

IN THE SUPREME COURT OF MISSOURI

Case No. SC89809

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,

Appellant,

v.

FAISAL J. ALBANNA, M.D.,

Respondent.

Transfer from the Missouri Court of Appeals, Western District
Case No. WD67905

RESPONDENT'S SUBSTITUTE BRIEF PURSUANT TO
RULE 84.05(e)

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JURISDICTIONAL STATEMENT

This Court has jurisdiction of this case pursuant to MO. CONST. Art. V, §10 and Rule 83.04 because of the general interest and importance of the issues presented for review; for the purpose of reexamining the existing law; and, for the reason that the opinion filed in the Court of Appeals is contrary to a previous decision of the Missouri Supreme Court.

STATEMENT OF FACTS

The Board of Registration for the Healing Arts (Board) started this action by filing with the Administrative Hearing Commission (AHC or Commission) a complaint against the license of Dr. Faisal J. Albanna, M.D. (Dr. Albanna). On January 23, 2003, the Board filed an amended complaint in six counts, each count concerning the course of treatment of a single patient.

After hearing, the Commission found no cause for discipline under Counts I, III, IV, and V. The Commission found cause for discipline on some, but not all, of the grounds asserted in Counts dealing with Patients S.W. and C.W. The Board has not sought review of the AHC's denial of cause to discipline, and those allegations are not before the Court.

Dr. Albanna holds a Missouri license to practice medicine and, at all times relevant, it was current and active.¹ (L.F. 87.) Dr. Albanna was originally licensed in Pennsylvania. He is also licensed in Illinois , and had a license in Washington, D.C., which he allowed to lapse. (L.F., AHC Tr., Vol. IV, 968:12-17.) Dr. Albanna, a native of Baghdad, Iraq, started medical school in Baghdad, finished medical school and a residency in Vienna, Austria, and completed further residencies in the United States - two years of general surgery and five years of neurosurgery. (L.F., AHC Tr., Vol. IV, 957:8-10; 958:7-25; 959-60:1-22; L.F. Supp., Bd. Tr. 29:6-19.) He has earned Board Certification in neurosurgery. (L.F., AHC Tr., Vol. IV, 970:9-11.)

¹Dr. Albanna's Curriculum Vitae is set out in the Appendix, A141-A147.

Dr. Albanna has practiced as a neurosurgeon in Missouri since 1987. (L.F., AHC Tr., Vol. IV, 966:9-15.) He has earned U.S. citizenship. (L.F., AHC Tr., Vol. IV, 969:15-17.)

In the fifteen years preceding the AHC hearing in 2003, Respondent had performed five thousand lumbar surgical procedures and three to four thousand cervical surgical procedures. (L.F., AHC Tr. Vol. IV, 973:17-25; 974:1-6.) Respondent often treated patients that other surgeons declined because of the complexity of the problem. (L.F. 80.)

Patient S.W.

Patient S.W. presented to Dr. Albanna in 1996 because of progressive neck problems causing unmanageable pain and discomfort that interfered with her ability to work and perform normal activities. (L.F., AHC Tr., Vol. IV, 1128:10-16; 1129:12-16.) Her pain had been progressive and disabling and she could not function. (Supp. L.F., Bd. Tr. 37: 4-5.) At the time of treatment S.W. was a 49 year old woman with a history of neck pain. She had had prior surgery to fuse vertebrae C4-5 and C5-6. (Tr. 295.)

Dr. Albanna recommended a course of conservative therapy known as cervical traction and prescribed a muscle relaxant. (L.F., AHC Tr., Vol. IV, 1130:1-6; 1131:14-21.) When Patient S.W. did not respond to the conservative therapy, Dr. Albanna ordered a myelogram to further evaluate her condition. (L.F., AHC Tr., Vol. IV, 1132:4-8.) Dr. Albanna recommended she continue with conservative treatment, but Patient S.W. sought different options. (L.F., AHC Tr., Vol. IV, 1132:17-25.)

Dr. Albanna found evidence of degenerative disease of varying degrees at every level from C-3 to C-7. (L.F., AHC Tr., Vol. III, 878:13; 879-87:1-13; Vol. IV, 1135-1140:18-25.)

He was convinced that Patient S.W. had a problem from C-3 to C-7. Dr. Albanna identified Patient S.W.'s options as 1) living with the pain, 2) continue conservative therapy, or 3) surgery. (L.F., AHC Tr., Vol. IV, 1134:4-8.) Patient S.W. chose the option of surgery and Dr. Albanna performed the surgery. (L.F., AHC Tr., Vol. IV 1135:1-5; Supp. L.F. Bd. Tr. 41:16-21; 42:10-24.)

Dr. Albanna performed a laminectomy and fusion of S.W.'s cervical vertebrae, C3 to C7. (Appendix, A59.)

After the surgery, Patient S.W. obtained a "second opinion" from Dr. Albanna's former partner, Dr. Bailey, who told her that the procedure performed by Dr. Albanna was not necessary. (Supp. L.F., Vol. II, 239:1-14.) Dr. Bailey provided a detailed note for Patient S.W. to use in filing a complaint against Albanna with the Board. (Supp. L.F., Vol. II, 239:1-4.) As a result, Patient S.W. never returned to Dr. Albanna for the follow-up treatment recommended by Dr. Albanna. (L.F., AHC Tr., Vol. IV 1143:1-11). Another former partner, Dr. Young (who also testified against Dr. Albanna in the AHC proceeding) (Supp. L.F., Vol. II, 234), wrote to Patient S.W. on August 18, 1997, also advising her to write to the Board to complain against Respondent. (Supp. L.F., Vol. II, 238:21-25.)

The AHC found that Dr. Albanna had performed an inappropriate operation on Patient S.W, and that he had insufficient evidence to warrant so very extensive an operation. (Appendix, A96.)

Patient C.W.

C.W. was a construction worker in 1998. (L.F., AHC Tr., Vol. II, 361:10-14.) He held a responsible position as foreman of his crew, and a physically demanding position due to his responsibility to fill in wherever he was needed. (L.F., AHC Tr., Vol. II 374:25; 375:1-3.) While working out of state he suffered a serious back injury. (L.F., AHC Tr., Vol. II, 361:19-25.) The pain was so bad that C.W. saw a doctor before returning home. (L.F., AHC Tr., Vol. II, 361:24-25; 379:9-11.) By the time he returned to St. Louis, the pain had gotten much worse, and C.W. was not able to work with his crew. (L.F., AHC Tr., Vol. II, 381:12-16; 383:4-6.) C.W. described the pain from the injury as unbearable pain, worse than anything he had experienced before. (L.F., AHC Tr., Vol. II, 377:22-25.) C.W. experienced pain in his lower back, as well as numbness, tingling and burning. (L.F., AHC Tr., Vol. II, 379:14-25.) The pain was so bad that he wanted to shoot his leg off. (L.F., AHC Tr., Vol. II, 380:9-12.)

In St. Louis, C.W. promptly began treatment with a chiropractor, Dr. Monti, whom he saw 1 to 2 times a day, 6 to 7 days a week for 3 to 4 weeks. (L.F., AHC Tr., Vol. II, 382:1-7.) Despite this intense chiropractic treatment, which included electrical stimulation, ultrasound, heat/ice treatments, and manipulations, the pain did not decrease and C.W. could not return to work. (L.F., AHC Tr., Vol. II, 363: 9-15; 382:12-25; 383:1-9.) At the recommendation of Dr. Monti, C.W. then saw Dr. Albanna. (L.F., AHC Tr., Vol. II, 364:2-5; 383:18-25; 384:1-3; 383:18-25.)

On the first visit, Dr. Albanna performed a physical examination. (L.F., AHC Tr., Vol. II, 384:12-13; Vol. IV, 1097:25; 1098:1-2.) Dr. Albanna discussed C.W.'s condition and his

MRI results with C.W. and his wife, who accompanied him. (L.F., AHC Tr., Vol. II, 386:24-25; 387:1-16; Vol. IV, 1103:10-12.) Dr. Albanna found that C.W. had considerable left foot weakness, abnormal gait, disc degeneration, and decreased range of motion of his lumbar sacral spine. (Supp. L.F., Bd. Tr. 44:22-25; 45:1-11; L.F., AHC Tr., Vol. IV, 1098:5-12; 1099:6-8.) Dr. Albanna's diagnosis was that C.W. had a herniated disc at L4-5, and disc degeneration at 3 levels. (Supp. L.F., Bd. Tr. 45:1-11; L.F., AHC Tr., Vol. IV, 1101:1-6.) To further evaluate C.W., Dr. Albanna ordered a myelogram and CT. (L.F., AHC Tr., Vol. IV, 1101:18-25; 1102:1-2.) Dr. Albanna did not discuss any surgical option at that time. (L.F., AHC Tr., Vol. II, 387:17-25.) C.W. did not hold anything back from Dr. Albanna about the enormity of the pain he was experiencing. (L.F., AHC Tr., Vol. II, 386:25; 387:1-7; Vol. IV, 1097:10-11; 1103:7-9) C.W. testified that after his initial visit to Dr. Albanna, he and his wife discussed future options for his treatment, including surgical placement of a particular type of instrumentation called "cages." (L.F., AHC Tr., Vol. II, 387:22-25; 388:14-25; 389: 12-22.) Dr. Albanna showed C.W. and his wife how cages worked and explained the surgical procedure. (L.F., AHC Tr., Vol. II, 387:22-25.) C.W. and his wife asked questions about the cages, including the risks and healing time. (L.F., AHC Tr., Vol. II, 388:1-8.) C.W. understood that there were both pros and cons of this operation. (L.F., AHC Tr., Vol. II, 370:17-20.) His wife considered C.W. to be an intelligent man (L.F., AHC Tr., Vol. II, 419:23-25) and C.W. testified that Dr. Albanna showed him and his wife at least two spinal models and presented them with literature on the procedure, which his wife read to him. (L.F., AHC Tr., Vol. II, 387:22-25; 388:14-22; 389:12-17; 390:18-21; 391:3-19.)

After his wife read the brochure to him, C.W. testified that he and his wife discussed the information further. (L.F., AHC Tr., Vol. II, 391:20-24.) C.W. understood that the insertion of cages was serious surgery, which would require him to be out of work for several months after leaving the hospital and carried various risks. (L.F., AHC Tr., Vol. II, 390:12-14; 392:8-10.)

