

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In Re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
	)	MPC 148-0803	MPC 126-0803
	)	MPC 106-0803	MPC 209-1003
David S. Chase	)	MPC 140-0803	MPC 89-0703
	)	MPC 122-0803	MPC 90-0703
Respondent	)		MPC 87-0703

**MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR JUDGMENT
AS A MATTER OF LAW**

At the close of the State's case in the above-captioned matters, Respondent David Chase, M.D. (hereinafter "Respondent") filed a Motion for Judgment as a Matter of Law (hereinafter "JMOL") asking the Hearing Committee (hereinafter "Committee") to dismiss the pending charges for two reasons. First, the Respondent argues that the State has not met its burden of proving its case-in-chief against the Respondent. Second, the Respondent seeks dismissal of the Amended Superseding Specification of Charges (hereinafter "Amended Charges") employing the baseless allegation that the State falsified evidence in the summary suspension proceeding.¹ The Respondent's arguments for dismissal are without merit and the motion must be denied.

As a fundamental matter there is no procedural mechanism in the Vermont Administrative Procedures Act ("VAPA", 3 V.S.A. §800, et seq.) or under the rules of the Vermont Board of Medical Practice ("Board") for the type of motion Respondent has filed. While the Vermont Rules of Civil Procedure provide for such a motion (V.R.C.P. 50), the Vermont Supreme Court has repeatedly stated that Rules of Civil Procedure apply to proceedings in District and Superior Court and are not applicable to administrative proceedings. While the

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

¹ Respondent has not alleged, nor could he, that the State has falsified evidence in the hearing on the merits.

Board may use the Rules as guidelines in its proceedings, the Board cannot adopt the Rules as procedure without going through formal rulemaking under VAPA. If the Committee addresses the merits of Respondent's motion it will in essence have adopted Rule 50 as a part of future procedures of the Board in contravention of VAPA.

Should the Committee decide to address the merits of Respondent's motion, the State's evidence clearly meets the legal standard to defeat Respondent's motion. The Vermont Supreme Court has set forth the legal standard for deciding a Rule 50 motion as follows:

[T]he evidence is viewed in the light most favorable to the nonmoving party and we exclude the effects of any modifying evidence.

Gero v. J.W.J. Realty, 171 Vt. 57, 59 (2000).² If evidence exists that may fairly and reasonably support the State's allegations of unprofessional conduct, then judgment as a matter of law is improper. *Id.* (citing *Brueckner v. Norwich University*, 169 Vt. 118, 122 (1998)). When the evidence is evaluated in the light most favorable to the State and modifying evidence is excluded, it is clear that the evidence fairly and reasonably supports the State's allegations of unprofessional conduct.³

The Respondent's argument that the charges should be dismissed because the State allegedly falsified evidence in the summary suspension proceeding is without merit for two reasons. First, there is no evidence to support the allegation that the State falsified evidence. Second, the Board has already addressed this type of argument in its decision on the Respondent's first motion to dismiss. In that decision, the Board granted Respondent's motion

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GENERAL
109 State Street
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² Nowhere in his motion does Respondent cite cases that set forth the appropriate standard for deciding his motion at this stage of the proceedings. The only cases cited by Respondent set forth the standard for determining if the State has met its burden after the conclusion of all the evidence. JMOL, p. 5.

³ Respondent's characterization of the State's burden as "high" (JMOL, p. 1) is woefully misleading. The State's burden in this case is the least onerous burden--proof by a preponderance of the evidence.

to rescind the summary suspension. Notwithstanding the rescission of the Summary Suspension, the Board also denied Respondent's motion to dismiss the charges. Any argument for dismissal of the charges based on the summary suspension proceedings is redundant and moot and should be denied.

I. STATE DID NOT FALSIFY EVIDENCE IN SUMMARY SUSPENSION HEARING AND ISSUES REGARDING SUMMARY SUSPENSION ARE MOOT AND CANNOT SUPPORT DISMISSAL OF THE AMENDED CHARGES.

The Respondent's argument that the Committee recommend dismissal based on alleged falsification of evidence in the summary suspension (JMOL, pp. 32-36) is without merit. First, the State has repeatedly argued in this case, and incorporates by reference those arguments here, that the Board does not have the authority to dismiss charges brought by the State. Second, the State at no point, either in these proceedings or in the summary suspension proceedings, presented evidence it knew to be untrue or engaged in affirmative actions to mislead the Board or the Committee or made affirmative statements to the Board or Committee contrary to what it knew to be the truth. See JMOL, p. 36 and cases cited therein. Finally, any irregularities, whether real or imagined, with respect to the summary suspension have already been remedied by the Board when it rescinded the summary suspension. Issues with respect to the summary suspension proceeding are therefore moot and cannot be used as a means of dismissing the proceeding on the merits.

Respondent should know from the history of these proceedings that his request for dismissal of the charges is without merit. Respondent attempted this maneuver in his original motion to dismiss. Respondent sought to have the charges in the case dismissed based on alleged improprieties in the summary suspension hearing. The Board rejected the argument then

and the Committee should reject the same argument now. Respondent's motion to dismiss the charges must be denied.

II. NEITHER THE BOARD'S STATUTE NOR RULES NOR VAPA PROVIDE FOR JUDGMENT AS A MATTER OF LAW AND BOARD CANNOT ADOPT RULES OF CIVIL PROCEDURE WITHOUT FORMAL RULE MAKING.

The Board, through the Committee, should not address the merits of Respondent's pending motion. Neither VAPA nor the Board rules or statute provide a mechanism for a Judgment as a Matter of Law. In order to adopt such a procedure, the Board must go through formal rulemaking under VAPA. Further, addressing the Respondent's pending motion on the merits will cause unnecessary delay in the resolution of these proceedings. The Committee should not address the merits of Respondent's motion for judgment as a matter of law.

The Vermont Supreme Court has repeatedly stated that the rules of civil procedure are only applicable to proceedings in superior and district courts and are not applicable to administrative hearings. *Cyr v. Subaru of America, Inc.*, 162 Vt. 226, 229 (1994) (rules of civil procedure, particularly Rule 60, not applicable Motor Vehicle Arbitration Board); *Condosta v. Department of Social Welfare*, 154 Vt. 465, 467 (1990)(administrative hearings not included in purview of rules of civil procedure); *International Association of Firefighters v. Montpelier*, 133 Vt. 175, 177 (1975). If the Committee and Board were to address the merits of Respondent's motion they would be doing much more than using the civil rules as guidelines for applying existing procedures. Cf. *In re Houston*, ___ Vt. ___, 906 A.2d 1174, 1178, 2006 Vt. 59, ¶ 11 (2006)(while rules of civil procedure not applicable to administrative hearings reasonable for Human Services Board to consult rules to determine discovery sanction). If the Board addresses the merits of Respondent's motion, it would perforce, have to allow subsequent Respondents to

utilize the same procedure. The Board would thus be adopting Rule 50 as part of its procedure without going through formal rulemaking in violation of VAPA. See, 3 V.S.A. §831(d). The Board, therefore, cannot address the merits of Respondent's motion.

In addition to the legal impediments preventing the Committee from addressing Respondent's motion there are practical impediments as well. Contrary to Respondent's arguments for considering the motion, the motion will not aid in bringing these matters to a final resolution in an efficient manner. The Committee can only recommend a disposition of the motion. A final decision on the motion would have to come from a full Hearing Panel. That procedure would take more time than simply allowing the hearing to conclude and having the Committee make a recommendation on the merits. By addressing the merits of Respondent's motion, the Committee, as one Committee member correctly observed, puts the proceedings on two tracks which delays resolution. The Committee should not address the merits of Respondent's pending motion.

III. WHEN EVIDENCE IS VIEWED IN LIGHT MOST FAVORABLE TO THE STATE AND MODIFYING EVIDENCE IS EXCLUDED EVIDENCE FAIRLY AND REASONABLE SUPPORTS THE STATE'S ALLEGATIONS OF UNPROFESSIONAL CONDUCT IN THE AMENDED CHARGES.

