To Be Argued By:
ANTHONY Z. SCHER
Time Requested: 15 Minutes

Appellate Division — Third Department Case No. 534554

New York Supreme Court

APPELLATE DIVISION—THIRD DEPARTMENT

IN THE MATTER OF DANIELLE ROBERTS, D.O.,

Petitioner,

For a Judgment and Order pursuant to Article 78
of the Civil Practice Law and Rules

—against—

THE NEW YORK STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT,

Respondent.

BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, Danielle Roberts, D.O., submits this Brief in support of her petition brought pursuant to Article 78 of the Civil Practice Law and Rules challenging the determination to revoke her medical license made by a hearing committee of respondent, The State Board for Professional Medical Conduct (the "State Board").

STATEMENT OF THE CASE

Up until the issuance of the Determination and Order (RR 3420-3525) made by the State Board's hearing committee, petitioner was a licensed physician in good-standing and maintained a general family medical practice on Long Island, New York. (RR 2094-2096). References preceded by RR are to the Record on Review. Petitioner also holds a Masters Degree in Clinical Nutrition, has served as a medical director of Integrative Healing Medical Center, served as a hospitalist, formed her own company that teaches body awareness and the mind/body connection that operated in three countries and found time to volunteer as the primary caregiver for mentally and physically retarded adults (RR 558-563, 2094-2096). Character witnesses testified to petitioner's exceptional character. One witness stated that petitioner had a reputation for being "exceptionally honest" (RR 2748-2749) and that she was a mentor to a lot of women who held her in high

regard (RR 2747). Another character witness testified that petitioner "is just one of the most caring, compassionate people I have ever worked with. She is just a special person." (RR 2759). And she further testified that "[s]he is just consistently in the years I have known her loyal, faithful, full of integrity." (RR 2762).

In 2016, petitioner joined a women's empowerment and leadership organization called DOS and about eight months later she was asked by the leadership of DOS if she would provide a "brand" to new members of DOS (RR 2158-2160). A brand is a scar formed on the skin by a hot iron strike or by an electro-cautery created for esthetic, symbolic or ritualistic purposes (RR 2660, 2671, 2696, 2716). Receiving a brand was to be part of the initiation ritual and ceremony in joining what was to be a secret organization of women (RR 2110). A group of about eight women involved in the initial formation and organizing of DOS had agreed to receive brands to symbolize their commitment to the organization and had done so by having a professional branding artist perform the task (RR 2160, 2168). Desirous of making this part of the initiation ceremony for new members more comfortable and intimate, they interviewed several women affiliated with DOS to select someone to accomplish this goal (RR 987, 2159-2160, 2168). They interviewed several women and eventually asked petitioner if she would be willing to undertake this task (RR 2159-2160, 2168). After receiving a brand herself from a professional branding artist and after familiarizing herself

with branding technique by researching and speaking to a professional branding artist, petitioner agreed (RR 2159-2161, 2168, 2165-2172). Petitioner purchased the device (an electro-cautery) used by some branding artists and learned how to use it by speaking to the branding artist who innovated the use of the electro-cautery in branding, by reviewing his instructions and by practicing on inanimate objects (RR 2167, 2173-2176). While an electro-cautery can be used by physicians in the performance of medical procedures, there are no restrictions on its use and the device can be purchased by anyone – unlike medical devices such as X-ray machines, no license is required to purchase an electro-cautery which can even be obtained on E-Bay (RR 2356, 2385).

The women who received a brand from petitioner had agreed to receive a brand when they joined DOS long before petitioner had been asked to perform the branding (RR 2475, 2480, 2574, 2579, 2584-2585, 2626, 2628, 2637-2638). At the time they agreed to receive a brand as part of the initiation ritual, none of the women had any idea that it would be a physician doing the branding (RR 2475, 2480, 2574, 2579, 2584-2585, 2626, 2628, 2637-2638). Indeed, the day the branding took place the women were taken by car to what initially was an unknown and undisclosed location (RR 1575, 1577-1578). As they found out, the location was the home of one of the original DOS members in Upstate New York and it was not until the women arrived and walked into the room being used for the

branding that they learned that it was petitioner who would be the branding artist (RR 2182-2183, 2475, 2480, 2574, 2579, 2584-2585, 2626-2628, 2637-2638).

