

**IN THE ALABAMA SUPREME COURT**

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**SUPREME COURT No. \_\_\_\_\_**  
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**PASCUAL HERRERA, JR., M.D., PETITIONER,**

**V.**

**MEDICAL LICENSURE COMMISSION OF ALABAMA, RESPONDENT.**

**PETITION FOR WRIT OF CERTIORARI  
TO THE ALABAMA COURT OF CIVIL APPEALS  
CIVIL APPEALS NO. 2030977**

**PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF  
PETITION FOR CERTIORARI OF PETITIONER  
PASCUAL HERRERA, JR., M.D.**

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**ORAL ARGUMENT REQUESTED**  
**PETITION FOR WRIT OF CERTIORARI**

COMES your Petitioner, Pascual Herrera, M.D., and prays that this Court will issue a writ of certiorari to the Alabama Court of Civil Appeals, and in support thereof, would show unto this Court as follows:

This is an appeal from an administrative agency decision. The Alabama Medical Licensure Commission (MLC) revoked Dr. Herrera's license to practice medicine in an order entered on April 25, 2001. Dr. Herrera timely appealed to the Montgomery County (Ala.) Circuit Court pursuant to Ala. Code 1975, §41-22-20.

Following a hearing, the Montgomery County Circuit Court entered an order on June 14, 2004, reversing the MLC's decision and reinstating Dr. Herrera's license to practice medicine. The MLC appealed, and on March 11, 2005 the Alabama Court of Civil Appeals reversed the Circuit Court. Dr. Herrera filed an Application for Rehearing on March 25, 2005, and on May 6, 2005 the Alabama Court of Civil Appeals withdrew its original opinion and released a substituted opinion. The substituted opinion, which is attached hereto as Appendix A, likewise reversed the Circuit Court's decision.

## **GROUND UPON WHICH CERTIORARI SHOULD ISSUE**

1. This Court should grant the petition to resolve a conflict in the law; namely, whether a circuit court or appellate court has the authority to modify a sanction meted out by an administrative agency. Both Benton v. Alabama Bd. of Med. Examiners, 467 So. 2d 234, 238 (Ala. 1985), and Eley v. Medical Licensure Commission of Alabama, 2003 Ala. Civ. App. Lexis 740, \*46 (Ala. Civ. App. 2003) allow courts to modify administrative agency's sanctions. "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." Eley, 2003 Ala. Civ. App. Lexis 740 at \*46. However, Ex parte Alabama Board of Nursing, 835 So.2d 1010 (Ala. 2001) has been cited by subsequent cases for the proposition that "the choice of punishment is totally within the discretion of the regulatory body." In fact, Ex parte Alabama Board of Nursing contains no such language, and its holding has been misconstrued by subsequent cases.

Dr. Herrera states pursuant to A.R.App.P. 39(d)(3)(B) that it is not feasible to quote that part of the Court of Civil Appeals' opinion which conflicts with the

above cases, because following Herrera's Application for Rehearing, the Court of Civil Appeals' substituted opinion sidestepped this issue by concluding, "we must conclude that the Commission's decision to revoke Dr. Herrera's medical license was reasonable and within the Commission's discretion." (Appendix A, p.41). This Court should issue the writ to resolve the conflict and announce a bright-line rule with respect to this issue.

2. The Alabama Court of Civil Appeals' opinion conflicts with prior precedent by employing an incorrect standard of review as to the question of whether there was "substantial evidence" to support the MLC's decision; this was incorrect. The Court of Civil Appeals' opinion states, in pertinent part:

The trial court also concluded that the Commission erred "as a matter of law" in relying upon the testimony of Dr. McBrearty rather than on the testimony of Dr. Brookoff in finding that Dr. Herrera had improperly prescribed controlled substances for his patients in violation of §34-24-360(8). In reaching that conclusion, the trial court made the evidentiary determination that Dr. Brookoff was 'imminently more qualified' than was Dr. McBrearty to evaluate Dr. Herrera's treatment of the three patients at issue in this matter. However, the evaluation of the qualifications of expert witnesses is a matter normally confined to the discretion of the trier of fact. In this case, the trier of fact was the Commission.

Appendix A, pp.32-33 (internal cites and quotes omitted). However, the Court of

Civil Appeals' opinion also states that only an investigator and Dr. McBrearty (the MLC witness) testified live to the MLC, Dr. Brookoff (Dr. Herrera's witness) testified by deposition. "Dr. Brookoff was unable to testify at the Commission hearing, so his deposition was taken after that hearing and submitted to the Commission members." (Appendix A, p.11).

