STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 12-1705PL
UMESH MADHAV MHATRE, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

On August 20, 2012, a duly-noticed hearing was conducted in Tallahassee, Florida, before Lisa Shearer Nelson, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lealand Lane McCharen, Esquire
Department of Health
Prosecution Services Unit
3052 Bald Cypress Way Bin C-65
Tallahassee, Florida 32399

For Respondent: Brian A. Newman, Esquire
Pennington, Moore, Wilkinson,
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215 South Monroe Street, Suite 200
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STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent, Umesh Madhav Mhatre, M.D. ("Dr. Mhatre" or "Respondent"), has violated

section 458.331(1)(t), Florida Statutes (2007), and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On January 17, 2012, Petitioner, Department of Health ("the Department") filed an Administrative Complaint against Respondent, alleging that he had violated section 458.331(1)(t) based upon his care and treatment of patient S.C. On January 24, 2012, Respondent disputed the allegations in the Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes.

On May 15, 2012, the case was referred to the Division of Administrative Hearings for the assignment of an administrative law judge. The case was assigned to the undersigned and on May 25, 2012, it was scheduled for hearing to be conducted on August 7-8, 2012. At the request of Respondent, the case was continued to August 20 and 22, 2012. The case commenced and concluded August 20, 2012. Prior to hearing, the parties filed a Joint Pre-hearing Statement containing several stipulated findings which, where relevant, have been incorporated into the findings of fact below.

At hearing, Petitioner presented the testimony of Israel Jack Abramson, M.D., and Petitioner's Exhibits 3, 5, and 6 were admitted into evidence. Respondent presented the testimony of

Lawrence Reccoppa, M.D., and testified on his own behalf. Respondent's Exhibits 1 through 3 were admitted into evidence.

The one-volume Transcript of the proceedings was filed on September 10, 2012. At the request of the parties, the deadline for submitting proposed recommended orders was extended twice, and both parties' submissions were timely filed. All references to the Florida Statutes are to the 2007 codification unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of the practice of medicine pursuant to section 20.43 and chapters 456 and 458, Florida Statutes.

2. Respondent is a licensed physician within the State of Florida, having been issued license number ME 27561 on September 13, 1976. He has never been the subject of disciplinary proceedings prior to this case.

3. Respondent's address of record is 165 S.W. Vision Glen, Lake City, Florida 32025.

4. Respondent is board-certified in adult psychiatry and child and adolescent psychiatry. Respondent practices in Lake City, Florida, and is the only full-time psychiatrist practicing there. He has served on the Board of Directors for the Lake City Medical Center, as chief of staff twice, as well as serving as the president of the Columbia County Medical Society. Dr. Mhatre was

an instructor at the University of Florida from 1979 to 1980, followed by service as an adjunct clinical professor for University of Florida for the next 20 years. He is a consultant to the State of Florida, Division of Vocational Rehabilitation within the Department of Education, and has been a court-appointed psychiatrist for the Third, Fifth, Seventh and Eighth Judicial Circuits.

5. Dr. Mhatre accepts all types of insurance, including Medicaid. He continues to treat patients after their insurance is depleted.

6. From approximately March of 1999 through approximately May of 2008, Respondent treated patient S.C.

7. S.C. was a patient experiencing moderate to severe mental illness. By history, she suffered from a psychotic disorder, most likely schizophrenia; post-traumatic stress disorder ("PTSD"), with significant personality dysfunction related to the trauma; obsessive-compulsive disorder ("OCD"); traits associated with a personality disorder; and history of alcohol abuse.

8. S.C. had a history of sexual abuse by both her mother and her mother's psychiatrist, and physical abuse from her former husband and her son. Prior to her treatment with Respondent, she had experienced over 50 hospitalizations in a 10-year period.

When she presented to Respondent, S.C. was experiencing auditory hallucinations and self-injurious behavior, such as cutting herself.

9. Auditory hallucinations are the misperception that someone is hearing voices that are not really there. Self-injurious behavior is the conscious intent to hurt one's self but without the intent to die.