If the Committee decides to address the merits of Respondent's JMOL motion, it must apply the standard employed by trial courts and the Vermont Supreme Court for deciding such motions. The standard is the same at both the trial and appellate level. *Gero*, 171 Vt., at 59. That standard requires the Committee to view the evidence in the light most favorable to the State and exclude any modifying evidence (e.g. Respondent's explanations for the manner in which he maintained his records). When the evidence is evaluated in that light, the Committee must deny the Respondent's if the evidence fairly and reasonably supports the State's allegations of unprofessional conduct in the Amended Charges. *Id.*

Respondent, in his memorandum in support of the motion, makes no attempt to apply the standard for deciding a JMOL. Indeed, there is no citation to any case setting forth the standard. Remarkably in the JMOL, Respondent fails to discuss the evidence in terms of the controlling statute—26 V.S.A. §1354 — which defines unprofessional conduct. Instead, contrary to the applicable standard, Respondent argues the evidence—primarily modifying evidence that should be excluded in deciding the motion—in the light most favorable to the Respondent.

When the standard set forth by the Supreme Court is applied correctly to all eleven cases before the Committee, it is clear the evidence fairly and reasonably supports the allegations of unprofessional conduct in the Amended Charges and the Respondent’s motion must be denied.

HELENA NICOLAY (NORDSTROM) – MPC 15-02003 (PATIENT #1)

Ms. Nicolay testified that she saw Respondent only once on Friday, January 17, 2003. Hearing Transcript, In re: David S. Chase, MPC 15-2003, et al., October 23, 2006, Testimony of Helena Nicolay, pp. 5 (Hereinafter citations to transcript will be “Tr., __/__/06, (witness name) Test., p. __”). Ms. Nicolay was having problems with eyestrain and wanted to have the problems corrected as soon as possible. Tr., 10/23/06, Nicolay Test., p. 5 . Respondent told Ms. Nicolay that she had cataracts and had her scheduled for a pre-operative appointment the following Monday and the first surgery scheduled for the following week. Tr., 10/23/06, Nicolay Test., p. 7,9, 1-HN-1-002 . Respondent told Ms. Nicolay that she should not get a second opinion and told Ms. Nicolay that he (Respondent) was the only physician in Vermont who could do this procedure. Tr., 10/23/06, Nicolay Test., p. 8 . Ms. Nicolay was upset regarding the diagnosis of cataracts and could not reconcile the diagnosis with the fact that she “saw fine.” Tr., 10/23/06, Nicolay Test., p. 10 . There is neither testimony nor any indication in

Ms. Nicolay's records that Respondent provided any explanation to Ms. Nicolay as to why cataract surgery was medically indicated in her case.

Respondent's chart for Ms. Nicolay contains a diagnosis of "dense central nuclear cortical cataracts os [left eye] > od [right eye]." 1-HN-1-002. Despite her testimony that she "saw fine" when she went to Respondent, Respondent had his staff write in Ms. Nicolay's chart that Ms. Nicolay was "was unable to see to drive clearly at night." 1-HN-1-001. Ms. Nicolay also testified that she did not remember saying that she was unable to see to drive clearly at night and "normally, I see fine at night." Tr., 10/23/06, Nicolay Test., p. 20.

Ms. Nicolay's chart also states that she was given a second opinion-when in fact she had not received a second opinion. 1-HN-1-002. In the section of Ms. Nicolay's chart designated as "vision" there is a result of 20/50 for each eye, the result of contrast sensitivity test ("CST") with a brightness acuity tester ("BAT") on high. 1-HN-1-001. Though at least two Snellen tests were done—one with dilation and one without dilation—these results are not recorded in the portion of Ms. Nicolay's record designated as vision. Tr., 9/11/06, Chase Test., pp. 181-183. In fact the results of the Snellen test performed without dilation were thrown away. *Id.*

Ms. Nicolay immediately sought a second opinion from her optometrist, Dr. Eriksson. Tr., 10/23/06, Nicolay Test., p. 11. Dr. Eriksson saw Ms. Nicolay the following Thursday and told her she did not have cataracts. Tr., 10/23/06, Nicolay Test. pp. 11,77. At the request of the Board, Ms. Nicolay saw Dr. Patrick Morhun on June 30, 2003. Tr., 12/4/06, Morhun Test., p. 14. Dr. Morhun's examination of Ms. Nicolay found her vision to be 20/15 in each eye (with correction) which is considered "superb" vision." Tr., 12/4/06, Morhun Test., p. 15. Dr. Morhun also found Ms. Nicolay's lenses to be normal and without cataracts. Tr., 12/4/06, Morhun Test., p. 16.

The evidence in this case fairly and reasonable supports the State's allegations of unprofessional conduct under 26 V.S.A. §1354. Respondent's misrepresentation in Ms. Nicolay's chart regarding dense cataracts when in fact she had no cataracts, regarding a second opinion given when none was given, and regarding her ability to drive at night support the State's allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Further, Respondent's attempt to discourage Ms. Nicolay from obtaining a second opinion by asserting he was the only qualified physician also demonstrates unfitness to practice and dishonest, immoral or unprofessional conduct.

Respondent's use of CST with BAT results as the sole indicator of Ms. Nicolay's most accurate vision also fairly and reasonably supports the State's claims of making a false record. Other physicians testified that neither glare nor dilation should be used to determine a patient's best vision. Tr., 11/8/06, Cleary Test., p. 8-9; Tr., 11/20/06, Irwin Test., p. 10-11; Tr., 12/4/06, Morhun Test., p. 6-7. Contrary to the testimony of the other physicians, Respondent recorded the results of the CST with BAT as Ms. Nicolay's vision even though Ms. Nicolay's Snellen result, even with dilation, indicated better vision than the CST with BAT result. 1-HN- -1-013. The fact that Respondent threw away and did not record the results of the Snellen test performed without either glare or dilation fairly and reasonably supports claim that Respondent sought to make a false record indicating that Ms. Nicolay's vision was worse than it actually was.

All of the evidence described above supports the State's allegations that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) and/or a failure to

practice competently under 26 V.S.A. §1354(b). Of particular importance is Respondent's failure to explain or even determine why cataract surgery was medically indicated for Ms. Nicolay. The American Association of Ophthalmology's ("AAO") Preferred Practice Patterns for Cataract in the Adult Eye (Exhibit 503b) states that the primary indication for surgery is when a patient's "visual function no longer meets their needs." Exhibit 503b, p. 15. Contraindications for surgery under the AAO Preferred Practice Patterns, relevant to these cases, are that the patient does not wish surgery, glasses or contacts are meeting the patient's needs, and the quality of the patient's life has not been compromised. Exhibit 503b, pp. 15-16. To determine the functional impairment due to vision, the AAO states that questions should be asked of the patient about his or her vision with respect to "activities that the patients views as important." Exhibit 503b, p. 13.

