." Immediately above L.G.'s signature on the form is an affirmation: "The above procedures, with their attendant risks, benefits and possible complications and alternatives, have been explained to me . . . ."

5. The evidence is not clear as to when, exactly, Dr. Scheinberg first saw L.G., but that fact is unimportant. The medical records reflect that at 8:30 p.m. on February 1, 2005, Dr. Scheinberg gave a telephone order to initiate an IV

push of the antibiotic Ampicillin; therefore, he had taken charge of L.G.'s care by that time.

6. The nurses' notes indicate that at 10:00 p.m., L.G.'s cervix had dilated to "rim" or approximately nine centimeters—— meaning that the dilation was complete, or nearly so. At this time, and throughout the duration of L.G.'s labor, an external fetal heart monitor was in place to detect and record the baby's heartbeats and the mother's uterine contractions.

7. An intrauterine pressure catheter ("IUPC")——a device that precisely measures the force of uterine contractions——was not inserted into L.G.'s uterus at any time during this event. The Department argues (although it did not allege in the Complaint) that, at some point during L.G.'s labor, the standard of care required Dr. Scheinberg either to place an IUPC or perform a C-section. Pet. Prop. Rec. Order at 10, ¶36. The Department's expert witness, Dr. John Busowski, testified unequivocally and unconditionally, however, that the standard of care does not require the use of an IUPC. T. 36. The undersigned credits this evidence and finds that Dr. Scheinberg's nonuse of an IUPC did not breach the standard of care.

8. Dr. Scheinberg conducted a physical at around 2:00 a.m. on February 2, 2005, which included taking L.G.'s complete history and performing a vaginal examination. L.G.'s cervix

remained dilated to approximately nine centimeters, and her labor had not substantially progressed for about four hours. Dr. Scheinberg noted in L.G.'s chart that the baby was in the posterior position at 2:00 a.m.

9. The Department argues, based on Dr. Busowski's testimony, that as of 2:00 a.m., the

> standard of care required [Dr. Scheinberg to] choose one of the following options: (1) watch the patient for a *few* more hours to allow for progress; (2) place an IUPC to determine the adequacy of Patient L.G.'s contractions; (3) start Pitocin without the placement of an IUPC; or (4) perform a C-section.

Pet. Prop. Rec. Order at 9-10, ¶ 32. The Department contends that Dr. Scheinberg breached the standard of care by choosing "simply to watch the patient for approximately 10 more hours"—— which was tantamount to "choosing to do nothing." Id. at 10, ¶¶ 33-34.

10. In fact, Dr. Scheinberg chose to watch the patient, which was, according to Dr. Busowski, within the standard of care. Obviously, at 2:00 in the morning on February 2, 2005, Dr. Scheinberg did not choose to wait for 10 more hours, because at that point he (unlike the parties to this litigation) did not know what was about to happen.

11. The nurses' notes reflect that L.G. was under close observation throughout the early morning hours, and that

Dr. Scheinberg was following the situation. At 4:30 a.m., L.G. was set up to push and at 4:45 a.m. was pushing well. At 6:15 a.m., the notes indicate that Dr. Scheinberg was aware of the mother's attempts to push. At 6:45 a.m., he reviewed the strips from the fetal heart monitor. At 7:45 a.m., he was present and aware of L.G.'s status.

12. From 7:00 a.m. until 8:00 a.m., no contractions were identifiable on the external monitor. At 8:00 a.m., however, L.G. was comfortable and pushing well. She stopped pushing at 8:30 a.m., but remained comfortable. Dr. Scheinberg then ordered the administration of Pitocin, a medicine which is used to strengthen contractions and hasten delivery. Although the Department faults Dr. Scheinberg for giving L.G. Pitocin at this relatively late stage of her labor, Dr. Busowski (the Department's expert witness) admitted being unable to say "that Dr. Scheinberg should have started Pitocin earlier . . . ." T. 72. The Department therefore has no clear evidential basis for second-guessing Dr. Scheinberg's professional judgment in this particular, and neither does the undersigned.

