

**IN THE CHANCERY COURT OF WASHINGTON COUNTY, TENNESSEE
AT JONESBOROUGH**

DAN A. NICOLAU,

Plaintiff,

v.

CITIZENS COMMISSION ON HUMAN
RIGHTS OF NASHVILLE, *et al.*,

Defendants.

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Case No.: 19-CV-0139

**DEFENDANT CITIZENS COMMISSION ON HUMAN RIGHTS' SPECIAL
MOTION TO STRIKE PLAINTIFF'S DEFAMATION CLAIM PURSUANT TO
CAL. CIV. PROC. CODE, § 425.16 AND MEMORANDUM IN SUPPORT**

I. Introduction

This is a defamation action filed by the Plaintiff against two mental health watchdog organizations that published news articles about the Plaintiff's high-profile misconduct regarding his romantic relationship with a woman to whom he admittedly prescribed medication and then stalked. *See Exhibit #1; Exhibit #2.* Defendant Citizens Commission On Human Rights is a California resident who published—from California—the article over which it has been sued, and California has the most significant relationship to that claim. Accordingly, California substantive law governs the Plaintiff's claim against Defendant Citizens Commission On Human Rights, and because the Plaintiff's lawsuit is a Strategic Lawsuit Against Public Participation (a "SLAPP-suit"), pursuant to Cal. Civ. Proc. Code § 425.16(f), the Defendant specially moves this Court to strike the Plaintiff's defamation claim, which arises from an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" pursuant to Cal. Civ. Proc. Code § 425.16(b)(1) & (e).

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at 9:35A
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II. Choice of Law

Under Cal. Civ. Proc. Code, § 425.16, a party may file a special motion to strike if it has been sued for an “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” or “an issue of public interest.” Cal. Civ. Proc. Code § 425.16(e). Under Tennessee choice of law principles, California substantive law—including Cal. Civ. Proc. Code, § 425.16—applies to the Plaintiff’s claim against Defendant Citizens Commission On Human Rights because California has the most significant relationship to the claim. For the Court’s convenience, a copy of Cal. Civ. Proc. Code § 425.16 has been attached to this motion.

With respect to its choice of law rules, Tennessee has adopted:

[T]he “most significant relationship” approach of §§ 6, 145, 146, and 175 of the Restatement (Second) of Conflict of Laws (1971), which provides:

§ 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state, which with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.3

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties,
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

§ 146. Personal Injuries

In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

...

The rule we adopt today shall be applied to (1) all cases tried or retried after the date of this opinion, and (2) all cases on appeal in which the conflicts of law issue was raised on a timely basis in the litigation.

Hataway v. McKinley, 830 S.W.2d 53, 59 (Tenn. 1992).

California substantive law affords people who exercise their First Amendment rights robust protection against SLAPP-suits like the Plaintiff's, having:

[found] and declare[d] that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

Cal. Civ. Proc. Code § 425.16(a). Consequently, to prevent the above-described abuse and protect the valid exercise of constitutional rights, California law affords defendants like the movant a right to file a special motion to strike called an "anti-SLAPP motion," stating:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1).

Here, California has the "most significant relationship" to the Plaintiff's claim against Defendant Citizens Commission On Human Rights by leaps and bounds. *Hataway*, 830 S.W.2d at 59. Defendant Citizens Commission On Human Rights

published the allegedly injurious article in California; Defendant Citizens Commission On Human Rights is a California resident that is incorporated within and has its principal place of business in California; and there is no relationship between the Plaintiff and Defendant Citizens Commission On Human Rights of any kind other than the article that was published in California. Thus, all four of the Second Restatement's contact considerations—"(a) the place where the injury occurred," "(b) the place where the conduct causing the injury occurred," "(c) the domicile, residence, nationality, place of incorporation and place of business of the parties," and "(d) the place where the relationship, if any, between the parties is centered"—point exclusively to California. *See id.* (quoting Restatement (Second) of Conflict of Laws § 145 (1971)). Accordingly, applying Tennessee's choice of law rules, California substantive law governs this action. *See id.* at 59.

Further, California has a profound interest in protecting its own citizens' constitutional right to speak within its own borders, which it has endeavored to safeguard through a robust anti-SLAPP statute. *See Tobinick v. Novella*, 884 F.3d 1110, 1114, n.1 (11th Cir. 2018) ("California law provides for the pre-trial dismissal of certain actions, known as Strategic Lawsuits Against Public Participation, or SLAPPs, that masquerade as ordinary lawsuits but are intended to deter ordinary people from exercising their political or legal rights or to punish them for doing so." (quoting *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013) (quotations omitted))). Emphasizing that interest—and applying an identical Restatement analysis to the dispute at issue in the instant motion—a District Court in Texas recently explained as follows:

Plaintiffs argue that because the Restatement requires the defamation laws of a plaintiff's domicile and place of injury (in this case, California) to generally apply, irrespective of where the defamatory statements were

made, California's anti-SLAPP statute should be applied. However, **in the anti-SLAPP context, courts typically consider the place where the allegedly tortious conduct occurred and the speaker's domicile in determining what state's law to apply. This is because the primary purpose behind an anti-SLAPP statute is to encourage and safeguard its citizens' constitutional rights.** See, e.g., Tex. Civ. Prac. & Rem. Code § 27.002. Although it is unclear whether or not Binkley in fact made these allegedly defamatory statements in Texas, it is undisputed that Binkley is domiciled in Texas, which weighs heavily in favor of applying Texas's anti-SLAPP statute. See *Underground Sols., Inc.*, 41 F. Supp. 3d at 726 (finding that a speaker's residence is one of the "central" factors to consider in determining which state's anti-SLAPP statute to apply). Thus, the Court finds that applying California's anti-SLAPP statute to a Texas defendant would impede on Texas's interest in protecting its citizens and fulfilling the statute's purpose in a similar way that applying Texas's defamation law to a California plaintiff would infringe on California's interests.

