

BEFORE THE NEW MEXICO MEDICAL BOARD

IN THE MATTER OF

SHELLY SELLA, M.D.

License No. MD2009-0759,

Respondent.

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No. 2012-026

OPENING BRIEF ON BEHALF OF DR. SHELLEY SELLA

INTRODUCTION

Dr. Shelley Sella submits this brief to assist the Hearing Officer in focusing on the issues at hand. Dr. Sella is a well-trained and experienced medical doctor who provides abortion procedures. At issue in this case is Dr. Sella's care for a patient, M.L., who underwent a third trimester abortion procedure. Based on a substantial misreading of the medical records by the Board's expert consultant, Dr. Gerald Bullock, Dr. Sella has been charged by the Medical Board with committing gross negligence in the care of a patient, M.L. The evidence at the hearing will show that Dr. Sella did not commit gross negligence. Dr. Sella complied with the standard of care for these procedures and demonstrated excellent and thoughtful care to M.L.

Third trimester abortions are legal in New Mexico. *State of New Mexico v. Gordon*, 84 N.M. 670; 506 P.2d 1217. Unfortunately, the politics of the anti-abortion movement are inexorably intertwined in this case, as discussed further below. This proceeding is before the Board because of anti-abortion activists who wish to put Dr. Sella out of the practice of providing legal abortions to women seeking her care.

FACTUAL BACKGROUND

Dr. Sella is a highly trained physician who is Board-certified in obstetrics. She is a fellow in the American College of Obstetrics and Gynecology. Since 2000, Dr. Sella started exclusively to provide abortion services to women around the country. Abortion services are part of women's health issues. As the evidence will show, while there is at least introductory information about abortion services when physicians are trained in OB/GYN, there are sub-specialties that provide further training. Dr. Sella has received this specialized training at Kaiser Permanente.

In 2002, Dr. Sella began providing abortion services to women in Wichita, Kansas, at the clinic of Dr. George Tiller. While there, Dr. Sella performed first, second, and third trimester abortions. She worked with Dr. Tiller, who was an international expert in third trimester abortions, until an anti-abortion fanatic assassinated Dr. Tiller in 2009. In 2010, Dr. Sella began working at Southwest Women's Options Clinic (SWOC). She provides first, second, and third trimester abortions at Southwest Women's Options Clinic. Dr. Sella has provided thousands of abortions over the course of her career. She has performed between 500-1000 third trimester abortions and approximately 75 of those involved patients who had a prior Cesarean section.

Dr. Sella, like her fellow abortion providers, long has been a target of anti-abortion activism. Specifically, Operation Rescue, a well-known anti-abortion political organization, has focused considerable attention on Dr. Sella and the other providers at Southwest Women's Options Clinic. It is Operation Rescue's goal to end all legal abortion. Operation Rescue and related organizations in concert with Operation rescue have used myriad different devices to end legal abortion, including but not limited to,

filing complaints with the medical boards of different states. It is through this manipulation that Dr. Sella's case is before the Medical Board. It is important for the Hearing Officer to understand this case was not brought before the Board on a patient complaint or a complaint from another medical provider. Operation Rescue (or a related organization) operatives made an Inspection of Public Records Act (IPRA) request for all 911 calls¹ from SWOC and forwarded all of them to the Board.

In May 2011, Dr. Sella treated a patient, M.L., who was from Brooklyn, New York. At the time Dr. Sella saw M.L. as a patient, M.L. was approximately 35-weeks pregnant and was seeking a third trimester abortion. M.L. sought this abortion because she had learned late in her pregnancy (at approximately 33 weeks) that the fetus suffered from multiple disorders that would likely cause serious abnormalities in brain development. M.L. had this diagnosis confirmed by multiple specialists in New York. Her maternal fetal medicine doctor, Dr. Victor Rosenberg, informed M.L. that she could not obtain an abortion in New York and recommended that she contact SWOC. The evidence will show that the patient and her family had multiple conversations with appropriate staff at SWOC, as well as with Dr. Susan Robinson (another doctor at SWOC) prior to her arrival at SWOC. The staff, Dr. Robinson and her own physician, Dr. Rosenberg, advised the patient and her family of the risks associated with a third trimester abortion, which, because M.L. had a prior Cesarean section, included uterine rupture. The patient, on the advice of Dr. Rosenberg, decided to come to SWOC.