Dr. Albanna performed a bilateral lumbar microdiscectomy, microlaminectomy, L4-L5, with posterior interbody fusion using autologous bone, applied into Ray cages. (App. A73.)

C.W. had continued to seek treatment with Dr. Albanna for a year after the surgery in question. (L.F., AHC Tr., Vol. II, 404:18-25.) When Dr. Albanna ordered a functional capacity exam after the surgery to determine if Patient C.W. could return to work, Patient C.W. stopped seeing Dr. Albanna. (L.F., AHC Tr., Vol. II, 397:10-24; Vol. IV, 1126:24-25; 1127:1-4.)

The Commission found that additional testing was required before doing a fusion as well as discectomy, and failure to differentiate between muscular and disk pain fell below the standard of care. (App. A110.) The Commission found that performing the fusion rather than just a discectomy was a violation of the standard of care and conduct harmful to the physical health of the patient. (App. A112.) The Commission found that:

Dr. Albanna's failure to secure the informed consent of C.W. for the off-label use of Pro-Osteon violated the standard of care. (App. A113.);

Dr. Albanna's surgical technique in the laminectomy destabilized the C.W.'s spine and contributed to the failure of the fusion, and that his technique fell below the standard of care. (App. A117.);

Dr. Albanna failed to recognize and correct post-operative indications of fusion problems violated the standard of care, was unprofessional conduct, and conduct that was harmful to the mental and physical health of the patient. (App. A117-A118.);

Dr. Albanna failed to document the full extent of the operation, which was below the standard of care. (App. A118.);

Dr. Albanna represented that fusion was progressing when it was not, which fell below the standard of care. (App. A119.);

Dr. Albanna's treatment of C.W. demonstrated a general lack of, or lack of disposition to use, his professional ability, which is cause to discipline for incompetence. (Appendix, A119.)

The Discipline

After hearing, the Board placed Dr. Albanna on probation for a period of five years for alleged violations of Sections 334.100.2 (4) and (5), RSMo.² The disciplinary order required that Dr. Albanna's patients must obtain a second opinion from a board certified neurosurgeon before Dr. Albanna could perform particular types of surgery. An additional

²All references to Missouri Statutes are to the Revised Statutes of Missouri, 2000, unless otherwise noted.

condition of probation required Dr. Albanna's patients to fill out an extensive and expanded informed consent form, which requires information that would not ordinarily be available to Dr. Albanna or his patients.

Procedural History

After the Board imposed discipline on Dr. Albanna's license, Dr. Albanna sought review of the Commission's and the Board's decisions in the Circuit Court of Cole County. The Circuit Court reversed the decisions of the Commission and the Board finding grounds for discipline and imposing discipline, and the Board sought review in the Court of Appeals.

In its Slip Opinion dated October 21, 2008, the Court of Appeals affirmed the Commission's decision that the Board could discipline Dr. Albanna for his treatment of patients C.W. and S.W. for "conduct that might be harmful to a patient" and for "conduct harmful to a patient." (Slip Opinion, pages 14-17). The Court of Appeals held that the Commission properly found Dr. Albanna negligent as to both C.W. and S.W., which together constituted repeated negligence under the statute. (Slip Opinion, page 20.)

On motion of Dr. Albanna, this Court granted transfer on February 24, 2009.

POINTS RELIED ON

I.

THE AHC ERRED IN HOLDING THAT DR. ALBANNA IS SUBJECT TO DISCIPLINE FOR UNPROFESSIONAL CONDUCT BECAUSE IT ERRONEOUSLY APPLIED THE LAW AND HAD NO EVIDENTIARY SUPPORT IN THAT UNPROFESSIONAL CONDUCT IS A BREACH OF PROFESSIONAL STANDARDS BASED ON COMMON OPINION AND FAIR JUDGMENT, AND IN THAT THERE IS NO RECORD EVIDENCE TO SUPPORT A FINDING OF UNPROFESSIONAL CONDUCT.

Perez v. State Bd. of Registration for Healing Arts, 803 S.W.2d 160 (Mo. App. 1999)

Hoffman v. Bd. of Reg. for the Healing Arts, 936 S.W.2d 182 (Mo. App. 1996)

State ex rel. Donelon v. Div. of Employment Sec., 971 S.W.2d 869

(Mo. App.1998)

Tendai v. State Bd. of Registration for Healing Arts, 161 S.W.3d 358

(Mo. banc 2005)

Section 334.100.2(4), RSMo

II.

THE AHC ERRED IN HOLDING THAT DR. ALBANNA IS SUBJECT TO DISCIPLINE FOR REPEATED NEGLIGENCE BECAUSE ITS HOLDING WAS BASED UPON AN ERRONEOUS APPLICATION OF THE LAW AND IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT

A.

THE AHC DID NOT APPLY THE PROPER LEGAL STANDARD FOR MEDICAL NEGLIGENCE, WHICH IS THE REASONABLE MEDICAL JUDGMENT RULE; AND,

B.

REPEATED NEGLIGENCE REQUIRES A GROSS DEPARTURE FROM THE APPROPRIATE STANDARD OF CARE BECAUSE ONLY SUCH A GROSS DEPARTURE IS CONSISTENT WITH THE BALANCE OF THE GROUNDS FOR DISCIPLINE IN §334.100.2(5) RSMo ; AND,

C.

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT DR. ALBANNA'S ACTIONS WERE A CLEAR DEPARTURE FROM THE

**CONDUCT OF NEUROSURGEONS UNDER THE REASONABLE
MEDICAL JUDGMENT RULE.**

Haase v. Garfinkel, 418 S.W.2d 108 (Mo. 1967)

Foremost Dairies, Inc. v. Thomason, 384 S.W.2d 651 (Mo. banc 1964)

State v. Bratina, 73 S.W.3d 625 (Mo. banc 2002)

Tendai v. State Bd. of Registration for Healing Arts, 161 S.W.3d 358 (Mo. banc 2005)

Section 334.100.2(5), RSMo

III.

THE AHC ERRED IN HOLDING THAT DR. ALBANNA ENGAGED IN CONDUCT THAT IS OR MIGHT BE HARMFUL OR DANGEROUS TO A PATIENT BECAUSE ITS HOLDING IS BASED UPON AN ERRONEOUS APPLICATION OF THE LAW IN THAT THE CONDUCT SANCTIONED BY DISCIPLINE UNDER THE STATUTE IS AKIN TO QUACKERY, AND IS NOT JUDGED BY POST HOC REVIEW OF PHYSICIAN SKILL OR PATIENT OUTCOME; AND BECAUSE IT IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THERE IS NO TESTIMONY THAT, “BUT FOR” DR. ALBANNA’S ACTIONS, HIS PATIENTS WOULD HAVE SUFFERED NO HARM.

Tendai v. State Bd. of Registration for Healing Arts, 161 S.W.3d 358

(Mo. banc 2005)

Section 334.100.2(5), RSMo

IV.

THE AHC ERRED IN HOLDING THAT DR. ALBANNA WAS INCOMPETENT BECAUSE SUCH HOLDING IS UNSUPPORTED BY THE EVIDENCE IN THE RECORD IN THAT DR. ALBANNA HAS SUCCESSFULLY PERFORMED MORE THAN 8,500 SURGICAL PROCEDURES OVER A FIFTEEN YEAR CAREER, WHICH IS INCONSISTENT WITH A FINDING OF A GENERAL LACK OF PROFESSIONAL ABILITY, AND THERE IS NO EVIDENCE OF RECORD SHOWING INCOMPETENCY.

Tendai v. State Bd. of Registration for Healing Arts, 161 S.W.3d 358 (Mo. banc 2005)

State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.2d 146

(Mo. banc 2003)

Section 334.100.2(5), RSMo

V.

THE BOARD ERRED IN ITS IMPOSITION OF DISCIPLINE BECAUSE IT WAS MADE ON UNLAWFUL PROCEDURE IN THAT THE BOARD EXCEEDED THE RECOMMENDATION OF DISCIPLINE OF ITS OWN COUNSEL AND OF THE AHC WITHOUT EVIDENCE, EXPLANATION OR FINDINGS OF FACT; BECAUSE IT IS ARBITRARY AND CAPRICIOUS IN THAT NO OTHER SIMILARLY SITUATED LICENSEE HAS BEEN PUNISHED AS SEVERELY AS DR. ALBANNA; AND BECAUSE SUCH DISCIPLINE IS INVIDIOUSLY DISCRIMINATORY IN VIOLATION OF CONSTITUTIONAL PROVISIONS IN THAT DR. ALBANNA HAS BEEN TREATED DIFFERENTLY AND MORE HARSHLY DUE TO HIS NATIONALITY.

State Bd. of Registration for Healing Arts v. Brown, 121 S.W.3d 234 (Mo. banc 2003)

H.S. v. Bd. of Regents, Southeast Mo. State Univ., 967 S.W.2d 665

(Mo. App. 1998)

Nat'l Educ. Ass'n v. Mo. State Bd. of Educ., 34 S.W.3d 266 (Mo. App. 2000)

ARGUMENT

I.

THE AHC ERRED IN HOLDING THAT DR. ALBANNA IS SUBJECT TO DISCIPLINE FOR UNPROFESSIONAL CONDUCT BECAUSE IT ERRONEOUSLY APPLIED THE LAW AND HAD NO EVIDENTIARY SUPPORT IN THAT UNPROFESSIONAL CONDUCT IS A BREACH OF PROFESSIONAL STANDARDS BASED ON COMMON OPINION AND FAIR JUDGMENT, AND IN THAT THERE IS NO RECORD EVIDENCE TO SUPPORT A FINDING OF UNPROFESSIONAL CONDUCT.

Standard of Review

In an appeal of the circuit court's judgment on judicial review of an agency decision, this Court reviews the action of the agency, not the circuit court. *Lagud v. Kansas City Bd. of Police Comm'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004). Its review includes a determination of whether the action of the agency is in violation of constitutional provisions; is in excess of statutory authority; is unsupported by competent and substantial evidence upon the whole record; is unauthorized by law; is made upon unlawful procedures; is arbitrary, capricious or unreasonable; or involves an abuse of discretion. *Id.* (citing Section 536.140.2, RSMo). On review, the court must look to the whole record in reviewing the agency's decision, not merely at the evidence which supports the agency's decision. *Id.* If the agency's decision involves a question of law, the court reviews the question *de novo*.