13. At 9:10 a.m., L.G. resumed pushing. The baby's fetal heart tones (heartbeats) were stable. L.G. continued pushing, with her family present, until around 11:00 a.m., at which time Dr. Scheinberg discussed the situation with the patient and her family. Dr. Scheinberg explained to L.G. or her husband the

risks of, and alternatives to, performing a vacuum-assisted vaginal delivery. Either L.G. or her husband gave verbal consent to the use of a vacuum device to assist in the delivery.

14. Between 11:00 a.m. and 11:10 a.m., the fetal heart monitor detected some variable decelerations, meaning a decrease in heart rate that could be a sign of fetal distress. Dr. Scheinberg delivered the baby at 11:23 a.m., using a vacuum device to help pull the infant out of the birth canal.

15. In his post-operative notes, Dr. Scheinberg wrote that his "pre-operative diagnosis" was "+3 station — prolonged second stage 2½ hrs." As a "post-operative diagnosis," Dr. Scheinberg recorded, "same + tight cord." He reported the following "findings": "tight cord cut on perineum[;] mec[onium] aspirated on perineum."

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes (2010).

17. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Florida Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Scheinberg by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec.

& Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

18. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp.

v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

19. The Department charged Dr. Scheinberg under section 458.331, Florida Statutes (2004), which provided in pertinent part as follows:

> (1) The following acts shall constitute grounds for . . . disciplinary action[:]
>
> * * *
>
> (m) Failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.
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> * * *
>
> (t) . . . the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. [Section 766.102(1) stated that the "prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate

> by reasonably prudent similar health care providers."] . . . A recommended order by an administrative law judge or a final order of the board finding a violation under this paragraph shall specify whether the licensee was found to have committed "gross malpractice," "repeated malpractice," or "failure to practice medicine with that level of care, skill, and treatment which is recognized as being acceptable under similar conditions and circumstances," or any combination thereof, and any publication by the board must so specify.

20. Florida Administrative Code Rule 64B8-9.003 (2002) provided in relevant part as follows:

> (2) A licensed physician shall maintain patient medical records in English, in a legible manner and with sufficient detail to clearly demonstrate why the course of treatment was undertaken or why an apparently indicated course of treatment was not undertaken.
> (3) The medical record shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of records or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient.

21. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate,

592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984)("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee."); see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011)(statues imposing a penalty must never be extended by construction).

22. Section 456.073, Florida Statutes (2004), provided in pertinent part as follows:

> (5) A formal hearing before an administrative law judge from the Division of Administrative Hearings shall be held pursuant to chapter 120 if there are any disputed issues of material fact. The determination of whether or not a licensee has violated the laws and rules regulating the profession, including a determination of the reasonable standard of care, is a conclusion of law to be determined by the board, or department when there is no board, and is not a finding of fact to be determined by an administrative law judge. The administrative law judge shall issue a recommended order pursuant to chapter 120. Notwithstanding s. 120.569(2), the department shall notify the division within 45 days after receipt of a petition or request for a formal hearing.

23. In support of the charge that Dr. Scheinberg committed medical malpractice, the Department alleged that, in light of all the relevant circumstances surrounding the delivery of L.G.'s baby, Dr. Scheinberg breached the standards of care for an obstetrician in the following specific ways:

> 1. Failing to perform a caesarean section . . . to facilitate delivery; and/or
> 2. Performing a vacuum-assisted delivery . . . after Patient L.G. had been in protracted/arrested labor for ten hours; and/or
> 3. Ordering the administration of Pitocin . . . after [Patient L.G.] had been in protracted/arrested labor for approximately 8 hours; and/or
> 4. Failing to determine the pressure of the vacuum used in the vacuum assisted delivery; and/or
> 5. Failing to determine the adequacy or intensity of Patient L.G.'s contractions; and/or
> 6. Failing to determine the station of the baby when the vacuum was applied; and/or
> 7. Failing to determine the position of the baby prior to the vacuum being applied.