O'Gara v. Binkley, No. 3:18-CV-2603-B, 2019 WL 1864099, at *3 (N.D. Tex. Apr. 24, 2019) (internal citations omitted) (emphases added). Several other decisions are in accord. See, e.g., *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011) ("A state has a strong interest in having its own anti-SLAPP law applied to the speech of its own citizens, at least when, as in this case, the speech initiated within the state's borders."); *Diamond Ranch Acad., Inc. v. Filer*, 117 F. Supp. 3d 1313, 1324 (D. Utah 2015) ("As in [*Underground Solutions, Inc. v. Palermo*, 41 F.Supp.3d 720 (N.D.Ill.2014)], the residence of the party seeking protection under the anti-SLAPP law—here, Ms. Filer—has great weight in the analysis. Ms. Filer's California residence, California's strong interest in protecting its citizens' free speech activities, and the court's conclusion that the record, fairly construed, shows that much of the speech likely originated in California, all weigh strongly in favor of applying California's, not Utah's, anti-SLAPP law. For these reasons, the court concludes that California has the 'most significant relationship' to the anti-SLAPP issue, and so the court will apply California's anti-SLAPP law."). See also *Sarver v. Chartier*, 813 F.3d 891, 898 (9th Cir. 2016) (applying anti-SLAPP law of California

defendants rather than New Jersey plaintiff); *Global Relief v. New York Times Co.*, No. 01C8821, 2002 WL 31045394 (N.D. Ill. Sept. 11, 2002) (applying anti-SLAPP law of a California-based speaker's residence, because California "has a great interest in determining how much protection to give California speakers"); *Dawe v. Corrections USA*, No. CIV. S-07-1790, 2009 WL 1420969 (E.D. Cal. May 20, 2009) (applying California Anti-SLAPP law in claim brought by Wyoming resident).

Thus, because every Restatement factor militates in favor of a finding that California has the most significant relationship to the Plaintiff's claim against Defendant Citizens Commission On Human Rights, and because the news article that the Plaintiff has sued over was published within the State of California by a California resident, California's substantive law governs the Plaintiff's defamation claim against Defendant Citizens Commission On Human Rights, and Cal. Civ. Proc. Code, § 425.16 applies. In the event that the Court concludes that Tennessee substantive law governs this action, however, Defendant Citizens Commission On Human Rights respectfully joins Defendant Citizens Commission On Human Rights of Nashville's contemporaneously filed *Petition to Dismiss Plaintiff's Amended Complaint Pursuant to the Tennessee Public Participation Act* and adopts and incorporates the arguments set forth therein as its own.

III. Process For Adjudicating a Special Motion to Strike

Given what the California legislature regarded as "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech," see Cal. Civ. Proc. Code, § 425.16, California's Anti-SLAPP statute endeavors to "nip SLAPP litigation in the bud" by quickly disposing of claims that target the exercise of a litigant's First Amendment rights. See *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th

1036, 1042 (1997). Under California’s Anti-SLAPP statute, any “cause of action against a person arising from any act . . . in furtherance of the person’s right of . . . free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc. Code, § 425.16(b)(1). Of note, this provision must also “be construed broadly.” *Id.* at § 425.16(a)(1).

When evaluating a special motion to strike, Cal. Civ. Proc. Code, § 425.16 contemplates the following two-step process:

“First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.” *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002). “A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e).” *Id.* (quoting *Braun*, 52 Cal.App.4th 1036 at 1043). In turn, Cal. Civ. Proc. Code § 425.16(e) provides that:

(e) As used in this section, “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) **any written or oral statement or writing made in connection with** an issue under consideration or review by a legislative, executive, or judicial body, or **any other official proceeding authorized by law**, (3) **any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest**, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech **in connection with a public issue or an issue of public interest**.

Id. (emphases added).

Second, after a defendant has demonstrated that the challenged cause of action arises from protected activity, the burden shifts to the Plaintiff to establish—with

competent evidence—“a probability that [he] will prevail on the claim.” *See* Cal. Civ. Proc. Code, § 425.16(b)(1). If the Plaintiff fails to meet that burden, his claims must be stricken with prejudice.

IV. Grounds for Granting Defendant’s Special Motion to Strike

Here, given that the news article over which the Plaintiff has sued Defendant Citizens Commission On Human Rights for defamation concerns the Plaintiff’s high-profile misconduct regarding his romantic relationship with a woman to whom he admittedly prescribed medication and stalked—behavior that resulted in both professional sanction and criminal proceedings initiated by governmental actors, *see Exhibit #1; Exhibit #2*—this action qualifies as one filed in response to the Defendant’s “act in furtherance of [its] right of petition or free speech under the United States or California Constitution in connection with a public issue” in several regards. *See* Cal. Civ. Proc. Code § 425.16(e)(2), (e)(3), (e)(4). Consequently, the burden shifts to the Plaintiff to establish “a probability that [he] will prevail on the claim.” *See* Cal. Civ. Proc. Code, § 425.16(b)(1).

In considering whether the Plaintiff has established a probability that he will prevail on his defamation claim, “the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” *See* Cal. Civ. Proc. Code § 425.16. Pursuant to this section, Defendant Citizens Commission on Human Rights expressly incorporates into Special Motion to Strike each defense set forth in its contemporaneously filed Motion to Dismiss. In further support of its defenses to this action, Defendant Citizens Commission on Human Rights has additionally appended a declaration to this Petition as **Exhibit #3** to establish the following:

- (1) The news article over which Defendant Citizens Commission On Human

Rights was sued was published on October 31, 2017;

(2) The news article over which Defendant Citizens Commission On Human Rights was sued was based on disclosed, non-defamatory facts;

(3) No statement in the news article over which Defendant Citizens Commission On Human Rights was sued was made with actual malice; and

(4) Defendant Citizens Commission On Human Rights lacks sufficient minimum contacts with Tennessee to confer personal jurisdiction.

See Exhibit #3.

Pending this Court's adjudication of the instant motion, discovery is stayed automatically by statute unless otherwise ordered. *See* Cal. Civ. Proc. Code § 425.16(g) ("All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.").