There was unrebutted testimony at the administrative hearing below that the women who were about to receive their brands did not consider petitioner to be their physician and they did not perceive themselves to be patients of petitioner (RR 1436, 2182-2183, 2480, 2494-2495, 2573, 2585, 2629). Similarly, petitioner did not consider the women who came to receive a brand to be her patients (RR 1113, 1337-1338, 1436, 1511, 2182) or that she was performing a medical procedure when she provided the brand that they had all agreed to receive (RR 1337-1338, 1408). Petitioner received no compensation from the women or anyone else (RR 1121, 2183, 2806, 2867); she prescribed no medication for the women (RR 2197, 2811); she provided no anesthesia during the branding (RR 1405-1406, 1458, 2171, 2200-2201, 2288,); she did not take a medical history (RR 1121, 1165, 1186); there was no evidence that she performed a physical examination prior to the branding; and she maintained no medical records as the branding was not part of her medical practice (RR 1121, 1165, 1186). Petitioner did not undertake any of these routine activities normally associated with the performance of a medical procedure because she was not performing a medical procedure; because the women were not coming to petitioner with any ailments that they wanted addressed; and because they were not her patients and she was not

their physician (RR 1113, 1173, 1337-1338, 1436, 1511, 2480, 2494-2495, 2573, 2585, 2629).

Testifying on this issue on behalf of petitioner was expert witness David Mayer, MD, JD. Dr. Mayer is a highly experienced surgeon who graduated from Cornell Medical School and he is also an attorney having graduated from the Hofstra University School of Law (RR 2341-2342). He testified that, in his expert opinion, petitioner was acting as a branding technician rather than as a physician (RR 2345-2351). As he testified:

> …because she did not perceive herself as engaging in the practice of medicine didn't get a formal informed consent, didn't perform a physical exam, didn't take a medical history, didn't take a medical record.
>
> These things that she didn't do are usually disturbing when OPMC reviews a case, but in this case they support the proposition that she did not engage in the practice of medicine, and therefore, wouldn't need to do the indicia of medical practices and documentations that medical practice would normally require. (RR 2355-2356)

Following the branding, the women were advised by petitioner as to how to care for the brand scar to achieve the desired esthetic effect (RR 2193-2196, 2810-2811, 2867-2868). Several women testified that they knew to and were advised by petitioner to see their physician in the unlikely event that there was a problem with

the scar created by the brand technique (RR 2811-2812, 2867-2868, 2869). This was the same advice that would routinely be given by a professional branding artist (RR 2194-2195, 2353-2355). There was no testimony at the administrative hearing below as to any significant problems that developed with any of the women who received a brand from petitioner.

The State Board's hearing committee concluded that when petitioner undertook the branding she was engaged in the practice of medicine and that by not taking a medical history and performing a physical examination and by not obtaining a formal written consent and by otherwise not following standard medical practices associated with the performance of a medical procedure, she had practiced the profession of medicine with negligence in violation of Section 6530 (3) of the Education Law and she had engaged in conduct in the practice of medicine which evidenced moral unfitness to practice medicine in violation of Education Law Section 6530 (20) (RR 3470-3525).

Unrelated to the branding initiation ritual, DOS members and their families participated in an annual corporate-type retreat held in Upstate New York (RR 2118-2126). In 2016, at one of the retreats, a number of people got sick with a flu-like disease – most likely a "noro-virus (RR 1836, 1846, 2126). Petitioner attended this 2016 retreat on her vacation and became aware that a number of participants had come down with this flu-like virus (RR 2118-2126). The people

who got sick developed nausea, vomiting and diarrhea and recovered in a few days (RR 2133). No one was hospitalized (RR 2129-2130). The State Board's hearing committee determined that petitioner had violated reporting requirements allegedly set forth in 10 NYCRR Section 2.1 *et. seq*. by not reporting the outbreak of this virus to the Department of Health and therefore was in violation of Education Law Section 6530 (16) which deems it misconduct to willfully or grossly negligently fail to comply with a substantial provision of any federal or state law, rule or regulation governing the practice of medicine. The hearing committee also concluded that petitioner had practiced negligently by not reporting the outbreak of the virus.

ARGUMENT

POINT I

The State Board had no jurisdiction over petitioner because the branding that she performed was not a medical procedure within the statutory definition of the practice of medicine as set forth in Section 6521 of the Education Law.

