



IN THE SUPREME COURT OF THE STATE OF DELAWARE

Delaware Board of Medical :
Licensure and Discipline, : No. 53, 2019
:
Appellant, : On Interlocutory Appeal from : The
:
vs. : Superior Court of the State of
:
Bruce Grossinger, D.O. : Delaware C.A. No. N16A-11-001
:
Appellee. : JAP
:
:
Trial Court: Delaware Board of
:
Medical Licensure and Discipline
:
Case No. 10-168-14

CROSS-APPELLANT BRUCE GROSSINGER, D.O.'S
REPLY BRIEF ON CROSS-APPEAL

POST & SCHELL, P.C.

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Dated: August 12, 2019

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CROSS-APPEAL REPLY ARGUMENT

At the risk of stating the obvious, this is the appeal of Dr. Bruce Grossinger. The issue in this appeal is whether there is substantial evidence respecting Dr. Bruce Grossinger's conduct to support the Board's conclusions that he deviated from the mandates of Regulation 18.3. The State's Answering Brief continues to paint with the same broad-brush what the Hearing Officer and Board similarly did; that is, in its effort to implicate Dr. Bruce Grossinger, it points to "evidence" of an alleged omission by a different physician, Dr. Steven Grossinger. The State does not specifically address the evidence applicable to Dr. Bruce Grossinger's very limited role in Michael's treatment, but when properly focused on the evidence respecting appellant Dr. Bruce Grossinger, *only*, the record lacks the requisite substantial evidence to support a finding that he violated Regulation 18.3.

The Board acknowledges in its Answering Brief, the record established that Michael was a patient of the GNS practice. (Answ. Br. on Cross-Appeal, at p. 16). With respect specifically to Dr. Bruce Grossinger, the Board acknowledges that "[Dr. Bruce Grossinger] did not have any 'encounters' with Michael; *his undisputed role was to 'refill prescriptions,'* and he admits he did not even make any chart notes when he refilled prescriptions for controlled substances for patient

Michael. (A114-117).” (Answ. Br. on Cross-Appeal, at p. 16, emphasis furnished.)¹

Judge Parkins referred to Dr. Bruce Grossinger’s “point[ing] to the testimony of Dr. Steven Grossinger which provided that the latter had thorough talks with Michael on the risks and benefits of opioid treatment.” Op. at 59. However, the Hearing Officer “did not credit this testimony, noting that ‘if it’s not in the chart it didn’t happen.’” Op. at 58-59. With that, Judge Parkins halted his analysis of Dr. Bruce Grossinger’s conduct, choosing to rely on the “canard”² that the omission from the written record of Dr. Steven Grossinger’s earlier discussions with Michael must mean that something never happened.

Respectfully, Judge Parkins’ analysis of the record missed the mark and he stopped short of properly testing whether there was substantial evidence to support the Board’s conclusions respecting Dr. Bruce Grossinger. The record is plain: the State did not offer any expert testimony with regard to any standard of care

¹ The Board *incorrectly* conflates “chart note” with Dr. Bruce Grossinger’s recordations that complied with Regulations 18.7.8 “treatments” and 18.7.9 “medications” (including date, type, dosage and quantity prescribed) by duly and accurately recording the refilling of Michael’s prescriptions. The record discloses that there were, indeed, record entries of Dr. Bruce Grossinger’s continuation of Michael’s low-dose medications. (A325-326; B1); Op. at 8-10.

² Judge Parkins described his reliance on a “canard.” Op. at 59. A “canard” as defined by Merriam-Webster is: “a false or unfounded report or story” or “a groundless rumor or belief.” “Canard.” 2019, *Merriam-Webster.com* Merriam-Webster, 2019. Web. 7 August 2019. A canard is not a synonym of or substitute for “substantial evidence.”

including whether it was unreasonable or inconsistent with the Regulations for a *re-filling physician* to rely on the statements of the treating physician who developed the patient's treatment plan and who unequivocally also stated he discussed the risks and benefits of the treatment with the patient.

The only expert in this matter, Dr. Staats, did not opine that Dr. Bruce Grossinger's conduct was improper. There is also no evidence to support the conclusion that Dr. Bruce Grossinger should have disregarded what his colleague advised him. Simply stated, there was no evidence from which the Board or the Superior Court could conclude Dr. Bruce Grossinger violated 18.3.

There is also nothing in the record and no expert evidence that, in his limited role in Michael's care, Dr. Bruce Grossinger was *required* to have a *separate, independent* "talk with Michael on the risks and benefits of opioid treatment." In point of law, Regulation 18.3 "Informed Consent" requires "[t]he practitioner must discuss the risks and benefits of the use of controlled substances with the patient." 24 Del. Admin. C. § 1700-18.3. Reasonably read, Regulation 18.3 *does not* require repeated, redundant discussions by all physicians remotely involved in the patient's care and the State offered no evidence that it does.