Consistent with the AAO Preferred Practice Patterns, every other physician who testified about the process for determining the need for cataract surgery described a discussion with the patient about the effect of their on their activities of daily living with the final decision ultimately resting with the patient. Tr., 10/23/06, Cavin Test., p. 132; Tr., 10/24/06, Guilfoy Test., pp. 126, 269; Tr., 10/26/06, Watson Test., pp. 106, 209; Tr., 11/8/06, Cleary Test., p. 6, 8; Tr., 11/20/06, Irwin Test., p. 13; Tr., 11/30/06, Tabin Test., pp. 17-18; Tr., 12/4/06, Morhun Test., p. 12. Even assuming that Ms Nicolay had cataracts (a generous assumption given the evidence), there is no evidence to support the conclusion that Ms. Nicolay's vision, with glasses, no longer met her needs or that her quality of life was compromised by her vision. More importantly, there is no evidence that Respondent made a meaningful attempt to determine if Ms. Nicolay's vision was meeting her needs as described in the AAO Preferred Practice Patterns and as practiced by other physicians. Further, the evidence reasonably and fairly supports the conclusion that the decision

regarding cataract surgery was Respondent's and Ms. Nicolay was pressured into being scheduled for surgery constituting a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

JUDITH SALATINO-MPC 208-1003 (PATIENT #2)

Judith Salatino was a long-time patient of Respondent. Tr., 10/26/06, Salatino Test., p. 5. Ms. Salatino saw Respondent on June 11, 2003 because she thought she needed a new prescription for her glasses. Tr., 10/26/06, Salatino Test., p. 6. When Ms. Salatino saw Respondent on June 11, 2003 she felt she was seeing fine, was driving both at night and in the day and was doing all the things she likes to do. Tr., 10/26/06, Salatino Test., p. 6-7. At the appointment, Respondent told Ms. Salatino that she did not need glasses but instead needed cataract surgery. Tr., 10/26/06, Salatino Test., p. 10. Respondent showed Ms. Salatino her CST with BAT results (1-JS-1-064) and told her that the results indicated her vision was so bad that if she were a truck driver she would not be allowed to drive. Tr., 10/26/06, Salatino Test., p. 11.

When Ms. Salatino asked about obtaining a second opinion, Respondent told Ms. Salatino that he was an expert in the field and that he was giving her a second opinion that the surgery needed to be done. Tr., 10/26/06, Salatino Test., p. 12. When Ms. Salatino asked if surgery could be delayed until she became eligible for Medicare, Respondent told Ms. Salatino that the surgery needed to be done right away and she should not wait to have it done. Tr., 10/26/06, Salatino Test., p. 12. Ms. Salatino agreed to have the surgery because Respondent told her she needed the surgery and she trusted Respondent. Tr., 10/26/06, Salatino Test., p. 12. Ms. Salatino's underwent surgery on her right eye on July 15, 2003 and was scheduled to

undergo surgery on left eye on July 22, 2003 but Respondent's license was summarily suspended the previous day. 1-JS-1-015, Tr., 10/26/06, Salatino Test., p. 14.

Notwithstanding that Ms. Salatino was driving both at night and during the day, Ms. Salatino's chart for June 11, 2003 states that Ms. Salatino is "unable to see clearly to drive in glare HS [at night]." 1-JS-1-013. Ms. Salatino testified that she did not tell Respondent nor anyone at his office that she was unable to see clearly to drive at night. Tr., 10/26/06, Salatino Test., p. 13. Ms. Salatino's chart also indicates that she was given a diagnosis of dense central nuclear cortical cataracts in both eyes and that Ms. Salatino was given a second opinion. 1-JS-1-014. In the section designated as "vision" Respondent has entered Ms. Salatino's CST with BAT score (20/100 in both eyes) as the only indicator of Ms. Salatino's vision notwithstanding that her Snellen result, even with dilation, indicated a considerably better vision of 20/30 in the left eye and 20/25 in the right. 1-JS-1-064. In Ms. Salatino's record of June 11, 2003, there are no results for CST or Snellen test performed without glare and without dilation.

Ms. Salatino was examined by both Dr. Irwin and Dr. Morhun. Dr. Irwin saw Ms. Salatino on July 25, 2003. Tr., 11/20/06, Irwin Test., p. 15. On that day Ms. Salatino's Snellen results with correction were 20/20 plus 2 in the unoperated left eye. Tr., 11/20/06, Irwin Test., p. 16. Upon performing a slit lamp examination, Dr. Irwin found a bare trace of cortical opacity in Ms. Salatino's left eye. Tr., 11/20/06, Irwin Test., p. 18. Dr. Irwin found nothing that would indicate a dense cataract. Tr., 11/20/06, Irwin Test., p. 18. Based on these results Dr. Irwin concluded that surgery on Ms. Salatino's left eye was not indicated. Id.

Ms. Salatino was examined by Dr. Morhun on September 5, 2003 at the request of the Board. Tr., 12/4/06, Morhun Test., p. 24. The results of Dr. Morhun's exam found Ms. Salatino's vision in the unoperated left eye to be 20/30 minus 2 with correction and Dr. Morhun

was able to refract Ms. Salatino to 20/20 in the unoperated left eye. Tr., 12/4/06, Morhun Test., p. 25. In performing a slit lamp exam of Ms. Salatino's unoperated left eye, Dr. Morhun found "early nonvisually significant cataract." Tr., 12/4/06, Morhun Test., p. 26. Based on these results Dr. Morhun concluded that surgery on Ms. Salatino's left eye was not indicated. Tr., 12/4/06, Morhun Test., p. 27.

As in the previous case, viewing the evidence in the light most favorable to the State, the evidence in this case fairly and reasonably supports the State's allegations of unprofessional conduct under 26 V.S.A. §1354. There are the same misrepresentation in Ms. Salatino's chart regarding dense cataracts in both eyes when in fact the cataract in the left eye was an early cataract and not visually significant. There are misrepresentations regarding a second opinion given when none was given and regarding Ms. Salatino's inability to drive at night that support the State's allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Respondent's attempt to discourage Ms. Salatino from obtaining a second opinion by asserting he was an expert in the field and that he would give Ms. Salatino a second opinion demonstrates unfitness to practice and dishonest, immoral or unprofessional conduct.

As in the previous case, Respondent's use of CST with BAT results as the sole indicator of Ms. Salatino's most accurate vision also fairly and reasonably supports the State's claims of making a false record. Respondent recorded the results of the CST with BAT as Ms. Salatino's vision even though her Snellen result, even with dilation, indicated much better vision than the CST with BAT result. Further, Respondent's use of the CST with BAT result to persuade Ms. Salatino that her vision was so bad as to require surgery not only supports the State's claim of

making a false record but also demonstrates unfitness to practice, dishonest, immoral or unprofessional conduct, and willful misrepresentation in treatment.

All of the evidence described above supports the State's allegations that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) and/or a failure to practice competently under 26 V.S.A. §1354(b). There is in this case, as there was in the previous case a failure on the part of Respondent to evaluate the relationship between Ms. Salatino's every-day functioning and her vision. Indeed, had Respondent conducted the type of inquiry recommended in the AAO Preferred Practice Outlines and as described by the other physicians at hearing, Respondent would have found that Ms. Salatino's vision was meeting her needs and therefore surgery was not indicated. The evidence reasonably and fairly supports the conclusion that the decision regarding cataract surgery was Respondent's and Ms. Salatino was pressured into undergoing surgery and that Respondent performed surgery when not medically indicated. Such conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

SUSAN LANG—MPC 148-0803 (PATIENT #4)

Susan Lang was also a long-time patient of Respondent. Tr., 10/2/06, Lang Test., p. 7. At her appointment with Respondent in July of 2002, Respondent told Ms. Lang in what she described as an agitated state, that he could understand why Ms. Lang did not have complaints about her vision and that he could not recommend surgery if she did not have complaints. Tr., 10/2/06, Lang Test., p. 11. Respondent also informed Ms. Lang that she had repeatedly failed the cataract test. Id. Respondent then showed Ms. Lang the results of a previous CST test. Tr.,

10/2/06, Lang Test., p. 12. Respondent never explained the results of the CST test but simply told Ms. Lang that if she were applying for a truck driver's license she would fail. Tr., 10/2/06, Lang Test., p. 13. Ms. Lang could not understand why she was not having complaints when she had repeatedly failed the cataract test. Tr., 10/2/06, Lang Test., pp. 13-14.

