IOWA COURT OF APPEALS

Docket No. 14-0975

Richard M Fleming, M.D.
Petitioner - Appellant

V.

Iowa Board of Medical Examiners
Respondent – Appellee

From the Polk County District Court
Case No. CVCV009488

Appellant Reply to Appellee's Brief

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STATEMENT OF THE CASE AND FACTS

As previously established on the record, this case was originally filed 15 November 2012 to address appellee's subpar investigation from it's inception and subsequent harm caused by appellee's ensuing actions; only after appellant had exhausted all administrative methods.

Appellant now replies to appellee's final brief with the Court order accepting the appendix.

ARGUMENT

Appellee's subpar investigation resulted in the deliberate and capricious exclusion of relevant facts, which a neutral, detached and reasonable person would require to determine the facts and matters of law in this case. The case is not a collateral attack of a prior case. In fact, no request has been made of the District Court or this Court to alter any other Courts actions. Appellee has failed to answer or oppose appellant's MSJ with SUF motions when filed and the District Court erred in not granting these. The District Court also erred in failing to grant damages to appellant and in failing to find that appellee has again conducted a subpar investigation of an Iowan physician. A fact which appellee admits to in the reply brief of 5 November 2014 and again in the final brief.

I. Appellee failed to substantially investigate this case and has acted in a reckless, disrespectful and deceitful manner.

The substantive material facts and matters of law were deliberately ignored by appellee during the investigative and punitive phases of this case and agency actions. This material, now included as appendix 11 (passim) as ordered by the Court, demonstrates that appellant tried to get appellee to investigate these facts and matters of law. Facts and matters of law which were investigated by others and resulted in the Society of Nuclear Medicine, the Nevada Federal Court (*U.S. v. Prabhu; 442 F. Supp. 2d, 2006*), Iowa State University, Medicare and Medicaid Instruction manual, and the Federal Office of Research, all concluding there were no criminal actions, resulting in the inclusion of appellant's work at International Scientific meetings and submission of patent application and the granting of copyrights to appellant. Clearly these facts and matters of law were relative to these agencies, scientific bodies and components of the Federal Government and in no way were limited nor called for a collateral attack of any kind elsewhere, including specifically Nebraska.

The inclusion of appendix 11 (passim; e.g. pp. 76-77, 124-126, 138, 144-145), so ordered by this Court to be included, proves beyond the shadow of a doubt that appellee *intentionally* and *maliciously* attempted to exclude from the District Court and later the Appellate Court, evidence which other "neutral, detached and reasonable person(s)" us "to establish the fact(s) at tissue" and were of "great importance" in doing so.

> "**Substantial evidence**" is statutorily defined as: [T]he quantity and quality of evidence that would be deemed sufficient by a **neutral, detached, and reasonable person, to establish the fact at issue** when the consequences resulting from the establishment of that fact are understood to be serious and of **great importance**." Iowa Code §17 A.19(10)(£)(1). (Emphasis added) *Collins v. IBME*, (*No. 3-847/13-0477*, Filed January 9, 2014).

Appellee could have said they disagreed with the evidence, but instead intentionally refused to investigate the evidence as demonstrated by correspondence (passim) in appendix 11. The appellee' s failure to investigate this substantial evidence constitutes an arbitrary and capricious behavior.

> "Agency action is considered **arbitrary or capricious** when the decision was made **without regard to the law or facts**. Agency action is **unreasonable** if the agency acted in the face of evidence as to which there is no room for difference of opinion among reasonable minds . . . or not based on substantial evidence." *Doe v. Iowa Bd. Of Med. Exam 'rs, 733 N.W.2d 705, 707* (Iowa 2007) (internal quotation marks and citations omitted). (Emphasis added) *Tobin v. IBME*, (No 3-1012/13-0294, Filed January 9, 2014)

The federal codes define reckless behavior as that which is not reasonable and prudent. Failure to investigate that which others have demonstrated (supra) as reasonable to establish the facts and matters of law, is clearly not reasonable.

> "(a) No person shall ... or in a manner **other than** what is reasonable and prudent . . . having regard to the actual and potential hazards existing." (Emphasis added) 32 C.F.R. § 263.6

The SCOTUS has also held that reckless behavior exists when the party knowingly disregards the facts before it, as appellee has.

> "…if (1) he is reckless as to the fact ... he is aware . . . but **disregards the** ... **fact** ... and (2) **knowingly** ...." (Emphasis added) *US. v. Bailey, 444 U.S. 394, 409* (1980)

The Iowa Supreme Court has further held, that this reckless disregard may constitute defamation of character and is malicious.

> " ... the correct definition of "actual malice" in this context is "a **knowing or reckless**

> **disregard for the truth**." (Emphasis added) *Barreca v. Nickolas, 683 N.W.2d 111, 119* (Iowa 2004)

Iowa Code stipulates, that such disregard for another's rights constitutes behavior for which the Court may reward punitive or exemplary damages.