Respondent, The State Board for Professional Medical Conduct, is a board under the auspices of the New York State Department of Health created pursuant to Section 230 of the Public Health Law. As such, it has only the powers, duties and jurisdiction granted to it by the Legislature. *New York State Association of*

Nurse Anesthetists v. Novello, 189 Misc. 2d 564 (Sup. Ct. Albany Co. 2001) *aff'd* 301 A.D. 2d 895 *rev. on other grounds* 2 N.Y. 2d 2007 (2004). The State Board was created to investigate and adjudicate matters of alleged professional misconduct as defined in Section 6530 of the Education Law. Section 6530 sets forth the definitions of professional misconduct that are subject to the State Board's jurisdiction. These definitions all involve the "practice of the profession of medicine" with the only exceptions being Education Law Section 6530 (8) which relates to alcohol or drug abuse and Section 6530 (9) which deems all criminal convictions to constitute professional misconduct. All of the other definitions of professional misconduct are tied either directly or implicitly to the practice of medicine. Thus, Education Law Section 6530 (3) refers to "**practicing the profession** with negligence on more than one occasion" (emphasis supplied) and Education Law Section 6530 (20) refers to "**conduct in the practice of medicine** which evidences moral unfitness to practice medicine." (emphasis supplied). No matter how immoral a physician's conduct may be (and petitioner's conduct was in no way immoral), it is only actionable by the State Board if the conduct occurs in the practice of medicine. The Legislature was not silent as to what is meant by the practice of medicine. Education Law Section 6521 is entitled "Definition of Practice of Medicine" and states that "[the] practice of the profession of medicine

is defined as diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition."

There can be no doubt that this definition of the practice of medicine is applicable herein. In *Matter of Gross v. Ambach*, 26 A.D. 2d 21 (3rd Dept. 1987) *aff'd* 71 N.Y. 2d 859 (1988), this Court was called upon to determine whether the State Board had jurisdiction over the forensic autopsies performed by Dr. Gross in his role as the Chief Medical Examiner for the City of New York. A motion had been made at Dr. Gross' administrative disciplinary hearing to dismiss the misconduct charges which included the allegation that he had practiced the profession of medicine with negligence on more than one occasion. The ground for the dismissal motion was that forensic autopsies are performed on cadavers rather than live patients and therefore Dr. Gross' actions did not fall within the definition of the practice of medicine set forth in Section 6521 of the Education Law. The motion worked its way through the administrative process and ultimately came before this Court. The Court held that the State Board did have jurisdiction to hear and decide the charges against Dr. Gross but the Court's reasoning is particularly pertinent to petitioner's case. The Court recognized the applicability of Section 6521of the Education Law but ruled that Dr. Gross was engaged in the practice of the profession of medicine because an autopsy is the "ultimate diagnosis" and, as such, falls within the statutory definition of the practice of the profession of

medicine. This decision makes it clear that Section 6521 must be considered in the analysis of whether the branding that occurred in this case was a medical procedure and a part of petitioner's practice of the profession of medicine which placed petitioner's activities within the State Board's jurisdiction or not.

When Education Law Section 6521 is correctly analyzed, it is clear that the branding ceremony performed by petitioner was not a medical procedure that falls within the practice of the profession of medicine. Section 6521 sets forth a two-pronged test. First, the activity must consist of "diagnosing, treating, operating or prescribing." It is self-evident that petitioner did not engage in diagnosing, treating or prescribing. Her use of an electro-cautery to create an esthetic scar could arguably be considered "operating" if one is willing to stretch the definition of operating. But this would not satisfy Section 6521 of the Education Law because of the second prong of the statute's definition of the practice of the profession of medicine. This second prong requires that the activity in question must relate to a human disease, pain, injury, deformity or physical condition. The women who received a brand from petitioner were all healthy young women (RR 1120, 1168). There was no evidence at the administrative hearing below that any of the women had a disease and there was no evidence that any of them had a pain, injury, deformity or physical condition that was being addressed by petitioner. The only relevant evidence was that they agreed to receive a brand as an initiation

requirement which symbolized their commitment to the organization which they had joined.

POINT II

There was no nexus between the branding performed by petitioner and the practice of medicine to warrant the exercise of the State Board's jurisdiction.

