

FILED *JJC*
MAR 16 2020

**BEFORE THE BOARD OF HEALING ARTS
OF THE STATE OF KANSAS**

KS State Board of Healing Arts

In the Matter of)
Steve M. Simon, M.D.)
Kansas License No. 04-20641) **KSBHA Docket No. 20-HA00038**
_____)

FINAL ORDER

On February 14, 2020, the parties appeared before the Kansas Board of Healing Arts (“Board”) for a Conference Hearing on the Summary Order filed December 26, 2019 (“Summary Order”), in the above captioned matter. Todd Hiatt, Litigation Counsel, appeared to present the position of the disciplinary panel of the Board. Steve M. Simon, M.D., (“Licensee”) appeared in person, and through counsel, Mark Stafford of Forbes Law Group, LLC.

Board members Dr. Balderston, Dr. Hutchins, and Mr. Kelly, recused themselves from participating in the Board’s deliberations and decision in this matter, as these members served on the Disciplinary Panel.

Pursuant to the authority granted to the Board by the Kansas Healing Arts Act, K.S.A. 65-2801, *et seq.*, and in accordance with the provisions of the Kansas Administrative Procedure Act, K.S.A. 77-501, *et seq.*, the Board enters this Final Order. The Summary Order is incorporated by reference, as though fully set forth, and is a part of this Final Order (copy of Summary Order attached). The Final Order differs from the Summary Order by adding the following additional conclusions of law:

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1. Licensee has not asserted his Fifth Amendment right (self-incrimination) as a basis to refuse to produce information legally requested by the Board. (Conference Hearing Transcript. pp. 61-62).
2. Licensee cites *Johnson v. Kraft Foods, N. Amer., Inc.*, 236 F.R.D. 535 (D.Kan.2006) and *Hilt v. SFC, Inc.*, 170 F.R.D. 182 (D.Kan.1997) as a basis for Licensee not providing tax returns as requested by the Board. (Licensee Exhibit 7. p.1). The standard to provide tax returns set forth in these cases is as follows:

“Although, as a general rule, courts do not favor compelling production of tax returns, no absolute privilege exists preventing their discovery. To that end, this district has developed a two-pronged test to assure a balance between the liberal scope of discovery and the policy favoring the confidentiality of tax returns.

“First, the court must find that the returns are relevant to the subject matter of the action. Second, the court must find that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable.”

“The party seeking production has the burden of showing relevancy, and once that burden is met, the burden shifts to the party opposing production to show that other sources exist from which the information is readily obtainable.” *Johnson v. Kraft Foods, N. Amer., Inc.*, 236 F.R.D. 535, 539 (D.Kan.2006) (citing *Hilt v. SFC, Inc.*, 170 F.R.D. 182, 188-189 (D.Kan.1997)).

3. The Summary Order finds that Licensee’s tax returns are legally requested by the Board to determine whether pharmaceutical company payments to Licensee are related to the amount of pharmaceuticals Licensee prescribed to his patients. (Summary Order. Section 20, p. 5). The Board concludes that Licensee’s tax returns, to the extent they reveal income, are relevant to determination of this issue and the burden of showing relevancy has been met.

4. Licensee has responded in part to the Board's requests for payment and income information but has not supplied all requested information, including tax returns.
5. In *Hilt* the party seeking production requested an unredacted copy of a tax return. The party opposing production provided: an extensively redacted tax return; and other tax documents related to the issue of income (redacted Form MO-1040, unredacted Form 1099-G, and unredacted Form W-2). The party opposing production argued that the tax return was a joint return and the income and earnings of the spouse were irrelevant and not calculated to lead to discovery of admissible evidence. *Hilt*, 170 F.R.D. 182, 188-189 (D.Kan.1997).
6. The *Hilt* court acknowledged production of the redacted tax return and related documents but concluded the information to be found in the unredacted tax return was needed and not readily available from other sources. The court held that the opposing party must "produce an unredacted tax return solely for inspection by defense counsel for the purpose of this lawsuit." *Hilt*, 170 F.R.D. 182, 189 (D.Kan.1997).
7. Similar to the *Hilt* case cited above, review of the record finds that Licensee has failed to provide sufficient evidence to establish that the needed information to be found in Licensee's tax returns is readily available from other sources.

