

IN THE ALABAMA COURT OF CIVIL APPEALS

COURT OF CIVIL APPEALS No. 2030977

MEDICAL LICENSURE COMMISSION OF ALABAMA,

APPELLANT,

V.

PASCUAL HERRERA, JR., M.D.,

APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY
(CIVIL ACTION NO.: CV-01-2232)

ORAL ARGUMENT REQUESTED

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT OF
APPLICATION FOR REHEARING OF APPELLEE
PASCUAL HERRERA, JR., M.D.

Algert S. Agricola (AGR001)
SLATEN & O'CONNOR, P.C.
Winter Loeb Building
105 Tallapoosa St., Suite 101
Montgomery, Alabama 36104
(334) 396-8882 (P)
(334) 396-8880 (F)

IN THE ALABAMA COURT OF CIVIL APPEALS

CASE NO. 2030977

MEDICAL LICENSURE COMMISSION	*
OF ALABAMA,	*
	*
Appellant,	*
	*
v.	*
	*
PASCUAL HERRERA, JR., M.D.,	*
	*
Appellee.	*

APPLICATION FOR REHEARING

Appellee Pascual Herrera, Jr., M.D. (hereinafter "Herrera"), files this Application for Rehearing pursuant to A.R.App.P. 40, and assigns as grounds therefore:

1. This Court's March 11, 2005 opinion, which reversed the Montgomery County (Ala.) Circuit Court's determination, conflicts with established Alabama law and prior Alabama decisions, or else makes unwarranted decisions of first impression, regarding the following areas:

1. This Court's opinion holds (opinion, pp.26-28) that as a matter of law, a doctor's handwriting is relevant to whether that doctor practices medicine in a manner which endangered his patients' health.
2. This Court's opinion holds (opinion, p.31) that the Court will assume that the trier of fact made those findings necessary to support its order; whereas statutory law and precedent establish that the charges must be proven by substantial evidence.
3. This Court's opinion holds (pp.34-37) that there was "substantial evidence" to support the MLC's decision; whereas there was insufficient evidence to support the MLC's decision.
4. This Court's opinion is silent as to the appropriateness of the sanctions meted out to Dr. Herrera.

A supporting brief is attached hereto, and filed contemporaneously with this Application for Rehearing.

STATEMENT OF FACTS

In 1978, Pascual Herrera enrolled in a six-year medical doctoral program at the University of Barcelona. He graduated in 1984 and began a three-year internal medicine residency program at Mercy Catholic Medical Center which was affiliated with Thomas Jefferson School of Medicine in Philadelphia, Pennsylvania. He completed his residency program in 1987 and moved to Attalla, Alabama where, after obtaining his license to practice in Alabama, he became a staff physician at Attalla Medical Center and practiced with Dr. Onelio Perdomo who specialized in family practice. Approximately five years later, Herrera opened his own internal medicine practice under the name of Clubview Medical

Clinic in Gadsden, Alabama. R. 462-64.¹

Over the last few years before these proceedings were initiated, Dr. Herrera began to focus his practice more in the area of pain management. He obtained independent study course materials entitled "Chronic Non-cancer Pain Treatment-The Use of Opioids" from the Alabama Board of Medical Examiners which were assembled by the University of Wisconsin-Madison Medical School for use as continuing medical education. Dr. Herrera had privileges at both Gadsden hospitals, Riverview Hospital and Gadsden Regional Hospital, was a member of the Alabama Medical Association, a member of the American Association of Pain Management, and a member of the American Pain Society. Dr. Herrera produced certificates showing completion of a 13-hour continuing medical education course, a five-hour continuing medical education course in pain

¹ The record is cited (C.____) for the Clerk's Record on Appeal and (R.____) for the transcript pages.

management sponsored by the University of Alabama in Birmingham, and an eight-and-one-half-hour continuing medical education course sponsored by the Pain and Rehabilitation Center of Birmingham at Baptist Montclair conducted by Dr. Dan Doley, a well-respected Ph.D. psychologist. R. 464-71.

