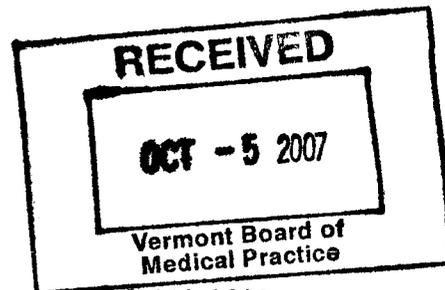


STATE OF VERMONT
BOARD OF MEDICAL PRACTICE



In re:

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

**RESPONDENT'S REPLY MEMORANDUM TO THE STATE'S REQUEST TO AMEND
THE HEARING COMMITTEE REPORT**

Respondent, David S. Chase, M.D., hereby submits the following Reply Memorandum in Response to the State's Request to Amend Report of Hearing Committee ("Request to Amend").

I. Introduction.

The State charged Dr. Chase with intentionally recommending and performing surgeries that he knew his patients did not need and purposefully falsifying his medical records to justify those surgeries. Having failed to prove its serious allegations at the merits hearing, the State once again attempts to backtrack, devoting most of its Request to Amend to convincing the Board to find that Dr. Chase is guilty of less serious, if uncharged, infractions. The Board must hold the State to its charges and to its proof.

In the same breath that it argues that the Board does not need to find that Dr. Chase purposefully falsified his charts, it argues that the Board must conclude that he acted dishonestly or immorally. This position is at odds both with the State's other arguments and with the record evidence, which demonstrates that Dr. Chase always acted honestly and in his patients' best interests.

Finally, the State makes a final, last-ditch attempt to demonstrate that Dr. Chase performed unnecessary cataract surgery on Judith Salatino, Susan Lang, and Margaret McGowan. As the evidence demonstrated, and the hearing panel found, all three of these patients were proper surgical candidates, all three made well-informed choices to proceed with surgery, and all three benefited from Dr. Chase's expertly performed surgeries.

II. Discussion.

A. The State Charged, But Failed To Prove, That Dr. Chase Purposefully Falsified His Charts.

Although the State has alleged since the outset of this case that Dr. Chase purposefully falsified his patients' charts, it spends the bulk of its Request to Amend arguing that it need only prove that the entries in Dr. Chase's charts were not "accidental." (Request to Amend at 5, 6.) In addition to being at odds with the allegations of purposeful falsification contained in the Amended Superceding Specification of Charges, this position misconstrues the willfulness requirement contained in 26 V.S.A. § 1354(b) and the lessons of the very cases relied upon by the State.

As the Vermont and United States Supreme Courts first stated nearly a century ago, "[W]here a statute imposes a penalty upon one who shall willfully violate a provision of the law, the word 'willful' is to be given meaning and force, that it implies 'a purpose to do wrong,' 'a determination with bad intent' to do, or to omit the doing of something, with an 'evil design' or with a 'bad purpose.'" *State v. Burlington Drug Co.*, 84 Vt. 243, 253 (1911) (quoting *Spurr v. United States*, 174 U.S. 728 (1899)). As the *Burlington Drug Co.* Court made clear, although this definition originates in criminal law, it applies whenever "a statute imposes a penalty upon one who shall willfully violate a provision of the law." *Id.* at 253. And while the word "willful" can be given different definitions in different circumstances, it "cannot well mean less than

intentionally and by design.” *Id.*; see also *State v. Parenteau*, 153 Vt. 123, 125 (1989) (“the word ‘willful’ denotes ‘intention and that means “by design””).

Consistent with this definition, in a case cited in the State’s own filing, the Supreme Court of Kansas construed the willfulness requirement in its nursing regulations, stating: “Willful conduct is action indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another.” *Kansas State Board of Nursing v. Burkman*, 531 P.2d 122, 126 (Kan. 1975). The remaining cases cited by the State actually support, rather than refute, this definition. See, e.g., *State Board of Nurse Examiners v. Rafferty*, 499 A.2d 289, 292 (Penn. 1985) (“willful” means “an intentional, designed act”).