Pet. Prop. Rec. Order at 18-19, ¶ 75. The foregoing enumerated alleged acts and omissions correspond, respectively, to the alleged negligence described in subparagraphs a), b), d), e), h), i), and j) of paragraph 27 of the Complaint.

24. In its Proposed Recommended Order, the Department summarized what the evidence shows, in its view, regarding Dr. Scheinberg's alleged failures to practice in accordance with the applicable standards of care:

> [The Department] has established by clear and convincing evidence that [Dr. Scheinberg committed medical malpractice] by (1) failing to perform a Cesarean section at either 2:00 a.m. or anytime prior to having Patient L.G. begin to push [at 8:30 a.m.[1]]; and/or (2) **failing to start Pitocin at 2:00 a.m., without the placement of an IUPC** and ordering administration of Pitocin only after Patient L.G. had been in arrested labor for more than eight hours; and/or (3) failing **to place an IUPC** to determine the adequacy or intensity of Patient L.G.'s contractions; and/or (4) failing to determine the station of the baby when the vacuum was applied; and/or (5) failing to determine the position of the baby prior to the vacuum being applied.

Id. at 19, ¶ 76 (heavy-faced type added).

25. The omissions described in boldface above were not alleged in the Complaint. As a matter of law, therefore, Dr. Scheinberg cannot be disciplined for such omissions.[2] Further, because the Department failed to mention certain alleged omissions in its summary of what it believes the evidence shows concerning Dr. Scheinberg's treatment of L.G., the undersigned deems abandoned the allegations set forth in the Complaint at paragraph 27, subparagraphs b), c), f), and g). This leaves for determination the allegations that Dr. Scheinberg committed medical malpractice by:

- Failing to perform a C-section.
- Failing to determine the adequacy or intensity of L.G.'s contractions.

- Using Pitocin to induce labor after Patient L.G. had been in arrested labor for more than eight hours.

- Failing to determine the station and position of the baby in connection with the use of the vacuum to assist delivery.

26. The surgical procedure known as a C-section is an alternative to the vaginal delivery of a baby. For the purposes of this case, at least, these two means of giving birth are mutually exclusive; that is, a baby removed from the mother's womb via a C-section cannot also be born through the mother's vagina. Thus, although the Department has pleaded alternative theories, the vital content of its case against Dr. Scheinberg hinges on the contention that at some clearly identifiable point between 2:00 a.m and 8:30 a.m. on February 2, 2005, the applicable standard of care required that Dr. Scheinberg perform a C-section on L.G. due to the passage of time, instead of allowing her to deliver vaginally.[3]

27. To be clear, this is not a case where either the mother or the baby appeared to be in imminent danger. The nurses' notes suggest that L.G. was not unduly uncomfortable, despite the long labor, and that the baby was doing fine until shortly before the delivery, when variable decelerations were observed. Nor has the Department alleged that Dr. Scheinberg's alleged negligence proximately caused any injuries. With these

points in mind, the evidential flaw in the Department's case is easy to spot: the evidence fails clearly and convincingly to establish a precise moment when——simply because of the length of time L.G. had been in labor, and regardless of other considerations such as the condition of the mother or baby——Dr. Scheinberg had no choice as a reasonably prudent physician but to perform a C-section.

28. To elaborate, the Department's theory of the case rests on the belief that the applicable standard of care prescribes an objective window of opportunity during which a vaginal delivery must occur——and at the close of which, if the baby has not been born, the obstetrician must perform a C-section, no matter what. In other words, the Department maintains that once the clock starts to run, there is an ascertainable vaginal-delivery deadline, which, if not met, compels surgical intervention. It was, therefore, the Department's burden to prove (a) the triggering event that opens the vaginal-delivery window, e.g., complete cervical dilation; and (b) the precise interval of time during which the window remains open, e.g., 6 hours.

29. The Department failed to prove these elements. Based on the evidence in the record, the undersigned is unable to conceptualize a standard of care, prevalent in February 2005, prescribing a fixed vaginal-delivery deadline. On the evidence

presented, therefore, the undersigned cannot find Dr. Scheinberg negligent for failing to perform a C-section.