10. Beginning in the spring of 2004, Respondent prescribed the psychotropic drug Geodon for S.C.

11. Geodon is an anti-psychotic drug that is believed to block dopamine receptors, and impacts several different receptors in the nervous system.

12. S.C. responded very positively to Geodon, and her auditory hallucinations and cutting behavior subsided while treated with the drug.

13. During the time that Dr. Mhatre was treating S.C., he was also a speaker for Pfizer Pharmaceuticals, giving lectures on the benefits of Geodon. He had given those lectures since approximately 2001. The lectures were presentations to a small number of other mental health providers in an informal setting. Dr. Mhatre was paid for his presentations.

14. Beginning at the end of 2005 through approximately March 20, 2008, S.C. participated in some of the seminars with Respondent, providing her experience with the use of Geodon

compared to other psychotropic drugs that had been prescribed for her over the years.

15. S.C. participated in six seminars with Respondent during this period of time. By contrast, according to Respondent's payment ledger submitted as Respondent's Exhibit 3, Respondent participated in approximately 31 presentations. There were times that S.C. told Dr. Mhatre that she could not attend a seminar because of a scheduling conflict, and from his view, her inability to appear did not cause any problems.

16. Dr. Mhatre agreed to speak for Pfizer in part because, as the only full-time psychiatrist in Lake City, it gave him the opportunity to interact with other physicians in his field. It also gave him the opportunity to see the data provided by the pharmaceutical companies to the Food and Drug Administration.

17. S.C. did not testify in this proceeding. According to Respondent, S.C. was a Medicaid patient and, after taking Geodon for approximately a year with great success, she had expressed concern that Medicaid might remove the drug from its formulary and stop paying for the Geodon. Respondent suggested that she speak to a Pfizer representative who was visiting his office, because Pfizer had some programs that assisted patients who could not afford their medications. Dr. Mhatre testified that as a result of S.C.'s discussions with representatives from Pfizer, they suggested that she participate in the lectures regarding

Geodon, and she agreed to do so. Dr. Mhatre's explanation is unrebutted.[1/]

18. S.C. was reimbursed by Mhatre for travel expenses, but no other payments were made to her. Dr. Mhatre's compensation as a speaker was not affected by S.C.'s participation or lack thereof. He continued to speak for Pfizer until 2011, approximately three years after his treatment of S.C. ended. The presentations took time away from his office practice, so the compensation he received from Pfizer has been replaced by seeing more patients. There has been little difference in his income as a result of no longer speaking for the company.

19. Dr. Mhatre discussed with S.C. the potential risks and benefits of appearing in the presentations. He felt participation could possibly raise her self-esteem and give her a feeling of self-control. Telling her story would give S.C. an opportunity to help other patients. On the other hand, he warned her that she could encounter some physicians who were not supportive and could be confrontational. Dr. Mhatre stated that, in the event such an issue arose, he would intercede for her. However, there is no indication that such a negative encounter ever occurred.

20. With respect to those presentations where S.C. participated, generally, Dr. Mhatre would begin a program with a standard presentation regarding Geodon, and would show some

slides related to the drug and its use with serious mental illness, such as bipolar disorder or schizophrenia. Then, S.C. would be given an opportunity to discuss her experiences in terms of her mental health history, to a degree; her poor response to other medications; and her robust response to Geodon.

21. S.C.'s participation in the presentation lasted approximately ten minutes. Her identity was not revealed and details regarding her mental health history were very limited.

22. S.C.'s last two visits with Dr. Mhatre were February 11, 2008, and May 12, 2008. At the February 11, 2008, visit, Dr. Mhatre's notes reflect that S.C.'s prescription for Prozac made her sleepy, stating in his objective assessment,

> Patient apparently continues to have some obsessive behavior in spite of 40 mg Prozac has not changed any rather she has become increasingly more tired and thus prefers to go back to 20 and deal with her obsession by doing more physical exercise.

23. Dr. Mhatre noted that her treatment response was "adequate for psychosis, not for OCD." Her mental status is described as "shows moderately anxious with some impulsion to clean but no psychosis not suicidal has no urge to hurt herself." The treatment plan indicates that her Geodon will remain at 80 mg 2 tablets daily, and her Prozac would be decreased to 20 mg a day, with S.C. returning in three months.