As a result, in order to prove its charges that Dr. Chase willfully falsified his patients’ charts in violation of 26 V.S.A. §1354(a)(8), the State must prove that Dr. Chase “intentionally” falsified his patients’ charts, or falsified those charts “by design.” That is exactly the standard of proof applied by the hearing panel when it correctly determined that Dr. Chase’s charts contained no “deliberate falsifications.”

Instead of accepting the State’s theory, the panel concluded that any purported inaccuracies in Dr. Chase’s records consisted of his own subjective impressions of his patients’ symptoms and surgical wishes, as well as his own description of their cataracts. While the panel found Dr. Chase’s method of describing his patients’ cataracts to be unprofessional,¹ it did not find that the description was false by intention or design as the State charged. Indeed, all of the evidence demonstrated that Dr. Chase’s chart entries were designed to help him provide his patients the best care that he could.

¹ As set forth in Dr. Chase’s Exceptions, the panel erred in that determination.

B. There Is No Evidence That Dr. Chase Engaged In Dishonest Or Immoral Conduct.

At the same time that it argues that the Board need not find that Dr. Chase engaged in purposeful falsifications, it contends that his conduct was not only unprofessional, but “dishonest” and “immoral” in violation of 26 V.S.A. § 1398. The State’s effort to have it both ways is manifestly inconsistent with the panel’s conclusions and the undisputed evidence on which the panel relied.

In support of its position that Dr. Chase was dishonest and immoral, the State does not actually cite to any evidence or law. Instead, it falls back on an argument that “[i]t is unreasonable to conclude that an experienced physician who was found to have consistently discouraged patients from seeking a second opinion and who led patients to believe he possessed some special expertise was not dishonest.” (Request to Amend at 12.) As set forth in Dr. Chase’s prior filings, the evidence does not support the conclusion that he purposefully discouraged patients from receiving a second opinion. More importantly for present purposes, the State does not begin to explain how such a practice is “dishonest.” The State’s claim that Dr. Chase dishonestly told patients that he had special expertise in cataract surgery is even more puzzling:² The undisputed evidence showed that Dr. Chase was, in fact, the only area ophthalmologist to be certified in cataract surgery by the American College of Eye Surgeons, which conducted a rigorous examination of his surgical skill. (PF ¶ 626.)

² Moreover, this allegation is not the subject of a single charge contained in the Superceding Specification of Charges and therefore cannot form the basis of any adverse verdict.

C. Dr. Chase Did Not Perform Any Unnecessary Cataract Surgeries.

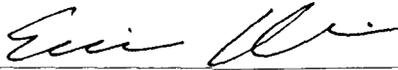
The State closes its Request to Amend with a last ditch argument that Dr. Chase actually performed unnecessary surgeries on the three complaining patients who chose to go forward with surgery after receiving Dr. Chase's full informed consent presentation. As set forth at length in Dr. Chase's prior filings, the undisputed evidence shows that: (1) all three patients had cataracts; (2) all three had significant visual symptoms attributable to those cataracts; (3) none of the patients' symptoms could be corrected with glasses or other visual aids; (4) all of the patients determined after an extensive informed consent process that their vision prior to surgery was no longer meeting their needs; and (5) all three patients' symptoms were addressed through expertly performed cataract surgery by Dr. Chase. The State's allegations to the contrary are not only unproven; they are false.

III. Conclusion.

For all of the reasons stated above and in Dr. Chase's prior filings, the Board should adopt the Committee's findings that Dr. Chase did not engage in unprofessional conduct. The Board should respectfully decline to adopt any findings that Dr. Chase engaged in unprofessional conduct because those findings are contrary to law and to the record evidence. In support of these positions, the Board should adopt all of Dr. Chase's Proposed Findings of Fact and Conclusions Of Law.

Dated at Burlington, Vermont, this 5th day of October, 2007.

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