The record confirms that Dr. Bruce Grossinger relied on the GNS's standard practices and that other GNS practitioners had developed Michael's treatment plan. Dr. Bruce Grossinger testified, without contradiction, that he followed GNS's

standard practices in determining whether or not to refill a prescription that was a part of Michael's treatment plan. There is *nothing* in the record even remotely suggesting that GNS' standard protocols *do not* conform to the requirements of all Regulations. There is nothing in the record that supports a conclusion that there was any violation of the Regulations when Dr. Bruce Grossinger determined that refilling Michael's low dose medications, for his well-documented, unabated pain, was not only proper, but necessary to avoid the consequences of abrupt withdrawal.

When the Hearing Officer and the Board concluded that Dr. *Steven* Grossinger must not have discussed "the risks and benefits of the use of controlled substances with [Michael]", they chose not to believe Steven Grossinger's testimony to the contrary. Judge Parkins characterized the Hearing Officer's and Board's conclusion respecting *Steven* Grossinger as based on the "medical adage" that "if it's not in the chart, it didn't happen." Op. at 59. Judge Parkins aptly described this conclusion as a "canard" which effectively created the "irrebuttable presumption" that where there was no written record of a discussion, this lack of any writing constituted positive proof that the required professional consultation with the patient never occurred. Op. at 59.

But as the State admits in its Answering Brief "this is not a rule of evidence." (Answ. Br. on Cross-Appeal, at p. 16). Neither the Hearing Officer nor

the Board suggested that this canard *as applied to Steven Grossinger* has any application to Dr. Bruce Grossinger's conduct. Yet it was the only "evidence" supporting the conclusions the Board reached. It was error for the Board and Judge Parkins to accept this "medical adage" as a substitute for factual and expert evidence and to effectively conclude that Dr. Bruce Grossinger should have adopted this canard, too, and acted differently.

Finally, even presuming that Dr. Bruce Grossinger had a duty to record "more" regarding the continuation of Michael's treatment,³ at most, there might be "substantial evidence" of the purported violation of Board Regulation 18.7.6. Had the Board stopped to admonish Dr. Grossinger's ministerial omission, its conclusion may have been supported by "substantial evidence." But instead, the Hearing Officer, Board, and finally the Superior Court merged Dr. Bruce Grossinger's purported ministerial omission --- which is the *sole* omission by **Dr. Bruce Grossinger** --- with an ostensible omission by Dr. Steven Grossinger. Simply stated, the absence of "evidence" of a more robust record entry by Dr. Bruce Grossinger is not substantial evidence of a violation of Regulation 18.3.

It was an error of law for the Hearing Office, Board and Superior Court to reach the conclusion that a possible standalone ministerial departure from 18.7.6

³ *See, supra*, for the reference to the record as to what Dr. Bruce Grossinger did record about Michael's continued treatment. Apparently, the Board believed "more" was required, yet it did not identify what additional information should have been recorded given Dr. Bruce Grossinger's limited role.

was *ipso facto* evidence of the violation of any other regulation. There is no evidence whatsoever that Dr. Bruce Grossinger deviated from any articulated professional standard and nothing in the record that any ministerial omission diminished the care of Michael. Appendix A and B, *passim*.

There is nothing in the record that points to any professional standard which Dr. Bruce Grossinger did not follow. There was no evidence offered by the Board, and the State has never suggested that Dr. Bruce Grossinger's refilling Michael's low-dose opioid analgesics for his severe spinal injury with herniated discs, for which Michael was undergoing surgical treatments with powerful epidural steroids, departed from the highest standard of care. This is likely because the Board knew that it would have imperiled Michael's health and welfare to abruptly halt the treatment without a medical basis to do so.⁴ There is nothing in the record, or in any Regulation, that imposed the *separate duty* on Dr. Bruce Grossinger to independently and redundantly discuss with Michael the "risks and benefits" of continuing his treatment. The record is totally void of evidence that Dr. Bruce

⁴ The record suggests that it would have been medically imprudent to abruptly halt Michael's treatment. The Board made no finding that Dr. Bruce Grossinger's treatment was improper apparently recognizing the well-known and well-established medical risks of such withdrawals. *See also* Mayo Clinic, *Tapering Off Opioids: When and How*, Mayo Clinic (June 10, 2018) <https://www.mayoclinic.org/diseases-conditions/prescription-drug-abuse/in-depth/tapering-off-opioids-when-and-how/art-20386036>; *see also* American Addiction Centers, *Vicodin Withdrawal Timeline, Symptoms and Treatment* (July 31, 2019) <https://americanaddictioncenters.org/withdrawal-timelines-treatments/vicodin>

Grossinger violated Regulation 18.3. Judge Parkins' and the Board's decision should be reversed.

POST & SCHELL, P.C.

Dated: August 12, 2019

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT
AND TYPE-VOLUME LIMITATION**

1. This Reply Brief complies with the typeface requirement of Rule 13(a)(1) because it has been prepared in Times New Roman 14-point typeface using Word 2010.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 1,703 words, which were counted by Word 2010.

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CERTIFICATION OF MAILING/SERVICE

I hereby certify that on August 12, 2019, I electronically filed the original Appellee Dr. Bruce Grossinger’s Reply Brief on Cross-Appeal with the Clerk of the Supreme Court via File & Serve Xpress and caused one (1) copy to be mailed by first class mail to the following persons:

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