The patient presented at SWOC and Dr. Sella on May 10, 2011. When the patient first arrived, the patient filled out a patient history. The SWOC staff then examined the

¹ Because Albuquerque Fire Department EMTs are more responsive than private ambulance services, SWOC uses the AFD EMTs to transport women from SWOC to UNM Hospital when there are emergencies.

patient and the patient underwent an ultrasound so that Dr. Sella could assess and confirm the size of the fetus. The patient then met with a counselor who had a detailed conversation with the patient about her decision and the risks associated with the procedure. Dr. Sella then met with the patient and her family (including a brief physical examination and one-on-one time with the patient).

After assessing the patient and obtaining the appropriate consents, Dr. Sella initiated the protocol associated with third trimester abortions. Third trimester abortions are not surgical procedures. Third trimester abortions involve the demise of the fetus, the preparation (or "ripening") of the cervix, and the eventual induction of labor to deliver the dead fetus from the womb. The protocol that Dr. Sella followed was one she has employed consistently at SWOC and previously in Wichita and is consistent with the protocols employed at the other four clinics in the United States that provide third-trimester abortion services² and hence constitute the appropriate national standard of care.

In this case, Dr. Sella started by injecting Digoxin into the fetus to effect fetal demise. This also has the effect of softening the fetal tissue, which is conducive to a successful delivery. Dr. Sella then began preparation of the cervix, which included inserting laminaria (seaweed sticks that cause the cervix to open) and the administration of 100 micrograms (mcg) of Misoprostol, an agent used in this context to ripen the cervix. As the hearing officer will hear, Dr. Sella worked carefully and thoroughly to prepare the cervix for delivery. It is important to note that Dr. Sella did not start the induction of labor. Her plan was to prepare the cervix for three days and induce labor on the fourth day. But M.L. presented on the evening of May 11, 2011 in labor. Dr. Sella

² The evidence will show that there are only four clinics in the United States that provide third trimester abortion services, SWOC in Albuquerque; and clinics in Los Angeles, California; Boulder, Colorado; and Baltimore, Maryland.

gave additional Misoprostol to augment the labor. She then started the patient on a low dose of Pitocin, a uterine agent, and placed the patient on therapeutic rest (the patient was placed on pain medication and a sedative over night). The patient remained at the clinic and was constantly monitored by a staff member and Dr. Sella, who remained on the premises.

At approximately 7:00 AM on May 12, 2011, Dr. Sella administered a larger dose of Pitocin to the patient to further augment labor. The patient's labor contractions progressed. At approximately 1:00 PM on May 12, Dr. Sella examined the patient and was planning to decompress the skull of the fetus to facilitate delivery. Dr. Sella immediately recognized the signs of a possible uterine rupture. After confirming with an ultrasound that the fetus had changed into a position suggesting rupture, the Clinic called 911 to have the patient transported to the University of New Mexico Hospital. The uterine rupture was confirmed and Dr. Lisa Moore, a maternal fetal medicine specialist at UNMH operated on the patient and successfully repaired the rupture. Three days later, the patient was able to travel back to New York without incident.

LEGAL STANDARD

The Board issued its notice of charge against Dr. Sella based on the report of its expert, Dr. Gerald Bullock, an obstetrician/gynecologist from Houston, Texas. The evidence will show that Dr. Bullock, who is personally opposed to late-term abortions, seriously misread M.L.'s medical charts, incorrectly believing that Pitocin and Misoprostol had been provided simultaneously to M.L. from the first day that she presented at SWOC.³ Based on his misreading of the medical charts and his application

³ Dr. Bullock substantially misread the charts in a number of other ways that led him to make other incorrect criticisms of Dr. Sella's care.

of an erroneous standard of care that M.L.'s late-term abortion could be provided only in a hospital setting, Dr. Bullock advised the Board that Dr. Sella's treatment of M.L. was "grossly negligent."