Thus, the Court of Civil Appeals' opinion conflicts with established case law which states that "when a [trier of fact's] ruling is not based substantially on testimony presented live to the [trier of fact], review of factual issues is de novo. Rogers Foundation Repair, Inc. v. Powell, 748 So.2d 869, 871 (Ala. 1999). Consequently, no presumption of correctness will be accorded the [trier of fact's] findings on the evidence, and this court will sit in judgment as if it had been presented de novo." Queen v. Belcher, 888 So.2d 472, 476 (Ala. 2003). Dr. Herrera's due process rights were abridged by the MLC's use of a non-expert witness in reaching its determination. This Court should issue the writ to correct the Court of Civil Appeals' reliance on the wrong standard of review.

3. The Alabama Court of Civil Appeals' opinion conflicts with a prior decision of that Court in holding that, as a matter of law, the legibility of a doctor's

handwriting is relevant to whether that doctor practiced medicine in a manner which endangered his patients' health. "Therefore, we must conclude that the trial court erred in finding that, 'as a matter of law,' the legibility of Dr. Herrera's patient charts was not relevant to the charges against him." (Opinion, p.28). This conflicts with Eley, supra, 2003 Ala. Civ. App. Lexis 740 at \*19: "However, poor medical-record documentation is not a basis for revoking a physician's license under §34-24-360(11)." This Court should issue the writ to resolve the issue.

4. The Alabama Court of Civil Appeals' opinion conflicts with statutory law and prior precedent in assuming that the MLC made such findings of fact necessary to support its order; whereas statutory law and precedent establish that the charges must be proven by substantial evidence. The Court of Civil Appeals' opinion states, in pertinent part:

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]."

Appendix A, pp.31-32 (cite omitted).

Ala. Code 1975, §41-22-20(k) states that the agency's order shall be taken as prima facie just and reasonable, and the reviewing court shall not substitute its judgment for that of the agency. In Ex parte Alabama Board of Nursing, 835 So.2d 1010, 1012 (Ala. 2001), this Court held, "Judicial review of an agency's administrative decision is limited to determining whether the decision is supported by substantial evidence ..." In short, both the statute and the interpretive cases contemplate judicial review which examines the evidence supporting the administrative agency's decision. The Alabama Court of Civil Appeals' opinion conflicts with this precedent by assuming there was evidence to support the MLC's action in revoking Dr. Herrera's medical license. This Court should issue the writ to resolve this conflict.

### **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.<sup>1</sup>

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.

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<sup>1</sup> The record is cited (C.\_\_\_\_) for the Clerk’s Record on Appeal and (R.\_\_\_\_) for the transcript pages.

Dr. Herrera produced certificates showing completion of a 13-hour continuing medical education course, a five-hour continuing medical education course in pain 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.

**ATTORNEY'S VERIFICATION**

I, the undersigned counsel of record for Petitioner Pascual Herrera, M.D., hereby certify pursuant to A.R.App.P. 39(d)(5)(A) that the foregoing Statement of Facts is a verbatim copy of the Statement of Facts presented to the Alabama Court of Civil Appeals in Herrera's Application for Rehearing to that Court.

\_\_\_\_\_  
Algert S. Agricola (Ala. ID AGR001)

Respectfully submitted this \_\_\_\_ day of May, 2005.

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**CERTIFICATE OF SERVICE**

PAGE

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):

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DATED this the \_\_\_\_ day of May, 2005.

\_\_\_\_\_  
Of Counsel

**IN THE ALABAMA SUPREME COURT**

**CASE NO.** \_\_\_\_\_

**PASCUAL HERRERA, JR., M.D.,**

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**Petitioner,**

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**v.**

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**MEDICAL LICENSURE COMMISSION**

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OF ALABAMA,

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Respondent.

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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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 Petition for Writ of Certiorari 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. The Alabama Court of Civil Appeals released its substituted opinion on May 6, 2005.

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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.

The Alabama Court of Civil Appeals issued its initial opinion on March 11, 2005. Dr. Herrera filed an Application for Rehearing on March 25, 2005. The Alabama Court of Civil Appeals withdrew its original opinion and released a substituted opinion on May 6, 2005.

### **ISSUES PRESENTED ON PETITION FOR WRIT OF CERTIORARI**

#### **I. THIS COURT SHOULD ISSUE THE WRIT TO RESOLVE A CONFLICT REGARDING WHETHER A REVIEWING COURT MAY MODIFY AN ADMINISTRATIVE AGENCY'S SANCTION**

First, Dr. Herrera asserts that the Court of Civil Appeals' substituted

opinion of May 6, 2005 evaded resolving a conflict in prior case law regarding whether a reviewing court has the authority to modify the sanction meted out by the administrative agency. This Court should resolve the conflict.

The Court of Civil Appeal' initial opinion states, "Given the evidence in the record, this court might have reached a different result than did the Commission. However, we cannot say that the April 25, 2001 decision of the Commission was clearly erroneous or that it constituted an abuse of discretion." Medical Licensure Commission of Alabama v. Herrera, 2005 Ala. Civ. App. Lexis 116, \*39 (Ala. Civ. App. 2005).