> a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted **willful and wanton disregard** ... of another. (Emphasis added) Iowa Code Ann. § 668A.1 (West)
>
> *Punitive damages*. Punitive damages are recoverable where it is proven by a preponderance of clear, convincing and satisfactory evidence that the conduct of the defendant constituted **willful and wanton disregard** for the rights of safety of another. Iowa Code § 668A.l(l) (a) (2007). (Emphasis added) Miller v. Welch, 2010 WL 3384221

Such reckless actions, including the "omission" of facts, can also form the grounds for discipline of appellee.

> d. Reporting information, such as satisfaction of continuing education, peer review, or attest qualification, in a false manner through overt deceit or with **reckless disregard for the truth or accuracy of the information asserted**.
> e. Otherwise participating in any form of fraud or misrepresentation by act **or omission**. (Emphasis added) Iowa Admin. Code r. 193 A-14.3(17A,272C,542)

The intentional and malicious efforts by appellee to exclude from the record the facts and matters of law **and** appellee's refusal to investigate this substantive material provided by appellant (appendix 11) to appellee, which other independent and reasonable individuals, agencies and scientific societies found to be "substantive" in their investigations and findings; demonstrates not only a subpar investigation as defined by this Court in *Smoker,* but also demonstrates an intentional, malicious and reckless disregard for the facts and matters of law which would be required by an independent and reasonable person or agency.

II. <u>This case IS not limited to a review of the IBME 17 September 2012 review and it does NOT represent a collateral attack on another case.</u>

As evidenced by Appendix 10, pp 280-282, there is no mention of any sort by appellant that this appeal is in any way limited to appellee's disciplinary action. Rather, it is clear that the appeal is of a subpar investigation by appellee and all subsequent actions taken by appellee, following appellant taking all the necessary steps both administratively and legally required before an

appellant could file an Appellate Court case. This appeal is for ALL appellee actions and rulings!

There are no facts or motions made by appellant to request the appellee, the District Court or the Iowa Court of Appeals to rule on another case by another Court. As noted supra, other Federal agencies, Universities, International Medical Societies, et cetera, have conducted their own substantive investigations and concluded differently without affecting the decisions of others. They have simply conducted their own "independent, reasonable" investigations into the facts and matters of law and made their conclusions. Such a statement by appellee is misleading, obfuscatory and disingenuous.

III. The District Court erred in not granting the MSJ with SUF motions as they are unsnswered and unopposed by appellee.

Appellee argued that a MSJ is "generally not allowed" quoting *City of Sioux City v. GME*. However, a full reading of the case shows that the Iowa Supreme Court has held that such a motion *is allowed* for consideration of the "facts" of the case when the facts are not in dispute. **Appellee has not only not disputed nor opposed the facts AND has in fact stipulated (infra) on the record that appellant has presented substantial evidence of a subpar investigation by appellee.**

> "Despite this general disapproval of summary judgment motions on judicial review of contested case proceedings, we have allowed such a motion to be considered as a motion for review on the merits **when the facts of the case were not in dispute**." (Emphasis added) *Dillehay, 280 N. W. 2d at 424. City of Sioux City v. GME., Ltd., 584 N. W. 2d 322, 324* (Iowas 1998)

The Iowa Supreme Court has further gone on to support the use of default judgment in such cases as this by noting this does NOT exceed statutory authority.

> "We conclude the district court correctly applied the law in reaching its conclusion… does not violate Iowa Code…and is not in excess of the agency's statutory authority. …a procedural rule designed to assure smooth operation of the agency and provide greater **procedural protections to litigants**…. The district court **correctly upheld** … and the **entry of default judgment** against the City is affirmed." (Emphasis added) *City of Sioux City v. GME. Ltd., 584 N. W. 2d 322, 326-27* (Iowa 1998)

The appellee has never refuted, answered nor opposed a single item within the MSJ and SUFs, nor for that matter with the **first** Memorandum of Law and its appendices. The Iowa Supreme Court has held that appellee *must provide specific facts* in showing a dispute in MSJ's and SUFs and cannot merely file a motion to dismiss them.

> "When a motion for summary judgment is made…an adverse party **may not rest**

> **upon** the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, **must set forth specific facts showing that there is a genuine issue for trial**. If he does not so respond, **summary judgment**, ... **shall be entered** against him." (Emphasis added) *Schulte v. Mauer, 219 N. W. 2d 496, 499* (Iowa 1974)

The District Court erred in not granting the motions for MSJ with SUFs as there has never been the required filing of specific facts by appellee, only motions to deny without the required specified facts.

IV. The District Court erred in not finding that appellee conducted a subpar investigation of this case as defined by the Iowa Court of Appeals. The Iowa Court of Appeals should reverse the District Court and grant appellant damages and injunctive relief.

Pursuant to the ruling of the Iowa Supreme Court and the Iowa Rules of Civil Procedure, when a Court does not correct errors of law and/or fact, said Court has failed to effectuate substantial justice. Such is the case with the District Court, which failed to correct these mistakes in fact and matters of law and in fact removed them from the record. Only as a matter of the Court order of December 3, 2015, has this evidence become available to demonstrate the subpar investigation by appellee and the intentional, malicious and reckless efforts to obfuscate the record and cover up a subpar investigation; which appellee now admits to in appellee's briefs.