24. S.C. participated in her last Geodon presentation on approximately March 20, 2008.

25. Her last visit with Dr. Mhatre was May 12, 2008. Her reported subjective assessment was that "I am doing alright." Dr. Mhatre's objective assessment states:

> The patient continues to do very well. She has not had any relapse of her hallucination. Neither has she had any urge to cut herself. Occasionally she has low moods but they are manageable. She is definitely not suicidal.

26. Dr. Mhatre listed her mental status as "shows no overt psychoses, hallucination or delusion. Not suicidal or homicidal." Dr. Mhatre's treatment plan for S.C. was for her to return in three months, and to maintain her treatment as is.

27. Dr. Mhatre did not associate with S.C. outside of the office setting and the Geodon presentations. He did not socialize with her before or after the presentations.

28. Despite her apparent stability at the May 12, 2008, visit, on July 7, 2008, S.C. was admitted to Shands at Vista, a crisis stabilization unit. She was discharged on July 11, 2008. Her Discharge Summary includes the following:

> This is a 44-year-old divorced white female admitted voluntarily on a referral from her therapist, Dr. Earley, after reinitiation of cutting herself superficially on her right thigh for the last five days. The patient states that she has had a history of cutting behavior for eight years in her 30s. She was started on Geodon at that time and since then her obsession and compulsion of cutting

> has improved until the last six months. . . She also notes that a recent stressor in the last month has been strong encouragement by her physician toward doing speeches for the Geodon pharmaceutical company. The patient states that, however, her symptoms of obsessions and compulsions have been worsened in the last six months and she has been afraid to tell her psychiatrist.

29. At that time, it had been close to two months since S.C. had seen Dr. Mhatre and three and a half months since she had appeared at a Geodon seminar. It is unclear how the seminars became a stressor in the last month, and S.C. was not at hearing to explain this comment in the discharge summary.

30. During this hospitalization, Abilify and Lexapro were introduced into S.C.'s medication regimen and Geodon and Prozac were discontinued. She did not see Dr. Mhatre again, and began treatment with another psychiatrist.

31. Dr. Mhatre's patient records for S.C. indicate on July 11, 2008, that he received a telephone call from a Dr. Earley in Gainesville who informed him that S.C. had decompensated and was admitted to Vista. His notes reported the following:

> Notation: I received a call from Dr. Earley in Gainesville, Florida. . . . Dr. Earley reports that while I was on vacation, S.C. had decompensated and ended up in Vista. Dr. Earley, however, was concerned that she felt because of S.C.'s discussions with me on Geodon subject to the physician and nurses group had compromised our doctor/ patient relationship and that S.C. no longer felt comfortable calling me when she was not

doing well, fearful that I may get upset with her or that she may let me down.

I discussed with Dr. Earley in that case we need to transfer her to another physician. Vista Pavilion has already taken the steps to set her up with another physician for further management.

Also, discussed in that case the daughter who is under my care for depression may need to be seen by someone else as S.C. may find it difficult to come to the office with her.

I expressed to Dr. Earley my significant surprise about S.C.'s decompensation and that in the past these talks had been a tremendous boost to her self-esteem and that she had done better than ever before. I urged Dr. Earley to explore other possibilities that may have caused decompensation.

I also assured Dr. Earley that since she started having talks with me, I have repeatedly discussed with her her feelings about wanting to do these talks and there was never any pressure put on S.C. and she had voluntarily did [sic] these talks. In fact, I repeatedly assured Dr. Earley that she had felt much better now that she could educate other people who had helped her self-esteem tremendousely to the point that she had even started working at domestic violence shelter and wanted to pursue an career as a counselor and that it was my belief all along that this participation in the talks was very therapeutic for S.C. and tremendously enhanced her self-esteem.

I have advised Dr. Earley that I will cancel S.C.'s next appointment and should there be any contact from S.C. with me that I will notify her.

32. The medical records for Shands Vista indicate that S.C. began seeing Dr. Earley (whom she had seen in the past) one week before her admission to Shands Vista. Dr. Earley, who filed the complaint with the Department against Dr. Mhatre, did not testify in this proceeding.