Ms. Lang then saw Respondent in June of 2003. Tr., 10/2/06, Lang Test., p. 15. On this day Ms. Lang informed Respondent that she having a particular problem with blurriness and working with an instrument at her job. Tr., 10/2/06, Lang Test., p. 15-16. Based on what Respondent had told her at the previous appointment, Ms. Lang wondered if the problem was related to the cataracts. Tr., 10/2/06, Lang Test., p. 16. Respondent said the blurriness was related to cataracts and the problem could be corrected with surgery. Id. Respondent did not ask Ms Lang about how her vision was affecting other aspects of her life nor did he discuss glasses as an alternative to solving her problem with blurriness. Tr., 10/2/06, Lang Test., p. 17. When Ms. Lang asked about a second opinion, Respondent said loudly she should not, showed her a plaque and told her he was the only physician in Vermont that was a member of a particular group. Tr., 10/2/06, Lang Test., pp. 17-18. Ms. Lang interpreted this to mean that Respondent was ore qualified than other physicians. Tr., 10/2/06, Lang Test., p. 18. Ms. Lang agreed to surgery based on what Respondent had told her at the 2002 appointment and the blurriness problem and her trust in Respondent. Tr., 10/2/06, Lang Test., p. 16. Respondent performed surgery on Ms. Lang's right eye on July 15, 2003.

Respondent's records for Ms. Lang's visit in June of 2003 contain a diagnosis of dense central nuclear cortical cataracts in both eyes. 1-SL-1-1-019. Ms. Lang's records also indicate that a second opinion was given. Id. Respondent has recorded in Ms. Lang's record that Ms. Lang "can't see to drive safely AS [at night] due to glare from cataracts." 1-SL-1-1-019. Ms.

Lang never told Respondent that she could not see to drive safely at night and in fact her vision was not affecting her ability to drive. Tr., 10/2/06, Lang Test., p. 18-19. In the portion of the record designated as “vision” the only result recorded is the CST with BAT result (20/100 right eye-20/70 left eye). Ms. Lang’s Snellen result, even with dilation, was far better (20/40 both eyes) but was not recorded in the vision portion of the record. 1-SL-1-1-068. For June 30, 2003, there is no result for CST or Snellen test administered without glare or without dilation.

Dr. Geoffrey Tabin examined Ms. Lang on July 24, 2003. 1-SL-1-2-000. At that examination Ms. Lang’s vision in her unoperated left eye was 20/25 plus one with correction and did not improve with refraction. Tr., 11/30/06, Tabin Test., p. 28-29. Dr. Tabin performed a slit lamp exam and diagnosed Ms. Lang with a trace cortical cataract in the unoperated left eye. Tr., 11/30/06, Tabin Test., p. 29. Based on these results and because Ms. Lang was “able to function extremely well with her visual function” (Tr., 11/30/06, Tabin Test., p. 31) Dr. Tabin advised against surgery in the left eye. Tr., 11/30/06, Tabin Test., p. 31.

The legal analysis in this case is similar to the previous cases. Viewing the evidence in the light most favorable to the State, the evidence in this case fairly and reasonable supports the State’s allegations of unprofessional conduct under 26 V.S.A. §1354. There are the same misrepresentations in Ms. Lang’s chart regarding dense cataracts in both eyes when in fact the cataract in the left eye was a trace cataract not affecting her visual functioning. There are misrepresentations regarding a second opinion given when none was given and regarding Ms. Lang’s inability to drive at night that support the State’s allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A.

§1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Respondent’s attempt to discourage

Ms. Lang from obtaining a second opinion by telling Ms. Lang not to get a second opinion and referring to his membership in an organization demonstrates unfitness to practice and dishonest, immoral or unprofessional conduct.

Again, Respondent's use of CST with BAT results as the sole indicator of Ms. Lang's most accurate vision also fairly and reasonably supports the State's claims of making a false record. Respondent recorded the results of the CST with BAT as Ms. Lang's vision even though her Snellen result, even with dilation, indicated much better vision than the CST with BAT result. Further, Respondent's use of the CST with BAT result to persuade Ms. Lang that her vision was so bad as to require surgery not only supports the State's claim of making a false record but also demonstrates unfitness to practice, dishonest, immoral or unprofessional conduct, and willful misrepresentation in treatment.

All of the evidence described above supports the State's allegations that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) and/or a failure to practice competently under 26 V.S.A. §1354(b). There is in this case, as there was in the previous case a failure on the part of Respondent to evaluate the relationship between Ms. Lang's every-day functioning and her vision. The very type of assessment that Dr. Tabin performed and suggested by the AAO Preferred Practice Patterns. The evidence reasonably and fairly supports the conclusions that the decision regarding cataract surgery was Respondent's, that Ms. Lang was pressured into undergoing surgery and that Respondent performed surgery when not medically indicated. Such conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

MARYLEN GRIGAS—MPC 106-0803 (PATIENT #5)

Marylen Grigas was a patient of Respondent for about eleven years. Tr., 11/8/06, Grigas Test., p. 143. Ms. Grigas had an appointment with Respondent on Monday, September 9, 2002. Tr., 11/8/06, Grigas Test., p. 143. After Respondent examined Ms. Grigas, Respondent and Ms. Grigas were talking about her cataracts and about the cataracts would be removed at some point in the future. Tr., 11/8/06, Grigas Test., pp. 143-144. Respondent then told Ms. Grigas that he had an opening the next day. Tr., 11/8/06, Grigas Test., p. 144. Ms. Grigas was directing a play for the South End Art Hop and had rehearsal on Tuesday afternoon. Tr., 11/8/06, Grigas Test., p. 144. Respondent told Ms. Grigas she could still conduct rehearsal on Tuesday afternoon. Id.

Ms. Grigas then spoke with nurse about scheduling surgery and began to become nervous and concerned at the speed with which events were unfolding. Tr., 11/8/06, Grigas Test., p. 145. Ms. Grigas asked the nurse if she could still conduct a rehearsal in a field the afternoon after her surgery. Tr., 11/8/06, Grigas Test., p. 145. The nurse informed Ms. Grigas that most people usually sleep all day after the surgery. Id. Ms. Grigas informed the nurse that she did not want to go through with the surgery. Tr., 11/8/06, Grigas Test., p. 145. The nurse then informed Respondent of Ms. Grigas's decision not to have surgery and Respondent came into the room and told Ms. Grigas in an authoritative tone that there was not going to be a problem. Tr., 11/8/06, Grigas Test., p. 145. Ms. Grigas returned home and then called Respondent's office and cancelled the surgery. Tr., 11/8/06, Grigas Test., p. 146.

Ms. Grigas's record for September 9, 2002, contains a diagnosis of dense central nuclear cataracts in both eyes and states that Ms. Grigas was given a second opinion. 1-MG-1-022. Respondent wrote in Ms. Grigas's record for September 9, 2002 "can't see to drive safely [at night] in glare due to cataracts." Ms. Grigas did not tell Respondent or anyone in his office that

she could not see to drive safely at night due to glare. Tr., 11/8/06, Grigas Test., p. 147. In fact, Ms. Grigas was routinely driving between Vermont and New Hampshire. Tr., 11/8/06, Grigas Test., p. 146.

Dr. Thomas Cavin examined Ms. Grigas on September 12, 2003. Tr., 10/24/06, Cavin Test., p. 138. Dr. Cavin performed a slit lamp exam and concluded that Ms. Grigas's cataracts were clinically relatively insignificant in both eyes. Tr., 11/8/06, Cavin Test., p. 141. Based on his exam Ms. Grigas reports that she was currently doing well with her present vision, Dr. Cavin did not recommend cataract surgery. Tr., 11/8/06, Cavin Test., p. 141.

Viewing the evidence in the light most favorable to the State, the evidence in this case fairly and reasonable supports the State's allegations of unprofessional conduct under 26 V.S.A. §1354 with respect to Ms. Grigas. The misrepresentations in Ms. Grigas's chart regarding dense cataracts in both eyes and Ms. Grigas's inability to drive at night that support the State's allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 and allegations that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) and/or a failure to practice competently under 26 V.S.A. §1354(b). Further supporting the claims of a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently is Respondent's failure to make a determination or to discuss with Ms. Grigas the relationship between her vision and her ability to do the things she likes to do. Respondent's pressuring of MS. Grigas to undergo surgery the next day when informed by the nurse that Ms.

