

CAB

MAY 15 2017

BEFORE THE BOARD OF HEALING ARTS
OF THE STATE OF KANSAS

KS State Board of Healing Arts

In the Matter of)
) KSBHA Docket No. 17-HA00060
 Allen S. Palmer, D.O.)
 Kansas License No. 05-33326)
 _____)

PETITION

COMES NOW the Petitioner, the Kansas State Board of Healing Arts ("Board"), by and through Susan R. Gering, Deputy Litigation Counsel, ("Petitioner") and initiates these proceedings pursuant to the provisions of K.S.A. 65-2836, K.S.A. 65-2851a, and K.S.A. 77-501 *et seq.* For its cause of action, Petitioner alleges and states:

FACTS COMMON TO ALL COUNTS

1. The Board is the sole and exclusive administrative agency in the State of Kansas authorized to regulate the practice of the healing arts, specifically the practice of osteopathic medicine and surgery. K.S.A. 65-2801 *et seq.*
2. Allen S. Palmer, D.O.'s ("Licensee") last known mailing address to the Board is: [REDACTED] Clayton, Missouri 63105.
3. Licensee is or has been entitled to engage in the practice of osteopathic medicine and surgery in the State of Kansas, having been issued original and permanent license No. 05-33326 on or about August 19, 2008, and having renewed most recently such license on or about October 31, 2016.
4. Since issuance of licensure in a regulated profession as an osteopathic medical doctor in the State of Kansas, pursuant to K.S.A. 65-2801, *et seq.*, Licensee did commit the following acts:

COUNT I

5. Petitioner incorporates herein, by reference, paragraphs one (1) through four (4) as fully restated and re-alleged herein.

6. On or about December 22, 2014, Patient 1, a 13-year-old female, presented to Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri, Inc. ("Planned Parenthood") for a surgical abortion with a gestational age of the fetus at approximately 10 weeks and 5 days. Patient 1 had indicated that her pregnancy was a result of consensual intercourse with her then 19-year-old boyfriend. Exhibit 1: Patient 1 Medical Records received from Planned Parenthood.

7. On December 22, 2014, an in-clinic suction abortion procedure was performed by Licensee.

8. Post-procedure Licensee failed to preserve fetal tissue extracted during Patient 1's abortion and submit the tissue to the Kansas Bureau of Investigation ("KBI").

9. On or about January 16, 2015, Aaron Samulcek, Chief Operating Officer of Planned Parenthood, filed a complaint with the Board reporting that Licensee, who Mr. Samulcek states was their employee, "a physician duly licensed to practice medicine and surgery in Kansas, after performing an abortion procedure on a minor less than 14 years of age, did not comply with K.S.A. 65-67a09 and K.A.R. 16-10-2 when he inadvertently failed to preserve fetal tissue extracted during such abortion and submit such tissue to the [KBI] or to a laboratory designated by the director of the [KBI]." Exhibit 2: Complaint dated January 16, 2015.

10. On or about June 12, 2015, Planned Parenthood provided medical records for Patient 1 and a narrative regarding Planned Parenthood's self-reported incident that occurred on December 22, 2014, involving Patient 1. Exhibit 3: Planned Parenthood letter dated June 12, 2015.

11. In its letter, Planned Parenthood outlined changes to policies and procedures that have been implemented since the incident on December 22, 2014, which includes in part, updates to the electronic health records including new task alerts “to key providers to assure the initiation of the specific process”, color coding of records: yellow for minors 14-17 and blue for minors 13 years or younger, and enhanced training in regards to KBI packaging and handling processes. *Id.*

12. On or about August 12, 2015, Licensee’s attorney provided a response on behalf of Licensee. The letter states, in part, that:

[Licensee] was not aware of nor did he receive training on any policies or procedures maintained by [Planned Parenthood] that were in place at the time of the incident to ensure compliance with K.S.A. 65-67a09 and K.A.R. 16-10-2. In [Licensee’s] opinion and as [Planned Parenthood] acknowledges in its response to [Board staff’s] request for information, it was [Planned Parenthood’s] inadvertent failure to follow its policies and procedure regarding the treatment of minors and specifically the failure to notify personnel involved in the procedures of the age of the patient that resulted in the inadvertent violation of the statute and regulation.

See Exhibit 4: Licensee’s Response p. 1.

