

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
MEDICINE,

Petitioner,

vs.

Case No. 15-0775PL

KENNETH D. STAHL, M.D.,

Respondent.

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DEPARTMENT OF HEALTH, BOARD OF  
MEDICINE,

Petitioner,

vs.

Case No. 15-0776PL

EDDIE MANNING, M.D.,

Respondent.

\_\_\_\_\_/

RECOMMENDED ORDER

On April 23 and May 26, 2015, hearing was held by video teleconference at locations in Miami and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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For Respondent Eddie Manning, M.D.:

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STATEMENT OF THE ISSUES

The issues in this case are whether Respondents performed a wrong procedure on patient C.C., as set forth in the second amended administrative complaints, and if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On April 13, 2015, Petitioner, Department of Health (Department), issued second amended administrative complaints against Respondents. The complaints charged Respondents with performing a wrong procedure on patient C.C. in violation of section 456.072(1)(bb), Florida Statutes (2010). Respondents disputed material facts alleged in the complaints and requested an administrative hearing.

At hearing, four joint exhibits, J-1 through J-4, were admitted into evidence. Petitioner offered eight exhibits, admitted as Exhibits P-1 through P-8, and no witnesses. Respondents offered seven exhibits, of which Exhibits R-1, R-3,

and R-7 through R-10 were admitted. Exhibit R-1, a deposition of Dr. Nicholas Namias, was admitted with the caveat that it would be used only to supplement or explain other evidence, not in and of itself to support any finding of fact. An objection as to the relevance of the exhibit marked for identification as R-6, a composite exhibit containing memoranda submitted to the Probable Cause Panel, was sustained, and it was not admitted. Respondents also offered the testimony of Dr. Namias, who was accepted as a fact witness. When Respondents indicated that they intended to testify, the hearing was recessed to allow Petitioner to take their depositions, as during discovery Respondents had asserted their Fifth Amendment right to remain silent. Following the depositions, Petitioner's motion for a continuance to undertake additional discovery was granted. Respondents then testified when the hearing continued on May 26, 2015. Official recognition was taken of Florida Administrative Code Rule 64B8-8.001 and the calendar for June 2011. A motion by counsel for Dr. Stahl to extend the date for submission of proposed recommended orders was granted, and July 6, 2015, was set as the deadline.

The two-volume final hearing Transcript was filed on June 18, 2015. The parties timely filed proposed recommended orders, which were considered in preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect on June 23, 2011, the date that violations were allegedly committed.

#### FINDINGS OF FACT

1. The Department of Health, Board of Medicine, is the state agency charged with regulating the practice of medicine in the state of Florida, pursuant to section 20.43 and chapters 456 and 458, Florida Statutes.

2. At all times material to this proceeding, Respondents were licensed physicians within the state, with Dr. Kenneth D. Stahl having been issued license number ME79521 and Dr. Eddie Ward Manning having been issued license number ME110105.

3. Dr. Stahl has been licensed to practice medicine in Florida since 1999 and in California since 1987. He has never had disciplinary action taken against either license. Dr. Stahl is board certified by the American College of Surgeons in general surgery, cardiac and thoracic surgery, and trauma and critical care surgery. Dr. Stahl's address of record is 3040 Paddock Road, Fort Lauderdale, Florida 33141.

4. Dr. Manning has been licensed to practice medicine in Florida since May 31, 2011. He has never had disciplinary action taken against his license. On June 23, 2011, Dr. Manning was a resident in general surgery. Dr. Manning's address of record is

1900 South Treasure Drive, Apartment 6R, North Bay Village,  
Florida 33141.

5. In February 2011, patient C.C., a 52-year-old female, was admitted to Jackson Memorial Hospital (JMH) with a diagnosis of perforated appendicitis. She also had a perirectal abscess. Her records indicate that she was treated with percutaneous drainage and a course of intravenous (IV) antibiotics. She was discharged on March 4, 2011.

6. On June 22, 2011, patient C.C. presented to the JMH Emergency Department complaining of 12 hours of abdominal pain in her right lower quadrant with associated nausea and vomiting. Shortly after her arrival she described her pain to a nurse as "10" on a scale of one to ten.