State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146, 152 (Mo. banc 2003).

This Court has held that MO. CONST. Article V, § 18, requires the court reviewing an agency decision to review the whole record before the agency, not just the evidence that supports the agency's decision. *Lagud*, 136 S.W.3d at 791 (citing *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003); *but see, Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 365 (Mo. banc 2005)).

Argument

The Commission found cause to discipline Dr. Albanna's license under Section 534.100.2(4) only for unprofessional conduct. (L.F. 85-86.) Section 334.100.2(4) provides:

The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered the person's certificate of registration or authority, permit or license for any one or any combination of the following causes:

(4) Misconduct, fraud, misrepresentation, dishonesty, unethical conduct or unprofessional conduct in the performance of the

functions or duties of any profession licensed or regulated by this chapter, including, but not limited to, the following:

The AHC defined “unprofessional conduct” as synonymous with unethical conduct and to include “any conduct which by common opinion and fair judgment is determined to be unprofessional or dishonorable.” (L.F. 50 (*citing Perez v. State Bd. of Registration for Healing Arts*, 803 S.W.2d 160, 164 (Mo. App. 1991)). Apparently, the only distinction between unethical and unprofessional conduct is that “ethical” relates to “moral standards of professional conduct.” *Id.* (*citing* MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 398 (10th Ed. 1993)).

The causes for discipline enumerated in Section 334.100.2(4), RSMo, all relate to elements of bad intent, dishonesty, transgressions and bad behavior. Importantly, all of the examples of such conduct in Section 334.100.2(4)(a) through (q) also expressly require at least elements of bad intent and gross departures from and abuse of the duties and functions of licensure or knowing and intentional conduct. Labeling conduct as unprofessional under this statute requires more than mere inadvertent departure from the standard of care—it requires knowledge, intent or wrongdoing.

The Board provided no testimony or any other evidence that Dr. Albanna had committed such acts. The Board did not proffer any testimony or evidence that he engaged in unprofessional conduct. When there is no testimony or evidence regarding alleged causes for discipline, the Commission’s decision cannot be upheld. *Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 370 (Mo. banc 2005). The AHC’s

conclusion that Dr. Albanna was subject to discipline for unprofessional conduct under Section 334.100.2(4), RSMo, is not supported by substantial evidence.

Examples of conduct determined to be unprofessional include cases where: a physician convicted of the federal felony of using the mail to defraud and assisting his employee to practice medicine without a license, *Hughes v. State Bd. of Health*, 159 S.W.2d 277 (Mo. 1942); a physician executed false prescriptions for narcotic drugs, *Rose v. State Bd. of Registration for Healing Arts*, 397 S.W.2d 570 (Mo. 1966); a physician was convicted of the federal felony of the interstate sale of misbranded drugs, which he represented would treat cancer, tuberculosis and leprosy, *State Bd. of Registration for Healing Arts v. De Vore*, 517 S.W.2d 480 (Mo. App. 1975); a physician engaged in a sexual relationship with an emotionally troubled and vulnerable patient, *Perez v. State Bd. of Registration for Healing Arts*, 803 S.W.2d 160 (Mo. App. 1991); and a physician assaulted a nurse, *Hoffman v. Bd. of Reg. for the Healing Arts*, 936 S.W.2d 182 (Mo. App. 1996). There is no reported case that supports Commission's present determination that conduct is unprofessional when the Board's expert witnesses simply disagree with a physician's treatment decisions for a patient.

Dr. Albanna's treatment of Patients S.W. and C.W. does not involve any criminal charges; has not allowed any employee to practice medicine without a license; does not involve any unlawful prescriptions; does not involve a sexual relationship with any patient or assault on another professional.

The *Perez* court held that a physician can be subject to discipline when conduct is considered to be unprofessional based on common opinion and fair judgment. *Perez v. State*

Bd. of Registration for Healing Arts, 803 S.W.2d 160 (Mo. App. 1991). In that case, the Court held that a fertility physician who knowingly, purposely and intentionally had sex with his client based on his advice to her that it was “treatment” was such a professional and ethical breach that no expert testimony was required. *Id.* Based on the *Perez* facts of a physician sexually assaulting a patient, the *Perez* court held that such conduct was unprofessional based on “...common opinion and fair judgment.” *Id.* at 164.

The Court of Appeals has upheld suspension of a state employee based on unprofessional conduct. *State ex rel. Donelon v. Div. of Employment Sec.*, 971 S.W.2d 869 (Mo. App. 1998). In *Donelon*, the Court held that temper outbursts, tantrums and addressing co-workers in a derogatory and rude manner constituted unprofessional conduct. *Id.* at 877. As in *Perez*, common opinion and fair judgment deemed those behaviors unprofessional, and expert opinion was not needed.

In no reported case has a physician been determined to have engaged in “unprofessional conduct” because his treatment was different than the licensing board’s witness’ theoretical treatment of that patient. Physicians have been found to have engaged in “unprofessional conduct” when they: had a sexual relationship with a patient, *Finucan v. Md. Bd. of Physician Quality Assurance*, 846 A.2d 377 (Md. 2004); were convicted of Medicare fraud, *Erickson v. State ex rel. Bd. of Med. Exam’rs*, 938 P.2d 625 (Mont.1997); had inappropriate sexual contact with one patient and performed inappropriate physical examinations and sexual questioning of other patients, *Nghiem v. State*, 869 P.2d 1086 (Wash. Ct. App. 1994); violated the Uniform Controlled Substances Act, *Galang v. State*

Med. Examining Bd., 484 N.W.2d 375 (Wis. Ct. App. 1992); exploited a juvenile patient for sexual gratification purposes, *Haley v. Med. Disciplinary Bd.*, 818 P.2d 1062 (Wash. 1991); described to patients in lurid and salacious detail sexual foreplay and sexual intercourse while they were hypnotized, *Shea v. State Bd. of Med. Exam'rs*, 146 Cal. Rptr. 653 (Cal. Ct. App. 1978); acted as a patsy to persons dealing in drug traffic, *Ark. State Med. Bd. v. Elliott*, 563 S.W.2d 427 (Ark. 1978); and were convicted of a crime involving moral turpitude, *Cadilla v. Bd. of Med. Exam'rs*, 103 Cal. Rptr. 455 (Cal. Ct. App. 1972).

These determinations that a physician had engaged in “unprofessional conduct” due to varied bad behaviors are similar to the facts in the *Perez* case. However, Dr. Albanna’s choice of treatment for Patients S.W. and C.W. cannot support a finding of “unprofessional conduct” by any standard used within this jurisdiction or any other jurisdiction nationwide. This Court should reverse the Commission’s determination that Dr. Albanna’s treatment of S.W. and C.W. constituted unprofessional conduct.

II.

THE AHC ERRED IN HOLDING THAT DR. ALBANNA IS SUBJECT TO DISCIPLINE FOR REPEATED NEGLIGENCE BECAUSE ITS HOLDING WAS BASED UPON AN ERRONEOUS APPLICATION OF THE LAW AND IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT

A.

THE AHC DID NOT APPLY THE PROPER LEGAL STANDARD FOR MEDICAL NEGLIGENCE, WHICH IS THE REASONABLE MEDICAL JUDGMENT RULE.

Standard of Review

In an appeal of the circuit court's judgment on judicial review of an agency decision, this Court reviews the action of the agency, not the circuit court. *Lagud v. Kansas City Bd. of Police Comm'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004). Its review includes a determination of whether the action of the agency is in violation of constitutional provisions; is in excess of statutory authority; is unsupported by competent and substantial evidence upon the whole record; is unauthorized by law; is made upon unlawful procedures; is arbitrary, capricious or unreasonable; or involves an abuse of discretion. *Id.* (citing Section 536.140.2, RSMo). On review, the court must look to the whole record in reviewing the agency's decision, not merely at the evidence which supports the agency's decision. *Id.* If the agency's decision involves a question of law, the court reviews the question *de novo*.

State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146, 152 (Mo. banc 2003).

This Court has held that MO. CONST. Article V, § 18, requires the court reviewing an agency decision to review the whole record before the agency, not just the evidence that supports the agency's decision. *Lagud*, 136 S.W.3d at 791 (citing *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003)); *but see*, *Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 365 (Mo. banc 2005)).

Argument

The long-standing rule for judging the actions of a physician in treating a patient has been that enunciated by the Supreme Court in *Haase v. Garfinkel*, 418 S.W.2d 108 (Mo. 1967). In that case, this Court held , “As long as there is room for an honest difference of opinion among competent physicians, a physician who uses his own best judgment cannot be convicted of negligence, even though it may afterward develop that he was mistaken.” *Id.* at 113-14. *Snyder v. St. Louis Southwestern Ry. Co.*, 72 S.W.2d 504, 512 (Mo. App. 1934); *Williams v. Chamberlain*, 316 S.W.2d 505, 510-11 (Mo. 1958); *Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 164 (Mo. banc 2003).

In order to find grounds for discipline for “repeated negligence” the Commission must find that there is no room for an honest difference of opinion among competent physicians. Although the Commission announced that it found the Board's witnesses persuasive on issues that form the basis for its decision, those findings fall far short of the required finding

that there was no room for an honest difference of opinion. Furthermore, the Commission could not make such a finding based on the evidence adduced in this case.

B.

REPEATED NEGLIGENCE REQUIRES A GROSS DEPARTURE FROM THE APPROPRIATE STANDARD OF CARE BECAUSE ONLY SUCH A GROSS DEPARTURE IS CONSISTENT WITH THE BALANCE OF THE GROUNDS FOR DISCIPLINE IN §334.100.2(5) RSMo.

The Commission erred in its opinion by its interpretation of the term “repeated negligence” to simply and mechanically comprehend two isolated acts of ordinary negligence. In doing so, the AHC has sanctioned discipline that is inconsistent with the balance of the statutory disciplinary provisions. The Commission misapplied the principle of *noscitur a sociis* in construing this subsection of Section 334.100.2, RSMo.

When interpreting statutory language, the maxim *noscitur a sociis* directs that words used in proximity be considered together. In construing Section 334.100.2(5), the Commission applied the maxim to remote, not proximate words. Correct application of this maxim of construction is particularly helpful to clarify the ambiguity in the present case.