13. Licensee was a part-time independent contractor with Planned Parenthood whose sole job was to perform procedures to terminate pregnancies that were in a patient’s first trimester. *Id.*

14. However, on the date of Patient 1’s procedure Licensee was “covering for the medical director who was on vacation for the holidays.” *Id.* at 2.

15. Licensee’s habit before performing a procedure was to review a patient’s ultrasound to verify gestational age, check a patient’s informed consent for signature, confirm the patient’s understanding of and consent to the procedure, and perform a physician examination to verify a patient’s health. *Id.*

16. Licensee alleges that he had never performed an abortion on a minor, less than 14 years of age until Patient 1’s procedure on December 22, 2014; therefore, Licensee “found it unnecessary

to familiarize himself in detail with the laws of the State of Kansas requiring the preservation of fetal tissue extracted during an abortion procedure on a minor who is less than 14 years of age.”

Id.

17. Licensee’s expectation was that Planned Parenthood “would have adequate procedures in place to assure compliance with those and any other statutes that would be implicated by the procedures performed at the clinic.” *Id.*

18. Licensee maintains that “inadvertent failure to preserve fetal tissue was solely the result of a system error at [Planned Parenthood] that was caused by the failure of clinic administrative and nursing staff to follow the procedures in place at the time and further facilitated by inadequate policies and procedures by that facility.” *Id.* at 4.

19. Additionally, Licensee in his response to the Board states that there is a difference between the electronic format of Patient 1’s record versus the printed medical record in the Board’s possession. Specifically, Licensee stated the printed record “would have one believe that the age was prominently placed at the top of the first page of the patient’s record, which is misleading. That is not the format of the electronic information on the computer screens available to [Licensee] for routine review prior to the procedure being performed.” *Id.* at 3.

20. On or about May 8, 2017, the Board received additional information from Planned Parenthood that included electronic screenshots of Patient 1’s medical record. *See* Exhibit 5.

21. Additionally, Mr. Samulcek provided a letter with the records stating Planned Parenthood had enclosed the following:

[S]creen shots of the entire electronic medical record, given the limitations of the software involved, as best we could reproduce as they would have been electronically displayed immediately prior to the abortion procedure performed December 22, 2014, for [Patient 1]. We have been advised by our electronic health records vendor that information in these medical records for this patient would have

been added to by the physician's documented procedures, but, the patient's name, gender, date of birth, weight, address, phone number, medical record number, insurance, preferred language and physician name would have appeared on her medical records and would never be changed or overwritten. . . .

I am enclosing a photocopy picture of an exemplar patient identification band which shows what information would have been contained on the patient identification band for this patient.

Id.

22. K.S.A. 65-67a09 states:

- (a) This section shall be known and may be cited as the child rape protection act.
- (b) As used in this section: . . . (2) 'Physician' means any person licensed to practice medicine and surgery.
- (c) Any physician who performs an abortion on a minor who was less than 14 years of age at the time of the abortion procedure **shall preserve**, in accordance with rules and regulations adopted by the attorney general pursuant to this section, fetal tissue extracted during such abortion. The **physician shall** submit such tissue to the Kansas bureau of investigation or to a laboratory designated by the director of the Kansas bureau of investigation.
- (e) Failure of a physician to comply with any provision of this section or any rule or regulation adopted hereunder: (1) shall constitute unprofessional conduct for purposes of K.S.A. 65-2837, and amendments thereto; and (2) is a class A, nonperson misdemeanor upon a first conviction and a severity level 10, nonperson felony upon a second or subsequent conviction.

Kan. Stat. Ann. § 65-67a09 (2005) (emphasis added).

23. K.S.A. 65-67a09(c) does not require knowledge or intent of Licensee under the law.

24. K.S.A. 65-67a09 places the responsibility for preservation and submission of fetal tissue in an abortion procedure that is performed on a minor who is less than 14 years of age on the performing physician, in this case, Licensee; not Planned Parenthood or its staff.

25. K.A.R. 16-10-2(a) states:

Each physician who performs an abortion on a minor who is younger than 14 years of age **shall perform** or **shall ensure** that the physician's staff performs the following steps:

- (1) Keep at least one fetal tissue collection kit provided by the KBI on hand at all times and obtain replacement kits from the KBI as needed; and
- (2) Collect, preserve, and ship fetal tissue using one of these fetal tissue collection kits.