The administrative complaint in this case returned by the Alabama Board of Medical Examiners (hereinafter "the Board") charged Dr. Herrera with violating four subsections of Ala. Code 1975, §34-24-360. First, Dr. Herrera was charged with practicing medicine in such a way as to endanger the health of his patients in violation of Ala. Code 1975, §34-24-360(3). Second, Dr. Herrera was charged with prescribing, dispensing, furnishing, or supplying controlled substances to individuals for other than a legitimate medical purpose in violation of Ala. Code 1975, §34-24-360(8). Third, Dr. Herrera was charged with gross malpractice in the practice of medicine in violation of Ala. Code 1975,

§34-24-360(9). Finally, Dr. Herrera is charged with performing unnecessary diagnostic tests or medical or surgical services in violation of Ala. Code 1975, §34-24-360(11).

In support of each of these charges the Board made the same four assertions. The Board asserted that Dr. Herrera failed to perform an adequate history and physical on James Whitten, Debra Lowe, and Gregory Scott Livingston, that he performed unnecessary diagnostic tests on these patients, that his medical notes on these patients were illegible, and that he prescribed controlled substances to these patients in excessive amounts, without medical justification, and without adequate documentation of the necessity for the amounts prescribed.

In its three-page order revoking Dr. Herrera's license to practice medicine, the Medical Licensure Commission (hereinafter "the Commission" or "the MLC") simply parroted back these same four assertions as its findings of fact without any

explanation of what was the specific evidence on which it based its findings or any review of the evidence it heard during its three-day administrative hearing. In making its conclusions of law, the Commission simply restated the charges against Dr. Herrera, again parroting the statutory language as its conclusions of law. In the concluding paragraph of its revocation order, the Commission expressed that it was gravely concerned about Dr. Herrera's basic knowledge of medicine and his ability to exercise appropriate medical judgment. These concerns, along with its so-called findings of fact and conclusions of law, led the Commission to conclude that Dr. Herrera should not be allowed to continue to practice medicine in Alabama.

Dr. Michael McBrearty is a family practitioner in Fairhope, Alabama. He had approximately five patients on opiates at the time of the hearing, he testified that he typically referred chronic-pain

patients to other doctors for treatment.

Dr. Daniel Brookoff, who testified as Dr. Herrera's expert, is the Associate Director for Medical Education for Methodist Hospital in Memphis, Tennessee. He serves as a Professor of Medicine for the University of Tennessee Medical School. He is also Associate Director of the Comprehensive Pain Institute located at Methodist Hospital. In his capacity as Associate Director for Medical Education, Dr. Brookoff supervises the training of internal medicine residents. These are people who are completing their training in either internal medicine or they are doing a transitional internship. As a medical professor, Dr. Brookoff teaches medical students at the University of Tennessee. Brookoff deposition, pp. 6-7. Dr. Brookoff also conducts research and writes scholarly articles in pain management. His fourteen-page curriculum vitae lists seven different editorial positions either as a reviewer or editorial board

member for scholarly medical journals, eighty-eight lectures by invitation to meetings of medical professionals across the country, thirty-five original papers in which he was either the author or co-author, eight medical book chapters in which he was either the author or co-author, three pamphlets, thirteen abstracts in which he was either the author or co-author, and three medical book reviews.

Dr. Brookoff serves on six committees at Methodist Hospital including the Clinical Competency Committee, the Cancer Committee, the Credentials Committee, the Critical Care Committee, the Emery House and Trauma Coverage Committee, and the Patient Education Committee. Respondent's Exhibit 14. Dr. Brookoff is a member of the American College of Physicians, the American Medical Association, the American Pain Society, the American Public Health Association, the College of Physicians of Philadelphia, the Society for Academic Emergency Medicine, the Southern Medical Association, the

Southern Association for Oncology, the Tennessee Medical Association, the Shelby County Medical Society, the Southern Pain Society, the Tennessee Pain Society, and the American Academy of Hospice and Palliative Medicine.

Dr. Brookoff is board certified in internal medicine and in medical oncology. He is also certified in advanced cardiovascular life support and is also certified as an instructor in ACLS. He has served on the faculty as an assistant professor of medicine at the University of Pennsylvania Medical School. He is licensed to practice medicine by the states of Tennessee and Pennsylvania. Dr. Brookoff did not receive any compensation from Dr. Herrera or from counsel for Dr. Herrera for his time spent giving testimony or for his time spent reviewing Dr. Herrera's patient charts. Brookoff Deposition, p. 17. Dr. Brookoff reviewed the patient charts for Debra Lowe, Gregory Scott Livingston, and James Whitten. *Id.* pp. 18-19.