V. Costs and Attorney's Fees

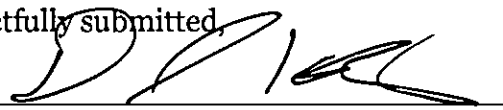
Pursuant to Cal. Civ. Proc. Code § 425.16(c)(1), absent exceptions not involved here, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." *Id.* Upon granting the instant Special Motion to Strike, both mandatory costs and attorney's fees should be awarded accordingly.

VI. Conclusion

For the foregoing reasons, the Defendant Citizens Commission on Human Rights special motion to strike should be **GRANTED**, and the Plaintiff should be ordered to pay the Defendant's court costs, reasonable attorney's fees, and discretionary costs.

Respectfully submitted,

By:



Daniel A. Horwitz, BPR #032176
1803 Broadway, Suite #531
Nashville, TN 37203
daniel.a.horwitz@gmail.com
(615) 739-2888

Counsel for Defendants

NOTICE OF HEARING

This motion is scheduled to be heard in the Chancery Court of Washington County, Tennessee at Jonesborough on September 10, 2019 at 11:00 a.m. Failure to respond to this motion or appear for the scheduled hearing may result in this motion being granted.

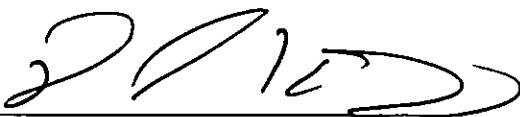
CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2019, a copy of the foregoing was served via UPS mail, postage prepaid, and e-mailed to the following parties:

Richard Phillips
The Law Office of Richard Phillips, PLLC
104 East Jackson Blvd., Suite #4
Jonesborough, Tennessee 37659
rjpmilligan@comcast.net

Counsel for Plaintiff

By:



Daniel A. Horwitz, Esq.

Exhibit #1

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at 8:35A .w.

Sarah Lawson, Clerk and Master



Department of
Health

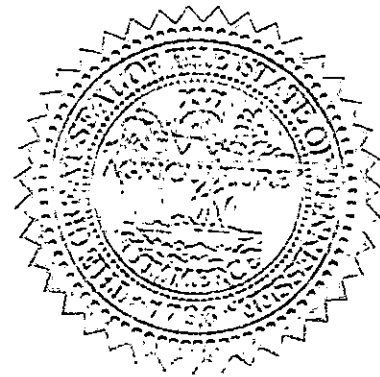
CERTIFICATION

July 2, 2019

I, Lori L. Leonard, Disciplinary Coordinator, do hereby certify that the attached Consent Order entered September 27, 2017 for Dan Nicolau, MD, Tennessee license number 49214, is a true and correct copy of the disciplinary order on file in this Office.

A handwritten signature in cursive script that reads "Lori L. Leonard".

Lori L. Leonard, Disciplinary Coordinator
Tennessee Department of Health
Investigations Division



**STATE OF TENNESSEE
DEPARTMENT OF HEALTH**

IN THE MATTER OF:)	BEFORE THE TENNESSEE BOARD OF MEDICAL EXAMINERS
)	
DAN NICOLAU, M.D. RESPONDENT)	CASE NO: 201602805
)	
JOHNSON CITY, TENNESSEE)	
TENNESSEE LICENSE NO.: 49214)	

CONSENT ORDER

Come now the Division of Health Related Boards of the Tennessee Department of Health (hereinafter the "Division"), by and through the Office of General Counsel, and Dan Nicolau, M.D. (hereinafter "Respondent"), who would respectfully move the Tennessee Board of Medical Examiners (hereinafter the "Board") for approval of this Consent Order affecting Respondent's medical license in the State of Tennessee.

The Board is responsible for the regulation and supervision of medical doctors licensed to practice in the State of Tennessee. See Tennessee Medical Practice Act, Tennessee Code Annotated Section (hereinafter "TENN. CODE ANN. §") 63-6-101, *et seq.* It is the policy of the Board to require strict compliance with the laws of this State, and to apply the laws so as to preserve the quality of medical care provided in Tennessee. It is the duty and responsibility of the Board to enforce the Tennessee Medical Practice Act in such a manner as to promote and protect the public health, safety and welfare in every practicable way, including disciplining medical doctors who violate the provisions of TENN. CODE ANN. § 63-6-101, *et seq.* or the Rules and Regulations promulgated by the Board and recorded in the Official Compilation Rules and Regulations of the State of Tennessee (hereinafter "TENN. COMP. R. & REGS.").

Respondent, by his signature to this Consent Order, waives the right to a contested case hearing and any and all rights to judicial review in this matter. Respondent agrees that

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AUG 14 2019

at 8:35 A.M.

Sarah Lawson, Clerk and Master

presentation to and consideration of this Consent Order by the Board for ratification and all matters divulged during that process shall not constitute unfair disclosure such that the Board or any of its members shall be prejudiced to the extent that requires their disqualification from hearing this matter should this Order not be ratified. Likewise, all matters, admissions and statements disclosed or exchanged during the attempted ratification process shall not be used against Respondent in any subsequent proceeding unless independently entered into evidence or introduced as admissions.

Respondent expressly waives all further procedural steps and expressly waives all rights to seek judicial review of or to challenge or contest the validity of this Consent Order. Respondent understands that by signing this Consent Order, Respondent is allowing the Board to issue its order without further process. Respondent acknowledges that this is a formal disciplinary action and will be reported to the Health Integrity and Protection Data Bank and/or similar agency. In the event that the Board rejects this Consent Order for any reason, it will be of no force or effect for either party.

I. STIPULATIONS OF FACT

1. Respondent has been at all times pertinent hereto licensed by the Board as a medical doctor in the State of Tennessee, having been granted Tennessee medical license number 49214 by the Board on October 3, 2012, which expires on May 31, 2018.
2. On or about September 2015, Respondent wrote one (1) prescription for Percocet 10/325 mg for acquaintance C.B. that was not pursuant to a doctor-patient relationship. On or about November 2015, Respondent wrote C.B. one (1) prescription for Oxycodone 30 mg that was not pursuant to a doctor-patient relationship.