30. Regarding Dr. Scheinberg's alleged failure to determine the adequacy or intensity of L.G.'s contractions, the Department's theory is that an IUPC should have been placed. The evidence, however, establishes that the use of an IUPC was not required under the standard of care, even as of March 2011; the undersigned therefore has no foundation upon which to base a finding that the nonuse of an IUPC violated the standard of care applicable in February 2005.

31. The evidence fails to establish clearly and convincingly that Dr. Scheinberg waited too long to administer Pitocin to hasten delivery, as the Department alleges. Indeed, the Department's expert witness was unable to give the opinion that Dr. Scheinberg should have used Pitocin any earlier than he did. There is, accordingly, an insufficient basis in the record to support a finding that Dr. Scheinberg violated the applicable standard of care in this regard.

32. As set forth above, the evidence shows that Dr. Scheinberg did, in fact, determine the station and position of L.G.'s baby before using the vacuum device to assist delivery. Therefore, the Department has not established, as was its burden, that Dr. Scheinberg failed to do these things, as alleged.

33. In support of the charge that Dr. Scheinberg did not keep adequate medical records, the Department alleged that he failed to:

> 1. Document the reasons for performing a vacuum-assisted delivery on Patient L.G.;
> 2. Keep medical records which justified ordering Pitocin for Patient L.G. after she had been in protracted/arrested labor for several hours;
> 3. Document consent for a vacuum-assisted delivery from Patient L.G. or her husband prior to performing a vacuum-assisted delivery;
> 4. Document the pressure of the vacuum used in the vacuum-assisted delivery;
> 5. Document the discussion with Patient L.G. or her husband regarding the alternatives to performing a vacuum-assisted delivery;
> 6. Document the time at which Respondent performed a vacuum-assisted delivery for Patient L.G.
> 7. Document the adequacy or intensity of Patient L.G.'s contractions;
> 8. Document the station of the baby when the vacuum was applied; and
> 9. Document the position of the baby prior to the vacuum being applied.

Pet. Prop. Rec. Order at 20-21, ¶ 81. The foregoing enumerated omissions correspond, respectively, to the alleged record-keeping failures described in subparagraphs a), b), c), d), e), g), h), i), and j) of paragraph 31 of the Complaint.

34. In its Proposed Recommended Order, the Department summarized what the evidence shows, in its view, regarding Dr. Scheinberg's alleged failures to keep adequate medical records:

> The Department established by clear and convincing evidence that [Dr. Scheinberg] violated Section 458.331(1)(m), Florida Statutes, by (1) failing to document the reasons for administering Pitocin to L.G.; and/or (2)failing to document reasons for performing a vacuum-assisted delivery on Patient L.G.; and/or (3) failing to document discussion with Patient L.G. regarding a vacuum-assisted delivery; and/or (4) failing to document consent for a vacuum-assisted delivery by Patient L.G. or her husband; and/or (5) failing to document the station of the baby prior to the time he applied the vacuum.

Id. at 21, ¶ 82.

35. Because the Department failed to mention certain alleged omissions in its summary of what it believes the evidence shows concerning Dr. Scheinberg's record-keeping, the undersigned deems abandoned the allegations set forth in the Complaint at paragraph 31, subparagraphs d), f), g), h), and j). This leaves for determination the allegations that Dr. Scheinberg failed to keep adequate medical records by:

- Failing, in connection with the vacuum-assisted delivery, to document: (i) the reasons for performing the procedure; (ii) any discussion with the patient or her husband regarding alternative procedures; (iii) informed consent to the procedure; and (iv) the station of the baby when the vacuum was applied.

- Failing keep records justifying the use of Pitocin.

36. The medical records in evidence clearly show that L.G. experienced a prolonged second-stage labor and that, shortly after 11:00 a.m. on the morning of delivery, the baby's heart rate decreased episodically in a manner suggesting possible fetal distress. The Department's expert witness agreed that these facts justified the use of a vacuum to assist delivery.