WHEREFORE, for the above-cited reasons, Appellee Pascual Herrera, Jr., M.D., prays that this Court will grant his Application for Rehearing in the above-styled case.

Respectfully submitted this ____ day of March, 2005.

Algert S. Agricola (AGR001)
Counsel for Appellee Pascual
Herrera, Jr., M.D.

Of Counsel:

Slaten & O'Connor, P.C.
Winter Loeb Building, Suite 101
105 Tallapoosa St.
Montgomery, AL 36104
(334) 396-8882 (P)
(334) 396-8880 (F)

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and complete copy of the foregoing by first-class United States Mail, postage prepaid, upon the following counsel of record for Appellee at the following address(es):

Wayne Turner, Esq.
1501 Madison Avenue
Montgomery, AL 36107

Troy King, Esq.
Alabama Attorney General
Alabama Statehouse
11 South Union St.
Montgomery, AL 36106

DATED this the ____ day of March, 2005.

Of Counsel

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	*
Appellee.	*

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

COMES NOW Appellee Pascual Herrera, Jr., M.D. (hereinafter "Herrera"), by and through the undersigned counsel, and herewith submits this brief in support of his Application for Rehearing in the above-styled case.

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STATEMENT OF JURISDICTION

The trial court's jurisdiction was based upon Ala. Code 1975, §12-3-10. This Court's jurisdiction is based upon Ala. Code 1975, §12-2-7. This Application for Rehearing is based upon A.R.App.P. 40.

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STATEMENT OF THE CASE

On April 17, 2000, the Alabama State Board of Medical Examiners filed with the Medical Licensure Commission (MLC) an administrative complaint, seeking to revoke or otherwise discipline the license to practice medicine in Alabama of Pascual Herrera, Jr., M.D. (C.11). On February 28, March 28, and March 29, 2001 a hearing was held on such complaint. Thereafter, on April 25, 2001, the MLC entered an order revoking Dr. Herrera's license to practice medicine in Alabama. (C.54). On June 5, 2001, Dr. Herrera filed an Application for Rehearing (C.68) and such application was denied on June 27, 2001. (C.70). On July 3, 2001, Dr. Herrera filed with the MLC a Notice of Appeal or Review. (C.76). On July 31, 2001, Dr. Herrera filed in the Circuit Court for Montgomery County, Alabama a Petition for Judicial Review. On June 14, 2004 the Circuit Court for Montgomery County issued a final judgment reversing the order of the MLC. On July 7, 2004 the

MLC filed a Notice of Appeal to this Court. This Court issued its opinion on March 11, 2005. Dr. Herrera files this Application for Rehearing on March 25, 2005.

ISSUES PRESENTED ON APPLICATION FOR REHEARING

I. THIS COURT'S OPINION ERRS IN HOLDING AS A MATTER OF LAW THAT A DOCTOR'S HANDWRITING IS RELEVANT TO WHETHER THAT DOCTOR PRACTICES MEDICINE IN A MANNER WHICH ENDANGERS HIS PATIENTS' HEALTH.

Dr. Herrera first asserts that this Court's March 11, 2005 opinions errs in determining, sub silentio, that the legibility of a medical doctor's handwriting can, as a matter of law, serve as a basis for finding that the doctor practices medicine in such a manner so as to endanger his patients' health.

The MLC's first charge against Dr. Herrera was illegible handwriting. There is no presumption of correctness applied to the MLC's legal conclusions or its application of law to the facts. Barngrover v. Medical Licensure Commission of Alabama, 852 So.2d 147, 152 (Ala. Civ. App. 2002). Thus, the MLC's determination that Dr. Herrera's allegedly

illegible handwriting constituted cause for sanctions is entitled to no deference from this Court.