Under the rule of *noscitur a sociis*, general and specific words, capable of analogous meaning, when used together, take color from each other, so that general words are restricted to a sense analogous to the less general, and the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used. *Foremost*

Dairies, Inc. v. Thomason, 384 S.W.2d 651, 660 (Mo. banc 1964); *State v. Bratina*, 73 S.W.3d 625, 627 (Mo. banc 2002).

Section 334.100.2(5) states:

The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered the person's certificate of registration or authority, permit or license for any one or any combination of the following causes:

(5)Any conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public; or incompetency, gross negligence or repeated negligence in the performance of the functions or duties of any profession licensed or regulated by this chapter. For the purposes of this subdivision, "repeated negligence" means the failure, on more than one occasion, to use that degree of skill and learning ordinarily used under the same or similar circumstances by the member of the applicant's or licensee's profession;"

Although the legislature used the words “skill and learning ordinarily used” in defining the term “repeated negligence,” a departure from that standard which warrants license discipline must be further colored and restricted by the other words in the same clause - “incompetency” and “gross negligence.” Both incompetency and gross negligence signify a “gross deviation from the standard of care.” *Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 368 (Mo. banc 2005) (emphasis in the original). Further, the legislature has not authorized the Board to discipline for ordinary negligence elsewhere in this subdivision (5), or elsewhere in the statute. *Id.*, at 661. Thus, read in the context of the words and phrases most closely associated with it (rather than words in different subsections addressing different issues, such as those employed by the Court of Appeals below), the legislature has authorized discipline only for substantial departures from the prescribed norms. The Commission did not find such a substantial departure from professional standards by Dr. Albanna, nor does the evidence support such a finding.

C.

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT DR. ALBANNA’S ACTIONS WERE A CLEAR DEPARTURE FROM THE CONDUCT OF NEUROSURGEONS UNDER THE REASONABLE MEDICAL JUDGMENT RULE.

The *Lagud* requirement that courts review the entire record of agency decisions is particularly important in cases involving the Board’s application of the medical judgment standard in license discipline cases. The Board has the burden of establishing the range of

alternative treatments available to physicians in a clinical setting. That is, before the agency can pass on the propriety of the action at issue, it must establish the entire range of alternatives considered by reasonable practitioners in the particular field, facing the same or similar circumstances.

In this case, the Board and the Commission have failed. Dr. Albanna has adduced competent, substantial evidence from practitioners in the field of neurosurgery that the treatment he recommended to his patients, and to which they gave their informed consent, was one that others in the field would reasonably offer. Only by finding that this evidence was simply not credible could the agencies establish that the range of appropriate alternate treatments does not include those offered by Dr. Albanna. The Commission did not so find, and the testimony of the Board's expert witnesses is insufficient for the task in any event.

The difficulty of the Board's task is consistent with the legislative design for regulation of the medical arts. The legislature, through the Board, has erected a substantial screening process to prevent gross departures by physicians from the standard of care. Medical schools screen candidates for licensure by review of academic performance, admission testing, references, and interviews. During medical school potential licensees are instructed, observed, and graded in clinical and as well as classroom settings. Licensees face additional years of clinical experience, observation and grading during internship and residency. This is followed in many cases by fellowships in specialty areas and study, practice, and testing before admission to specialty certification. Once in practice, licensees

must complete continuing medical instruction under the auspices of the Board, and are also subject to peer review by their colleagues and hospitals.

As this Court observed in *Tendai*, the legislature designed the disciplinary process enforced by the Board to exclude ordinary negligence. Such exclusion reflects the legislature's understanding that the Board, through the initial licensing process will weed out those aspirants who lack the technical or attitudinal requisites of good practitioners. It also reflects the legislature's purpose that society's substantial investment in the training of medical professionals is not unimportant, and the judgment to discipline their licenses only for gross departures from practice standards should be the rule.

As this Court has also observed in *Tendai*, even competent practitioners can perform a negligent act. The discipline imposed on physicians for negligent acts is by private recovery of damages that such negligent acts might cause to their patients. The legislature has only authorized the Board to discipline the gross departures from the standards of practice that the public safety demands, and for which monetary discipline is insufficient. None of the allegedly deficient acts of Dr. Albanna are within the scope of discipline authorized by Section 334.100.2.

Patient S.W.

With respect to Patient S.W. the Board relied primarily on the testimony of Dr. Edward Smith. Dr. Albanna relied on the testimony of Dr. Greg Cizek and Dr. Terry Lichtor.

The Board's primary expert for the S.W. count, Edward Smith, M.D., was from a rural area in the central coast of the state of California. (L.F. AHC Tr., Vol. I 35:22-23.) Only 45% of Dr. Smith's clinical work is in the "neurosurgical field," and none is in the role of primary neurosurgeon. (L.F., AHC Tr., Vol. I 37:10, 16-17.) Dr. Smith completely abandoned his surgical practice in 1985 after practicing surgery for only ten years. (L.F., AHC Tr., Vol. I 37:16-19; 184:4-9.) Since 1985, Dr. Smith has assisted in surgery approximately once a month and has not acted in the role of primary surgeon. (L.F., AHC Tr., Vol. I 38:1-3.) In 1985, when Smith last acted as a primary surgeon, Smith testified that modern instrumentation such as that at issue in this case was not widely used. (Supp. L.F., Vol. II, 253:7-10.) Dr. Smith never had the opportunity to use or learn some of the instrumentation used by Dr. Albanna. (L.F., AHC Tr., Vol. I 193:18-21.)

Since 1995, Dr. Smith has done a significant amount of testifying in medical cases. Over 98% of his testimony has been for Plaintiff's attorneys. (L.F., AHC Tr., Vol. I 198:15-20.) He is not a member of the North American Spine Society. (L.F., AHC Tr., Vol. I 241:17-21.) Dr. Smith had his staff privileges at a hospital suspended for six weeks earlier in his career (Supp. L.F., Vol. II, 254:22-25), and has paid damages to three of his patients due to medical malpractice. (Supp. L.F., Vol. II, 255:2-9; 256:5-11, 14-20.)

Dr. Smith agreed that practicing physicians can reach different opinions with regard to standard of care. (L.F., AHC Tr., Vol. I 188:23-25; 189:1; Vol. III 889:1-8.) When he was sued for malpractice, for instance, he thought that he had met the standard of care but the plaintiff's expert witness did not agree. (L.F., AHC Tr., Vol. I 189: 4-6.) Smith never examined Patient S.W. (L.F., AHC Tr., Vol. I 40:9-16.) He did not possess the entire clinical presentation of the patient when he determined that the operation was not necessary. (L.F., AHC Tr. Vol. I 71:2.) Both the Board's expert, Dr. Smith, and Dr. Albanna's expert, Dr. Lichtor, agreed that a fusion from C-3 to C-7 is good medical practice if the neurosurgeon is convinced that there is a problem at those levels. (L.F., AHC Tr., Vol. I 208:11-14; Vol. II 293:13-24; 301:18-20.)

Dr. Greg Cizek, a board certified neuroradiologist³ (L.F., AHC Tr., Vol. III 848:12-16) practicing in St. Louis County (L.F., AHC Tr., Vol. III 854:5-16) testified that the decision on whether surgery is warranted and the type of surgery that is most appropriate for the patient is best made by the treating neurosurgeon who has the entire clinical presentation of the patient. (L.F., AHC Tr., Vol. III 889:6-17; Supp. L.F. Bd. Tr. at 43:1-15.) Based on the radiological studies, including the myelogram, and an EMG and a nerve conduction test, Dr. Cizek agreed with Dr. Albanna's finding of evidence of degenerative disease of varying degrees at every level from C-3 to C-7. (L.F., AHC Tr., Vol. III 878:13; 879-887:1-13; Vol. IV 1135-1140:18-25.) Although Dr. Albanna's own interpretation of the X-rays differed from the Board's radiologist who reviewed them at the hearing, Dr. Cizek the

³Dr. Cizek's Curriculum Vitae is set out in the Appendix, A148-A149.

neuroradiologist confirmed the findings were significant enough to justifiably offer the patient a surgical treatment option. (L.F., AHC Tr., Vol. III 891:22-25; 892:1-8.) The Commission not only accepted unqualified and irrelevant testimony as support for its conclusion, but ignored the only competent testimony offered establishing the contrary conclusion.

Dr. Albanna's expert, Dr. Lichtor, a board certified neurosurgeon⁴ (L.F., AHC Tr., Vol. II 274:20-22) testified that Dr. Albanna's surgery on Patient S.W. was within the standard of care. (L.F., AHC Tr., Vol. II 301:18-20.) Dr. Lichtor testified that a minimum of three operation options could have been performed on Patient S.W. including a foraminotomy, a laminectomy with a fusion, and a laminectomy without a fusion. (L.F., AHC Tr., Vol. II 313:9-14.) Dr. Lichtor testified that the disadvantages of not performing a laminectomy and fusion are that the patient might need more surgery down the road and there would be two operations instead of one. (L.F., AHC Tr., Vol. II 316:3-8.) Importantly, Dr. Lichtor testified that the determination of the surgical option is based on many different factors:

[A]lthough many of them would have offered a bigger operation up front. But they wouldn't offer the smaller operations, the ones I know who offer the fusion and laminectomy and fusion. Several of my colleagues offer that for every patient like this I can tell you and they don't offer the smaller operations...It's not

⁴Dr. Lichtor's Curriculum Vitae is set out in the Appendix, A150-A161.

a question of agreement. A lot of it is a question of our experience and our personalities and a lot of things. And I think you're (the Board) making a right or wrong out of something which there is no right or wrong.

(L.F., AHC Tr., Vol. II 319:14-20; 320:1-5.)

Where, as here, experts offer conflicting opinions on the proper treatment, it is obvious that there is a choice within the range of acceptable options, and a physician cannot be found negligent under the reasonable medical judgment rule.

Patient C.W.

Appellant's expert for the C.W. count was Dr. Thomas Freeman from Tampa, Florida. (Supp. L.F., Vol. II, 298:1.) Dr. Freeman testified that he has never used a Ray cage. (Supp. L.F., Vol. II, 215:18-20.) Dr. Freeman's definition of a standard of care differs from the definition used in Missouri. (Supp. L.F., Vol. II, 223:18-20.) Dr. Freeman did not appear live at the hearing and therefore was not available to answer questions from the Commission. Dr. Freeman admitted that the clinical examination is essential to the diagnosis, but he was not asked to, and did not request to, examine the patient. (Supp. L.F. 2695:17-18.)

