

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In re: Melissa Carla Smith-Horn, M.D.)
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Docket No. MPS 101-0804
 MPS 97-0605

STIPULATION AND CONSENT ORDER

NOW COME, the State of Vermont, by and through Attorney General William H. Sorrell and James S. Arisman, Assistant Attorney General, and Melissa Carla Smith-Horn, M.D., Respondent in the above-captioned matters, and agree and stipulate as follows:

1. Melissa Carla Smith-Horn, M.D. (Respondent) holds Vermont medical license Number 042-0010538, issued on December 24, 2002. Respondent practices in the field of occupational medicine and surgery.
2. Jurisdiction vests in the Vermont Board of Medical Practice (Board) by virtue of 26 V.S.A. §§1353, 1354-61 & 1398 and 3 V.S.A. § 814(c).
3. The Vermont Board of Medical Practice summarily suspended Respondent's Vermont medical license on August 3, 2005 on the State's motion. Respondent cooperated fully with the Vermont Board during investigation of the above-captioned matters. To date, no formal specification of charges of unprofessional conduct has been filed by the State of Vermont. Respondent has relocated her practice to the State of Florida. Her Vermont medical license has expired. In light of the instant agreement, the parties have agreed that no formal filing of a specification of charges will be required.

I. Background.

A. Care of Patient Medical Records.

4. The Vermont Board of Medical Practice opened this matter for investigation on August 8, 2004 following receipt of information from the Shelburne (Vermont) Police

Department. A Shelburne police officer on the morning of August 5, 2004 received a report that a quantity of patient medical records had been observed in plain view, at curbside in front of a residence located at 130 Bayfield Drive, Shelburne, Vermont. Upon arrival at the residence the officer found approximately 500 medical records had been left at curbside. The records were inside red folders with patient name visible. Most of the records were set out in boxes in the driveway of the residence, as if awaiting refuse collection. The complainant informed the police that the woman who had been renting the house was a doctor and that she had recently moved to Florida, to begin a new practice. The name of the physician, found on multiple records, was Melissa C. Smith-Horn, M.D.

5. Officers of the Shelburne Police Department recovered from the location in question 14 cardboard boxes and one plastic bin, also containing patient medical records. Investigative personnel of the Vermont Board of Medical Practice later took these medical records into custody. The Vermont Board of Medical Practice subsequently opened an investigation regarding Respondent's relationship to the patient medical records that were recovered from the driveway.

6. Respondent later admitted to a Vermont Board investigator that she had left the records in the locked garage of her residence in Shelburne during the first week of August 2004 when movers were to transport her personal property to Florida. Respondent stated to the investigator that she had made arrangements with a local company that disposes of documents for pick up of the records. Respondent told the investigator that she could not remember the name of the company in question. Respondent also told the investigator that the documents in question were not medical records, but, rather, were Independent Medical Evaluations (IMEs).

Respondent stated that it was her understanding that these IMEs already were matters of public record because they were evidence in past workers compensation cases in Oklahoma, where Respondent had previously practiced.

7. A Medical Board investigator found upon examination that the records in the boxes, in fact, appeared to be medical evaluations in workers' compensation cases that Respondent had performed before moving to Vermont. The investigator found that the records contained sensitive information including first, middle, and last names; gender; race; home address; telephone number; date of birth; social security number; marital status; educational information; employment and income information; social history; discussion of reproductive matters; information regarding drug and alcohol use as pertaining to workers' compensation claims; discussion of mental condition and psychotropic drugs taken; medical history; current condition and results of physical examination; and evaluations of disabling conditions. Such information was legible, intact, and had not been expunged from the records in any way.

8. Another Board investigator later spoke with Respondent regarding the patient records. Respondent stated at this time that she had left the records in the locked garage at the residence and "told the landlord he would have to let the company in to pick them up." Respondent stated that she had made pick-up arrangements regarding the records with a local office records disposal company. The investigator contacted all local document disposal and shredding companies, but could not corroborate Respondent's statement regarding arrangements having been made.

B. Medical Confidentiality.

9. The Code of Medical Ethics of the American Medical Association states the following: (a) the information disclosed to a physician during the course of the relationship

between physician and patient is confidential to the greatest possible degree; (b) where a physician's services are limited to performing an isolated assessment of an individual's health or disability, the information obtained by the physician as a result of such examination is confidential; and (c) to preserve confidentiality when discarding old records, all documents should be destroyed and should not be communicated to a third party. See Sections 5.05, 5.09, and 7.05 of AMA Code of Medical Ethics, 2004-2005 ed.

10. Under Vermont law, "[A] person authorized to practice medicine . . . shall not disclose any information acquired in attending a patient in a professional capacity". See 12 V.S.A. § 1612(a), Patients' Privilege.

11. Under Federal law, a health care provider may not disclose or divulge protected health care information, except as may be permitted or required by the Federal Health Insurance Portability and Accountability Act, 45 CFR Subtitle A, Subchapter C, Section 164.502(a). The circumstances in this matter do not fall within any such exception.