Although it is clear that petitioner was not subject to the State Board's jurisdiction pursuant to Section 6521 of the Education Law because she was not performing a medical procedure as alleged in the Statement of Charges (RR 43-66) brought against her, the State Board has ruled in the past and this Court has upheld disciplinary jurisdiction where there is a sufficient nexus between the charged conduct and what is generally understood to be the practice of medicine. *See,* for example, *Matter of Addei v. State Board for Professional Medical Conduct*, 278 A.D. 2d 551 (3rd Dept. 2000). Therein, this Court upheld the State Board's finding that the physician had engaged in conduct in the practice of medicine which evidenced moral unfitness to practice medicine where the physician had sexually abused and verbally harassed his co-workers at a hospital. The Court emphasized the fact that the physician's conduct had occurred at the hospital, during working hours, while the co-workers were on duty and where the physician had staff privileges.

In *Matter of Wasserman v. Board of Regents*, 11 N.Y. 2d 173 (1962), the Court of Appeals upheld the revocation of a physician's license where he was found to have submitted false bills to an attorney in a medical malpractice action. This conduct was deemed to have a sufficient nexus to medical practice to warrant the exercise of the State Board's disciplinary jurisdiction because the physician was in a position to commit fraud because he held a medical license and because his fraudulent scheme was committed as part of his medical practice. *Id*. at 177, 178.

The State Board has on several occasions disciplined physicians for conduct in the practice of medicine which evidences moral unfitness to practice medicine where the conduct did not relate to patients. In all of the cases, however, there was a clear nexus between the immoral conduct and the physician's medical practice. Thus, in *Matter of Alkoc, M.D.*, 2001 N.Y. Phys. Dec. Lexis 339, the State Board sustained charges of moral unfitness in the practice of medicine (Section 6530 (20) of the Education Law) against a physician who had engaged in sexual acts against two women who were not patients by drugging them with Xanax which he had placed in their alcoholic drinks. The State Board emphasized that the physician used his medical license to obtain the drugs that were used to sedate the women and render them helpless and thus violated the public trust bestowed upon physicians by virtue of the medical license. In that case, the State Board explicitly

recognized that because the women molested by Dr. Alkoc were not patients there would have been no jurisdiction without this nexus. It was the use of his medical license to obtain the Xanax that brought his conduct under the umbrella of the practice of his profession.

Other cases where physicians were disciplined for immoral conduct outside the strict definition of the practice of the profession set forth in Education Law Section 6521 also have had a clear nexus between the immoral conduct and the physician's practice of medicine. Thus, in *Matter of Innes, M.D.,* 2005 N.Y. Phys. Dec. Lexis 154, a physician was disciplined for massaging an employee's neck; brushing up against the genitals of a female staff member; forcibly kissing a nurse on her mouth; and making contact with an employee's breast and genitals during an office party. And, in *Matter of Desai, M.D.,* 2003 N.Y. Phys. Dec. Lexis 541, a physician was disciplined by the State Board for making offensive sexual comments to a nurse who worked under him. In *Matter of Marshall, R.P.A.,* 2007 N.Y. Phys. Dec. Lexis 382, a licensed physician's assistant was disciplined for moral unfitness in the practice of medicine for making unsolicited sexual contact with a co-worker and a student working under his supervision. In increasing the penalty imposed by the hearing committee, respondent's Administrative Review Board noted that the sexual contact occurred in the workplace while the co-worker was making entries in a patient's chart.

The common thread that runs through these court cases and administrative determinations made by the State Board is that the conduct over which the State Board seeks to exercise jurisdiction must fall within the definition of the practice of the profession of medicine as set forth in Section 6521 of the Education Law or there must be a significant nexus relating the conduct in question to what is generally understood to be the practice of medicine. As noted above, petitioner's conduct in providing a brand to the women who requested same clearly does not fall within Section 6521's definition of the practice of the profession. Below, we show that there was no nexus between the ritual branding at issue and petitioner's medical practice.