3. On or around June 2016, Respondent and C.B. entered into a romantic relationship that ended in August 2016.
4. On or about August 27, 2016, C.B. received text messages from another user's Facebook account after C.B. had blocked the Respondent from her Facebook.
5. Later that same evening, C.B. was awakened by the Respondent in her bedroom.
6. C.B. had recently been out of town and had left a key under the mat for her neighbor to have access to her home in to feed her dog. The Respondent was aware that C.B. would leave a key under the mat for the neighbor to feed the dog.
7. Respondent used the key and entered C.B.'s home. He approached C.B. and began to grab her and attempt to hug and kiss her.
8. C.B. screamed for the Respondent to leave, called 911 and ran outside of her home to meet Johnson City police officers who responded to the call.
9. The Johnson City police officers moved the Respondent to another area so they could speak with each person individually. During this time, the Respondent used his cell phone to call and text C.B. as she spoke with officers.
10. On or about August 23, 2017, Respondent appeared before the Criminal Court for Washington County, Tennessee and was placed on judicial diversion for 11 months and 29 days for one (1) count of aggravated criminal trespassing and one (1) count of stalking.
11. The judicial diversion ordered by the Court also required the Respondent to pay costs, complete a treatment plan established by the Tennessee Board of Medical Examiner and have no contact with C.B.
12. Prior to the Court placing the Respondent on judicial diversion, Respondent completed a multidisciplinary assessment with Acumen Assessments on or about June 2017.

13. The assessment stated that the Respondent was fit to practice medicine and recommended the following:
- a. Respondent enter into a monitoring agreement with the Tennessee Medical Foundation for a period of time deemed appropriate by the TMF;
 - b. Respondent refrain from consuming alcohol for one year;
 - c. participate in a TMF approved boundary course within six months;
 - d. participate in a continuing medical education prescription boundaries course within 6 months;
 - e. utilize a chaperon when seeing females in an addiction/Suboxone treatment context;
 - f. engage in weekly, individual psychotherapy with a TMF approved psychologist;
 - g. continue to be under the care of a TMF approved psychiatrist;
 - h. receive hormone replacement treatment from a physician at a medical office where he is being treated and that physician there review the report
14. On or about August 3, 2017 Respondent entered into a two (2) year contract with the Tennessee Medical Foundation.

II. GROUNDS FOR DISCIPLINE

The facts stipulated to in the Stipulations of Fact are sufficient to establish that grounds for discipline of Respondent's medical license exist. Specifically, Respondent has violated the following statutes or rules which are part of the Tennessee Medical Practice Act, (TENN. CODE ANN. § 63-6-101, *et seq.*) for which disciplinary action before and by the Board is authorized:

15. The facts stipulated in paragraph 2 *supra*, constitute a violation of TENN. CODE ANN. § 63-6-214(b)(12):

Dispensing, prescribing or otherwise distributing any controlled substance or any other drug not in the course of professional practice, or not in good faith to relieve pain and suffering, or not to cure an ailment, physical infirmity or disease, or in amounts and/or for durations not medically necessary, advisable or justifiable for a diagnosed condition

16. The facts stipulated in paragraphs 2 through 10, *supra*, constitute a violation of TENN. CODE ANN. § 63-6-214(b)(1):

Unprofessional, dishonorable or unethical conduct

17. The facts stipulated in paragraph 10, *supra*, constitute a violation of TENN. CODE ANN. § 63-6-214(b)(2):

Violation or attempted violation, directly or indirectly, assisting or abetting the violation, or conspiring to violate any provision of this chapter or, any lawful order of the board issued pursuant thereto or any criminal statute of the state of Tennessee

III. POLICY STATEMENT

The Tennessee Board of Medical Examiners takes this action in order to protect the health, safety and welfare of the people of the State of Tennessee and ensure that the public confidence in the integrity of the medical profession is preserved.

IV. ORDER

NOW THEREFORE, Respondent, for the purpose of avoiding further administrative action with respect to this cause, agrees to the following:


18. The Tennessee medical license of Dan Nicolau, M.D., license number 49214, is hereby placed on **PROBATION** for two (2) years effective the date of entry of this Order.
19. Respondent shall comply with all recommendations of the Acumen assessment. IN addition to the Acumen assessment recommendations, Respondent shall comply with all recommendation and requirements of the Tennessee Medical Foundation. Respondent must submit a quarterly report to the Board's Medical Director showing compliance with all recommendations and requirements.
20. Respondent shall pay two (2) 'Type A' civil penalties in the amount of one thousand dollars (\$1,000.00) each; representing each prescription the Respondent wrote not pursuant to a doctor-patient relationship in violation of Section II, Grounds for Discipline; for a total of two thousand dollars (\$2,000.00). Any and all civil penalties shall be paid within thirty (30) days of the effective date of this Consent Order. Any and all civil penalty payments shall be paid by certified check, cashier's check, or money order, payable to the State of Tennessee, which shall be mailed or delivered to: **Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, 665 Mainstream Drive, 2nd Floor, Nashville, Tennessee 37243**. A notation shall be placed on said check that it is payable for the civil penalties of Dan Nicolau, M.D., COMPLAINT NO. 201602805.
21. Respondent must pay, pursuant to TENN. CODE ANN. §§ 63-6-214 (k) and 63-1-144(a)(4), the actual and reasonable costs of prosecuting this case to the extent allowed by law, including all costs assessed against the Board by the Division's Bureau of Investigations in connection with the prosecution of this matter. These costs will be established by an Assessment of Costs prepared and filed by counsel for the Department. Said costs shall not exceed three thousand dollars (\$3,000.00).