12. In sum, Respondent failed to protect the confidentiality of these medical records. Respondent failed to (a) provide for the protection of the records in her absence; and (b) was unable to document that she had arranged for the proper pickup and destruction of the patient medical records by a qualified document disposal/shredding firm.¹

C. Prescribing.

13. During its investigation, the Vermont Board also found evidence of possible irregularities in Respondent's prescribing practices. Board investigation determined that on two or more occasions, Respondent prescribed controlled substances without a *bona fide*

1. Respondent's explanation is that she had made arrangements with her landlord to provide access to the locked garage of her former residence, so that a local waste management company could pick up and dispose of the medical records. Respondent asserts that the records had been left in large plastic storage containers in the garage and that her landlord appears to have removed the records from these containers and placed them at curbside, following the departure of Respondent and her husband from the local area.

medical purpose. Investigation by the Board also determined that Respondent had prescribed controlled substances on more than one occasion without evidence of having prepared and maintained proper medical records.² Respondent cooperated with the Vermont Board's investigation of her prescribing practices.

D. Criminal Convictions.

14. On January 30, 2006, the State of Vermont filed a criminal information charging Respondent with unlawful delivery/dispensing of a depressant, stimulant, or narcotic, a felony. 18 V.S.A. § 4234(b)(1). *Inter alia*, the State of Vermont alleged that Respondent Smith-Horn had unlawfully dispensed 40 hydrocodone tablets³ on both April 22, 2004 and June 15, 2004.

15. On October 10, 2006, Respondent entered a conditional plea of guilty, pursuant to a deferred sentencing agreement with the State, in Vermont District Court for Chittenden County to two felony counts of unlawful delivery/dispensing of a depressant, stimulant, or narcotic. 18 V.S.A. § 4234(b)(1). Respondent admitted that she had used subterfuge in improperly prescribing narcotics that actually were intended for a close family member with whom Respondent resided. The family member purportedly suffered from an addiction to narcotic prescription drugs and painkillers. However, Respondent falsely prescribed the drugs in the name of a co-worker at her then-employer, Occupational Health and Rehabilitation of South Burlington, Vermont. The co-worker filled the prescriptions, obtained the drugs, and passed the drugs to Respondent. Respondent then gave the drugs to her close family member.

2. On May 23, 2005, the Vermont Board served a subpoena upon Respondent's former employer, Occupational Health and Rehabilitation of South Burlington, Vermont, for certain relevant patient records. However, officials of Occupational Health and Rehabilitation reported that the subject medical records could not be found in their files.

3. Hydrocodone is an opioid analgesic and is classified as a DEA Schedule III controlled substance.

Respondent stated that she used this stratagem because she knew she could not lawfully write narcotics prescriptions "directly" for her family member. Respondent also admitted to having prescribed narcotics to another individual without examining him and also admitted to prescribing non-narcotics on other occasions without preparing a medical record reflecting the basis for such prescribing. Transcript, Sentencing Hearing, 1/16/07, at 33-41.

16. On January 17, 2007, the judge entered judgments of guilty, based on Respondent's conditional plea of guilty, on two felony counts of unlawful delivery/dispensing of a depressant, stimulant, or narcotic under 18 V.S.A. § 4234(b)(1) in Vermont District Court for Chittenden County. The Court entered a deferred sentence on each of the two felony counts and placed Respondent on probation, with conditions, on each of these counts for 7 years.⁴

17. Respondent admits here that her prescribing of 40 hydrocodone tablets on April 22, 2004 and June 15, 2004 had no *bona fide* medical purpose, was improper, and unprofessional. She admits that her conditional plea of guilty and deferred sentence for violation of 18 V.S.A. § 4234(b)(1) are related to the practice of medicine and constitute unprofessional conduct on her part. 26 V.S.A. § 1354(a)(30). She also admits that such prescribing is contrary to 26 V.S.A. §§ 1354(a)(1), (7), (9), (22)&(27); 1354(b)(1)&(2); and Board Rule 4.3. Respondent regrets such conduct.

III. Terms and Conditions; Final Surrender of Vermont Licensure.

18. Respondent affirms that she is knowingly and voluntarily agreeing to this Stipulation and Consent Order. She acknowledges and agrees that she has had the opportunity to obtain advice of counsel regarding the matters before the Board and in reviewing this

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4. Under 13 V.S.A. § 7041, after a conditional plea of guilty and an adjudication of guilt, the court may defer sentencing and place the defendant on probation. If probation is successfully completed, the defendant's record of conviction will be expunged.

Stipulation and Consent Order. Respondent agrees here that she is well satisfied with any counsel and representation she may have received in this matter.

19. Respondent agrees and understands that by executing this document she is waiving any right to challenge the jurisdiction and continuing jurisdiction of the Board in this matter, to be presented with a detailed, formal specification of charges, to be presented with evidence adverse to her, to cross-examine witnesses, and to offer evidence of her own to contest the State's allegations. 26 V.S.A. §1356; and 3 V.S.A. §§ 809 & 814.