Herrera's Application for Rehearing stressed, inter alia, that the reviewing court had the authority to lessen or modify the administrative agency's sanction. The Court of Civil Appeals' substituted opinion sidestepped this issue by concluding, "we must conclude that the Commission's decision to revoke Dr. Herrera's medical license was reasonable and within the Commission's discretion." (Appendix A, p.41).

The MLC has the authority to revoke a medical practitioner's license, as well as the authority to impose 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 modify the MLC's sanctions. Eley v. Medical Licensure Commission of Alabama, 2003 Ala. Civ. App. Lexis 740, \*46 (Ala. Civ. App. 2003) 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. Alabama Bd. of Med. Examiners, 467 So. 2d 234, 238 (Ala. 1985).

However, 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 this Court's order denying certiorari in Eley, Ex parte Medical Licensure Board, no. 1030975, 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 Court of Civil Appeals' Eley dissent, 2003 Ala. Civ. App. Lexis 740 at \*47-48, does not contain any such holding or language.

In fact, the statutory language indicates that reviewing courts have the inherent authority to modify administrative sanctions. Ala. Code 1975, §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. This Court has consistently held that:

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. Judicial review is also limited by the presumption of correctness that attaches to a decision by an administrative agency.

Ex parte Medical Licensure Commission of Alabama, 2004 Ala. Lexis 230, \*7 (Ala. 2004) (emphasis added), quoting Ex parte Alabama Board of Nursing, 835 So.2d at 1012. Judicial review to determine whether the agency’s actions were “reasonable” clearly contemplates judicial authority to modify an unreasonable agency decision; no other interpretation is consistent with the plain language of the statute and the case law. 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 Benton and Eley, *supra*, as well as the holdings in other jurisdictions which have examined this issue. See, e.g., Colorado Board of

Medical Examiners v. Ogin, 56 P.3d 1233 (Col. Ct. App. 2002); Gant v. Novello, 754 N.Y.S.2d 746, 302 A.D.2d 690 (N.Y. 2003); License of Fanelli, 174 N.J. 165, 803 A.2d 1146 (N.J. 2002); Guanzon v. State Medical Board, 123 Ohio App. 3d 489, 704 N.E.2d 598 (Ohio 1997); and Holladay v. Louisiana Board of Medical Examiners, 689 So.2d 718 (La. Ct. App. 1997).

This Court should issue the writ to resolve the ambiguity in the law pertaining to whether judicial review has the inherent authority to modify the choice of punishment meted out by an administrative agency. Additionally, because the punishment in this case is unduly harsh and unjust (a fact hinted at in the Court of Civil Appeals' initial opinion), this Court should resolve the issue in Dr. Herrera's favor and modify his punishment to a less severe sanction.

**II. THIS COURT SHOULD ISSUE THE WRIT TO RESOLVE THE CONFLICT BETWEEN THE COURT OF CIVIL APPEALS' OPINION AND PRIOR CASE LAW WITH RESPECT TO THE CONTROLLING STANDARD OF REVIEW OF THE EVIDENCE**

Next, Dr. Herrera contends that the Court of Civil Appeals' May 6, 2005 opinion errs in stating that the MLC's action revoking his medical license was

supported by “substantial evidence,” and in the standard of review it applied to the evidence before the MLC. The MLC’s actions were not supported by substantial evidence, and it is not necessary to reweigh the witnesses’ 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 504, 506 (Ala. Civ. App. 1989).

The Court of Civil Appeals’ opinion states, in pertinent part:

The trial court also concluded that the Commission erred “as a matter of law” in relying upon the testimony of Dr. McBrearty rather than on the testimony of Dr. Brookoff in finding that Dr. Herrera had improperly prescribed controlled substances for his patients in violation of §34-24-360(8). In reaching that conclusion, the trial court made the evidentiary determination that Dr. Brookoff was ‘imminently more qualified’ than was Dr. McBrearty to evaluate Dr. Herrera’s treatment of the three patients at issue in this matter. However, the evaluation of the qualifications of expert witnesses is a matter normally confined to the discretion of the trier of fact. In this

case, the trier of fact was the Commission ... The trial court improperly replaced its own judgment for that of the Commission in assigning weight to the testimony of the experts in this case.

Appendix A, pp.32-33 (internal cites and quotes omitted).