22. Any and all costs shall be paid in full within thirty (30) days after the issuance of the Assessment of Costs unless Respondent makes arrangements for an extended payment plan for the assessed costs through the Disciplinary Coordinator of the Division of Health Related Boards. Payment shall be made by certified check, cashier's check, or money order, payable to the State of Tennessee, Department of Health. Any and all payments shall be forwarded to the Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, 665 Mainstream Drive, 2nd floor, Nashville, Tennessee 37243. A notation shall be placed on said money order or such check that it is payable for the costs of Dan Nicolău, M.D., COMPLAINT NO. 201602805.

23. Upon expiration of the two (2) year probationary period, and continued compliance with all recommendations of the TMF, Respondent may request an Order of Compliance to have the probation of Respondent's license to practice medicine lifted. Respondent must personally appear before the board to have the probation lifted.


24. Respondent understands that this is a formal disciplinary action and will be reported to the National Practitioner Data Bank (N.P.D.B.) and/or similar agency.

This **CONSENT ORDER** was approved by a majority of a quorum of the Tennessee Board of Medical Examiners at a public meeting of the Board and signed this 27th day of September, 2017.



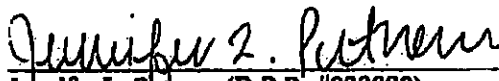
Chairperson
Tennessee Board of Medical Examiners

APPROVED FOR ENTRY:



Dan Nicolau, M.D.
Respondent

9-27-17
DATE



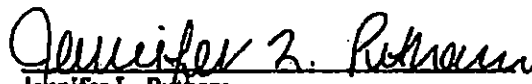
Jennifer L. Putnam (B.P.R. #029890)
Assistant General Counsel
Office of General Counsel
Tennessee Department of Health
665 Mainstream Drive, 2nd Floor
Nashville, Tennessee 37243
(615) 741-1611

9-27-17
DATE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon Respondent, Dan Nicolau, M.D., by and through counsel, Tom Jessee, Esq., Jessee & Jessee, 412 East Unaka Avenue, Johnson City, Tennessee 37605, by delivering same in the United States Mail, Certified Number 7016 1976 0066 1321 9528, return receipt requested, and United States First Class Postage Pre-Paid Mail, with sufficient postage thereon to reach its destination and via email at jjlaw@jesseeandjessee.com.

This 29th day of September, 2017.



Jennifer L. Putnam
Assistant General Counsel

Exhibit #2

FILED

AUG 14 2019

at 8:35A.....

Sarah Lawson, Clerk and Master

IN THE CRIMINAL COURT FOR WASHINGTON COUNTY
ENNESSEE AT JONESBOROUGH

STATE OF TENNESSEE

vs.

Docket No. 42345

DAN A Nicolau
DEFENDANT

Filed 23 day of
August 2017 at
10:08 o'clock A M
Karen Guinn, Clerk TT

PETITION FOR ACCEPTANCE OF
PLEA OF GUILTY BY DEFENDANT AND WAIVER OF RIGHTS

Comes the Defendant who states that he/she has been advised by the Court of the following rights which the Defendant fully understands that he/she is giving up by this guilty plea.

1. The right to plead not guilty
2. If not represented by an attorney, that he/she has a right to be represented by an attorney at every stage of the proceeding against him/her, and if necessary, one will be appointed to represent him/her.
3. The right to a jury trial
4. The right to confront and cross-examine the witnesses against him/her.
5. The right not to incriminate himself/herself.
6. The right to indictment or presentment by the Grand Jury.
7. The right to compulsory process to secure attendance of witnesses in his/her behalf.
8. The right to appellate review if convicted by trial.

Defendant further states that he/she fully understands and waives each and every one of these rights freely and voluntarily.

Further, Defendant states that he/she has been fully advised by the Court and fully understands:

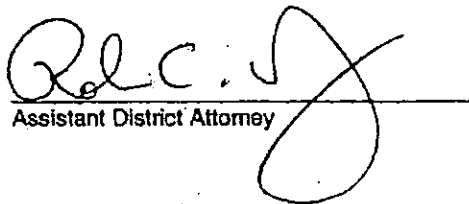
1. The nature of the charge(s) against him/her.
2. The minimum punishment for said charge(s).
3. The maximum punishment for said charge(s).
4. That prior convictions or other factors may be considered in determining his/her sentence.
5. That no trial will follow this plea but only sentencing.
6. That it is perjury to falsely answer questions while under oath.
7. That there must be facts to support the plea.
8. That this conviction may be used in the future to increase the punishment for subsequent offenses.

Further, the Defendant states that he/she is guilty of the charge(s) because the facts which he/she knows to exist equal the elements of the charge(s) as those elements have been explained to him/her by the Court. Defendant therefore states that there is a factual basis for his/her plea.

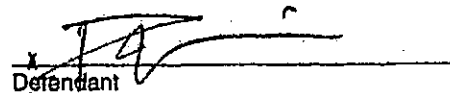
Further, the Defendant states that he/she is pleading guilty freely and voluntarily and not as the result of force of threats or of promises apart from a plea agreement, wherein his/her willingness to plead guilty results from discussions between the District Attorney's Office and the Defendant or his attorney.

Further, Defendant has been advised by the Court that the Judge is required to interrogate the Defendant personally concerning the facts and waivers herein set out and make a verbatim transcript of said interrogation. Defendant having been fully advised of this requirement does now freely and voluntarily waive said interrogation and verbatim recording and petitions the Court to accept his plea of guilty without said interrogation and verbatim recording.

SUBMITTED, APPROVED AND CONCURRED IN:


Assistant District Attorney


Attorney for Defendant


Defendant

MINUTEBOOK
ENTERED
788 PAGE 211
CIR. CL. CLK

FILED

AUG 14 2019

at 8:35A

Sarah Lawson, Clerk and Master

ORDER ACCEPTING PLEA OF GUILTY

After reviewing the Petition set out herein, the Court did then interrogate the Defendant personally as to the following matters.