A. Respondent did not violate the standard of care by failing to get Patient C.W.'s informed consent during surgery.

The Board found fault with Dr. Albanna's off-label use of a product in performing fusion surgery on Patient C.W. The best bone material used in creating the fusion is from a patient's own body. This bone can be taken from the bone removed from the back (lamina)

that is removed to make room for the procedure, as was done in this case. (L.F., AHC Tr., Vol. IV 1120:15-25; 1121:1.) The bone could also be taken from the patient's hip. (L.F., AHC Tr., Vol. IV 1121:17-18.) Taking bone from a patient's hip is a more invasive procedure and has various complications including post-surgical pain to the patient. (L.F., AHC Tr., Vol. IV 1122:20-25; Supp. L.F., Vol. II, 221:18-20.) Removal of bone from the patient's hip requires proper informed consent. (Supp. L.F., Vol. II, 221: 21-25; 222:1-4.) In this case, Dr. Albanna had the vast majority of the bone needed from the patient's lamina which had been only partially removed. (L.F., AHC Tr., Vol. IV 1121:12-13, 22-25; 1122:1-17.) To make up the difference he used a coral substance known as Pro-Osteon. (L.F., AHC Tr., Vol. IV 1121:21-25; 1122:1-17.) The use of FDA approved products for other uses that are not specifically approved is not prohibited and is called an "off-label use" of the product. Dr. Wilkinson testified that if a surgeon, in the throes of performing surgery (as was Dr. Albanna here), determined that he or she needed to use a product which had not been specifically approved for use that particular way by the FDA, such conduct would not be a deviation from the standard of care. This seems sensible where, as here, the amount of the substance is small, the use is acceptable if consented to (i.e., Pro-Osteon is safe and effective in this off label use), and the patient would have to be awakened from an incomplete surgery to consent to an obvious choice of treatments. He then would need to be re-sedated and the operation continued.

Dr. Freeman stated that he had never used Pro-Osteon. (Supp. L.F., Vol. II, 218:9-10.) Nevertheless, he testified that in his opinion informed consent is required when such

a product is used off-label. (Supp. L.F., Vol. II, 221:2-4.) Dr. Albanna's witness, Dr. Wilkinson,⁵ responded to Dr. Freeman's testimony:

“Q. And I think what you're saying is you may be in the operating room and you realize that you need some sort of material that's not FDA approved but you believe it would work better than not?

A. If I think it would help the patient, I would use it.

Q. And in your opinion, would that action be a deviation from the standard of care?

A. If it is, we've got to go back and take out lots of rods, lots of screws, lots of things that have been put in.

Q. Just for the record, would your answer be no?

A. No, sorry.”

(L.F. AHC Tr., Vol. II 566:19-25; 567:1-7.)

The AHC's conclusion that Dr. Wilkinson's response did not address Dr. Freeman's testimony is erroneous, arbitrary, capricious, and an abuse of discretion. (L.F. 74.) Wilkinson's testimony and evidence responded directly to and refuted Dr. Freeman's overstated opinion that surgeons under the circumstances Dr. Albanna found himself in never make off-label uses without informed consent. Moreover, the response did so by stating the obvious reasonable premise missing from Freeman's blanket conclusion - - you don't stop in the middle of surgery, revive the patient and ask him if he approves of an off-label use of

⁵Dr. Wilkinson's Curriculum Vitae is set out in the Appendix, A163-A165.

a product known to the physician to be commonly used and appropriate. Dr. Freeman's opinion and the AHC decision carries the practice of "defensive medicine" to new levels of absurdity, elevating legalistic caution far above patient welfare.

Further, Dr. Freeman's testimony suffers from a lack of knowledge and is not based on facts. He categorically stated that Pro-Osteon is not and never has been FDA approved for spinal use. (Supp. L.F., Vol. II, 213:5-9.) He did not know that Pro-Osteon includes four types, Pro-Osteon 200, Pro-Osteon 500, Pro-Osteon 200R, and Pro-Osteon 500R, (Supp. L.F., Vol. II, 219:20-24), and Dr. Freeman further did not know what version of Pro-Osteon Dr. Albanna used. (Supp. L.F., Vol. II, 220:2-9.) Pro-Osteon 500R has been FDA approved for spinal use, and Dr. Albanna used Pro-Osteon 500R. Dr. Freeman admitted that the use of medical products for off-label uses is commonly done. (Supp. L.F., Vol. II., 220:11-13.)

The Missouri Supreme Court has held that "...non-FDA-approved, or 'off-label,' use of medications by physicians is not prohibited by the FDA and is generally accepted in the medical profession." *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 150 (Mo. banc 2003) (citing 21 U.S.C. § 396 (2000); *Buckman Co. v. Plaintiffs Legal Comm.*, 531 U.S. 341, 350-51, & n.5, 121 S.Ct. 1012, 148 L.Ed. 2d 854 (2001)). Under all the evidence, an off-label use of Pro-Osteon, especially when used as a small portion of the bone supplement needed for the cages during surgery, was appropriate in this case. There was no substantial credible evidence offered by the Board to support the conclusion that Dr. Albanna violated the standard of care in this regard. *Lagud v. Kansas City Board of Police Comm'rs*, 136 S.W.3d 786 (Mo. banc 2004). This finding and decision should be reversed.

B. Respondent did not violate the standard of care as Respondent did not destabilize Patient C.W.'s facet joint.

The AHC found fault with Respondent's surgery based upon conjecture and guesswork about how a result dictates its cause. The AHC states that it does not "believe" that Respondent placed the cages symmetrically on both sides of the disc space. However, the Commission also found that the placement of these cages did not violate the standard of care. (L.F. 77.) But the Commission then decided that because of this alleged "misplacement," Patient C.W.'s spine became unstable. (L.F. 78.) This decision was not based on substantial evidence or any evidence.

The Board's expert stated that Dr. Albanna "should have" stabilized the spine "...somehow..." *Id.* The AHC determined that the surgery was not below the standard of care, but that a result of that surgery fell below the standard of care. This finding is arbitrary and clearly inconsistent with its factual determination which is the matter at issue. A bad result is not actionable without an underlying proximate violation of the standard of care. *See, Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 370 (Mo. banc 2005). The Board's expert's opinion regarding the destabilization of the spine was based on an erroneous presumption that the cages were "misplaced" in violation of the standard of care. (L.F. 78.) At most, the AHC made no clear determination of the presumed issue. That is a presumption not shown or established by the evidence. Indeed, the credible evidence and presumption is contrary - while perhaps not placed precisely, the cages were placed within the standard of care.

Dr. Albanna's expert Dr. Raskas⁶ testified, based upon all the medical records, that the cages were placed in proper location at the time of the surgery. (Supp. L.F., Vol. II, 268 at 56:1-4, 8-14.) The location of the right cage did not obliterate the right facet joint. (Supp. L.F., Vol. II, 268 at 56:15-19.) Patient C.W.'s spine was unstable before his operation, (Supp. L.F., Vol. II, 267 at 45:22-25; 46:1-3) and a discectomy laminectomy also disrupts the facets. (Supp. L.F., Vol. II, 269 at 57:1-3.) Speculation that "something" more could or should have been done to promote stability in this particular unique case proved nothing about the standard of care and provided no evidence of causation.

The procedure was itself performed successfully under the standard of care. According to the radiology reports, fusion in the right cage was solidly occurring with the patient's vertebrae. (L.F., AHC Tr., Vol. II 572:21-22.) Dr. Albanna properly placed the Ray cages in the intradisc space at L4-5. According to Drs. Raskas, Wilkinson and Cizek, the radiographic images taken immediately after the procedure clearly show that the cages are not touching. (Supp. L.F., Vol. II, 269 at 58:9-12; L.F., AHC Tr., Vol. II 570:8-13; Vol. III 899:6-8.) Even the films taken several months later did not show the cages were touching, indicating that the cages were properly placed. (L.F., AHC Tr., Vol. IV 1124:12-24.) In addition, not only were the cages not touching, the cages were appropriately placed and not too medial. (Supp. L.F., Vol. II, 268 at 56:2-4.) Dr. Albanna's expert, Dr. Wilkinson, testified that Patient C.W.'s cages were as symmetrical as a surgeon can get them. (L.F., AHC Tr., Vol. II 575:21-22.) The AHC'S determination that the cages were not

⁶Dr. Raskas' Curriculum Vitae is set out in the Appendix, A162.

symmetrical when placed is not supported by competent and substantial evidence and should be reversed. Because there was no violation of the standard of care in performing the operation, there can be no cause in fact connection to a bad result which subsequently developed. There is no cause for discipline under the evidence of record in this case.

The Commission held that Dr, Albanna violated the standard of care by allegedly destabilizing the facet joint. (L.F. 78.) Expert testimony is required for a finding of such negligence. *See Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358 (Mo. banc 2005). No expert witness provided such testimony, therefore, Appellant's decision cannot be upheld.

C. Respondent recorded proper operative notes regarding Patient C.W. and did not violate the standard of care.

The Board asserts that Respondent's operative notes were below the standard of care because they were not a complete description of what occurred. (L.F. 79.) The AHC had previously concluded that one cage crossed the midline and that Dr. Albanna thereby destabilized the spine. Dr. Albanna has refuted both these determinations and, therefore, his operative notes reflect the actual operation, not the surgery which the Board believes should have been performed. Based upon an unproven assumption concerning a result, the AHC incongruously cites Dr. Albanna for operative notes which accurately reflect the surgery which he performed, but not the surgery the AHC assumes. (L.F. 79.)

Dr. Wilkinson, a Missouri practicing neurosurgeon, testified that Dr. Albanna's documentation of the procedure and treatment complied with the standard of care for such

note taking. (L.F., AHC Tr., Vol. II 575:23-25; 576:1-6.) The Commission, however, concluded that Dr. Albanna failed to sufficiently document “the full extent” of the operation on Patient C.W. The Commission’s determination that Dr. Albanna’s failure to document “the full extent” of an operation fell below the standard of care was not based on competent and substantial evidence but on an assumption that the result dictates that Dr. Albanna must have performed a different operation. The AHC’s conclusion in this regard is arbitrary, capricious and an abuse of discretion. Such stacking of inferences does not constitute competent and substantial evidence to support the Commission’s conclusion.