Grigas did not want surgery is contrary to the AAO Preferred Practice Patterns and reasonably and fairly supports the conclusions that the decision regarding cataract surgery was Respondent's and that he attempted to pressure Ms. Grigas into undergoing surgery when such surgery was not medically indicated. Such conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

DONALD OLSON—MPC 122-0803 (PATIENT #7)

Donald Olson is a retired professor of dentistry who moved to Vermont from Maryland thirteen years ago. Tr., 10/2/06, Olson Test., pp. 97-98. Dr. Olson saw Respondent on September 9, 1995. Tr., 10/2/06, Olson Test., p. 99. After being tested by Respondent's technicians, Dr. Olson saw Respondent. Tr., 10/2/06, Olson Test., p. 100. Respondent told Dr. Olson he had cataracts and when Dr. Olson asked how severe the cataracts were Respondent informed Dr. Olson that if he were a truck driver he would not be allowed to drive. Tr., 10/2/06, Olson Test., p. 100. Dr. Olson was surprised by Respondent's diagnosis because no other physician had previously told him of cataracts. Tr., 10/2/06, Olson Test., pp. 100. According to Dr. Olson, Respondent advised him to have cataract surgery and did not present surgery as an option. Tr., 10/2/06, Olson Test., pp. 100-101. When Dr. Olson saw Respondent in 1995 his glasses were meeting his needs and his quality of life was not compromised by his vision. Tr., 10/2/06, Olson Test., p. 104. Dr. Olson did not have surgery. Tr., 10/2/06, Olson Test., p. 101.

Dr. Olson saw Dr. Guilfooy on January 20, 1998. Tr., 10/24/06, Guilfooy Test., p. 142. Dr. Guilfooy's examination of Dr. Olson found to have 20/20 vision in the right eye and a "fuzzy" 20/25 in the left eye, with refraction. Tr., 10/24/06, Guilfooy Test., p. 143. Dr. Guilfooy performed a slit lamp examination and found Dr. Olson to have a moderate nuclear sclerosis on

both eyes. Tr., 10/24/06, Guilfoy Test., p. 143. Dr. Guilfoy concluded that Dr. Olson's cataracts were of no "particular visual significance." 1-DO-2-009. Dr. Guilfoy did not recommend surgery because Dr. Olson's visual acuity was too good to undergo the risks and costs of surgery. Tr., 10/24/06, Guilfoy Test., p. 144.

Viewing the evidence in the light most favorable to the State, the evidence in this case fairly and reasonable supports the State's allegations of unprofessional conduct under 26 V.S.A. §1354 with respect to Dr. Olson. Respondent's misrepresentations to Dr. Olson as to the severity of his cataracts and his attempt to have Dr. Olson undergo surgery when such surgery was not indicated support the State's allegations of unfitness to practice medicine under 26 V.S.A. §1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 and allegations that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22). Further supporting the claim of a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician is Respondent's failure to make a determination or to discuss with Dr. Olson the relationship between his vision and its affect on Dr. Olson's quality of life, contrary to the AAO Preferred Practice Patterns.

JANE CORNING—MPC 110-0803 (PATIENT #8)

Jane Corning saw Respondent on June 30, 2000 for a routine check-up. Tr., 10/3/06, Corning Test., p. 223. After being tested by Respondent's staff, Ms Corning met with Respondent. Tr., 10/3/06, Corning Test., p. 225. Respondent informed Ms. Corning that she had cataracts in both eyes and that he could scheduled her for surgery the following Tuesday.

Tr., 10/3/06, Corning Test., p. 225. Respondent told Ms. Corning of his accreditation in a particular group and of his qualifications to perform surgery. Tr., 10/3/06, Corning Test., p. 225. Respondent then sent Ms. Corning to a staff to have the surgery scheduled for the following Tuesday. Tr., 10/3/06, Corning Test., p. 226-227.

Ms. Corning felt pressured by the facts that things were moving so quickly. Tr., 10/3/06, Corning Test., p. 227 . Ms. Corning felt she did not have time to formulate questions about the surgery. Tr., 10/3/06, Corning Test., p. 227. Ms. Corning was alarmed by the process of being put on the surgical schedule so quickly. Tr., 10/3/06, Corning Test., p. 227 . Further, Ms. Corning was surprised that she was not experiencing any symptoms from the cataracts. Tr., 10/3/06, Corning Test., p. 226. When Ms. Corning met with Respondent's staff for scheduling she informed them she needed time to think about the surgery. Tr., 10/3/06, Corning Test., p. 228.

Ms. Corning's record for June 30, 2000 contains a diagnosis of dense central nuclear cortical cataracts in both eyes and indicates that Ms. Corning was given a second opinion. 1-JC-1-003. Ms. Corning's record also indicates that Ms. Corning "wants cataracts removed." 1-JC-1-004. Ms. Corning testified that the entry "want cataracts removed" is a false statement. Tr., 10/3/06, Corning Test., p. 229. In the portion of the record designated as "vision" the only result recorded is the CST with BAT result (20/32 right eye-20/63 left eye). 1-JC-1-004. Ms. Corning's Snellen result, even with dilation, was far better (20/20 right eye- 20/25 left eye) but was not recorded in the vision portion of the record. 1-JC-1-017. For June 30, 2000, there is no result for CST or Snellen test administered without glare or without dilation.

On October 5, 2000, Ms. Corning was examined by Dr. Alan Irwin. Tr., 11/20/06, Irwin Test., p. 25. When refracted, Ms. Corning's vision tested 20/20 in the right eye and 20/25

in the left eye. Tr., 11/20/06, Irwin Test., p. 26. In examining the lenses of Ms. Corning, Dr. Irwin found a trace cortical cataract. Tr., 11/20/06, Irwin Test., p. 27. Dr. Irwin did not recommend surgery because Ms. Corning had good vision and, in talking with Ms. Corning, determined that Ms. Corning did not believe that her problems driving at night in the rain warranted surgery. Tr., 11/20/06, Irwin Test., p. 28.

The evidence in this case fairly and reasonable supports the State's allegations of unprofessional conduct under 26 V.S.A. §1354. Respondent's misrepresentation in Ms. Corning's chart regarding dense cataracts when in fact she had trace cataracts, regarding a second opinion given when none was given, and regarding desire for cataract surgery support the State's allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Further, Respondent's use of CST with BAT results as the sole indicator of Ms. Corning's most vision also fairly and reasonably supports the State's claims of making a false record. Respondent recorded the results of the CST with BAT as Ms. Corning's vision even though Ms. Corning's Snellen result, even with dilation, indicated better vision than the CST with BAT result.

All of the evidence described above supports the State's allegations that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22). Also supporting the State's claim that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) is Respondent's failure to explain or even determine why cataract surgery

was medically indicated for Ms. Corning. There is no evidence to support the conclusion that Ms. Corning's vision, with glasses, no longer met her needs or that her quality of life was compromised by her vision. In fact, Dr. Irwin's examination demonstrates the opposite. Further, there is no evidence that Respondent made a meaningful attempt to determine if Ms. Corning's vision was meeting her needs as described in the AAO Preferred Practice Patterns and as practiced by other physicians. The speed with which Respondent attempted to schedule Ms. Corning for surgery reasonably and fairly supports the conclusion that the decision regarding cataract surgery was Respondent's and that Ms. Corning was pressured into being scheduled for surgery constituting a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician.