> "Rule 244(h), Rules of Civil Procedure, ... there have been "**errors of law** occurring in the proceedings, or **mistakes of fact** by the court" . ... **failed to effectuate substantial justice** between the parties. (Emphasis added) *Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 63 2* (Iowa). *Thompson v. Rozeboom, 272 N.W.2d 444, 446-47* (Iowa 1978)

Appellee has never stated, they do not believe appellant's holographic plea nor that they have reviewed the facts and matters of law in this case (passim) and simply disagree. Rather, appellee has adamantly refused to investigate the facts and matters of law pertaining to (1) the holographic plea, (2) documentation that the Court has never denied appellants actual innocence, (3) evidence showing the case of origin is still in litigation (*Fleming v. USA, 13-17230*) or (4) inter alia, the fact that other individuals, Federal Agencies and Scientific bodies have conducted substantial investigations into the facts and matters of law and concluded appellant was in fact significantly advancing the field of medicine and improving the quality of health care; even though the mandate of the IBME is to the people of Iowa and the quality of health care provided to the citizens of Iowa.

Thereby in fact, preventing the people of Iowa from benefiting from these advances in medicine, which appellant is Nationally and Internationally known for.

Instead appellee intentionally, maliciously and recklessly conducted an investigation which excluded from it's investigation, these relevant facts and matters of law, all the while moving for and being granted by the District Court, the removal from the record of those documents which would prove, what appellee now admits to in it's briefs, viz. a subpar investigation by appellee.

As such appellee has again conducted a subpar investigation of yet another Iowan physician. Appellee has intentionally failed to include *Smoker* in the list of cases in it's brief. The District Court erred in failing to rule that this investigation was subpar, even after having been previously reversed by the Iowa Court of Appeals [Smoker v. Iowa Bd of Med, 834 N.W.2d 83(Iowa App. 2 013)] and by excluding from the record evidence which demonstrated the appellee conducted a subpar investigation has not only failed to effectuate substantial justice; but, has directly aided appellee in the concealment of this evidence.

V. Appellee's amended proof brief a nd final brief admits appellant preserved all arguments and that appellee's investigation was and is subpar.

Appellee's briefs repeatedly stipulate that appellant's arguments have been preserved and that appellant has provided substantial evidence that appellee conducted a subpar investigation.

> "Preservation of Error: Dr. Fleming raised substantial evidence…supar investigation …" (Appelle's Proof Brief, p. 16, filed October 20, 2014)
>
> AND YET AGAIN without any recanting of this stipulated admission.
>
> "Preservation of Error: Dr. Fleming raised substantial evidence…supar investigation …" (Appelle's Final Brief, p. 16, filed October 5, 2015)

The Court should find that as a matter of law and facts, which are undisputed by appellee, that appellee conducted a subpar investigation by its own admission with preservation of appellant's arguments. Appellee has tried to obfuscate the record by pretending we are not discussing its entire investigation and actions. As discussed and proven supra, we **are** discussing the entire subpar investigation and all of the subsequent actions taken by appellee and the District Court.

CONCLUSION

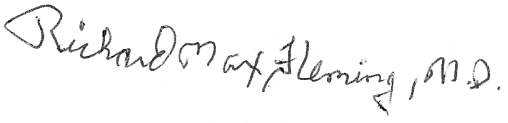
For the reasons set forth above and as set forth in the prior court documents, briefs and appendices, appellant asks that the Court find for appellant and reverse the District Court. Specifically, appellee's admission that Dr. Fleming has preserved the error and provided the Courts with substantial evidence that appellee's investigation was subpar. There is clearly no dispute between the parties as to this fact as stipulated to by appellee.

This subpar investigation by appellee was intentional, malicious and reckless! Going beyond that which occurred in the *Smoker* case. The record now shows (appendix 11) beyond the shadow of a doubt, that appellee intentionally omitted from the record, documentation proving a subpar investigation; such omission designed to prevent the Courts from seeing yet another subpar investigation of an Iowa physician by appellee, despite prior reversal by this Court of the same District Court and appellee. The inclusion of the emails and documents accumulated by appellee and excluded from the District Court record, but now included in appendix 11 (including documents redacted from other parts of the appendix but now in appendix 11), clearly shows appellee intentionally and maliciously excluded material from its investigation despite evidence that other individuals, Federal agencies and International Scientific Societies upon review of these facts and matters of law, acting independently and reasonably based upon this evidence, came to different conclusions and acted differently.

The mandate by Iowa law is that appellee determine if appellant poses a threat to the health and safety of Iowa patients. Appellee failed that responsibility; but it did so intentionally, maliciously and recklessly. Appellant hereby requests the Iowa Court of Appellee's to immediately and forthwith grant appellant's appeal to this Court and grant appellant's motions, including Motion for Summary Judgment and other motions submitted to both the District Court and the Iowa Court of Appeals, including but not limited to damages for amount certain and injunctive relief as stated in the prior Court documents by appellant.

Original Date: 5 October 2015 (minimal corrections made and submitted as final brief 5 December 2015)

Respectfully submitted,



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