After reviewing the Summary Order, the agency record, the testimony of Licensee, hearing the arguments of the parties, and being duly advised in the premises, the Board orders as follows:

Final Order

The Board **SUSTAINS** the Summary Order, as amended by this Final Order, indefinitely suspending the license of Dr. Simon until he provides to the Board the information legally requested in Board Investigative Case No. 18-00075.

Licensee Request to Stay Final Order

At the Conference Hearing after the Board verbally issued its order, Licensee, through counsel, requested the Board to stay the Final Order for a period of time to allow Licensee to search for records that might be satisfactory.

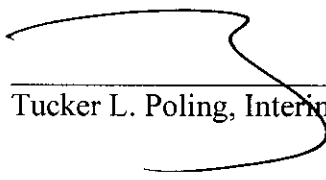
The Board finds the Final Order necessary and justified to protect against a substantial threat to the public health, safety or welfare. Specifically, Licensee has been alleged to have violated the Healing Arts Act, K.S.A. 65-2801 *et seq.* Accordingly, an investigation was opened. Licensee refused to provide the Board with legally requested information that is necessary to proceed with the investigation to determine if there has been a violation of the Healing Arts Act.

Blocking an investigation by refusing to produce legally requested information is a substantial threat to the public health, safety, or welfare and creates a significant risk in that those who may have, or have, violated the Healing Arts Act are able to continue practicing unchallenged by using this obstructive tactic.

The Board **DENIES** Licensee's request to stay the Final Order.

IT IS SO ORDERED this 16th day of March 2020.

KANSAS STATE BOARD OF HEALING ARTS



Tucker L. Poling, Interim Executive Director

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NOTICE OF RIGHTS

PLEASE TAKE NOTICE that this is a Final Order. A Final Order is effective upon service. A party to an agency proceeding may seek judicial review of a Final Order by filing a petition in the District Court as authorized by K.S.A. 77-601, *et seq.* Reconsideration of a Final Order is not a prerequisite to judicial review. A petition for judicial review is not timely unless filed within 30 days following service of the Final Order. A copy of any petition for judicial review must be served upon Tucker L. Poling, Interim Executive Director, Kansas State Board of Healing Arts, 800 SW Jackson St., Lower Level-Suite A, Topeka, KS 66612.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a true and correct copy of the above and foregoing FINAL ORDER, by depositing the same in the United States mail, postage prepaid, and emailed, on this 14th day of March 2020, addressed and emailed to:

Steven M. Simon, M.D.
CONFIDENTIAL

Licensee

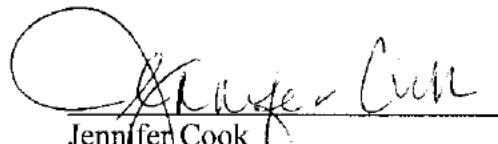
Mark W. Stafford
Forbes Law Group, LLC
6900 College Blvd., Ste. 840
Overland Park, KS 66211
mstafford@forbeslawgroup.com
Attorney for Licensee

and a copy hand delivered to the office of:

Todd Hiatt
Litigation Counsel
Kansas Board of Healing Arts
800 SW Jackson, Lower Level-Suite A
Topeka, Kansas 66612

Compliance Coordinator
Kansas Board of Healing Arts
800 SW Jackson, Lower Level-Suite A
Topeka, Kansas 66612

and the original filed with the office of the Executive Director.



Jennifer Cook
Paralegal

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BEFORE THE BOARD OF HEALING ARTS
OF THE STATE OF KANSAS

KS State Board of Healing Arts

In the Matter of)

STEVEN M. SIMON, M.D.)

Kansas License No. 04-20641)

KSBHA Docket No. 20-HA00038

SUMMARY ORDER

NOW ON THIS 26th day of December, 2019, this matter comes before Tucker Poling, Interim Executive Director, Kansas State Board of Healing Arts ("Board"), in summary proceedings pursuant to K.S.A 77-537.