20. Respondent does not currently practice in the State of Vermont and agrees that her Vermont medical license has expired. Respondent agrees that she has relocated from the State of Vermont and now wishes to pursue her professional activities elsewhere. She agrees that her plans do not include the future practice of medicine in Vermont. After due consideration and reflection, Respondent has determined that she will have no further need of medical licensure in this State. Therefore, Respondent has determined, in lieu of the filing of charges of unprofessional conduct, an evidentiary hearing, and disciplinary action by the Vermont Board of Medical Practice, that it is appropriate for her to enter into the terms and conditions of this Stipulation and Consent Order. Respondent has carefully read and fully understands this agreement.

21. Respondent acknowledges that she wishes to resolve with finality all matters now pending before the Vermont Board of Medical Practice. Respondent agrees and admits that the content of Paragraphs 5 through 18, above, is substantially accurate, and agrees that the Board may enter these as its findings of fact and/or conclusions of law in this matter. While she disputes some characterizations, *see, e.g., n.1, page 4*, she admits that the facts set forth in Paragraphs 5 through 18, conclusively establish two or more counts of unprofessional conduct

by her. Respondent agrees that this is a sufficient basis for the Vermont Board of Medical Practice to enter the conclusions and order contemplated herein. 26 V.S.A. §§ 1354, 1361, and 1398.

22. Therefore, Respondent knowingly and voluntarily has determined that in lieu of the time, expense, and uncertainty of a public hearing and Board disciplinary action: (a) she shall agree to a **PUBLIC REPRIMAND** by the Vermont Board for her unprofessional conduct; and (b) agrees she shall voluntarily and forthwith **SURRENDER** to the Vermont Board of Medical Practice her license to practice medicine in the State of Vermont upon approval of this agreement by the Board. Respondent fully understands and agrees that thereafter any prior rights of licensure in this State shall be wholly void and without effect, and that she shall retain no residual rights of any kind as to medical licensure in the State of Vermont. Respondent understands and agrees that this action by her of surrender of her Vermont medical license shall be final, irrevocable, and non-appealable in any forum.

23. Respondent agrees and warrants that at no time hereafter shall she ever seek by any means whatsoever licensure, reinstatement, relicensure, or practice as a physician or medical doctor in the State of Vermont, regardless of circumstances or the passage of time. Respondent expressly agrees that hereafter the Board may and shall return to her, without action or obligation of due process of any kind, any application, request, motion, petition, or other writing from her with regard to licensure, reinstatement, or relicensure. Respondent expressly and voluntarily waives any right to confidentiality that she may possess as to the Board's investigative/legal file(s) for the matters presently open before the Board in regard to an application for or proceeding related to professional licensure, practice, or privileges in another jurisdiction. Finally, the Vermont Board of Medical Practice agrees that upon

Respondent's execution of this Stipulation and Consent Order, in lieu of disciplinary action, and pursuant to the terms herein, all matters involving her that are currently open before the Board shall be administratively closed by the Vermont Board. Thereafter, the Board shall take no further action on these matters, absent non-compliance with the terms and conditions of this document by Respondent.

24. This Stipulation and Consent Order is conditioned upon its acceptance by the Vermont Board of Medical Practice. Respondent expressly requests the Vermont Board's review and approval of this agreement. If the Vermont Board of Medical Practice rejects any part of this document, the entire agreement shall be considered void. Respondent agrees that in such a case she shall not assert a claim or defense that her rights of due process have been prejudiced in any way by such inchoate consideration. Respondent acknowledges and understands that this Stipulation and Consent Order, if approved, shall be a matter of public record, shall become part of her permanent Board file, shall constitute an enforceable legal agreement, and shall be reported to other licensing authorities.

25. In exchange for the actions by the Vermont Board, as set forth herein, specifically including Paragraphs 22 through 24, above, Respondent expressly agrees to be bound by all terms and conditions of this Stipulation and Consent Order. Therefore, the parties jointly agree that should the terms and conditions of this Stipulation and Consent Order be deemed acceptable, the Vermont Board of Medical Practice may (a) enter an order of **PUBLIC REPRIMAND** of Melissa Carla Smith-Horn, M.D., for the conduct set forth herein; (b) implement the terms and conditions herein, thereby accepting the final and irrevocable **SURRENDER** of the Vermont medical license of Respondent, Melissa Carla Smith-Horn, M.D.

Dated at Montpelier, Vermont, this 9th day of July 2007.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: James S. Arisman
JAMES S. ARISMAN
Assistant Attorney General

Dated at Satellite Beach, Florida, this 5 day of July 2007.

Melissa Carla Smith-Horn, M.D.
MELISSA CARLA SMITH-HORN, M.D.
Respondent, *pro se*

FOREGOING, AS TO MELISSA CARLA SMITH-HORN, M.D.
APPROVED AND ORDERED
VERMONT BOARD OF MEDICAL PRACTICE

John A. Williams
John J. Murray
Allyson Jones
John Rose
Ross Davidson
Peter A. King
David W. Claux

DATED: July 11, 2007
ENTERED AND EFFECTIVE: July 11, 2007

JSA/AAG; Smith-Horn; Stip/Consent Order: Surrender REV 7/3/07; not effective until reviewed and approved by Vermont Board of Medical Practice

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