33. The Department contends that Respondent failed to meet the relevant standard of care by engaging in a boundary violation, which was exploitative and/or resulted in harm to S.C. In support of this contention, the Department presented the testimony of Jack Abramson, M.D.

34. Dr. Abramson is a graduate of Laval University School of Medicine in Quebec City, Canada, and served his residency at Harvard Medical School. He has been in group practice in Miami, Florida, since 1990, and is board-certified in general psychiatry, and the subspecialties of geriatric psychiatry, addiction psychiatry and forensic psychiatry. Dr. Abramson is a diplomate of the American Board of Psychiatry and Neurology and a diplomate of the National Board of Medical Examiners and the American Board of Quality Assurance. He is also licensed in Louisiana, Texas, Iowa, Massachusetts, and Arizona.

35. Dr. Abramson has an "eclectic" practice and sees patients as a private practitioner in South Florida. He does not accept Medicaid patients. Approximately one-third of his practice is devoted to forensic psychiatry.

36. Dr. Abramson reviewed Dr. Mhatre's medical records for S.C. Insofar as the actual conduct of Dr. Mhatre in his office, and his notes, medical prescriptions, diagnoses and evaluations for S.C., he "found no issues." However, Dr. Abramson believed that Dr. Mhatre committed a boundary violation when he recruited S.C. to present her story in commercial presentations on behalf of a drug company. According to Dr. Abramson, the standard of care is well-accepted in the psychiatric community. When one is engaged with psychiatric patients in a doctor-patient relationship, it is inherently recognized that the relationship is one of unequals, and that the doctor holds a position of superiority and power over the patient, and therefore has a responsibility to strictly observe boundaries with respect to the relationship.

37. When asked what constituted the actual violation or departure from the standard of care, Dr. Abramson opined that "the violation was that he got his patient to agree to present her story to commercial presentations on behalf of the drug company." However, there was no evidence presented that Dr. Mhatre persuaded S.C. to participate in the presentations. The only competent evidence presented indicates that a Pfizer representative made the suggestion to S.C. Dr. Abramson also testified that if no recruitment by Dr. Mhatre took place, and S.C. indicated that participation in the programs was something

she wanted to do, then it was Dr. Mhatre's responsibility to discuss with her the possible straying outside the normal therapeutic limits and ramifications for treatment.

38. Dr. Abramson acknowledged that there is no statute or rule specifically prohibiting the kind of conduct at issue in this case, as there is with sexual misconduct. He also acknowledged that allowing the participation of a patient in a presentation such as the one described here would not necessarily be a departure from the standard of care with respect to every patient, and in some cases, a patient could derive a benefit from participation. In his view, what makes it an issue with respect to S.C. is the extent of her illness. Because of the complexity of S.C.'s history, Dr. Abramson opined that she was an extremely fragile patient with whom boundaries must be extremely firm and concrete.

39. Dr. Abramson also acknowledged that S.C. could experience a return of symptoms at any time whether she participated in the Geodon programs or not. He did not interview S.C. or evaluate her.

40. Respondent presented the expert testimony of Lawrence Reccoppa, M.D. Dr. Reccoppa completed his undergraduate degree at Cornell University and his medical degree at the University of Florida. His residency was also completed at the University of Florida. He is board-certified in psychiatry and licensed to

practice medicine in Florida since 1987. For the last 20 years, Dr. Reccoppa has served as a courtesy clinical professor for the University of Florida, supervising approximately two residents per year in his private practice, and works with the forensic fellows at the University who work in the prison system. 41. Dr. Reccoppa's private practice generally consists of an adult outpatient private practice, with patients of both sexes from age 16 to late in life. His patients include people with mood and/or anxiety disorders, and thought disorders or psychoses and personality disorders. He treats patients with auditory hallucinations and self-injurious behaviors.

42. Dr. Reccoppa reviewed S.C.'s patient records from Dr. Mhatre and from Shands Vista. He saw nothing in S.C.'s medical records that indicated she did not have decision-making or informed consent capacity, and does not think that the Geodon seminars were a factor in her decompensation, stating that there can be multiple factors leading to a relapse. Dr. Reccoppa also attended one of the Geodon presentations at which S.C. appeared.