37. The medical records indicate that, at around 11:00 a.m., Dr. Scheinberg discussed the existing situation with L.G. and her husband. The parties stipulated that Dr. Scheinberg explained to L.G. or her husband the risks of, and alternatives to, performing a vacuum-assisted delivery. The parties further stipulated that either L.G. or her husband gave verbal consent to the use of a vacuum device to assist in the delivery. The undersigned infers that the discussion mentioned in the medical records is the one in which Dr. Scheinberg obtained the patient's consent to the use of a vacuum after explaining the risks and alternatives.

38. The evidence, therefore, is insufficient to prove, clearly and convincingly, that Dr. Scheinberg failed to keep records justifying the use of a vacuum to assist delivery. Further, the Department seems to be trying to extend section 458.331(1)(m) to reach conduct that it clearly does not regulate, namely the respective obligations——which are distinct from the duty to keep records justifying the course of

treatment——to explain the procedure to be performed and to obtain the informed consent of the patient. Logic dictates that while a physician's failure to explain the procedure to be performed or to obtain the patient's informed consent might warrant discipline, such a default would not prevent him from keeping impeccable medical records that justify the course of the patient's treatment in compliance with section 458.331(1)(m).

39. There are, to be sure, standards of practice governing explanations and consent. Florida Administrative Code Rule 64B8-0.007 (1991), in effect at the time of the incident in question, provided in pertinent part as follows:

> (1) The ultimate responsibility for diagnosing medical and surgical problems is that of the licensed doctor of medicine or osteopathy who is to perform the surgery. In addition, it is the responsibility of operating surgeon or an equivalently trained doctor of medicine or osteopathy or a physician practicing within a Board approved postgraduate training program to explain the procedure to and obtain the informed consent of the patient. It is not necessary, however, that the operating surgeon obtain or witness the signature of the patient on the written form evidencing informed consent.

The Department did not charge Dr. Scheinberg with violating this rule, however, and, in any event, the evidence establishes that he fully complied with it. Consequently, there is no basis for finding that Dr. Scheinberg committed record-keeping violations

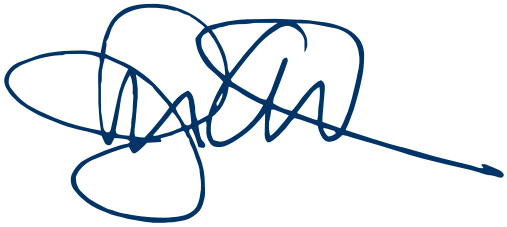
in connection with explaining procedures to the patient or obtaining the patient's informed consent.

40. The evidence is insufficient to prove, clearly and convincingly, that the medical records fail to justify the use of Pitocin at 8:30 a.m. to make L.G.'s contractions stronger and accelerate delivery. The records show that from around 7:00 a.m. to 8:00 a.m., L.G. was having weak contractions, at best. She had been pushing for hours, to no avail. The Pitocin was added, justifiably, to strengthen L.G.'s contractions with the hope that she soon would give birth.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final order finding Dr. Scheinberg not guilty of the charges set forth in the Complaint.

DONE AND ENTERED this 20th day of June, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of June, 2011.

ENDNOTES

[1]/ The Department maintains that "L.G. began to push" at 8:30 in the morning. See Pet. Prop. Rec. Order at 11, ¶ 42. As found above, however, L.G. actually began to push as early as 4:45 a.m.

[2]/ Due process prohibits an agency from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument. See § 120.60(5), Fla. Stat. ("No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action . . . ."); see also Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992)("[T]he conduct proved must legally

fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

[3]/ The Department's failure to prove that Dr. Scheinberg was required under the applicable standard of care to perform a C-section would mean that the vaginal delivery of L.G.'s baby was not, without more, a negligent act. In that event, Dr. Sheinberg could still be found to have committed medical malpractice by, e.g., administering Pitocin to hasten delivery. Such a failure of proof would, however, substantially diminish the strength of the Department's case, which is founded on the notion that Dr. Scheinberg's decision not to perform a C-section ultimately forced him to administer Pitocin and deliver L.G.'s baby vaginally, using a vacuum device. See Pet. Prop. Rec. Order at 19, ¶ 77.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.