First and foremost, the women who received brands from petitioner did not perceive themselves to be patients of petitioner (RR 1436, 2480, 2494-2495, 2573, 2629). Nor did petitioner consider the women to be her patients (RR 1113, 1337-1338, 1436, 1511). None of the usual indicia of medical practice were present (RR 2355-2356). The women did not even know that a physician would act as the branding artist until they entered the room where the branding would take place and saw petitioner (RR 1436, 2480, 2494-2495, 2573, 2629). Although the branding procedure was entirely consensual, no formal written consent was obtained which would have been if this had been a medical procedure (RR 2355-2356). The branding did not take place in a hospital or medical facility or even in a

physician's medical office (RR 2182, 2481-2482, 2585, 2862). Rather, the branding was performed in the home of one of the members of the organization that the women had agreed to join (RR 2481-2482). Although the State Board hearing committee cited the fact that the women were not offered anesthesia to mitigate any discomfort associated with the branding and that other standard medical practices were not followed (RR 3470-3525), this actually underscores petitioner's position that the branding was completely separate and apart from her medical practice. If petitioner had undertaken customary medical practices related to the branding, it might demonstrate a connection or nexus to medical practice that might have justified the State Board's exercise of jurisdiction. Petitioner kept no medical records as she ordinarily does when engaged in her medical practice (RR 1121, 1165, 1186); no compensation was offered or received (RR 1121, 1165, 1186); there was no evidence that third party payors were billed (no billing codes even exist for branding); no medical history was taken (RR 1115, 2161-2162); there was no evidence of a physical examination being performed; and no prescriptions were administered, dispensed or written (RR 2197, 2811). The branding was simply part of a ritual for initiation into an organization that the women wished to join (RR 1113-1114). This was identical to the initiation undergone by African American men who receive a brand when they join the prestigious Omega Psi college fraternity (RR 1067, 1093, 1341, 1426, 1431).

Michael Jordan, the former basketball player, is one such member who proudly displays his Omega Psi brand in public (RR 1163**).**

The one woman, S.E., who received a brand who testified against petitioner at the administrative hearing was initially desirous of getting the brand and joining the organization (RR 1556-1728). Later on, she regretted her decision to get the brand and claimed that she had been misled about the nature of the brand as well as the nature of the organization (RR 1556-1728). Although her testimony was not credible for several reasons, even if true it does not render petitioner's purely private, non-medical conduct within the jurisdiction of the State Board.

In demonstrating the lack of a nexus between the branding and the practice of medicine, it is noteworthy that branding was not (and still is not) regulated by New York State. *See,* Article 4-A of the Public Health Law. Many states regulate "body art" which usually includes tattooing, body piercing and branding (sometimes referred to as scarification). *See,* for example, Michigan Body Art Facilities Act 210 PA 375 Section 3.1.9 which specifically distinguishes branding for esthetic purposes from branding which the Michigan Medical Board determines to be medical in nature. It is only medical branding that falls within the jurisdiction of the Michigan Medical Board. In New York, it is clear that esthetic or ritual branding is outside the jurisdiction of the State Board for Professional Medical Conduct just as it is in Michigan and other States. Tattooing and body piercing are

regulated activities in New York but branding is not. Article 4-A Public Health Law. This is significant because Section 462 of the Public Health Law states that to perform tattooing or body piercing the practitioner must be licensed by the Department of Health or must be exempt from licensure by virtue of possessing a medical license. Thus, a physician who is not issued a license to perform tattooing or body piercing under Article 4-A is permitted to do so pursuant to her medical license. Reliance on a medical license to perform tattooing or body piercing might provide a sufficient nexus between the physician's medical practice and the tattooing or body piercing to justify the exercise of the State Board's jurisdiction. But no such nexus exists with respect to branding because in New York anyone can engage in the body art of branding and no statutory authorization or exemption by reason of licensure is necessary. What then provides the necessary nexus that could justify the State Board's exercise of jurisdiction in this case?

The State Board's Determination and Order (RR 3470-3525) supports its assertion of jurisdiction in large measure upon the argument that petitioner's education, training and experience as a physician gives her specialized knowledge not enjoyed by the general public and that this knowledge is always present in a physician wherever they go and whatever they are doing (RR 3470-3525). In the State Board's reasoning, when petitioner was acting as a branding artist she necessarily brought this knowledge to bear and this serves as the nexus to medical