43. The presentation that Dr. Reccoppa attended occurred in Gainesville sometime in 2007. It was attended by approximately 10 mental health professionals, including Dr. Reccoppa and several other psychiatrists, including two faculty members at the University of Florida (Dr. Carlos Muniz and Dr. Ross McElroy); a psychologist; and a mental health therapist.

44. Dr. Reccoppa's description of the program varied very little from Dr. Mhatre's, with the exception of the order in which the presentation was structured. The differences were not material in terms of S.C.'s participation. He recalled that S.C. discussed problems she had experienced with weight gain and sedation with other medications, and her experience with Geodon. It did not appear that she was uncomfortable or forced to relive any trauma from her past during the program, and she gave no indication that she was anxious about participating in the program.

45. To the contrary, she appeared to be comfortable in front of the approximate ten attendees. According to Dr. Reccoppa, the attendees were very accepting of her participation and told her that they were grateful that she attended and shared her experience. He recalled S.C. stating that she felt comfortable doing it and that it was a positive experience for her to be able to express some of her problems with medications and the positive experience she had had with Geodon, with the hope that she could help other providers care for their patients.

46. Dr. Reccoppa opined that it is possible for a patient like S.C. to derive a therapeutic benefit from appearing at a program like the Geodon program, as it could provide a positive effect on the patient's self-esteem to be able to speak to an

empathetic group who could provide positive feedback. Such a patient could also benefit from the idea that he or she was helping others.

47. Dr. Reccoppa compared the presentation to grand rounds, and has attended other, similar programs, both at the University of Florida and at the Department of Corrections. He described grand rounds at the university as a situation where several faculty members attend a meeting in which a presentation is given about a disease state, a medication, or where a patient is interviewed to discuss his or her history and course of treatment. While Dr. Abramson testified that there are ethics panels through which patients would be screened for participation in a grand rounds setting, Dr. Reccoppa was not aware of such a requirement. In fact, Dr. Reccoppa stated that the complexity of S.C.'s situation made her appropriate for a grand round setting, because a simple patient does not present the same educational opportunity. Dr. Reccoppa's testimony is credited.

48. Dr. Reccoppa did not believe that allowing S.C. to participate in the Geodon presentations was a violation of the appropriate standard of care, and did not believe that Dr. Mhatre had committed a boundary violation. He knew of no peer-reviewed or authoritative literature that would indicate that it would be departure from the standard of care for a patient to participate

with his or her psychiatrist in a pharmaceutical company-sponsored program.

49. Dr. Reccoppa opined that a boundary violation that would represent a practice below the applicable standard of care would occur when a psychiatrist becomes involved with a patient in a manner that does not encompass the doctor-patient relationship, and involves co-mingling outside of the professional setting, such as dating, socializing or investing with a patient. Dr. Mhatre did not engage in this type of behavior with S.C.

50. After careful review of the expert testimony presented, Dr. Reccoppa's opinion is more persuasive as applied to the evidence in this case. Dr. Abramson, while a fine psychiatrist, is not a reasonably prudent similar physician practicing under similar circumstances. His practice is in a metropolitan setting and he does not see Medicaid patients. Dr. Mhatre is the only full-time psychiatrist in a much more rural area and sees all types of patients, regardless of insurance. Dr. Reccoppa had actually observed S.C. and saw her behavior during one of the presentations at issue. Given the totality of the evidence, it is found that there was no violation of the relevant standard of care with respect to Dr. Mhatre's care and treatment of patient S.C.

CONCLUSIONS OF LAW

51. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).

52. This is a proceeding whereby the Department seeks to impose discipline against Respondent's license to practice medicine. Accordingly, the Department has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 595 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

> 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 lacking in confusion as to the facts at issue. The evidence must be of such a 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is ambiguous."

Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

53. Moreover, in disciplinary proceedings, the statutes and rules for which a violation is alleged must be strictly construed in favor of Respondent. Elamariah v. Dep't of Prof'l Reg.. 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988).