1. The nature of the charge(s) against Defendant;
2. The minimum punishment for said charges(s);
3. The maximum punishment for said charge(s);
4. Prior convictions and other factors may be considered in determining his/her sentence;
5. The fact that no trial will follow this plea but only sentencing;
6. The fact that it is perjury for the Defendant while under oath to answer the Court's questions falsely;
7. That there must be facts to support the plea;
8. Any plea negotiations which may have taken place;
9. The fact that this conviction may be used to increase the punishment for any subsequent offenses.

Further, the Court did interrogate the Defendant as to the intelligent and voluntary waiver of the following rights:

1. The right to plead not guilty;
2. The right to assistance of counsel, if the Defendant is unrepresented, including the right to appointment of counsel if indigent;
3. The right to jury trial;
4. The right to confront and cross-examine the witnesses against him/her;
5. The right to compulsory process to secure attendance of witnesses in his/her behalf;
6. The right not to be compelled to incriminate himself/herself;

Based upon this personal interrogation, the Court concludes that the Defendant understands the nature of the charge(s) against him/her and the rights which he/she is giving up by this guilty plea.

The Court concludes that there is a factual basis for the Defendant's plea of guilty and therefore, the Defendant's plea is being entered freely, knowledgeable and voluntarily after freely, knowledgeable and voluntarily waiving the above set-out rights.

Finally, the Court accepts the Defendant's plea of guilty.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendant's plea of guilty, heretofore entered, ought to be and is hereby accepted by the Court. The Defendant is therefore found to be guilty of the offense(s) as set forth in the judgment form(s) attached hereto.

ENTER, this the 23 day of August, 2017.



CRIMINAL COURT JUDGE

IN THE CRIMINAL CIRCUIT COURT FOR WASHINGTON COUNTY, TENNESSEE

Case Number: 42345 Count # 1 Counsel for the State: ROBIN BAYERIN MCARDLE
 Judicial District: 1st Judicial Division: I Counsel for the Defendant: Steve Finney
 State of Tennessee Retained Pub Def Appt Private Atty Appt
 vs. Counsel Waived Pro Se
 Defendant: DAN A. NICOLAU Alias: _____ Date of Birth: 5-25-80 Sex: M
 Race: W SSN: _____ Relationship to Victim: _____ Victim's Age: _____
 State ID #: _____ County Offender ID # (if applicable): _____ State Control #: _____
 Arrest Date: _____ Indictment Filing Date: 3-10-17

ORDER OF DEFERRAL (JUDICIAL DIVERSION) Original Amended Corrected

On the 23 day of August, 20 17, the defendant:

<input type="checkbox"/> Pled Guilty <input checked="" type="checkbox"/> Pled Nolo Contendere Was Found Guilty By: <u>Affid</u> <input type="checkbox"/> Jury Verdict <input type="checkbox"/> Bench Trial	Indictment: Class (circle one) 1 st A B <u>C</u> D E <input checked="" type="checkbox"/> Felony <input type="checkbox"/> Misdemeanor Indicted Offense Name AND TCA #: <u>Aggr. Burglary 39-14-403</u> Amended Offense Name AND TCA #: <u>Aggr. Crim. Trespass 39-14-406</u> Offense Date: <u>8-27-16</u> County of Offense: <u>WASHINGTON</u> Deferred Offense Name AND TCA #: <u>Aggr. Criminal Trespass 39-14-406</u> Deferred Offense: Class (circle one) <u>A</u> B C D E <input type="checkbox"/> Felony <input checked="" type="checkbox"/> Misdemeanor
--	---

- Upon review of the case, the court finds the facts stated above as well as the following (For Item 3, Check ONE Of The Two Boxes):
- The defendant is eligible for deferral of the prosecution pursuant to Tennessee Code Annotated section (T.C.A.) 40-35-313;
 - The Tennessee Bureau of Investigation has certified (per attached certificate) that the defendant does not have a prior felony or Class A misdemeanor conviction;
 - The defendant was not charged with a violation of a criminal statute the elements of which constitute abuse, neglect or misappropriation of the property of a vulnerable person as defined in Title 68, Chapter 11, Part 10: OR
 The defendant agrees without contest or any further notice or hearing that the defendant's name shall be permanently placed on the registry governed by Title 68, Chapter 11, Part 10, whereupon a copy of this order shall be forwarded by the clerk to the department of health;
 - The defendant consents to T.C.A. 40-35-313 deferral, as evidenced by the defendant's signature below; AND
 - The defendant should be granted a deferral of charges pursuant to T.C.A. 40-35-313.

It is, therefore, **ORDERED** that the prosecution in this case is deferred pursuant to T.C.A. 40-35-313, and the defendant is placed on probation. The terms and conditions ordered by this court apply to the defendant's probation and are incorporated herein by reference thereto.

Probation Term: Total Length 11 months 29 days Beginning Date 8/23/17 Ending Date 8/22/18 Supervised Unsupervised
 Supervising Entity (unless otherwise provided to the defendant by the court): Name CCI
 Phone Number _____ Address _____ Filled 23 day of August 20 17 at 10:08 o'clock A M
 Defendant's Contact Information (unless otherwise provided to the probation officer by the court): Phone Number _____ Address _____
* must complete treatment plan established by medical Board of Guinn, Clerk 77
* NO contact w/ victim Cynthia Barker

Costs	Concurrent with:	Restitution	Pretrial Jail Credit Period(s):
\$ _____ Sex Offender Tax (39-13-709)		Victim Name _____	From <u>8-28-16</u> to <u>8-28-16</u>
\$ _____ Sex Offender Fine (40-24-108)		Address _____	From _____ to _____
\$ _____ Drug Testing Fee (39-17-420)	Consecutive to:	Total Amount \$ _____	From _____ to _____
\$ _____ Treatment Expenses (40-35-313)		Per Month \$ _____	From _____ to _____
\$ _____ Supervision Fees (40-35-313)			
\$ <u>25</u> Other: <u>Fine</u>			