practice permitting the exercise of the State Board's jurisdiction. But this argument proves too much. By this logic, a physician would always be subject to the State Board's jurisdiction no matter what activity she was engaged in. If she were running an aerobics fitness class (petitioner actually is an aerobics instructor RR 532), she would be subject to the State Board's jurisdiction for alleged negligence and/or immoral conduct if she didn't take a medical history and perform a physical examination of the participants because one of the participants might have a cardiac or pulmonary condition which might not withstand the rigors of the strenuous exercise. If the State Board's reasoning in this case is followed, the physician's specialized knowledge could be deemed to put her on notice of the possibility of such a condition in one or more of the participants and might oblige her to perform a comprehensive cardiac examination including the performance of an EKG and her "failure" to do so would subject her to the disciplinary jurisdiction of the State Board. Similarly, if a physician acting in a purely private, non-medical capacity were chaperoning a class of elementary school students at an amusement park, would her specialized knowledge as a physician require that she take a comprehensive medical history from each student (or their parents) to assure that none of the students had a pre-existing medical or psychiatric condition that could be triggered by a high-speed roller coaster or a frightening haunted house exhibit? The State Board's reasoning in this case, if permitted to stand by this Court, would

constitute a significant expansion of the definition of the practice of the profession of medicine and would permit the State Board to venture into what had previously been considered the private life of a physician. The Legislature was careful to tie the State Board's jurisdiction over physicians only to conduct which truly involves medical practice. An expansion of this doctrine should properly be left to the Legislature rather than addressed on an *ad hoc* basis by rotating, three-member hearing committees of the State Board. Perhaps the Department of Health could promulgate appropriate regulations interpreting the statutes in question or elaborating on the definition of the practice of medicine, but the State Board enjoys no such regulatory or rule-making authority. *Matter of New York State Association of Nurse Anesthetists v. Novello, supra*. Accordingly, respondent's Determination and Order (RR 3470-3525) should be vacated and annulled insofar as it is based on the charges that were sustained relating to the alleged practice of medicine by petitioner.

POINT III

The administrative law judge who presided over the hearing below erroneously and prejudicially refused to admit in evidence a Department of Health letter written to the main prosecution witness, S.E., which rejected her complaint against petitioner due to the State Board having no jurisdiction over the allegations set forth in her complaint.

At the hearing below, petitioner sought to introduce in evidence a letter issued by the Department of Health in response to the Complaint made by S.E. – the only woman who received a brand who testified against petitioner (RR 1556). The letter advised S.E. that the State Board had no jurisdiction over the allegations contained in her Complaint because her allegations "did not occur within the doctor-patient relationship" (pursuant to a motion made by respondent herein which was granted by the Court (RR 29-36), this letter has not been included in the bound Record on Review and is submitted to the Court in a sealed manner for *in camera* review (RR 3526). The administrative prosecutor argued that the letter should be excluded from evidence on the ground that it could only be understood if the Complaint to which it was responding was also admitted in evidence (RR 617-619) and that complaints made to the Office of Professional Medical Conduct are confidential pursuant to Section 230 (11)(a) of the Public Health Law and "shall not be admitted into evidence in any administrative or judicial proceeding." But

this rule is not without exceptions. In *Matter of McBarnette v. Sobol* 190 A.D. 2d (3rd Dept. 1993) *aff'd* 83 N.Y. 2d 333 (1994), this Court and the Court of Appeals reviewed the purpose of Section 230 (11)(a) and concluded that the statute was intended to encourage reports of misconduct without fear of litigation or other recriminations and to cloak the program with the appearance of "inviolable trust." In *McBarnette,* a physician's need to have the prior complaints of the witnesses against him to assist in cross-examination was deemed to outweigh the need for confidentiality. This Court and the Court of Appeals noted that once the complainants came forward and voluntarily testified the need for confidentiality was essentially non-existent. Their identities were known to the physician charged with misconduct as soon as they testified. In the instant case, the administrative law judge, who was undoubtedly aware of the *McBarnette* decision, bizarrely excluded the letter on a different ground - that she deemed the letter irrelevant because, once S.E.'s Complaint was rejected by the Health Department and a new investigation was opened up (for reasons that have never been explained but which petitioner believes was politically motivated due to the high profile nature of the allegations), somehow the letter was not relevant to the new investigation (RR 2991). This, of course, makes no sense.