D. Dr. Albanna did not falsely report a good fusion and did not violate the standard of care.

The Commission found that Respondent “falsely” reported a good fusion on Patient C.W. because it concluded that the cage had migrated into the spinal canal. The evidence on this finding and conclusion is conflicting and equivocal. Dr. Raskas testified that the migration of the left cage would not prevent fusion, (Supp. L.F., Vol. II, 270 at 62:3-6) and Dr. Wilkinson testified that the right cage was solid. (L.F., AHC Tr., Vol. II 575:1-2.) Thus, the question of fusion was one of degree or level of fusion. Dr. Wilkinson testified that it was not clear to the radiologist that a cage was backing out, (L.F., AHC Tr., Vol. II 591:12-23) and that one cage had migrated about a millimeter, but the cage had not backed into the spinal canal. (L.F., AHC Tr., Vol. II 593: 4-7.) There was no unequivocal evidence that fusion was not occurring, and the Commission’s determination that a cage had migrated into the spinal canal was not based on competent and substantial evidence. Such determination

is mere conjecture gleaned by the AHC from the eventual result. The Board failed in its burden of proof of violation of the standard of care for “sufficient” judgment of the level of fusion.

Moreover, to justify imposition of discipline the Board must prove that the harm would have not occurred to Patient C.W. “but for” Respondent’s alleged conduct. *See Tendai*, 161 S.W.3d at 370. That is, the Board’s evidence must show that due to Dr. Albanna’s alleged failure to recognize misplacement of the cage (which the AHC determined was not “misplaced”), harm was proximately caused to Patient C.W. The Board’s expert “believed” that the cage was not placed correctly solely because of the result. The Board offered no evidence that the “alleged misplacement” caused harm, or that any alleged failure by Dr. Albanna to recognize a “mistake” the Commission has found caused harm. No evidence provided proximate cause that the bad result was linked to any conduct of Dr. Albanna shown to be in violation of the standard of care. No “but for” causation between Dr. Albanna’s conduct and any alleged harm has been shown.

The AHC’s determination that alleged discrepancies in reports caused, or even might cause, any harm actually experienced by Patient C.W. cannot be supported by the evidence here. No expert, or any witness, so testified, which requires reversal for failure to meet the Board’s burden of proof. *Tendai*, 161 S.W.3d at 370-71.

III.

THE AHC ERRED IN HOLDING THAT DR. ALBANNA ENGAGED IN CONDUCT THAT IS OR MIGHT BE HARMFUL OR DANGEROUS TO A PATIENT BECAUSE ITS HOLDING IS BASED UPON AN ERRONEOUS APPLICATION OF THE LAW IN THAT THE CONDUCT SANCTIONED BY DISCIPLINE UNDER THE STATUTE IS AKIN TO QUACKERY, AND IS NOT JUDGED BY POST HOC REVIEW OF PHYSICIAN SKILL OR PATIENT OUTCOME; AND BECAUSE IT IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THERE IS NO TESTIMONY THAT, “BUT FOR” DR. ALBANNA’S ACTIONS, HIS PATIENTS WOULD HAVE SUFFERED NO HARM.

Standard of Review

In an appeal of the circuit court’s judgment on judicial review of an agency decision, this Court reviews the action of the agency, not the circuit court. *Lagud v. Kansas City Bd. of Police Comm’rs*, 136 S.W.3d 786, 791 (Mo. banc 2004). Its review includes a determination of whether the action of the agency is in violation of constitutional provisions; is in excess of statutory authority; is unsupported by competent and substantial evidence upon the whole record; is unauthorized by law; is made upon unlawful procedures; is arbitrary, capricious or unreasonable; or involves an abuse of discretion. *Id.* (citing Section 536.140.2, RSMo). On review, the court must look to the whole record in reviewing the

agency's decision, not merely at the evidence which supports the agency's decision. *Id.* If the agency's decision involves a question of law, the court reviews the question *de novo*. *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003).

This Court has held that MO. CONST. Article V, § 18, requires the court reviewing an agency decision to review the whole record before the agency, not just the evidence that supports the agency's decision. *Lagud*, 136 S.W.3d at 791 (citing *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003)); *but see, Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 365 (Mo. banc 2005)).

Argument

The AHC erred in its interpretation and application of the statutory phrase “conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public” in Section 334.100.2(5), RSMo. The Commission decision is based on an analysis of the skill used by Dr. Albanna, and on the results of that treatment on the patients C.W. and S.W. This analysis is not consistent with the statutory scheme set forth in Section 334.100.2, RSMo, with the balance of subdivision (5) of that subsection, nor with this Court's prior analysis of the subdivision.

Section 334.100.2, RSMo, contains several provisions that authorize discipline for conduct that is commonly called “quackery.” Section 334.100.2(4)(e), RSMo, authorizes discipline for “[M]isrepresenting that any disease, ailment or infirmity can be cured by a method, procedure, treatment, medicine or device.” Section 334.100.2(4)(f), RSMo,

authorizes discipline for “[P]erforming or prescribing medical services which have been declared by board rule to be of no medical or osteopathic value.” Section 334.100.2(4)(q), RSMo, authorizes discipline for “[A]dvertising by an applicant or licensee which is false or misleading, . . . or which claims without substantiation the positive cure of any disease . . .” By these provisions the general assembly has prohibited misrepresenting quack cures, advertising quack cures, or performing services which the Board has proclaimed by rule to be quack practices.

Section 334.100.2(5), RSMo, states:

The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered the person's certificate of registration or authority, permit or license for any one or any combination of the following causes:

(5)Any conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public; or incompetency, gross negligence or repeated negligence in the performance of the functions or duties of any profession licensed or regulated by this chapter. For the

purposes of this subdivision, "repeated negligence" means the failure, on more than one occasion, to use that degree of skill and learning ordinarily used under the same or similar circumstances by the member of the applicant's or licensee's profession;

The first clause of Section 334.100.2(5), RSMo, completes the statutory scheme by authorizing discipline for the practice of quackery (other than as defined by Board rule) by a licensee, i.e., any conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public. Absent this provision, the Board would not have direct statutory authority to discipline a licensee for the administration of the types of remedies that the licensee cannot proclaim to be efficacious.

Analysis of the clause must also consider what it does not mean - ordinary negligence. The Missouri Supreme Court has held that Board does not have authority to discipline for ordinary negligence; it may only do so for repeated negligence or gross negligence. *Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 367-68 (Mo. banc 2005). Had the legislature intended by enacting Section 334.100.2(5), RSMo, to authorize the Board to discipline for ordinary negligence, it would have used the words "ordinary negligence." The language at issue authorizes discipline based only upon analysis of the conduct or practice itself, without regard to the licensee's skill in its application or the results achieved for a particular patient. A licensee may be skilled and even achieve results (or at least do no harm), but the proscription against quackery remains.

The interpretation suggested - proscription of the practice of quackery - is consistent with the legislative intent demonstrated by the other provisions of the subdivision. The first clause of the subdivision (“conduct which is or might be harmful or dangerous”) is stated separately from the other alternative terms of the subdivision - “incompetence”, “gross negligence”, and “repeated negligence” - which are measured by reference to the performance of the functions or duties of any profession licensed or regulated by the chapter. Thus, the legislature distinguished the discipline authorized under the “conduct or practice” clause: it is to focus on the conduct or practice alone without reference to the skill or results of the licensee’s performance. Contrary to the application of this section by the AHC, the legislature has not approved discipline for ordinary negligence by use of this clause as a subterfuge.

IV.

THE AHC ERRED IN HOLDING THAT DR. ALBANNA WAS INCOMPETENT BECAUSE SUCH HOLDING IS UNSUPPORTED BY THE EVIDENCE IN THE RECORD IN THAT DR. ALBANNA HAS SUCCESSFULLY PERFORMED MORE THAN 8,500 SURGICAL PROCEDURES OVER A FIFTEEN YEAR CAREER, WHICH IS INCONSISTENT WITH A FINDING OF A GENERAL LACK OF PROFESSIONAL ABILITY, AND THERE IS NO EVIDENCE OF RECORD SHOWING INCOMPETENCY.

Standard of Review

In an appeal of the circuit court's judgment on judicial review of an agency decision, this Court reviews the action of the agency, not the circuit court. *Lagud v. Kansas City Bd. of Police Comm'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004). Its review includes a determination of whether the action of the agency is in violation of constitutional provisions; is in excess of statutory authority; is unsupported by competent and substantial evidence upon the whole record; is unauthorized by law; is made upon unlawful procedures; is arbitrary, capricious or unreasonable; or involves an abuse of discretion. *Id.* (citing Section 536.140.2, RSMo). On review, the court must look to the whole record in reviewing the agency's decision, not merely at the evidence which supports the agency's decision. *Id.* If the agency's decision involves a question of law, the court reviews the question *de novo*.

State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146, 152 (Mo. banc 2003).

This Court has held that MO. CONST. Article V, § 18, requires the court reviewing an agency decision to review the whole record before the agency, not just the evidence that supports the agency's decision. *Lagud*, 136 S.W.3d at 791 (citing *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003); *but see, Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 365 (Mo. banc 2005)).

Argument

The Commission authorized the Board to discipline Dr. Albanna for “incompetency,” a term which is not defined in Section 334.100.2(5), RSMo. The Commission determined that Dr. Albanna was incompetent due to a general lack of, or lack of disposition to use his professional ability. (L.F. 80.) No explanation for this finding of incompetency is given.

Section 334.100.2(5), RSMo, states:

The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered the person's certificate of registration or authority, permit or license for any one or any combination of the following causes:

(5) Any conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public; or incompetency, gross negligence or repeated negligence in the performance of the functions or duties of any profession licensed or regulated by this chapter. For the purposes of this subdivision, "repeated negligence" means the failure, on more than one occasion, to use that degree of skill and learning ordinarily used under the same or similar circumstances by the member of the applicant's or licensee's profession;

Incompetence is defined as "the state or fact of being incompetent." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1144 (2002). The *Tendai* court referred to incompetency as "...a state of being," *Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005), and held that incompetency was different than "gross negligence" or "repeated negligence." *Id.* The Court determined that a violation of the standard of care was "...evidence of ordinary negligence, but not incompetency." *Id.* at 370.

In the case at bar, the Board failed to present evidence that Dr. Albanna: was not legally qualified to practice as a physician; was incapable of practicing medicine; lacked the qualities needed for effective action; and failed to present any evidence that he was unable to function properly as a physician.