Copy pay fees/costs 4 in 90 days
 Defendant: _____
 Hon. Lisa N. Rice
 JUDGE'S NAME
 Counsel for the Defendant: _____
 ENTERED the 23 day of August, 20 17.
 JUDGE'S SIGNATURE

 Counsel for the State of Tennessee
 ENTERED 7:28C PAGE 208
 CIR. CL. CLK

IN THE CRIMINAL CIRCUIT COURT FOR WASHINGTON COUNTY, TENNESSEE

Case Number: 42345 Court # 2 Counsel for the State: ROBIN RAY/ERIN MCARDLE
 Judicial District: 1st Judicial Division: I Counsel for the Defendant: Steve Finney
 State of Tennessee Retained Pub Def Appt Private Atty Appt
 vs. Counsel Waived Pro Se
 Defendant: DAN A. NICOLAW Alias: _____ Date of Birth: 5-25-80 Sex: M
 Race: W SSN: _____ Relationship to Victim: _____ Victim's Age: _____
 State ID #: _____ County Offender ID # (if applicable): _____ State Control #: _____
 Arrest Date: _____ Indictment Filing Date: _____

ORDER OF DEFERRAL (JUDICIAL DIVERSION) Original Amended Corrected

On the 23 day of August, 2017, the defendant:

<input type="checkbox"/> Pled Guilty <input checked="" type="checkbox"/> Pled Nolo Contendere Was Found Guilty By: <u>Alford</u> <input type="checkbox"/> Jury Verdict <input type="checkbox"/> Bench Trial	Indictment: Class (circle one) 1 st <input checked="" type="checkbox"/> A <input type="checkbox"/> B <input type="checkbox"/> C <input type="checkbox"/> D <input type="checkbox"/> E <input type="checkbox"/> Felony <input checked="" type="checkbox"/> Misdemeanor Indicted Offense Name AND TCA §: <u>STALKING</u> Amended Offense Name AND TCA §: _____ Offense Date: _____ County of Offense: <u>WASHINGTON</u> Deferred Offense Name AND TCA §: <u>Stalking</u> Deferred Offense: Class (circle one) <input checked="" type="checkbox"/> A <input type="checkbox"/> B <input type="checkbox"/> C <input type="checkbox"/> D <input type="checkbox"/> E <input type="checkbox"/> Felony <input checked="" type="checkbox"/> Misdemeanor
---	---

Upon review of the case, the court finds the facts stated above as well as the following (For Item 3, Check ONE Of The Two Boxes):

- The defendant is eligible for deferral of the prosecution pursuant to Tennessee Code Annotated section (T.C.A.) 40-35-313;
- The Tennessee Bureau of Investigation has certified (per attached certificate) that the defendant does not have a prior felony or Class A misdemeanor conviction;
- The defendant was not charged with a violation of a criminal statute the elements of which constitute abuse, neglect or misappropriation of the property of a vulnerable person as defined in Title 68, Chapter 11, Part 10: OR
 The defendant agrees without contest or any further notice or hearing that the defendant's name shall be permanently placed on the registry governed by Title 68, Chapter 11, Part 10, whereupon a copy of this order shall be forwarded by the clerk to the department of health;
- The defendant consents to T.C.A. 40-35-313 deferral, as evidenced by the defendant's signature below; AND
- The defendant should be granted a deferral of charges pursuant to T.C.A. 40-35-313.

It is, therefore, ORDERED that the prosecution in this case is deferred pursuant to T.C.A. 40-35-313, and the defendant is placed on probation. The terms and conditions ordered by this court apply to the defendant's probation and are incorporated herein by reference thereto.

Probation Term: Total Length 11 mos. 29 days Beginning Date 8/23/18 Ending Date 8/22/19 Supervised Unsupervised

Supervising Entity (unless otherwise provided to the defendant by the court): Name _____ Filed 23 day of August 2017 at _____
 Phone Number _____ Address _____

Defendant's Contact Information (unless otherwise provided to the probation officer by the court): Phone Number 10:08 o'clock PM
 Address _____ Karon Ginn, Clerk

* Must complete treatment plan established by medical Board, * NO contact w/

victim Cynthia Barker

Costs \$ _____ Sex Offender Tax (39-13-709) \$ _____ Sex Offender Fine (40-24-108) \$ _____ Drug Testing Fee (39-17-420) \$ _____ Treatment Expenses (40-35-313) \$ _____ Supervision Fees (40-35-313) \$ <u>25</u> Other: <u>Fine</u>	Concurrent with: Consecutive to: <u>C1</u>	Restitution Victim Name _____ Address _____ Total Amount \$ _____ Per Month \$ _____	Pretrial Jail Credit Period(s): From <u>8-28-16</u> to <u>8-28-16</u> From _____ to _____ From _____ to _____ From _____ to _____
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[Signature]
 Defendant
Hon. Lisa N. Rice
 JUDGE'S NAME
[Signature]
 Counsel for the Defendant

ENTERED this 23 day of August, 2017
[Signature]
 JUDGE'S SIGNATURE
[Signature]
 Counsel for the State of Tennessee

ENTERED
 MINUTEBOOK 228C PAGE 207
 CIR. CLK

Exhibit #3

**IN THE CHANCERY COURT OF WASHINGTON COUNTY, TENNESSEE
AT JONESBOROUGH**

DAN A. NICOLAU,

Plaintiff,

v.

CITIZENS COMMISSION ON HUMAN
RIGHTS OF NASHVILLE, *et al.*,

Defendants.

§
§
§
§
§
§
§
§
§
§

Case No.: 19-CV-0139

DECLARATION OF FRAN ANDREWS

1. My name is Fran Andrews, I have personal knowledge of the facts affirmed in this Declaration, I am competent to testify regarding them, and I swear under penalty of perjury that they are true.

2. I am the Executive Director of Defendant Citizens Commission on Human Rights.

3. Defendant Citizens Commission on Human Rights is a California non-profit corporation that maintains no physical presence in Tennessee, but it does make its website available to anyone in the world who has internet access. CCHR reviews publications and public records from Tennessee, just as it does with each of the 50 states, as well as numerous foreign countries. CCHR is a clearinghouse for information regarding psychiatric practices and abuses in the mental health profession. CCHR's maintains a passive world wide website located in California. The website is not interactive, but persons may submit reports and information from anywhere in the world. The website is managed from California and does not target residents from Tennessee.