Kan. Admin. Regs. § 16-10-2 (2005) (emphasis added).

26. K.A.R. 16-10-2(a) does not require knowledge or intent of Licensee under the law.

27. K.A.R. 16-10-2(a) places responsibility on the physician, who performs an abortion procedure on a minor who is less than 14 years of age, to either perform the steps required for fetal tissue collection or ensure the physician's staff perform the steps. In this case, Licensee was responsible for the fetal tissue collection and/or to ensure the fetal tissue collection occurred; not Planned Parenthood or its staff.

28. Ignorance of the law is not a defense or excuse that is recognized in Kansas. *See Chelf v. State*, 46 Kan.App.2d 522 (2011) (finding that an inmate was not deprived the right to procedural due process rights when he claimed he did not know the Department of Corrections adopted a 10-day deadline for filing a personal injury claim. The court stated 'ignorance of the law excuses no one; not because courts assume everyone knows the law, but because this excuse is one all will plead and no one can refute.') (internal citations omitted); *see also State v. Jones*, 47 Kan.App.2d 512 (2012) ("Generally, citizens of a state are presumed to know that the legislature has made certain conduct illegal.") (internal citations omitted).

29. Licensee's acts and conduct constitute violations of the Kansas Healing Arts Act as follows:

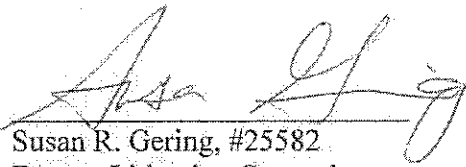
- a. K.S.A. 65-2836(b), in that Licensee has committed an act or acts of unprofessional and/or dishonorable conduct;
- b. K.S.A. 65-2836(b) as further defined by K.S.A. 65-2837(b)(12), in that Licensee committed conduct likely to deceive, defraud or harm the public;
- c. K.S.A. 65-2836(b) as further defined by K.S.A. 65-2837(b)(30) in that Licensee failed to properly supervise, direct or delegate acts which constitute the healing arts to persons who perform professional services pursuant to such licensee's direction, supervision, order, referral, delegation or practice protocol when Licensee; and/or
- d. K.S.A. 65-2836(b) as further defined by K.S.A. 65-2837(b) and 65-67a09(e)(1), in that Licensee violated K.S.A. 65-67a09, and amendments thereto. Specifically, Licensee violated 65-67a09 when he performed an abortion on Patient 1, a 13-year-old female and failed to preserve fetal tissue extracted during such abortion and failed to submit such tissue to the KBI or to a laboratory designated by the director of the KBI.

30. Pursuant to K.S.A. 65-2836 *et. seq.*, the Board has grounds to revoke, suspend, censure, place on probation, fine or otherwise limit Licensee's license for violations of the Kansas Healing Arts Act.

WHEREFORE, Petitioner prays that the Board make findings of fact and conclusions of law that Licensee committed these acts in violation of the Kansas Healing Arts Act, that Licensee's license to practice osteopathic medicine and surgery in the State of Kansas be revoked, suspended, placed on probation, censured, or otherwise limited, and that the Board assess such administrative fines and impose such costs against Licensee as it shall deem just and proper and as authorized by law.

WHEREFORE, Petitioner further requests this matter be set for a conference hearing pursuant to K.S.A. 77-533. It would be appropriate to set this matter for a hearing at the next available Board meeting.

Respectfully submitted,



Susan R. Gering, #25582
Deputy Litigation Counsel
800 SW Jackson Street
Lower Level Suite A
Topeka, KS 66606
(785) 368-8212
(785) 368-8210 – facsimile
susan.gering@ks.gov

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing Petition was served this 15th day of May, 2017, by depositing the same in the United States Mail, first-class postage prepaid, and addressed to:

Allen S. Palmer, D.O.
Licensee
[REDACTED]
Clayton, Missouri 63105

Tom L. Theis
Attorney for Licensee
534 South Kansas Ave.
Topeka Tower, Suite 1400
Topeka, Kansas 66603-3436

and the original was filed with the office of the Executive Director:

Kathleen Selzler Lippert
Executive Director
Kansas State Board of Healing Arts
800 SW Jackson Lower Level, Suite A
Topeka, KS 66612