The letter issued by the Department of Health could not have been more relevant. It expressly indicated that the State Board lacked jurisdiction over the

allegations set forth in S.E.'s Complaint because the actions complained of did not occur within a doctor-patient relationship (RR 3526) – which is the primary basis of the defense in this case. The administrative prosecutor at the hearing below did not contend that the testimony given by S.E. was different from the Complaint that she filed. As noted above, he argued that the letter would only make sense if the Complaint were also admitted in evidence and since he contended that the Complaint could not be admitted as a matter of law, the letter rejecting it also had to be excluded. The letter (RR 3526) should have been admitted and the hearing committee should have been given the opportunity to review the Complaint so that it could see what allegations had been rejected by the Health Department. It is difficult to believe that the admission of the letter would not have had a significant effect on the hearing committee. The exclusion of this highly relevant letter was error requiring that the Determination and Order issued by the hearing committee be vacated and annulled.

POINT IV

No Department of Health regulation required that petitioner report the outbreak of a flu-like virus while she was on vacation at a corporate retreat which did not involve any of her patients.

The State Board sustained charges against petitioner which alleged that she willfully or grossly negligently failed to comply with a substantial provision of a

federal or state law, rule or regulation governing the practice of medicine in violation of Education Law Section 6530 (16). The regulation that petitioner purportedly violated was 10 NYCRR Section 2.1 *et. seq.* which imposes on physicians the obligation to report communicable diseases to the Department of Health. In September 2016, petitioner was on vacation at a corporate retreat which was attended by several hundred people (RR 2123, 2127). Petitioner learned that a number of people came down with flu-like symptoms (probably a Noro virus – RR 1836, 1846, 2126) and were sick with nausea, vomiting and diarrhea for a few days and then recovered (RR 1836, 1846, 2126, 2131). There was no evidence that anyone was hospitalized (RR 2129-2130). Petitioner was charged with failing to report this disease to the Department of Health (RR 43-66). But petitioner was under no obligation to report this virus pursuant to regulations of the Department of Health or pursuant to the accepted standards of medical practice.

The regulation which petitioner allegedly failed to comply with in a willful or grossly negligent manner is 10 NYCRR Section 2.1 *et. seq.* which requires that physicians report to the Department of Health the outbreak of communicable diseases and the outbreak of unusual diseases. 10 NYCRR Section 2.1(a), however, defines communicable diseases as those diseases set forth on a list of diseases contained in the section. There was agreement at the hearing that the type of virus that broke out at the corporate retreat was not on the list of reportable

communicable diseases set forth in Section 2.1 (a) of 10 NYCRR. There was also agreement at the hearing that the virus in question was not an "unusual disease." In fact, the expert witness who testified against petitioner agreed that the virus was a routine, non-lethal, garden-variety type virus (RR 720, 1680-1681). The State Board's decision to sustain the charge that petitioner failed to comply with the reporting requirement of 10 NYCRR Section 2.1 *et. seq*. appears to be based on a highly strained reading of 10 NYCRR Section 2.1 (c). This subsection states that "any disease outbreak or unusual disease shall also be reported to the State Department of Health as provided in subdivision (b) of this section." On its face, this section implies that all disease outbreaks must be reported – not just communicable diseases and unusual diseases. But subdivision (b) refers, in turn, to Section 2.10 which reads as follows

> It shall be the duty of every physician to report to the city, county or district health officer, within whose jurisdiction such patient resides, the full name of and address of every person with a suspected or confirmed case of a communicable disease, any outbreak of communicable disease, any unusual disease or unusual disease outbreak, and or otherwise authorized in Section 2.1 of this Part together with the name of the disease if known, and any other additional information requested by the health officer.

The language in Section 2.1(c) that refers to the reporting of any disease outbreak is limited by that section's reference to Section 2.10 which refers only to communicable diseases and unusual diseases. It is clear from reading these various sections together that there is no mandatory reporting requirement imposed on a physician unless she becomes aware of a communicable disease (the virus was not a communicable disease within the meaning of 10 NYCRR Section 2.1) or an unusual disease (the virus did not meet the definition of unusual disease set forth in Section 2.1 and the expert testimony was that it was not an unusual disease). To read the regulation in any other way would require the reporting of every outbreak of the common cold, strep throat or a myriad of other routine diseases. Moreover, even if the Court were to uphold the interpretation by the State Board, it should be clear that any violation of this poorly worded regulation cannot possibly be considered to have occurred "willfully" or "grossly negligently" as the sustained misconduct section requires. As such, the charges related thereto should be vacated and annulled.

POINT V

There was no substantial evidence at the hearing below that supports the State Board's finding that petitioner practiced the profession of medicine negligently by not reporting the outbreak of the noro virus.