Pursuant to K.S.A 77-537 and K.S.A. 77-542, this Summary Order shall become effective as a Final Order, without further notice, if no written request for a hearing is made within fifteen (15) days of service. Upon review of the agency record and being duly advised in the premises, the following findings of fact, conclusions of law, and order are made for and on behalf of the Board:

Findings of Fact

1. Steven M. Simon, M.D. ("Licensee") was originally issued license number 04-20641 to practice medicine and surgery in Kansas on or about August 10, 1984. Licensee last renewed such license on or about May 27, 2019. Licensee's current license designation is Active.
2. Licensee's last known mailing address to the Board is: CONFIDENTIAL
3. During all times relevant to the facts set forth in this Summary Order, Licensee held an Active license to practice medicine and surgery in Kansas.
4. On or about July 20, 2017, the Board received a news article from the Kansas City Star indicating a former patient of Licensee alleged Licensee prescribed him high doses of an opioid

spray, despite the patient reporting he did not suffer from a condition which warranted such treatment. The patient additionally alleged Licensee reported to the patient he received substantial payments from the pharmaceutical company, Insys, for speaking engagements regarding the opioid medication.

5. On or about July 24, 2017, the Board received a complaint from the above patient alleging Licensee was overprescribing an opioid spray medication for patients based not on their diagnoses; but rather, on Licensee's financial relationship with the manufacturer of such medication.

6. Based on the above information received by the Board, KSBHA Investigation No. 18-00075 was subsequently opened against Licensee.

7. On or about August 28, 2019, Board Investigator Jennifer Burkdoll, RN, BSN, requested Licensee's personal financial records. This request included Licensee's financial statements and records for Licensee's personal bank account(s) as well as the deposit information and personal income tax information. This same request was made of Licensee for the same type of documents for his business for the timeframe of January 1, 2013 to present. Licensee was given a deadline of September 19, 2019 to provide this information.

8. On or about September 4, 2019, Licensee's attorney responded to the Board's request via letter, stating, "we object to the board's request for personal financial and taxation records that are personal to Dr. Simon and his wife. Those records do not relate to any issue that is within the board's authority to regulate."

9. On or about September 8, 2019, Disciplinary Counsel Reese Hays contacted Licensee's attorney via email to address his objection to providing the legally requested information and provided Licensee a deadline by end of business day on September 16, 2019 to comply with the

requested production of personal financial records. Licensee's deadline to provide such information was end of business day September 16, 2019.

10. On or about September 9, 2019, Licensee's attorney responded to Disciplinary Counsel Hays' email stating: "I fully understand the situation. As I indicated to Ms. Burkdoll, we are awaiting receipt of the report of income received through the consulting entity, either a K-1 or a 1099. I have not heard back from the accountant yet. I suggest we all keep our powder dry until that comes in and see what questions remain. MWS".

11. On or about September 16, 2019, Licensee's attorney provided on behalf of his client, Licensee's various businesses (Pharma Consultants LLC, ILC Pharma Consultants LLC, Pharma Consultants KC LLC, Steven Simon Pharma Consultants KC LLC, Steven Simon MD LLC) and Licensee's 1099s received from various pharmaceutical companies for tax years 2015 to 2017. Neither Licensee nor Licensee's attorney provided the requested financial statements and records for his personal bank account(s) including deposit information for the timeframe from January 1, 2013 to date nor were the financial statements and records for Pharma Consultants KC, LLC, including deposit information produced.

12. On or about October 7, 2019, Investigator Burkdoll again requested Licensee to produce the following:

- a. Financial statements and records for Pharma Consultants KC, LLC, including deposit information for the timeframe of January 1, 2013 to current; and
- b. Financial statements and records for Licensee's personal bank account(s) including deposit information for the timeframe of January 1, 2013 to current.

13. Licensee was given a deadline of October 24, 2019 to produce the above requested information.

14. On or about October 16, 2019, Licensee's attorney informed Disciplinary Counsel Hays that his client would not be complying with the request for legally requested information and requested the investigation be closed.

15. On that same day, Disciplinary Counsel Hays responded to Licensee's attorney and informed Licensee's attorney via email that he noted Licensee's attorney's objection to producing the requested legally requested information. Further, Disciplinary Counsel Hays noted Licensee's attorney did not provide any legal authority to support his objection to providing the legally requested. Disciplinary Counsel Hays further provided the legal authority based upon Kansas statutes and caselaw supporting the Board's request.

16. To date, Licensee has not responded and has not provided the requested information.

Applicable Law

17. Under K.S.A. 65-2836, a license may be revoked, suspended or limited, or the licensee may be publicly censured or placed under probationary conditions, upon a finding of the existence of any of the following grounds:

- (r) The Licensee has failed to furnish the board, or its investigators or representatives, any information legally requested by the board.