FRANKLIN COLE—MPC 126-0803 (PATIENT #10)

Franklin Cole first saw Respondent in October of 1982 to have a piece of hay chaff removed from his eye. Tr., 9/26/06, Cole Test., p. 80; 1-FC-1-001. At the next visit, Respondent diagnosed Mr. Cole with glaucoma and prescribed timoptic for the glaucoma. Tr., 9/26/06, Cole Test., p. 81. Mr. Cole continued to see Respondent until July of 1992. At Mr. Cole's appointment of July 15, 1992, Respondent informed Mr. Cole for the first time that he had cataracts and that surgery could be scheduled for the following week to address both the cataracts and glaucoma. Tr., 9/26/06, Cole Test., p. 82, 83. Respondent told Mr. Cole he could get a second opinion but that no other doctor would question Respondent's diagnosis. Tr., 9/26/06, Cole Test., p. 83. Mr. Cole could not believe he had cataracts because he had "no trouble seeing." Tr., 9/26/06, Cole Test., p. 82. Mr. Cole's chart for July 15, 1992 indicates that Mr. Cole was "bothered by lights" and that Mr. Cole "doesn't like to drive at night." 1-FC-1-

011. Mr. Cole testified that when he saw Respondent on July 15, 1992, he had “no problems” driving and was not bothered by lights. Tr., 9/26/06, Cole Test., pp. 82, 124-125.

After the July 15, 1992 appointment, Mr. Cole saw Dr. Karen Cleary on February 25, 1993. Tr., 11/8/06, Cleary Test., p. 11. Dr. Cleary performed a visual acuity test on Mr. Cole with results of 20/20 and 20/20-1 which Dr. Cleary described as excellent vision. Tr., 11/8/06, Cleary Test., p. 11. Dr. Cleary examined Mr. Cole’s lenses and found cortical changes which were normal for a man of Mr. Cole’s age. Tr., 11/8/06, Cleary Test., pp. 11-12. Dr. Cleary also examined Mr. Cole for glaucoma and determined he did not have glaucoma. Tr., 11/8/06, Cleary Test., p. 12. Dr. Cleary confirmed that Mr. Cole did not have glaucoma at a follow up visits in September of 1993 and March of 1994 and discontinued his glaucoma medication. Tr., 11/8/06, Cleary Test., pp. 13-15. Dr. Cleary has seen Mr. Cole continuously from February of 1993 until the present. Tr., 11/8/06, Cleary Test., p. 15. Mr. Cole’s vision is currently meeting his needs and his vision does not compromise his life. Tr., 9/26/06, Cole Test., p. 86.

The evidence in this case fairly and reasonable supports the State’s allegations of unprofessional conduct under 26 V.S.A. §1354. Respondent’s misrepresentation in Ms. Cole’s chart stating Mr. Cole was bothered by lights and did not like to drive at night supports the State’s allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Respondent’s diagnosis of glaucoma when Mr. Cole did not have glaucoma and his diagnosis of cataracts that required surgery also supports the State’s allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest,

immoral or unprofessional conduct under 26 V.S.A. §1398. All of the evidence described above supports the State's allegations that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22).

Also supporting the State's claim that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) is Respondent's failure to explain or even determine why cataract surgery was medically indicated for Mr. Cole. There is no evidence to support the conclusion that Mr. Cole's vision, with glasses, no longer met his needs or that his quality of life was compromised by his vision. Further, there is no evidence that Respondent made a meaningful attempt to determine if Ms. Cole's vision was meeting his needs as described in the AAO Preferred Practice Patterns and as practiced by other physicians. Respondent's attempt to schedule Ms. Cole for surgery for cataracts that were normal for a man of his age and for non-existent glaucoma reasonably and fairly supports the conclusion that the decision regarding surgery was Respondent's and that Mr. Cole was pressured into being scheduled for surgery that was not medically indicated, constituting a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician.

MARGARET MCGOWAN—MPC 209-1003 (PATIENT #11)

Margaret McGowan had seen Respondent regularly since 1972. 1-MM-1-001. In August of 1997 Respondent first raised the issue of cataract surgery with Ms. McGowan. Tr., 10/3/06, McGowan Test., p. 93-94 . Ms. McGowan was surprised by the discussion of cataract surgery because she was not having problems with her vision. Tr., 10/3/06, McGowan Test., p. 94. Ms. McGowan had done extensive driving at night prior to the August 1997. Tr., 10/3/06, McGowan

Test., p. 94-95. Respondent told Ms. McGowan she could get a second opinion but that he had “special teaching” and the Respondent was the only person “certified to do this.” Tr., 10/3/06, McGowan Test., p. 103. Ms. McGowan declined surgery at the August 1997 visit. Tr., 10/3/06, McGowan Test., p. 99.

Ms. McGowan next saw Respondent on July 9, 1999. Tr., 10/3/06, McGowan Test., p. . . . When Respondent administered the CST on this day it was after Ms. McGowan had been dilated twice. Tr., 10/3/06, McGowan Test., p. 99. At this appointment Respondent again raised the issue of cataract surgery. Tr., 10/3/06, McGowan Test., p. 99. Respondent again told Ms. McGowan she could get a second opinion but that Respondent was the only one certified to do this. Tr., 10/3/06, McGowan Test., p. 102. Because Ms. McGowan had been doing extensive driving at night between her 1997 and 1999 appointments she did not believe she was having a problem and declined surgery. Tr., 10/3/06, McGowan Test., p. 100-101.

Ms McGowan then saw Respondent on August 29, 2001. Tr., 10/3/06, McGowan Test. p. 103. At the August 2001 appointment Ms. McGowan’s CST was again administered after she had been dilated three times. Tr., 10/3/06, McGowan Test. p. 106-107. Respondent told Ms. McGowan that her vision was getting worse and that cataract surgery would solve the problem. Tr., 10/3/06, McGowan Test. p. 107. Ms. McGowan had been doing extensive driving between her 1999 and 2001 appointments and had not had problems with her vision. Tr., 10/3/06, McGowan Test. p. 106-107. Ms. McGowan declined surgery. Tr., 10/3/06, McGowan Test. p. 106.

Ms McGowan’s next appointment with Respondent was in June of 2003. Tr., 10/3/06, McGowan Test. p. 109. At this visit the CST was administered after Ms. McGowan had been twice dilated. Tr., 10/3/06, McGowan Test. p. 109-110. Respondent then showed Ms.

McGowan the results of the CST exam without explaining what the test represented. Tr., 10/3/06, McGowan Test. p. 111-112. Ms. McGowan believed the CST result showed her vision declining over a period of time. Tr., 10/3/06, McGowan Test. p. 112. Respondent again told Ms. McGowan she could get a second opinion but that Respondent was the only one certified to do this. Tr., 10/3/06, McGowan Test. p. 113. Because Ms. McGowan was scared after seeing the results of the CST she agreed to surgery. Tr., 10/3/06, McGowan Test. p. 112-113, 117. Respondent performed surgery on Ms. McGowan's right eye on July 1, 2003. 1-MM-1-019.

Ms. McGowan's chart for June, 2003 contains a diagnosis of dense central nuclear cortical cataracts in both eyes and states that Ms. McGowan received a second opinion.. 1-MM-1-018. In the section of the chart designated as "chief complaint" Respondent has entered "can't see to drive safely in glare due to cataracts." 1-MM-1-017. Yet Ms. McGowan testified that she was continuing to drive a great deal at night and that her vision was not affecting her ability to travel. Tr., 10/3/06, McGowan Test. pp. 116-117. In the portion of Ms. McGowan's June, 2003 chart designated as "vision" Respondent has entered 20/100 for each eye, the result of Ms. McGowan's CST with BAT that had been administered after Ms. McGowan had been dilated three times. 1-MM-1-017. Not recorded in the vision portion of the record is Ms. McGowan Snellen result of 20/25+, right eye, and 20/30+, left eye (1-MM-1-073) — a considerably better result despite the fact that Snellen was administered with dilation.