The trial court found that a factual finding that Dr. Herrera's patient charts were illegible could not, as a matter of law, serve as a basis for supporting the MLC's findings. This Court found that Eley v. Medical Licensure Commission of Alabama, ___ So.2d ___, 2003 Ala. Civ. App. Lexis 740 (Ala. Civ. App. 2003), which holds that "poor medical-record documentation is not a basis for revoking a physician's license," Id., at *19, addressed the documentation of a patient's chart and not the legibility thereof. (March 11, 2005 opinion at p.27). From there, however, this Court held that it could not conclude, as a matter of law, that evidence pertaining to the legibility of patient charts cannot serve as the basis for revoking a medical license. (March 11, 2005 opinion, p.28).

By refusing to hold that the legibility of a

doctor's handwriting could not form the basis of charges against him, this Court held, at least by implication, the converse to be true: the legibility of a doctor's handwriting can, as a matter of law, form the basis of charges against that doctor.

This holding is unique. An exhaustive review of nationwide authority fails to uncover any other court, federal or state, which has held that the legibility of a doctor's handwriting can form the basis of disciplinary action against that doctor. This is hardly surprising, given the inherently subjective nature of such an inquiry.

Dr. Herrera submits that this Court's March 11, 2005 opinion constitutes an unprecedented and unwarranted expansion of the MLC's authority to discipline doctors for arbitrary subjective criteria, and as such violates Dr. Herrera's due process rights. The right to practice medicine is a property right, which may be denied only if that denial is consonant with due process. Benton v.

Alabama Board of Medical Examiners, 467 So.2d 234, 237 (Ala. 1985).

II. THIS COURT'S OPINION ERRS IN ASSUMING THAT THE MLC MADE SUCH FINDINGS NECESSARY TO SUPPORT ITS DECISION.

Next, Dr. Herrera asserts that this Court's March 11, 2005 opinion mistakenly finds that the trial court erred in determining that the evidence did not support the MLC's determination that Dr. Herrera had practiced medicine in a manner that endangered his patients' health. As stated in this Court's opinion:

As already stated in this opinion, the Commission did not cite specific facts to support its contention that Dr. Herrera practiced medicine in a manner that might endanger his patients' health. Thus, it appears that the trial court, in rejecting the Commission's legal conclusions, speculated that the Commission relied only upon the evidence pertaining to the anti-inflammatory medication. However, "this Court will assume that the [trier of fact] made those findings necessary to support the [order]."

(March 11, 2005 opinion, p.31). This Court's opinion errs in assuming that the MLC made findings of fact to support its determination. However, the law is clear that the MLC's findings of fact must be supported by substantial evidence. Alabama Medicaid Agency v. Peoples, 549 So.2d 504, 506 (Ala. Civ. App. 1989). This evidence must be in the record; it is impermissible for the reviewing Court to simply assume that such facts exist or that the MLC made findings necessary to support its determination to revoke Dr. Herrera's medical license. The MLC raised a host of scattershot, contradictory, and inherently subjective claims against Dr. Herrera; the MLC cannot then refuse to cite any specific finding of fact to support its arbitrary conclusion that Dr. Herrera's medical license should be revoked. As noted above, a medical license is a property right, and Dr. Herrera has a due process right to know the exact factual findings relied upon

by the MLC in revoking his medical license.² Benton,
supra.

As addressed in greater detail infra, the MLC's failure to cite specific facts constitutes a failure to provide substantial evidence to support the charges, and the MLC's license revocation order should be vacated on that basis alone.

**III. THIS COURT'S OPINION ERRS IN FINDING THAT
SUBSTANTIAL EVIDENCE SUPPORTED THE MLC'S
DETERMINATION.**

Next, Dr. Herrera contends that this Court's March 11, 2005 opinion errs in stating that the MLC's action revoking his medical license was supported by "substantial evidence." The MLC's actions were not supported by substantial evidence, and it is not necessary to reweigh the witnesses'

²Dr. Herrera submits that the MLC's failure to make any factual findings constitutes a tacit admission that the evidence adduced at his hearing was insufficient to support any findings.

credibility in order to arrive at this conclusion.