54. The Administrative Complaint charges Respondent with violating section 458.331(1)(t), Florida Statutes (2007), which provides:

> (t) Notwithstanding s. 456.072(2) but as specified in s. 456.50(2):
>
> 1. Committing medical malpractice as defined in s. 456.50. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. Medical malpractice shall not be construed to require more than one instance, event, or act.
>
> 2. Committing gross medical malpractice.
>
> 3. Committing repeated medical malpractice as defined in s. 456.50. A person found by the board to have committed repeated medical malpractice based on s. 456.50 may not be licensed or continue to be licensed by this state to provide health care services as a medical doctor in this state.
>
> Nothing in this paragraph shall be construed to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph. 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 medical malpractice," "repeated medical malpractice," or "medical malpractice," or any combination thereof, and any publication by the board must so specify.

55. Section 456.50, Florida Statutes (2007), states:

> (e) "Level of care, skill, and treatment recognized in general law related to health care licensure" means the standard of care specified in s. 766.102.
>
> (f) "Medical doctor" means a physician licensed pursuant to chapter 458 or chapter 459.
>
> (g) "Medical malpractice" means the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure. Only for the purpose of finding repeated medical malpractice pursuant to this section, any similar wrongful act, neglect, or default committed in another state or country which, if committed in this state, would have been considered medical malpractice as defined in this paragraph, shall be considered medical malpractice if the standard of care and burden of proof applied in the other state or country equaled or exceeded that used in this state.

56. Finally, section 766.102, Florida Statutes (2007), defines the prevailing professional standard of care as "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."

57. The Administrative Complaint alleges that Respondent violated the standard of care as follows:

> a. Respondent violated his doctor-patient relationship with S.C. by having her relive her early trauma through giving speeches or testimonials in support of Geodon.
> b. Respondent violated his doctor-patient relationship with S.C. by having her reveal confidential and privileged doctor-patient communications to the public.
>
> c. Respondent engaged in a dual relationship with a patient to the detriment of the therapeutic relationship and the patient.
>
> d. Respondent engaged in a boundary violation, which was exploitative and/or resulted in harm to S.C.
>
> e. Respondent inappropriately took advantage of the dynamics that were present naturally in the therapy situation: transference, intimacy, dependency, idealization, rapport, empathy and the closeness S.C. felt with Respondent as a confidant.
>
> f. Rather than serving as an essential element of the therapeutic alliance for therapeutic goals, these natural elements of therapy were put to the service of Respondent's gratification rather than the patient's welfare.

58. The Department did not establish by clear and convincing evidence that S.C. "re-lived her early trauma" through giving speeches or testimonials in support of Geodon. S.C. did not testify, and Drs. Mhatre and Reccoppa, who participated in or witnessed the presentations, testified that

she seemed comfortable and empowered by the experience, which is wholly inconsistent with someone who is re-living past trauma.

59. The Department did not establish by clear and convincing evidence that Dr. Mhatre violated the appropriate standard of care by having S.C. reveal confidential and privileged doctor-patient communications to the public. First, there was no evidence that communications between doctor and patient were revealed at all. Second, the evidence is clear that S.C.'s identity was not revealed, and any information related to her history was limited. Most importantly, no evidence was presented to indicate that S.C. has ever been determined to be incompetent. Therefore, it is within S.C.'s rights to determine how much or how little of her history she shares with anyone. There was no competent evidence presented that Dr. Mhatre pressured her to reveal anything.

60. The Department did not establish by clear and convincing evidence that Respondent engaged in a dual relationship. Neither Dr. Abramson nor Dr. Reccoppa described the appearance at these six presentations as evidence of a dual relationship, and a dual relationship was never defined. Because the Administrative Complaint separately lists dual relationships and boundary violations, it must be assumed, absent evidence to the contrary, that the two terms can mean

different things, even if they have the potential to overlap. No such evidence was presented.

61. The Department did not prove by clear and convincing evidence that Dr. Mhatre "took advantage of the dynamics and potential dynamics that are present in the therapy situation: transference, intimacy, dependency, idealization, rapport, empathy and the closeness S.C. felt with Respondent as a confidant." Most of this terminology was not even mentioned by witnesses in the hearing. Without some testimony as to how these factors apply in this case, they cannot be assumed.