Ms McGowan was examined by Dr. Patrick Morhun on October 21, 2003. Tr., 12/4/06, Morhun Test. p. 20. Dr. Morhun's examination found that Ms McGowan's visual acuity in the unoperated left eye was 20/20 with and without refraction. Tr., 12/4/06, Morhun Test. p. 20-21. Dr. Morhun diagnosed Ms. McGowan with a "mild" posterior subcapsular cataract in the

operated left eye. Tr., 12/4/06, Morhun Test. p. 20-21. Dr. Morhun would have graded the cataract less than a one. Tr., 12/4/06, Morhun Test. p. 21. Dr. Morhun did not recommend cataract surgery for Ms. McGowan's left eye because the cataract in that eye was not "visually significant." Tr., 12/4/06, Morhun Test. p. 23-24.

Viewing the evidence in the light most favorable to the State, the evidence in this case fairly and reasonably supports the State's allegations of unprofessional conduct under 26 V.S.A. §1354. The misrepresentation in Ms. McGowan's chart regarding dense cataracts in both eyes when in fact the cataract in the left eye was an early cataract and not visually significant, regarding a second opinion given when none was given and regarding Ms. McGowan's inability to drive at night that support the State's allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Respondent's attempts on several occasions to discourage Ms. McGowan from obtaining a second opinion by asserting he was the only person certified to do cataract surgery demonstrates unfitness to practice and dishonest, immoral or unprofessional conduct.

Respondent's use of CST with BAT results, after being dilated three times, as the sole indicator of Ms. McGowan's most accurate vision also fairly and reasonably supports the State's claims of making a false record. Respondent recorded the results of the CST with BAT as Ms. McGowan's vision even though her Snellen result, even with dilation, indicated much better vision than the CST with BAT result. Further, Respondent's use of the CST with BAT result to persuade Ms. McGowan that her vision was so bad as to require surgery not only supports the

State's claim of making a false record but also demonstrates unfitness to practice, dishonest, immoral or unprofessional conduct, and willful misrepresentation in treatment.

All of the evidence described above supports the State's allegations that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) and/or a failure to practice competently under 26 V.S.A. §1354(b). There is in this case, as there was in the previous case a failure on the part of Respondent to evaluate the relationship between Ms. McGowan's every-day functioning and her vision. Indeed, had Respondent conducted the type of inquiry recommended in the AAO Preferred Practice Outlines and as described by the other physicians at hearing, Respondent would have found that Ms. McGowan's vision was meeting her needs and therefore surgery was not indicated. The evidence reasonably and fairly supports the conclusion that the decision regarding cataract surgery was Respondent's and Ms. McGowan was pressured into undergoing surgery and that Respondent performed surgery when not medically indicated. Such conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

JOSEPH TOUCHETTE-MPC 89-0703 (PATIENT #12)

Joseph Touchette was a longtime patient of Respondent and saw Respondent in June of 1998 because characters on the page and on his PC were getting smaller. Tr., 10/2/06, Touchette Test., p. 143. At the appointment of June 1998, Respondent told Mr. Touchette that he had cataracts and that he needed surgery. Tr., 10/2/06, Touchette Test., p. 143-144. This was the first time that Respondent had told Mr. Touchette that he had cataracts and Mr. Touchette was surprised. Tr., 10/2/06, Touchette Test., p. 144. Mr. Touchette tried to discuss the diagnosis and

surgery with Respondent but Respondent directed him to staff to schedule the surgery. Tr., 10/2/06, Touchette Test., p. 145. Respondent told Mr. Touchette that it was no use to get a second opinion because Respondent was the only physician qualified. Tr., 10/2/06, Touchette Test., p. 145.

Mr. Touchette's chart for June 19, 1998 contains a diagnosis of dense central nuclear cortical cataracts with left eye greater than right eye and indicates that Mr. Touchette was given a second opinion. 1-JT-1-009. In the portion of the chart designated as "chief complaint" Respondent has written that Mr. Touchette's cataracts "interfere with life" and that Mr. Touchette "wants cataracts removed." 1-JT-1-008. Mr. Touchette testified that he never told anyone Respondent or anyone in his office that he wanted his cataracts removed. Tr., 10/2/06, Touchette Test., pp. 147-148. Mr. Touchette also testified that when he saw Respondent in June of 1998, his quality of life was not compromised by his vision. Tr., 10/2/06, Touchette Test., p. 150.

Dr. James Watson examined Mr. Touchette on September 28, 1998. Tr., 10/26/06, Watson Test., p. 110. Mr. Touchette's vision was 20/25 in the right eye and 20/20 in the left eye. Tr., 10/26/06, Watson Test., p. 111. With refraction Mr. Touchette's vision improved to 20/20 in each eye. Id. In performing a slit lamp exam Dr. Watson found that Mr. Touchette had minimal cataract, compatible with a man of his age. Tr., 10/26/06, Watson Test., p. 111. Dr. Watson did not recommend cataract surgery for Mr. Touchette because Mr. Touchette "didn't have a problem that a cataract surgery would solve and . . . didn't have a true cataract something that would be bad enough to warrant surgery." Tr., 10/26/06, Watson Test., p. 113.

The evidence in this case fairly and reasonable supports the State's allegations of unprofessional conduct under 26 V.S.A. §1354. Respondent's misrepresentations in Mr. Touchette's chart showing a diagnosis of dense central nuclear cortical cataracts, stating Mr. Touchette received a second opinion, stating that cataracts interfered with his life and that Mr. Touchette wanted cataracts removed supports the State's allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Respondent's statement that Mr. Touchette needed surgery and his attempts to quickly schedule Mr. Touchette for surgery also support the State's allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. All of the evidence described above supports the State's allegations that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22).

Also supporting the State's claim that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) is Respondent's failure to explain or even determine why cataract surgery was medically indicated for Mr. Touchette. Mr. Touchette's vision, with glasses, was meeting his needs and his quality of life was not compromised by his vision. Further, there is no evidence that Respondent made a meaningful attempt to determine if Mr. Touchette's vision was meeting his needs as described in the AAO Preferred Practice Patterns and as practiced by other physicians. Respondent's attempt to schedule Mr. Touchette

for surgery for cataracts that were compatible with a man of his age reasonably and fairly supports the conclusion that the decision regarding surgery was Respondent's and that Mr. Touchette was pressured into being scheduled for surgery that was not medically indicated, constituting a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician.

BILL PIERSON (AUGOOD)—MPC 90-0703 (PATIENT #13)

Bill Pierson saw Respondent for the first and only time in October of 2002 for a prescription change. Tr., 10/24/06, Pierson Test., p. 5. After Mr. Pierson's exam, Respondent informed Mr. Pierson that he had cataracts in each eye and that he could have surgery very soon. Tr., 10/24/06, Pierson Test., p. 6. Respondent asked Mr. Pierson if he wanted to hear about cataract surgery. Tr., 10/24/06, Pierson Test., p. 8. Mr. Pierson declined and, after a few moments, Respondent again asked if Mr. Pierson wanted to hear about surgery. Tr., 10/24/06, Pierson Test., p. 8. It was clear to Mr. Pierson that he was not going to be able to leave until he was told about cataract surgery so Mr. Pierson agreed to listen about cataract surgery. Tr., 10/24/06, Pierson Test., p. 9. Respondent told Mr. Pierson that he need not get a second opinion because Respondent was the only doctor certified to do this particular operation. Tr., 10/24/06, Pierson Test., p. 7. Mr. Pierson was "shocked," "confused," and "frightened" by his appointment with Respondent. Tr., 10/24/06, Pierson Test., p. 6-7. When Mr. Pierson saw Respondent on October 30, 2002, his glasses were meeting his need and his quality of life was not compromised by his vision. Tr., 10/24/06, Pierson Test., p. 16.

Mr. Pierson's chart for October 30, 2002 contains a diagnosis of dense central nuclear cortical cataracts in each eye. 1-WA-1-002. Mr. Pierson's chart also indicates that he was given a second opinion on October 30, 2002. 1-WA-1-002. Mr. Pierson's chart of October 30,

Respondent has entered that Mr. Pierson “wants cataracts removed.” 1-WA-1-001. Mr. Pierson is “100 percent sure” he did not tell Respondent or anyone in his office that he wanted his cataracts removed. Tr., 10/24/06, Pierson Test., p. 13.