Ala. Code 1975, §41-22-20(k) states, "the [MLC's] order shall be taken as prima facie just and reasonable and the [reviewing] court shall not substitute its judgment for that of the [MLC] as to the weight of the evidence on questions of fact." Therefore, judicial review of an agency's administrative decision is limited to determining whether the decision is supported by substantial evidence, whether the agency's actions were reasonable, and whether its actions were within its statutory and constitutional powers. Alabama Medicaid Agency v. Peoples, 549 So.2d at 506.

This Court's March 11, 2005 opinion (pp.29-30) found that the evidence pertaining to the MLC's charges against Dr. Herrera was "disputed," and therefore the MLC had the sole authority to resolve the dispute. However, merely finding that the evidence was "disputed" does not insulate the MLC's determination from judicial review. The evidence

supporting the MLC's determination must be "substantial."

"Substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." Ex parte Bowater, Inc., 772 So.2d 1181, 1182 (Ala. 2000).

The MLC's revocation determination was not supported by substantial evidence. It is important to note at this point that Dr. Herrera's practice focuses on pain management. The most serious charges against Dr. Herrera pertain to dispensing narcotic painkillers. Yet the MLC's expert witness was Dr. Michael McBrearty, a family practitioner who admittedly refers his chronic-pain patients to other doctors. Dr. McBrearty opined that the medical tests Dr. Herrera ordered for D.L. were "probably duplicative" of tests D.L. received in a Georgia medical facility, despite his lack of first-hand

knowledge of the Georgia tests; Dr. McBrearty offered incorrect testimony regarding which doctor prescribed D.L.'s anti-inflammatory medication (McBrearty erroneously ascribed this to Dr. Herrera); Dr. McBrearty opined that Dr. Herrera improperly prescribed narcotic cough medicine for a patient with Chronic Obstructive Pulmonary Disorder (COPD) when such testimony was outside McBrearty's expertise as a family practitioner; and Dr. McBrearty opined that seeing chronic-pain patients every three months was sufficient, when such testimony was outside his expertise as a family practitioner.

In short, Dr. McBrearty testified to matters outside his personal knowledge (such as the medical tests performed upon D.L. in Georgia), and outside his area of practice and expertise. There is simply nothing in the record that remotely supports an inference that Dr. McBrearty was qualified to give expert testimony on matters outside his practice

area of family practice, and certainly not as to matters such as chronic-pain management or thoracic/pulmonary practice. To qualify as an expert, a witness must have "such knowledge, skill, experience or training that the witness's opinion will be considered in reason as giving the trier of fact light upon the question to be determined." C. Gamble, *McElroy's Alabama Evidence*, §127.02(2) (5th ed. 1996), citing ARE 702. For that reason, Dr. McBrearty's testimony, standing alone, is insufficient to form "substantial evidence" supporting the MLC's decision to strip Dr. Herrera's medical license. It should also be noted at this point that Dr. McBrearty was the sole medical witness to testify against Dr. Herrera.

Further, it violates Dr. Herrera's due process rights to use a witness who is unfamiliar with the practice area at issue (chronic-pain treatment) to support a determination to revoke Dr. Herrera's medical license.

For the same reasons, that portion of this Court's opinion finding that the trial court made an evidentiary determination that Dr. Brookoff was eminently more qualified than Dr. McBrearty (March 11, 2005 opinion, pp.32-33), was in error, because Dr. McBrearty did not purport to be a chronic-pain specialist. Dr. Brookoff is an eminent chronic-pain specialist, and it is not a question of evaluating their respective credentials to take judicial notice of this fact.

The MLC continuously urges the appellate courts to exercise extreme deference to its actions. See, generally, MLC's initial brief, pp.17-18; Ex parte Alabama Medical Licensure Commission, 2004 Ala. Lexis 230, *8. While it is well settled that judicial review is deferential, Ala. Code 1975, §41-22-20(k), this judicial deference is not unlimited. Courts have the right and responsibility to overturn MLC actions which are not supported by substantial evidence, are erroneous, unreasonable, arbitrary,

capricious, or an unwarranted exercise of discretion, as in this case. Ala. Code 1975, §41-22-20(k)(5)-(7).

To hold otherwise would clothe the MLC with unlimited and unreviewable discretion, a result which the Alabama Legislature clearly did not intend when drafting the Alabama Administrative Procedures Act.