At issue in this case is whether Dr. Sella committed "gross negligence" in the treatment of M.L. It is the Board's obligation to show by a preponderance of the evidence that Dr. Sella committed this elevated negligence. But the evidence will show that, contrary to committing gross negligence, Dr. Sella was not negligent in any way in her care of M.L. Instead, the evidence will show that Dr. Sella relied on her considerable expertise in her treatment of M.L. The fact that the patient experienced a known complication—a uterine rupture—was not due to negligence on Dr. Sella's part. The evidence will show that uterine rupture is a known risk for women who undergo so-called VBACs (vaginal births after C-section). The evidence will further show that both SWOC and her own physician advised the patient of this risk and that she properly consented to the procedure.

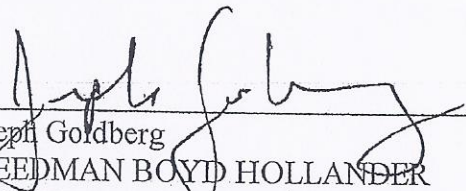
The Board will rest its case on the opinion of its expert, Dr. Gerald Bullock. Dr. Bullock is not an abortion provider. Indeed, Dr. Bullock has made clear in his opinions that he considers third trimester abortions to be morally repugnant, a view that has unfortunately shaded his opinions. Dr. Bullock's analysis and opinions will be contradicted by Dr. Sella's medical expert, Dr. Philip Darney of the Medical School at the University of California at San Francisco. Dr. Darney is one of the world's leading experts on obstetrics and family planning, including the termination of pregnancies. Dr. Darney will explain that Dr. Sella's care of M.L. was consistent with appropriate standards of care and was not "grossly negligent."

It is anticipated that Dr. Bullock will opine that it was "grossly negligent" for Dr. Sella to perform this procedure on M.L. in a clinic setting and not in a hospital. In reaching this opinion, Dr. Bullock applies the wrong standard. He fails to provide the standard applicable to abortions, which he concedes. Instead, he applies what he asserts is the obstetrical standard – that applicable to live births. The evidence will show, however, that contrary to Dr. Bullock's assertion of what is the applicable national standard, the vast majority of third trimester abortions, including for patients who had prior C-sections, are performed in an outpatient clinic setting like SWOC and this comports with the standard of care.⁴ Dr. Sella applied the correct standard of care here. She and the staff at SWOC carefully evaluated whether this patient was appropriate for care at SWOC and, in their expert opinion, determined they could care for the patient, which they did. The acceptance of M.L. as a patient for third trimester abortion procedure was consistent with how Dr. Sella had performed her professional practice for many years, was consistent with the protocols at SWOC and was consistent with the protocols applied by every other clinic providing third trimester abortion services throughout the country.

Although the Medical Practice Act does not include a definition of "gross negligence," in the context of medical malpractice, under the decided law of New Mexico, gross negligence must rise to the level of "reckless indifference." *Gonzales v. Sansoy*, 103 N.M. 127, 703 P.2d 904 (Ct.App.1984) ("The supreme court stated that punitive damages may be awarded where the negligence is wanton or gross, or where the

⁴ The evidence will also show that in New Mexico VBAC deliveries (vaginal births after prior C-sections) are routinely offered and provided by free-standing, non-hospital-based clinics, thus contradicting what Dr. Bullock incorrectly offers as the obstetric standard.

physician is shown to have been actuated by bad motives or intent to injure, where the treatment was given with utter indifference to the effect on the patient, or where the physician has been guilty of gross negligence amounting to reckless indifference. . . . A survey of the cases from other jurisdictions indicates that mere negligence or inadvertence is not sufficient to support an award of punitive damages, the negligence must be aggravated by a mental state such as reckless indifference.") In this case, it will be impossible for the Board to demonstrate that Dr. Sella engaged in "reckless indifference" in her care of the patient. The great weight of evidence will show that Dr. Sella was the very opposite of reckless or indifferent. Dr. Sella carefully considered the risks the patient faced and determined she could provide adequate care at SWOC, which she did.



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