With regard to the treatment of Patient C.W., the AHC concluded that “we find that Albanna’s treatment of Patient C.W. demonstrates a general lack of, or lack of disposition to use, his professional ability, and we therefore find cause to discipline Albanna for incompetence.” (L.F. 80.) This finding of “incompetence” is not supported by the evidence of record and is improper under any legal standard. An unintentional or negligent act cannot support a finding of incompetency. *Tendai*, 161 S.W.3d at 370. This Court should reverse the AHC’s determination that it had cause to discipline Dr. Albanna for incompetency.

This Court has announced the standard of proof that the Board must meet in order to prove incompetency. *Tendai*, 161 S.W.3d at 370. The Court held that in order to prove incompetency, the Board must offer testimony of expert witnesses that the physician is incompetent. *Id.* Appellant must show that the physician is not legally qualified to practice as a physician; that the physician was “... incapable of practicing medicine or that he lacked the qualities needed for effective action or was unable to function properly as a physician.” *Id.* The Board has provided no such evidence. This Court also held that if there is sufficient evidence to support a finding that a physician was negligent (which is not present in the case at bar) “... a finding of a negligent act—by itself—is not enough to establish incompetency because a competent physician can commit a negligent act.”

The Commission defined “incompetence” as “... a general lack of, or lack of disposition to use, a professional ability. *Forbes v. Mo. Real Estate Comm’n*, 798 S.W.2d 227, 230 (Mo. App. 1990).” (L.F. 50.) The Commission’s reliance on *Forbes* is particularly misplaced. *Forbes* was denied a real estate salesperson’s license by the AHC. *Forbes* was

found guilty of multiple violations of the Real Estate Practice Act, including misappropriation of funds, fraud and deception toward clients in financial dealings and resulting financial injury to the clients. The AHC (and the Court) found that Forbes' dealing with the Nelsons demonstrated that he lacked the disposition to use his otherwise sufficient present abilities, and he was therefore incompetent to transact the business of a real estate salesperson in a manner to safeguard the public interest, as required under Section 339.040.1, RSMo (1986). *Id.* at 230. The statute required licensees with "...a good reputation for honesty, integrity, and fair dealing, and who are competent to transact the business of..." real estate. *Id.* The actual conduct of real estate business and the proficiency of Forbes in that occupation was not even considered.

A real estate broker or sales license may be denied or revoked upon a finding that the individual's conduct has destroyed his reputation for honesty, integrity, and fair dealing.

Forbes at 230 (citing *Mo. Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 709 (Mo. App. 1989)). Forbes was "incompetent" because of his propensity to be dishonest.

Clearly, Forbes' conduct was an important consideration, but not as to how well he performed the occupational tasks. The conduct which showed his propensity to cheat, steal and defraud his clients established his incompetence. There is no such finding (or even such suggestion) made of Dr. Albanna here. The AHC apparently found that its "belief" mistakes were made, also supports a finding of incompetency under Section 334.100.2(5), RSMo. This is not the longstanding test of incompetency.

Incompetency is defined as a general lack of present ability to perform the duties and functions of licensure. *Johnson v. Bd. of Nursing Home Adm'rs*, 130 S.W.3d 619, 642, (Mo. App. 2004); *Forbes v. Real Estate Comm'n*, 798 S.W.2d 227, 230 (Mo. App. 1990). Isolated, individual acts do not demonstrate incompetency, and the evidence must show not just the acts but the disposition of the licensee. *Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005). The attitudinal component to be shown is a disposition to do wrong (clearly not shown by or found by the AHC against Dr. Albanna here) or a lack of disposition to use one's competence in performance of duties and functions of the profession generally. *Id.* at 369-370. Single, isolated instances of negligence do not establish incompetency nor do they alone constitute evidence of wrongful attitude. Even multiple acts of negligence, standing alone, do not automatically constitute incompetency – the acts must be analyzed and declared by the evidence to demonstrate “attitudinal deficiency,” as indicated by this Court in *McDonagh* and *Tendai*. Dr. Albanna is at most guilty of two isolated instances of mere negligence regarding Patient S.W. and Patient C.W., occurring two years apart, eight to ten years ago, and as part of a professional practice stretching over twenty years that has included literally thousands of successful similar operations. Under the facts found by the AHC, there is no grounds for disciplinary action based upon incompetency.

In the case at bar, the Board has failed, as it did in *Tendai*, to establish the incompetency of a physician: it did not offer testimony that Dr. Albanna was incompetent; it offered no evidence that he was not legally qualified to practice as a physician; and it did

not present evidence that he was incapable of practicing medicine or that he lacked the qualities needed for effective action or was unable to function properly as a physician. Respondent made decisions, as Dr. Tendai did, with which some, but not all of the experts, disagreed. The Court held that such disagreement does not establish incompetency. Tendai, 161 S.W.3d 358 (Mo. banc 2005). The AHC's decision should be reversed.

V.

THE BOARD ERRED IN ITS IMPOSITION OF DISCIPLINE BECAUSE IT WAS MADE ON UNLAWFUL PROCEDURE IN THAT THE BOARD EXCEEDED THE RECOMMENDATION OF DISCIPLINE OF ITS OWN COUNSEL AND OF THE AHC WITHOUT EVIDENCE, EXPLANATION OR FINDINGS OF FACT; BECAUSE IT IS ARBITRARY AND CAPRICIOUS IN THAT NO OTHER SIMILARLY SITUATED LICENSEE HAS BEEN PUNISHED AS SEVERELY AS DR. ALBANNA; AND BECAUSE SUCH DISCIPLINE IS INVIDIOUSLY DISCRIMINATORY IN VIOLATION OF CONSTITUTIONAL PROVISIONS IN THAT DR. ALBANNA HAS BEEN TREATED DIFFERENTLY AND MORE HARSHLY DUE TO HIS NATIONALITY.

Standard of Review

In an appeal of the circuit court's judgment on judicial review of an agency decision, this Court reviews the action of the agency, not the circuit court. *Lagud v. Kansas City Bd. of Police Comm'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004). Its review includes a determination of whether the action of the agency is in violation of constitutional provisions; is in excess of statutory authority; is unsupported by competent and substantial evidence upon the whole record; is unauthorized by law; is made upon unlawful procedures; is arbitrary, capricious or unreasonable; or involves an abuse of discretion. *Id.* (citing Section

536.140.2, RSMo). On review, the court must look to the whole record in reviewing the agency's decision, not merely at the evidence which supports the agency's decision. *Id.* If the agency's decision involves a question of law, the court reviews the question *de novo*. *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003).

This Court has held that MO. CONST. Article V, § 18, requires the court reviewing an agency decision to review the whole record before the agency, not just the evidence that supports the agency's decision. *Lagud*, 136 S.W.3d at 791 (citing *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003); *but see, Tendai v. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 365 (Mo. banc 2005)).

Argument

The Board's decision to discipline Dr. Albanna's license under Sections 334.100.2(4) and (5) is so inconsistent with its prior actions in the same or similar type cases as to be unauthorized by law, arbitrary, capricious and unconstitutional.

The Board posts to its website (www.pr.mo.gov/healingarts-discipline-newsletter.asp) a newsletter which includes a listing of disciplined physicians. As stated on page 1 of each newsletter, the newsletters are official publications of the Division of Professional Registration and are the only available source of official actions of the Board. (Respondent's Supplemental Legal File, 87-206.) No physician was reported to be disciplined under Section 334.100.2(4) and (5), RSMo from Spring 1996 until Spring 1998.

A. In Volume 13, Number 1, of its Spring 1998 newsletter, the Board reported three physicians who were disciplined under Section 334.100.2(4) and (5), RSMo.

1. John M. Moore's license was placed on probation for five years due to unprofessional conduct against seven women employees. Licensee was required to continue participation in the Missouri State Medical Association's Physician's Health Program.
2. Victor E. Isaac's license was placed on probation for seven years due to self-prescribing and use of controlled substances.
3. Keith Patterson's license was publicly reprimanded and placed on probation for five (5) years. Licensee was restricted from treating female patients until he received approval from his psychiatrist.

(Supp. L.F., Vol. I, 95-98.)

B. In Volume 14, Number 1, of its Fall, 1999 newsletter, the Board reported one physician who was disciplined under §334.100.2(4) and (5), RSMo.

1. Jessie E. Cooperider's license was publicly reprimanded.

(Supp. L.F., Vol. I, 115.)

C. In Volume 15, Number 1, of its Fall, 2000 newsletter, the Board reported one physician who was disciplined under §334.100.2(4) and (5), RSMo.

1. Mark Tendai's license was publicly reprimanded. License was suspended for sixty (60) days. License restricted that licensee may not practice obstetrics or perform obstetrical procedures. Licensee must also complete a course on documentation. The Board's action was reversed due to lack of evidence. *See Tendai v. Missouri State Board of Registration for the Healing Arts*, 161 S.W.3d 358 (Mo. banc 2005).

(Supp. L.F., Vol. I, 133.)

D. In Volume 16, Number 2, of its Fall, 2001 newsletter, the Board reported three physicians who were disciplined under §334.100.2(4) and (5), RSMo.

1. Sam Caputo's license was revoked for having a sexual relationship with a patient. Revocation was immediately stayed and license suspended for thirty (30) days to be followed by a period of probation of five (5) years.
2. Charlotte Balcer's license was publicly reprimanded.
3. Paul D. Rains' license was placed on probation for a period of two (2) years.

(Supp. L.F., Vol. I, 153-157.)

E. In Volume 17, Number 2, of its Fall, 2002 newsletter, the Board reported one physician who was disciplined under §334.100.2(4) and (5), RSMo.

1. Larry Ozenberger's license was placed on probation for a period of two (2) years.

(Supp. L.F., Vol. I, 174.)

- F. In Volume 18, Number 1, of its Summer, 2003 newsletter, the Board reported one physician who was disciplined under §334.100.2(4) and (5), RSMo.

1. Robert J. Oliver's license was publicly reprimanded.

(Supp. L.F., Vol. I, 185.)

- G. In Volume 20, Number 2, of its Fall, 2005 newsletter, the Board reported one physician who was disciplined under § 334.100.2(4) and (5), RSMo.

1. Omar Warzan's license was publicly reprimanded.

(Supp. L.F., Vol. I, 205.)