It is undisputed that petitioner was on vacation attending a corporate retreat when there was an outbreak of a what was probably a noro virus (RR 1678). It is also undisputed that no patient of petitioner was involved with this virus (RR 2125). In an effort to prove that petitioner departed from accepted standards of care by "failing" to report this virus to the Department of Health, an infection control course given at St. Peter's Hospital was placed in evidence (RR 232-370). But a review of the course curriculum reveals that there is no reference to a standard practice that applies when a physician is on vacation and there is an outbreak of a mild, self-limiting disease which does not relate to any of her patients (RR 232-370). Moreover, the expert in infectious diseases called by the administrative prosecutor was unable to identify any textbook that refers to a physician's reporting requirements under the applicable circumstances (RR 1810-1814). Nor could he identify any standard teaching that takes place during a physician's post-graduate training years or any scholarly literature that refers to and defines a physician's obligation under such circumstances (RR 1810-1814). Finally, when he was questioned by a member of respondent's hearing committee as to whether in his 40 years of practice he had ever heard of a family practice physician, such as

petitioner, attending a community event and reporting the outbreak of such a virus, he candidly admitted that he could not recall a single such incident (RR 1848-1849). Given this testimony and the lack of any other evidence to support the State Board's finding concerning this charge, the State Board's finding must be vacated and annulled as not supported by substantial evidence in the record.

CONCLUSION

For the reasons set forth herein, the Determination and Order issued by the State Board should be vacated and annulled.

Dated: September 8, 2022

Respectfully submitted

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—THIRD DEPARTMENT

In the Matter of Danielle Roberts, D.O.,
Petitioner,

Case No. 534554

For a Judgment and Order pursuant to Article 78 of the Civil Practice Law and Rules,

—against—

The New York State Board for Professional Medical Conduct,
Respondent.

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1. This is an original proceeding in this Court, Docket No. 534554, which has been brought pursuant to Article 78 of the CPLR and Public Health Law Section 230-c (5) to review a Determination and Order of a hearing committee of The New York State Board for Professional Medical Conduct.

2. Petitioner, Danielle Roberts, D.O., was the respondent in the administrative hearing below. Respondent, The New York State Board for Professional Medical Conduct, is a board under the auspices of the New York State Department of Health. The Department of Health, acting through its Office of Counsel, Bureau of Professional Medical Conduct, brought misconduct charges against petitioner's medical license.

3. The administrative hearing below was based on a Notice of Hearing dated March 5, 2020 and an Amended Statement of Charges dated April 27, 2020. The hearing below commenced on June 2, 2020 and was continued for several hearing dates, concluding on March 2, 2021. The hearing committee issued a Determination and Order which sustained misconduct charges and revoked petitioner's medical license. Petitioner timely commenced an Article78 proceeding in this Court challenging said Determination and Order.

4. The hearing below was based on allegations and charges that petitioner had practiced medicine with negligence on more than one occasion; had engaged in conduct in the practice of medicine which evidenced moral unfitness to practice medicine, and willfully or grossly negligently failed to comply with a Department of Health regulation which allegedly required her to report the outbreak of a virus while she was on vacation.

5. This Article 78 proceeding is from Determination and Order No. 21-206 issued by a hearing committee of The New York State Board for Professional Medical Conduct on or about October 6, 2021.

6. The full record of appeal is being utilized. Petitioner is responsible for filing with the Court an original and five copies of a reproduced full record and a digital full Record on Review.

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[91503]

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS: **AFFIDAVIT OF SERVICE**

Edward Gutowski, being duly sworn, deposes and says: I am not a party to the action, and I am over 18 years of age.

On the 20th day of September 2022, I served 1 true copy of the within

Brief for Petitioner

upon the attorneys at the addresses indicated below, by the following method(s):

Contact	Firm	Address + Email Address	Delivery Method
James M. Hershler *Assistant Attorney General*	New York State Attorney General's Office *Attorneys for Respondent*	28 Liberty Street New York, New York 10005 (212) 416-8000 james.hershler@ag.ny.gov	FedEx Next Business Day

Sworn to me this:
September 20, 2022

Nadia R. Oswald-Hamid
Notary Public, State of New York
No. 01OS6101366
Qualified in Kings
Commission Expires November 10, 2023

Case Name: In the Matter of Roberts v. NY State Board for Professional Medical Conduct
Case No.: 534554