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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 brief.

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 was relative to the case and agency actions *and was intentionally* excluded by appellee during the District Court case but is now included here in appendix 11 as insisted on by appellee and so ordered by this Court, in the emails and documents showing appellant tried to bring material to the attention of the appellee. Material which a reasonable, detached and neutral party would have found to be substantive, independent of whether appellee

agreed with the material. The argument is not whether appellee agreed with the facts and matters of law presented to them, but rather that they refused to investigate such substantive evidence.

> "**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 § 17A.19(10)(f)(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 failed/refused* to investigate the evidence. 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*.

> (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 the appellee has.

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

The Iowa Supreme Court has also held, that this reckless disregard may constitute defamation of character.

> "...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** for the rights or safety 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.1(1)(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. 193A-14.3(17A,272C,542)

The *intentional omission* and *failure to investigate* the substantive material provided by appellant (appendix 11) and independently available to appellee, constitutes a subpar investigation with a willful and wanton disregard for facts and matters of law, which a reasonable, detached, neutral individual would require in this case. Appellant did not ask for a decision regarding another case, only that the appellee not conduct a subpar investigation.

II. 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..

As evidenced by Appendix 10, pp 280-282, there is no mention of any sort by appellant that he is limiting his judicial review of this case. The judicial review was for ALL appellee actions and rulings. There are no facts or motions made by appellant to request that the District Court or the Iowa Court of Appeals rule on another case. Such action is being taken elsewhere. *Fleming v. U.S.* 13-17230 as despite the incorrect statements by appellee continue. (Ninth Circuit) Such suggestion by appellee is misleading, obfuscatory and disingenous. But appellee cannot state a guilty holographic plea was entered when the evidence in appendix 11 shows, no plea of a crime was entered and no evidence of a crime as attested to by the American Medical Association (pp. 76-77, 124-126, 138, 144-145, et al.)

III. The District Court erred in not granting the MSJ with SUF motions as they are unanswered 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 disputed these facts.**

> 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 (Iowa 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** the agency action 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 disagreed with 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 the MSJ 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**, if

appropriate, **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.

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 position of the Iowa Supreme Court and the Iowa Rules of Civil Procedure, a Court which does not correct errors of law and/or fact has failed to effectuate substantial justice.

> 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 632 (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 or (3) the evidence showing the case of origin is still in litigation.

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 such an 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. 2013)] and has thereby failed to effectuate substantial justice.

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

Appellee repeatedly admits that appellant's arguments have been preserved and that appellee conducted a subpar investigation. The Court should find that as a matter of law and facts, that appellee conducted a subpar investigation *by admission* with preservation of appellant's arguments. Appellee tries to mitigate this by pretending we are not discussing its entire investigation and actions - *we are!*

On having received *appellee's* final *brief today* (5 October 2015), *appellant cannot help but note the almost verbatim similarity to the 20 October 2014.* Including "Dr. Fleming raised substantial evidence arguments at the district court ... subpar investigation..." (appellee's final brief, p. 16) Appellant continues to note the persistent intentional exclusion of facts and matters of law. E.g. it is appellee who persistently reports appellant "plead guilty to crimes" yet persistently excludes the actual holographic plea from the record showing what was plead to were not crimes. While appellant only wanted a substantal investigation by appellee that was not subpar, it is appellee who insists that this was used to reverse another case. Appellee could have simply investigated and then concluded whatever. Instead appellee persistently "refused to investigate" the case and the evidence - even when presented directly to them. This was an intentional effort to conduct a subpar investigation as appellee did in *Smoker* and an intentional effort to exclude from the record showing there was evidence presented to appellee for investigation which appellee adamantly refused to investigate resulting in a subpar investigation. (*Smoker).*

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 substantial evidence has been provided by appellant, *that a subpar investigation was made by appellee.* This subpar investigation was intentional! The record *now* shows beyond the shadow of a doubt, that appellee intentionally omitted from the record, documentation of this subpar investigation to prevent the Court from seeing yet another subpar investigation of an Iowa physician despite prior reversal by this Court. The inclusion of emails and documents accumulated by appellee and excluded from the District Court record, but now included in appendix 11, shows appellee *intentionally* excluded the material from its investigation and subsequent actions. Appellant hereby requests the Iowa Court of Appellee's to *forthwith* grant appellant's appeal to this Court **and** grant appellee's motions, including Motion for Summary Judgment and other motions submitted to both the District Court and the Iowa Court of Appeals for damages for amount certain and injunctive relief to appellant as stated in the prior Court documents by appellant.

Date: 5 October 2015

Respectfully submitted,

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