The Court of Civil Appeals' finding that the MLC was the "trier of fact" was correct. Generally, the resolution of conflicting evidence is within the exclusive province of the Commission. Ex parte Medical Licensure Commission, 2004 Ala. 230, \*13. However, "this rule is premised on the proposition that the trier of fact – here the Commission – is in the best position to observe the demeanor and credibility of the witnesses, especially in this case where the members of the Commission were members of the profession being regulated." Id. However, that rule is inapplicable where, as in this case, a significant portion of the evidence was not presented through live witnesses. In this case, an MLC investigator provided non-medical testimony, and Dr. McBrearty (the MLC expert) provided opinion testimony. However, Dr. Brookoff (Herrera's expert witness) testified by deposition. (Appendix A, p.11). Alabama law is well settled that:

When a [trier of fact's] ruling is not based substantially on testimony presented live to the [trier of fact], review of factual issues is de novo. Rogers Foundation Repair, Inc. v. Powell, 748 So.2d 869, 871 (Ala. 1999). Consequently, no presumption of correctness will

be accorded the [trier of fact's] findings on the evidence, and this court will sit in judgment as if it had been presented de novo.

Queen v. Belcher, 888 So.2d 472, 476 (Ala. 2003). See also Eubanks v. Hale, 752 So.2d 1113, 1122 (Ala. 1999); Hospital Corp. of America v. Springhill Hospitals, Inc., 472 So.2d 1059, 1061 (Ala. Civ. App. 1985). Thus, in this case, the MLC's factual determinations are reviewed de novo, and the Court of Civil Appeals' blinkered standard of review was plainly erroneous.

When the evidence is reviewed de novo, this Court will easily determine that the evidence supporting the MLC's decision was not "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 that Dr. McBrearty was the sole medical witness to testify against Dr. Herrera.

Further, it violated Dr. Herrera’s due process rights to use a witness who was 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 the Court of Civil Appeals’ opinion finding that the trial court erred in determination that Dr. Brookoff was eminently more qualified than Dr. McBrearty (Appendix A, p.32), was itself erroneous, 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. Thus, the trial court did not overstep its discretion in determining that Dr. Brookoff was a more persuasive witness than was Dr. McBrearty.

The MLC continuously urges the appellate courts to exercise extreme

deference to its actions. See, e.g., 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.

The MLC's factual determinations were subject to de novo review, and the Court of Civil Appeals erred in its deferential review. There was not "substantial evidence" to support the MLC's actions in this case, and the Court of Civil Appeals' May 6, 2005 opinion errs in so holding.

**III. THIS COURT SHOULD ISSUE THE WRIT TO RESOLVE A CONFLICT REGARDING WHETHER A MEDICAL DOCTOR'S ILLEGIBLE HANDWRITING CAN, AS A MATTER OF LAW, FORM**

## THE BASIS FOR REVOKING A MEDICAL LICENSE

Dr. Herrera next asserts that the Court of Civil Appeals' May 6, 2005 opinion 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 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 determined 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. The Court of Civil Appeals held that Eley, supra, 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. (Appendix A, p.28). From there, however, the Court of Civil Appeals 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. (Appendix A, p.28).

By refusing to hold that the legibility of a doctor's handwriting could not form the basis of charges against him, the Court of Civil Appeals 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 for unfitness to practice medicine.

The Court of Civil Appeals' 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 the Court of Civil Appeals' May 6, 2005 opinion constitutes an unprecedented and unwarranted expansion of the MLC's authority to discipline doctors for arbitrary and 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 at 237. Dr.

Herrera's due process rights should not be abridged by an issue of first impression in Alabama, particularly an issue that is so inherently arbitrary and subjective.

**IV. THIS COURT SHOULD ISSUE THE WRIT TO RESOLVE A CONFLICT REGARDING WHETHER AN ADMINISTRATIVE AGENCY MUST MAKE SPECIFIC FACTUAL FINDINGS TO SUPPORT ITS DETERMINATION**

Last, Dr. Herrera asserts that this Court's May 6, 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 the Court of Civil Appeals' 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]."

(Appendix A, pp.31-32). This Court's opinion errs in assuming that the MLC made findings of fact to support its determination. However, this conflicts with prior case law holding that the MLC's findings of fact must be supported by

substantial evidence. Alabama Medicaid Agency v. Peoples, 549 So.2d at 506. 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. Benton, supra.

As addressed in greater detail in Issue II, supra, 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. The Court of Civil Appeals' May 6, 2005 opinion conflicts with established law, and this Court should issue the writ to resolve the conflict.

### **CONCLUSION**

WHEREFORE, for the above-listed arguments and citations to authority, Petitioner Pascual Herrera, Jr., M.D., prays that this Court will grant this Petition

for Writ of Certiorari in the above-styled case, and following consideration of the same, will enter an order reversing the Alabama Court of Civil Appeals' May 6, 2005 opinion in the above-styled case, and enter an order affirming the Montgomery County Circuit Court's order of June 14, 2004; or alternatively lessening the MLC's sanctions against him. Dr. 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 May, 2005.

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### **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

PAGE

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DATED this the \_\_\_\_ day of May, 2005.

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Of Counsel

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