4. The first news article appended to the Plaintiff's Amended Complaint in the above-captioned case—entitled “Betrayal Under the Guise of Help—Sexual Predators Pervasive in Mental Health Industry”—was published by Citizens Commission on Human Rights on October 31, 2017, which is the publication date noted on the article itself.

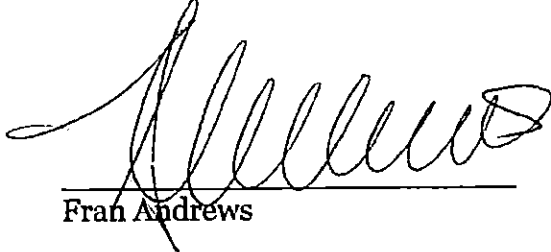
5. The article catalogued misconduct by multiple mental health professionals around the world and was not an effort to target Tennessee.

6. The contents of the article were based on published and reported facts regarding Dan Nicolau's professional disciplinary proceedings and criminal proceedings—including the attached Knoxville News Sentinel article regarding those proceedings—which was disclosed and linked within the article itself.

7. Each statement contained in the article was based on Defendant Citizens Commission on Human Rights' good-faith reliance upon and understanding of published and reported facts regarding Dan Nicolau's professional disciplinary proceedings and criminal proceedings.


Pursuant to Tenn. R. Civ. P. 72, I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 13, 2019

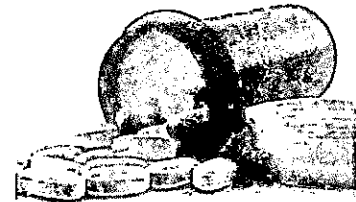


Fran Andrews

Sexual misconduct with patients, overprescribing drugs: 3 ET doctors on probation, state says

 [knoxnews.com/story/news/health/2017/10/23/sexual-misconduct-patients-overprescribing-drugs-3-east-tennessee-doctors-probation/791709001/](https://www.knoxnews.com/story/news/health/2017/10/23/sexual-misconduct-patients-overprescribing-drugs-3-east-tennessee-doctors-probation/791709001/)
Kristi L. Nelson

Three Upper East Tennessee doctors have their licenses on probation after both engaging in sexual misconduct with patients and overprescribing drugs, said the Tennessee Department of Health.



One, psychiatrist Dr. Dan Nicolau of Johnson City, began a “romantic relationship” with a patient for whom he had prescribed narcotics “not pursuant to a doctor-patient relationship,” according to state records, and after their relationship ended, entered her home uninvited using a neighbor’s key and tried to “grab her and attempt to hug her and kiss her.”

Another, Dr. David Leslie Merrifield Jr. of Jonesborough, a family practitioner, had a yearlong relationship with a patient for whom he wrote 10 prescriptions for Subutex without requiring a drug screen. State records also say he hired the patient, giving the patient an allowance, credit card and 2015 Jeep Compass, all while engaged in a sexual relationship with the patient.

According to the state, Merrifield wrote 14 prescriptions — including diazepam, clonazepam and Adderall — without examining patients, keeping medical records or creating treatment plans. He wrote 35 prescriptions for Suboxone for a single patient for whom he had no medical record, drug screen or treatment plan; five prescriptions including Subutex and clonazepam to another patient with no medical record, drug screen or treatment plan; and 60 prescriptions — 30 of which were Subutex — to a third patient who hadn’t been screened for drugs. In addition, the state said, he met patients and wrote prescriptions for Suboxone at their homes, McDonald’s and Burger King, where he didn’t have access to their drug test results and medical records, and he failed to report his own DUI charge to the state.

U.S. Attorney for the Eastern District of Tennessee Nancy Stallard Harr announces the district’s participation in the Department of Justice’s Opioid Fraud and Abuse Detection Unit.
Saul Young/News Sentinel

A third, Dr. Michael Sanders Wysor, a general practitioner in Gray, tried to force a patient to kiss him during an office visit, state records said. The state disciplined him for “sexual harassment,” which includes “unwelcome sexual advances” and “requests for sexual favors.”

Wysor had been disciplined in 2005, where he was medical director of the New Image Weight Loss Clinic in Abingdon, Va. There, he also let unlicensed individuals examine patients, inject vitamin B-12, and sell and dispense multivitamins and Schedule III and IV weight-control drugs, including phentermine/Adipex; presigned blank prescription forms which his office staff used "at their discretion"; and let the clinic use his DEA registration number for purchasing, dispensing and selling controlled substances without a Virginia license. In addition, he incorrectly stored and labeled drugs and didn't have required information on his prescription pads, and the state documented 21 patients ranging in age from 24 to 75 to whom he prescribed weight-loss drugs without taking into account their other health problems or warning them of the risks.

All three physicians waived their rights to challenge or contest the decisions of the Tennessee Board of Medical Examiners, the state board responsible for disciplining doctors.

Nicolau will pay \$2,000 in civil penalties, in addition to the costs of prosecuting his case, and will be on probation for two years, starting this month. The board also required continuing education, psychotherapy, hormone replacement treatment, monitoring by the Tennessee Medical Foundation, and that he refrain from alcohol for a year and be chaperoned when treating females for addiction.

Merrifield will be on probation for five years and pay his court costs and \$2,500 in civil penalties. He can't serve as a supervising physician or prescribe any product — including Suboxone — containing buprenorphine during probation, and he will be will be monitored and randomly screened for alcohol and other drugs.

Wysor will be on probation for five years and pay a \$500 civil penalty. The Tennessee Medical Foundation will evaluate him, he can't be a supervising physician, and he is required to complete a state-approved course on patient-doctor boundaries.

Statewide, the board disciplined 13 doctors last month.