Conclusions of Law

18. The Board has jurisdiction over Licensee as well as the subject matter of this proceeding, and such proceeding is held in the public interest.

19. In *Wolgast v. Schurle*, the Kansas Court of Appeals affirmed a lower court's decision which "found that fishing expeditions are a legitimate administrative investigatory tool . . ." *State ex rel. Wolgast v. Schurle*, 11 Kan. App. 2d 390, 392 (Kan. App. 1986). *Schurle* further noted that "in

matters relevant to purposes for which the agency is authorized the agency may investigate 'merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" *Id.* at 393 (citing *United States v. Powell*, 379 U.S. 48, 57, 85 S.Ct. 248, 254, 13 L.Ed.2d 112 (1964), quoting from *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43, 70 S.Ct. 357, 364, 94 L.Ed.2d 401 (1950)).

20. The Board finds that the information requested is legally requested information because there is a suspicion pharmaceutical companies made payments to Licensee directly and through his various legal entities in amounts that were directly related to the amount of their pharmaceuticals he prescribed to his patients. Specifically, the more he prescribed, the more money he received from the pharmaceutical companies to speak on their behalf. The information requested relates to determining whether or not there was this correlation between Licensee's prescribing amounts and the amount of money he received from the various pharmaceutical companies. Basing the amount, a licensee prescribes to a patient on the amount of money they will receive from the pharmaceutical company is a violation of several provisions of the Healing Arts Act, K.S.A. 65-2801 *et. seq.*

21. The Board finds that Licensee violated K.S.A. 65-2836(r), in that Licensee has failed and/or refused to respond to the request for information regarding his personal financial records.

22. Based on the facts and circumstances set forth herein, it appears that the use of summary proceedings in this matter is appropriate, in accordance with the provisions set forth in K.S.A. 77-537(a), in that the use of summary proceedings does not violate any provision of law and the protection of the public interest does not require the Board to give notice and opportunity to participate to persons other than Licensee, Steven M. Simon, M.D.

IT IS, THEREFORE, ORDERED that Licensee's license to practice osteopathic medicine in Kansas is **INDEFINITELY SUSPENDED** for violating the Kansas Healing Art Act. Licensee's license shall be Indefinitely Suspended until such time as he provides the legally requested information pursuant to the requests regarding KSBHA Investigative Case No. 18-00075.

PLEASE TAKE NOTICE that upon becoming effective as a Final Order, this document shall be deemed a public record and be reported to any reporting entities authorized to receive such disclosure.

Dated this 26th day of December, 2019.

KANSAS STATE BOARD OF HEALING ARTS



Tucker Poling
Interim Executive Director

NOTICE OF RIGHTS
(Pursuant to K.S.A. 77-542)

Licensee is entitled to a hearing pursuant to K.S.A. 77-537 and K.S.A. 77-542 of the Kansas Administrative Procedure Act ("KAPA"). If Licensee desires a hearing, within fifteen (15) days from the date of service of this Order, Licensee must file a written request for a hearing with the office of the Executive Director at:

Tucker Poling, Interim Executive Director
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level - Suite A
Topeka, Kansas 66612

If Licensee requests a hearing, the Kansas State Board of Healing Arts will notify the Licensee of the time and place of the hearing and information on the procedures, right of representation, and other rights of parties relating to the conduct of the hearing before commencement of the same. If a hearing is not requested in the time and manner stated above, this Summary Order shall become effective as a Final Order upon the expiration of time for requesting a hearing pursuant to K.S.A. 77-542. Pursuant to K.S.A. 77-613(e), the Executive Director is the agency officer designated to receive service of petition for judicial review on behalf of the agency.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing Summary Order was served this 26th day of December, 2019, by depositing the same in the United States Mail, first-class postage prepaid, and addressed to:

Mark Stafford
Attorney for Licensee
Forbes Law Group, LLC
6900 College Blvd., Suite 840
Overland Park, KS 66211

And a copy was hand-delivered to:

General Counsel
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level, Suite A
Topeka, Kansas 66612

M. Katie Baylie
Associate Litigation Counsel
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level, Suite A
Topeka, Kansas 66612

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

Tucker Poling
Interim Executive Director
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level, Suite A
Topeka, Kansas 66612

Ali for Susan Gile