7. A computed tomography (CT) scan of patient C.C.'s abdomen was conducted. The CT report noted that the "the uterus is surgically absent," and "the ovaries are not identified." It noted that "the perirectal abscess that was drained previously is no longer visualized" and that the "appendix appears inflamed and dilated." No other inflamed organs were noted. The radiologist's impression was that the findings of the CT scan were consistent with non-perforated appendicitis.

8. Patient C.C.'s pre-operative history listed a "total abdominal hysterectomy" on May 4, 2005. Patient C.C.'s prior surgeries and earlier infections had resulted in extensive scar

tissue in her abdomen. Dr. Stahl later described her anatomy as "very distorted."

9. Patient C.C. was scheduled for an emergency appendectomy, and patient C.C. signed a "Consent to Operations or Procedures" form for performance of a laparoscopic appendectomy, possible open appendectomy, and other indicated procedures.

10. Patient C.C. was taken to surgery at approximately 1:00 a.m. on June 23, 2011. Dr. Stahl was the attending physician, Dr. Manning was the chief or senior resident, and Dr. Castillo was the junior resident. Notes indicate that Dr. Stahl was present throughout the critical steps of the procedure.

11. Dr. Stahl had little recollection of the procedure, but did testify that he recalled:

looking at the video image and seeing a tremendous amount of infection and inflammation and I pulled--I recall that I myself went into the computer program and pulled up the CT scan and put that on the screen right next to the video screen that's being transmitted from the laparoscope and put them side-to-side and compared what the radiologists were pointing to as the cause of this acute infection and seeing on the laparoscopic video image that that indeed matched what I saw in the CT scan and I said, well, let's dissect this out and get it out of her so we can fix the problem.

Dr. Stahl further testified that the infected, hollow organ that was dissected and removed was adherent laterally in the abdomen and was located where the appendix would normally be. He

recalled that an abscess cavity was broken into and the infected, "pus-containing" organ that was removed was right in the middle of this abscess cavity.

12. Dr. Stahl also recalled the residents stapling across the base of the infected organ and above the terminal ileum and the cecum and removing it.

13. The Operative Report was dictated by Dr. Manning after the surgery and electronically signed by Dr. Stahl on June 23, 2011. The report documents the postoperative diagnosis as "acute on chronic appendicitis" and describes the dissected and removed organ as the appendix.

14. Progress notes completed by the nursing staff record that on June 23, 2011, at 8:00 a.m., patient C.C. "denies pain," and that the laparoscopic incision is intact.

15. Similar notes indicate that at 5:00 p.m. on June 23, 2011, patient C.C. "tolerated well reg diet" and was waiting for approval for discharge.

16. Patient C.C. was discharged on June 24, 2011, a little after noon, in stable condition.

17. On June 24, 2011, the Surgical Pathology Report indicated that the specimen removed from patient C.C. was not an appendix, but instead was an ovary and a portion of a fallopian tube. The report noted that inflammatory cells were seen.

18. Surgery to remove an ovary is an oophorectomy and surgery to remove a fallopian tube is a salpingectomy.

19. On Friday, June 24, 2011, Dr. Namias, chief of the Division of Acute Care Surgery, Trauma, and Critical Care, was notified by the pathologist of the results of the pathology report, because Dr. Stahl had left on vacation. Dr. Namias arranged a meeting with patient C.C. in the clinic the following Monday. At the meeting, patient C.C. made statements to Dr. Namias regarding her then-existing physical condition, including that she was not in pain, was tolerating her diet, and had no complaints. Dr. Namias explained to patient C.C. that her pain may have been caused by the inflamed ovary and fallopian tube or may have been caused by appendicitis that resolved medically, and she might have appendicitis again. He explained that her options were to undergo a second operation at that time and search for the appendix or wait and see if appendicitis recurred. He advised against the immediate surgery option because she was "asymptomatic."

20. The second amended administrative complaints allege that Dr. Stahl and Dr. Manning performed a wrong procedure when they performed an appendectomy which resulted in the removal of her ovary and a portion of her fallopian tube.