Mr. Pierson was examined by Dr. Thomas Cavin on October 6, 2003. Tr., 10/23/06, Cavin Test., p. 149. Dr. Cavin determined that Mr. Pierson’s vision on this day was 20/20 in each eye with correction. Tr., 10/23/06, Cavin Test., p. 150. Dr. Cavin examined Mr. Pierson’s lenses and found “very mild” cataracts. Tr., 10/23/06, Cavin Test., p. 150. Dr. Cavin did not recommend that Mr. Pierson undergo cataract surgery because Mr. Pierson was “happy with his vision” and surgery was not medically indicated. Tr., 10/23/06, Cavin Test., p. 151.

The evidence in this case fairly and reasonable supports the State’s allegations of unprofessional conduct under 26 V.S.A. §1354. Respondent’s misrepresentations in Mr. Pierson’s chart showing a diagnosis of dense central nuclear cortical cataracts, stating Mr. Pierson received a second opinion, and stating that Mr. Pierson wanted cataracts removed supports the State’s allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Respondent’s attempts to quickly schedule Mr. Pierson for surgery and telling Mr. Pierson he did not a second opinion also support the State’s allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. All of the evidence described above supports the State’s allegations that Respondent’s conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent

physician under 26 V.S.A. §1354(a)(22) and/or a failure to practice competently under 26 V.S.A. §1354(b).

Also supporting the State's claim that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) and/or a failure to practice competently under 26 V.S.A. §1354(b) is Respondent's failure to explain or even determine why cataract surgery was medically indicated for Mr. Pierson. Mr. Pierson's vision, with glasses, was meeting his needs and his quality of life was not compromised by his vision. Further, there is no evidence that Respondent made a meaningful attempt to determine if Mr. Pierson's vision was meeting his needs as described in the AAO Preferred Practice Patterns and as practiced by other physicians. Respondent's attempt to schedule Mr. Pierson for surgery for cataracts that were very mild and not interfering with his vision fairly supports the conclusion that the decision regarding surgery was Respondent's and that Mr. Pierson was pressured into being scheduled for surgery that was not medically indicated, constituting a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

JANET KERR-MPC 87-0703 (PATIENT #14)

Janet Kerr saw Respondent on November 20, 2002 to get a prescription update for her contact lenses. Tr., 10/3/06, Kerr Test., p. 8. During Respondent's examination of Ms. Kerr, Respondent used the term "opaque" when speaking to his scribe. Tr., 10/3/06, Kerr Test., p. 10. After the examination Ms. Kerr asked Respondent about his use of the term "opaque." Tr., 10/3/06, Kerr Test., p. 10-11. Respondent informed Ms. Kerr that there was a problem with her cataracts and that she should have surgery soon and that she should book the surgery with the

scheduler. Tr., 10/3/06, Kerr Test., p. 11. Ms. Kerr was “shocked” and “surprised” by Respondent’s diagnosis. Tr., 10/3/06, Kerr Test., p. 11. When Ms. Kerr raised the possibility of getting a second opinion, Respondent informed Ms. Kerr that a second opinion wouldn’t be necessary because Respondent was the most qualified in the. Tr., 10/3/06, Kerr Test., p. 11. Ms. Kerr did not schedule her surgery. Tr., 10/3/06, Kerr Test., p. 12.

Ms. Kerr’s chart for November 20, 2002 contains a diagnosis of dense central nuclear cortical opacity in both eyes. 1-JK-1-002. Ms. Kerr’s chart for that day also indicates Ms. Kerr was given a second opinion. 1-JK-1-002. Ms. Kerr’s chart for November 20, 2002 also states that she “can’t see to drive safely hs [at night] due to cataracts, wants cataracts removed.” 1-JK-1-001. When Ms. Kerr saw Respondent on November 20, 2002 she was not having problems driving safely at night and she did not want her cataracts removed. Tr., 10/3/06, Kerr Test., pp. 16-18. In the portion of her record designated as “vision” the sole indicator of Ms. Kerr’s vision are the results of Ms. Kerr’s CST with BAT (20/100 right eye, 20/70 left eye). 1-JK-1-001. Not recorded in the vision portion of the chart are Ms. Kerr’s Snellen results (20/30 in both eyes) even though the results indicate much better vision, even with dilation. 1-JK-1-011.

Ms. Kerr was examined by Dr. Alan Irwin on January 15, 2003. Tr., 11/30/06, Irwin Test., p. 23. Dr. Irwin determined that Ms. Kerr had 20/20 vision in each eye with refraction. Tr., 11/30/06, Irwin Test., p. 24. In performing his slit lamp exam, Dr. Irwin found early cataracts. Tr., 11/30/06, Irwin Test., p. 24. Dr. Irwin concluded that surgery was not indicated for Ms. Kerr because, with refraction, Ms. Kerr had 20/20 vision and her visual problems were described by Ms. Kerr as mild. Tr., 11/30/06, Irwin Test., p. 25.

Ms. Kerr was examined by Dr. Edwin Guilfooy on March 19, 2003. Tr., 10/24/06, Guilfooy Test., p. 134. Dr. Guilfooy found Ms. Kerr’s visual acuity to be 20/13 in each eye. Tr.,

10/24/06, Guilfoy Test., p. 135. When Dr. Guilfoy performed a slit lamp exam he did not see a cataract. Tr., 10/24/06, Guilfoy Test., p. 136. Dr. Guilfoy did recommend surgery for Ms. Kerr because she did not have visible cataracts and her visual acuity was “excellent.” Tr., 10/24/06, Guilfoy Test., p. 136.

The evidence in this case fairly and reasonable supports the State’s allegations of unprofessional conduct under 26 V.S.A. §1354. Respondent’s misrepresentations in Ms. Kerr’s chart showing a diagnosis of dense central nuclear cortical cataracts, stating Ms. Kerr received a second opinion, stating that Ms. Kerr could not see to drive safely at night, and stating that Ms. Kerr wanted cataracts removed supports the State’s allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Respondent’s attempts to quickly schedule Ms. Kerr for surgery and telling her she did not need a second opinion also support the State’s allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Respondent’s use of CST with BAT results as the sole indicator of Ms. Kerr’s most accurate vision also fairly and reasonably supports the State’s claims of making a false record. Respondent recorded the results of the CST with BAT as Ms. Kerr’s vision even though her Snellen result, even with dilation, indicated much better vision than the CST with BAT result. All of the evidence described above supports the State’s allegations that Respondent’s conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the

ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) and/or a failure to practice competently under 26 V.S.A. §1354(b).

Also supporting the State's claim that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) and/or a failure to practice competently under 26 V.S.A. §1354(b) is Respondent's failure to explain or even determine why cataract surgery was medically indicated for Ms. Kerr. Ms. Kerr's vision, with glasses, was meeting her needs and her quality of life was not compromised by his vision. Further, there is no evidence that Respondent made a meaningful attempt to determine if Ms. Kerr's vision was meeting her needs as described in the AAO Preferred Practice Patterns and as practiced by other physicians.

Respondent's attempt to schedule Ms. Kerr for surgery for cataracts that Dr. Irwin described as early fairly supports the conclusion that the decision regarding surgery was Respondent's and that Ms. Kerr was pressured into being scheduled for surgery that was not medically indicated, constituting a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

CONCLUSION

For all the reasons argued above, the Respondent's motion for judgment as a matter of law must not be addressed by the Committee or, alternatively, must be **DENIED**.

Dated at Montpelier, Vermont this 16th day of January, 2007.

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

WILLIAM SORRELL
ATTORNEY GENERAL
STATE OF VERMONT
BY



Joseph L. Winn
Assistant Attorney General