62. Finally, the Department did not prove by clear and convincing evidence that "natural elements of therapy were put to the service of Respondent's gratification rather than the patient's welfare." The evidence indicates that Respondent was a speaker for Pfizer well before S.C.'s participation, and well after. Nothing with respect to his remuneration from the company for speaking changed because of S.C. No testimony was elicited that indicated any other type of gratification experienced by Dr. Mhatre as a result of S.C.'s participation.

63. As with many treatment approaches for mental illnesses, there are risks and there are benefits to allowing S.C.'s participation in the drug presentation. Dr. Abramson seemed to think that if there was a risk to a complex patient, any potential benefit had to be discounted. The evidence indicated, however,

that at least for a time, S.C. did in fact benefit from the presentations for Pfizer. As a competent adult, she had the ability to decide whether she wanted to appear, despite her illness. She made the decision to do so, and later changed her mind. The reluctance to share a change of heart is not limited to those people suffering from a major mental illness. Allowing S.C. to make up her own mind does not equate to a departure from the applicable standard of care.

64. The undersigned notes that Dr. Abramson testified that there was no statute or rule, as compared to sexual misconduct, that identified the type of conduct alleged in this case as a boundary violation, and that Dr. Reccoppa testified that he knew of no peer review or authoritative literature that identified this conduct as a departure from the standard of care. In that respect, this case is much like that presented in Breesmen v. Department of Professional Regulation 567 So. 2d 469 (Fla. 1st DCA 1990). In Breesmen, the Department of Professional Regulation charged a physician with a violation of section 458.331(1)(t) and (m), based upon his treatment (or lack thereof) of a seriously ill cardiac patient. The physician testified after her death that he had attempted to persuade the patient to accept treatment and she refused. In reversing the Board's conclusion that Dr. Breesmen violated section

458.331(1)(m), with respect to recordkeeping, the First District stated:

> We also note that at no time during these proceedings has the Board made reference to any statute or rule that fixes the standard of conduct to be followed by a physician whose patient refuses treatment and requests that his or her refusal not be documented in the hospital records. Nor has the Board set forth any statute or rule that requires a physician to document in the patient's medical chart the physician's reason for not performing particular tests or procedures. Basic due process requires that a professional or business license not be suspended or revoked without adequate notice to the licensee of the standard of conduct to which he or she must adhere. The opinions of the experts offered by the parties cannot make certain, after the fact, those standards of conduct that are not clearly set forth in the statute or rule.

576 So. 2d at 471-2.

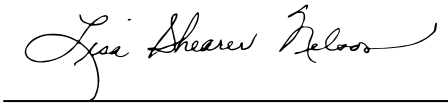
65. The same can be said here. The only boundary violation clearly delineated, in both statute and rule, is sexual misconduct. §§ 456.063 and 458.329, Fla. Stat.; Fla. Admin. Code R. 64B8-9.008. Dr. Mhatre testified credibly that it never occurred to him that allowing S.C. to appear at the Pfizer presentations was improper. With no statute, rule, or authoritative literature advising against it, his position is reasonable.

66. In short, there is no clear and convincing evidence that Respondent violated section 458.331(1)(t), with respect to his care and treatment of S.C.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Board of Medicine enter a Final Order dismissing the Administrative Complaint against Respondent.

DONE AND ENTERED this 20th day of November, 2012, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of November, 2012.

ENDNOTE

[1/] There is some indication in the patient records from Shands that Dr. Mhatre "strongly encouraged" S.C. to appear at these presentations. There is also indication in those records that she was paid to do so, when in fact she was only reimbursed for mileage if the presentation was out of town. While the medical records are admissible as an exception to the hearsay rule under section 90.803(4) & (6), it does not mean hearsay within hearsay

thus becomes admissible. Hammond v. Mulligan, 667 So. 2d 854, 855 (Fla. 5th DCA 1996); Loper v. Allstate Ins. Co., 616 So. 2d 1055, 1058-59 (Fla. 1st DCA 1993).

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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.