21. It is clear that Dr. Stahl and Dr. Manning did not perform an appendectomy on patient C.C. on June 23, 2011.



Dr. Stahl and Dr. Manning instead performed an oophorectomy and salpingectomy.

22. It was not clearly shown that an appendectomy was the right procedure to treat patient C.C. on June 23, 2011.

23. The Department did convincingly show that patient C.C. had a history of medical problems and that she had earlier been diagnosed with appendicitis, had been suffering severe pain for 12 hours with associated nausea and vomiting, that she suffered from an infection in her right lower quadrant, that the initial diagnosis was acute appendicitis, and that the treatment that was recommended was an appendectomy.

24. However, substantial evidence after the operation suggests that an appendectomy was not the right procedure. The infected and inflamed organ that was removed from the site of a prior abscess was not an appendix. After the procedure, patient C.C. no longer felt severe pain in her lower right quadrant, with associated nausea and vomiting. She was discharged the following day and was asymptomatic. It is, in short, likely that the original diagnosis on June 22, 2011, was incorrect to the extent that it identified the infected organ as the appendix.

25. The pre-operative diagnosis that patient C.C.'s severe pain and vomiting were caused by a severe infection in an organ in her lower right quadrant was correct. Surgical removal of that infected organ was the right procedure for patient C.C. If

that inflamed organ was misidentified as the appendix before and during the operation, that would not fundamentally change the correctness of the surgical procedure that was performed.

26. The evidence did not clearly show that the wrong procedure was performed. It is more likely that exactly the right procedure was performed on patient C.C. That is, it is likely that an oophorectomy and salpingectomy were the right procedures to address the abdominal pain that caused patient C.C. to present at the JMH emergency room, but that the right procedure was incorrectly initially denominated as an "appendectomy," as a result of patient history and interpretation of the CT scan.

#### CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

28. A proceeding to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Petitioner must therefore prove the charges against Respondents by clear and convincing evidence. Fox v. Dep't of Health, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) (citing Dep't of

Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996)).

29. The clear and convincing standard of proof has been described by the Florida Supreme Court:

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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

30. Disciplinary statutes and rules "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992).

31. Respondents are charged with performing a wrong procedure in violation of section 456.072(1)(bb), which in pertinent part creates the following disciplinary violation:

Performing or attempting to perform health care services on the wrong patient, a wrong-site procedure, a wrong procedure, or an unauthorized procedure or a procedure that is medically unnecessary or otherwise unrelated

to the patient's diagnosis or medical condition.

32. Petitioner showed that the initial diagnosis on June 22, 2011, based in part upon patient C.C.'s history and a CT scan, was acute appendicitis, and that an emergency appendectomy was scheduled. It was not clearly shown, however, that the wrong procedure was performed.<sup>1/</sup> Respondents presented compelling evidence that the oophorectomy and salpingectomy that they performed were in fact the right procedures, because these procedures were those required to remove the infected and inflamed organs afflicting patient C.C., and that it was only the earlier denomination of the required procedure as an appendectomy that was likely in error.

33. Petitioner failed to prove by clear and convincing evidence that Respondents performed a wrong procedure in violation of section 456.072(1)(bb).

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Medicine, enter a final order dismissing the second amended administrative complaints against the professional licenses of Dr. Kenneth D. Stahl and Dr. Eddie Ward Manning.

DONE AND ENTERED this 15th day of July, 2015, in  
Tallahassee, Leon County, Florida.

*F. Scott Boyd*

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F. SCOTT BOYD  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 15th day of July, 2015.

ENDNOTE

<sup>1/</sup> Petitioner emphasizes that Respondents believed that they were performing an appendectomy throughout the procedure, never realizing that the inflamed organ they removed was not the appendix. This misidentification was uncontroverted, though perhaps justifiable given the fact that patient C.C. had suffered previous infections and her anatomy was "very distorted." However, misidentification of a specimen does not constitute proof of the violation charged here, performance of a wrong procedure. Respondents did not perform the wrong procedure unless an appendectomy was in fact the correct procedure to be performed, which the evidence did not clearly show.

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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.