There was not "substantial evidence" to support the MLC's actions in this case, and this Court's March 11, 2005 opinion errs in so holding.

IV. THIS COURT'S OPINION IS SILENT AS TO THE SEVERITY OF DR. HERRERA'S SANCTION.

Last, Dr. Herrera notes that this Court's March 11, 2005 opinion is silent as to whether a lesser punishment, other than revocation of his license, would be appropriate in this case.

Dr. Herrera preserved this issue by raising it before the trial court, and the MLC argued this

issue in its initial brief to this Court. (MLC's initial brief, pp.18-19).

As this Court is aware, the MLC has the authority to revoke a medical practitioner's license, as well as lesser penalties such as suspension or restriction. See, generally, Ala. Code 1975, §34-24-360(2). The MLC elected to impose its harshest penalty, revocation of medical license, upon Dr. Herrera in this case.

It is unsettled whether Alabama's courts have the inherent authority to lessen the MLC's sanctions. Eley v. Medical Licensure Commission of Alabama, 2003 Ala. Civ. App. Lexis 740, *46 states: "Because we conclude, based on the record presented, that the sanction imposed by the Commission revoking Eley's medical license was excessive and disproportionate to the wrong committed, that sanction is due to be reversed." See also Benton v. Board of Medical Examiners, 467 So.2d at 238.

The dissent in Eley relied upon Ex parte Alabama

Board of Nursing, 835 So.2d 1010 (Ala. 2001) for the proposition that "the choice of punishment is totally within the discretion of the regulatory body." Justice Houston's dissent in the Alabama Supreme Court's order denying certiorari in Eley, Ex parte Medical Licensure Board, 2004 Ala. Lexis 361 (rel. December 30, 2004) echoes the Eley dissent: "I also agree ... that the choice of punishment is totally within the discretion of the regulatory body." Id. However, Ex parte Alabama Board of Nursing, relied upon by the Eley dissent, Eley, 2003 Ala. Civ. App. Lexis 740 at *47-48, does not contain any such holding or language.

In fact, the contrary is true. Section 41-22-40 speaks of judicial review of agency "decision[s]" and "order[s]," which by definition encompasses the ultimate punishment meted out by the agency. Indeed, it would be inherently contradictory to hold that judicial review was available for every other aspect of an administrative agency's determination,

except the range of punishment meted out. This would be clearly contrary to the plain language of the law.

Dr. Herrera additionally notes that such a holding would be contrary to the holdings in other jurisdictions such as those cited in Eley, 2003 Ala. Civ. App. Lexis 740, at *46, n.10.

This Court should resolve the ambiguity in the law pertaining to whether judicial review has the inherent authority to modify the choice of punishment meted out by the regulatory body. Additionally, because the punishment in this case is unduly harsh and unjust (a fact hinted at in this Court's March 11, 2005 opinion, pp.36-37), this Court should resolve the issue in Dr. Herrera's favor and modify his punishment to a less severe sanction.

CONCLUSION

WHEREFORE, for the above-listed arguments and

citations to authority, Appellee Pascual Herrera, Jr., M.D., prays that this Court will grant this Application for Rehearing in the above-styled case; and, upon rehearing, will vacate its March 11, 2005 decision and enter an order affirming the judgment of the Montgomery County Circuit Court. Herrera further prays that this Court will grant such further, other, or different relief to which he may be equitably entitled, whether specifically prayed for herein or not.

Respectfully submitted this ____ day of March, 2005.

Algert S. Agricola (AGR001)
Counsel for Appellee Pascual
Herrera, Jr., M.D.

Of Counsel:

Slaten & O'Connor, P.C.
Winter Loeb Building, Suite 101
105 Tallapoosa St.
Montgomery, AL 36104
(334) 396-8882 (P)
(334) 396-8880 (F)

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and complete copy of the foregoing by first-class United States Mail, postage prepaid, upon the following counsel of record for Appellee at the following address(es):

Wayne Turner, Esq.
1501 Madison Avenue
Montgomery, AL 36107

Troy King, Esq.
Alabama Attorney General
Alabama Statehouse
11 South Union St.
Montgomery, AL 36106

DATED this the ____ day of March, 2005.

Of Counsel