Of the eleven physicians who were disciplined under § 334.100.2(4) and (5), RSMo, over the past ten years, four received only public reprimands, three received a term of probation, one received probation and a reprimand, one received a reprimand and a sixty-day suspension and one license was revoked. Of those five physicians who received probation, two received two years, two (who behaved unprofessionally toward women) received five years, and one physician (drug use) received seven years probation. Only one, Dr. Tendai, received additional conditions to his reprimand and suspension of his license for sixty days, which restricted him from practicing obstetrics or obstetrical procedures. This Court overturned Appellant's discipline of Dr. Tendai. *See Tendai v. State Bd. of Registration for*

Healing Arts, 161 S.W.3d 358 (Mo. banc 2005). There is no record of any licensee ever being subjected to discipline of the magnitude and severity of that proposed against Dr. Albanna for conduct alleged to constitute mere negligence or even repeated mere negligence.

In no reported disciplinary action has the Board required that patients of a professional licensee placed on probation must obtain a second opinion prior to treatment. The Board has stated no legitimate basis for placing Dr. Albanna on probation and requiring that his patients seek a second opinion. To do so violates his constitutional rights to due process and equal protection of the laws, guaranteed under U.S. CONST., Amendments V and XIV and MO. CONST., Art. I, §§ 2 and 10. On this record, the disciplinary action proposed is arbitrary and capricious, and is motivated solely by a desire and intent to punish Dr. Albanna rather than any attempt to protect the public. The conditions of probation will likely require Dr. Albanna to cease practice.

The required consent form is specially and uniquely required only of Dr. Albanna and requires the patient to obtain a second opinion from a Board certified neurosurgeon for all surgeries involving spinal instrumentation. (L.F. 88.) Currently, however, ninety percent of all spine surgeries are performed by orthopedic surgeons. In 2003, the entire greater St. Louis area had fewer than twenty-five neurosurgeons in private practice. Not all of these neurosurgeons are Board certified. David F. Jimenez, M.D., *A State in Crisis: Missouri*, 12 AMER. ASSOC. NEUROLOGICAL SURGEONS 3, 17 (Fall 2003). Dr. Albanna's patients are usually in severe pain upon first seeing him. A patient attempting to seek a second opinion from a Board certified neurosurgeon in the St. Louis area would have to delay surgery for

months. Only one-third of all patients receiving lumbar surgeries with instrumentation, and less than ten percent of those receiving cervical surgeries with instrumentation, currently obtain a second opinion. Prohibiting a patient from obtaining this type of surgery from the doctor of his choice without getting a second opinion greatly impairs the rights of the patient. Obviously, the painful delay and inconvenience for a patient to use the services of the only physician who is required to force patients to get second opinions before surgery will destroy that physician's practice.

In a recent study, it was determined that there was a direct correlation between physician characteristics and the likelihood of medical board-imposed discipline. Neal D. Kohatsu, M.D., M.P.H., et al., *Characteristics Associated with Physician Discipline: A Case Control Study*, 164 ARCHIVES OF INTERNAL MED., 653-58 (2004). The researchers determined that male physicians who were of increasing age and had international medical school education were associated with an elevated risk for disciplinary action. *Id.* Bias, prejudice and discrimination is as prevalent in the medical community as it is anywhere. Dr. Faisal Albanna, a male Iraqi native, started medical school in Baghdad, Iraq, finished medical school and a residency in Vienna, Austria and is over fifty (50) years of age. (L.F., AHC Tr., Vol. IV 957: 8-10; and 958:7-22; Board of Registration for the Healing Arts Disciplinary Hearing Transcript (Supp. L.F., Bd. Tr., 29: 6-11; 30:1-2.) The inference from the record of proceedings and evidence in this case is unmistakable that Respondent has been subjected to discipline due in large part to his sex, age, training and nationality. The disparity between his discipline and that imposed by the Board in all similar cases can be explained on no other

basis. It is obvious that Dr. Albanna's discipline was based not on the AHC case and decision, but on the original six patient Petition, which in large part was dismissed by the Commission. His discipline was already decided at the time of the Board's filing.

A constitutional equal protection claim exists when a plaintiff "...has been intentionally treated different from others similarly situated and that there is not a rational basis for the difference in treatment." *State Bd. of Registration for Healing Arts v. Brown*, 121 S.W.3d 234, 236 (Mo. banc 2003) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). Dr. Albanna has alleged in his First Amended Petition for Judicial Review, and demonstrated on the record before the lower court, that he has been treated differently and more harshly than other physicians who have been disciplined under § 334.100.2(4) and (5), RSMo, or disciplined for conduct amounting to mere negligence. The Board has provided no rational basis for the difference in the discipline.

Due process of law requires that Dr. Albanna be judged under objective standards. The Board's use of a subjective disciplinary system has permitted the prohibited sex, age, training and nationality biases into the system. Dr. Albanna was denied a fair and impartial hearing before the Board as a direct result of discrimination and prejudice based on his sex, training, age and nationality. Based upon the entire record, as shown by Dr. Albanna, the burden shifts to the Board to rebut the showing of bias and discrimination and to justify by evidence in this record its disproportionate punishment as providing public protection rather than personal punishment. The Board cannot do so.

In determining that a native of Iraq was protected from racial discrimination, the Supreme Court held “... that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.” *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 2028 (1987). Likewise, the law protects Dr. Albanna from discriminatory actions of the Board.

When discipline is disproportionate to a member of a protected class compared to others, discrimination may be implied. *H.S. v. Bd. of Regents, Southeast Mo. State Univ.*, 967 S.W.2d 665 (Mo. App. 1998). The Board’s excessive discipline of Respondent’s license, which is out of proportion to any other discipline of a licensed physician under § 334.100.2(4) and (5), RSMo, must be presumed based on discrimination.

In the case at bar, no testimony nor evidence was presented regarding the procedure that the Board used in determining discipline for Dr. Albanna.

An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence. *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 892 (Mo. App. 1995). Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. *State ex rel. Div. of Transp. v. Sure-Way Transp., Inc.*, 948 S.W.2d 651, 655 n.4 (Mo. App. 1997). Capriciousness concerns whether the agency’s action was whimsical, impulsive, or unpredictable. *Id.* To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency’s decision must be made using some kind of objective data rather than mere surmise, guesswork, or “gut feeling.” *Manning*, 891

S.W.2d at 893. An agency must not act in a totally subjective manner without any guidelines or criteria. *Id.* at 893-894. *Nat'l Educ. Ass'n v. State Bd. of Educ.*, 34 S.W.3d 266, 281 (Mo. App. 2000).

The Board has acted in a wholly subjective manner in disciplining Dr. Albanna's license. Its determination is not based on any objective data, exceeded its statutory authority, is arbitrary, capricious, unreasonable and an abuse of discretion, is not based on competent and substantial evidence, is not authorized by law, is made on unlawful procedure without fair trial, is in violation of constitutional provisions, and should be reversed.

The Board's disciplinary order also ignores its own hearing officer's recommendations. The Commission's advice to the Appellant was:

Throughout this case, experts who testified portrayed Albanna as an "aggressive" surgeon, often in contrast to their self-description as "conservative." Some of them also characterized Albanna as a surgeon who treats patients with difficult and dangerous conditions that others might not treat. Although the record indicates [to the AHC] that he has over-diagnosed and over-treated certain patients, it also indicates that he has attempted to treat patients that other neurosurgeons might not. In accordance with § 621.110, the degree of discipline for a licensed professional lies within the discretion of the licensing board, not with this Commission. Albanna's willingness to treat

patients that others would not...has a positive side that we believe should be taken into account by the Board in determining the appropriate degree of discipline in this case.

(L.F. 80-81) (emphasis added.)

At the disciplinary hearing the Board's counsel recommended as discipline only that the Board publicly reprimand Dr. Albanna, place him on probation for five years, require Dr. Albanna use a more detailed informed consent form on the design of which he would have input, and that he report certain incidents during the probationary period. (Supp. L.F., Disciplinary Hearing Tr. 61-64)

The Board responded to the Commission's suggestion by imposing excessive and disproportionate discipline of Dr. Albanna's license – to punish him rather than protect the public.

In a similar case, where the licensing board adopted the Administrative Law Judge's findings and conclusions in its entirety and then imposed a significantly more severe punishment, the decision was reversed. *Ind. State Bd. of Health Fertility Adm'rs v. Werner*, 841 N.E.2d 1196 (Ind. App. 2006). The Court held that the Board's failure to explain its imposition of a much harsher discipline caused the Court to speculate regarding the basis of the Board's discipline. *Id.* at 1208. The Court held that the Board's action was arbitrary and capricious. *Id.*

The Eighth Circuit Court of Appeals has held that evidence of biased behavior affects a plaintiff's right to unimpaired adjudication. *Marler v. Mo. State Bd. of Optometry*, 102 F.3d 1453 (8th Cir. 1996). The Board's reports of discipline of other physicians, provides evidence of its bias and lack of impartiality. (Supp. L.F., Vol. I, 85-206.) No other physician disciplined under Section 334.100.2(4) and (5), RSMo, has received a discipline as severe as Dr. Albanna's.

Based upon his expectation of fair treatment under objective standards, Dr. Albanna had no reason to present evidence of other punishment until the Board imposed the disparate punishment in its Disciplinary Order. On an equal protection claim, the court may "...hear and consider evidence of...unfairness by the agency not shown in the record." *State Bd. of Registration for Healing Arts v. Brown*, 121 S.W.3d 234, 237 (Mo. banc 2003) citing § 536.140.4, RSMo. Further,

[I]t may be an abuse of discretion to deny a hearing [of the evidence] where an equal protection-disparate punishment claim is properly pled and the parties have not otherwise been afforded an opportunity to present evidence on the issue.

Id.

In Dr. Albanna's First Amended Petition for Review, he properly pled an equal protection-disparate punishment claim, and a due process of law violation. The parties have not been afforded an opportunity to present evidence on that issue because the Circuit Court

of Cole County reversed the Board's decision on other grounds. Dr. Albanna requests, pursuant to Section 536.140.4, RSMo, that if necessary this Court consider the evidence of unfairness by the Board and, if any cause for discipline be found, reverse the Board's discipline as a violation of Dr. Albanna's constitutionally protected rights to due process of law and to equal protection of the laws.

CONCLUSION

Because the Board is not authorized to discipline Dr. Albanna under Section 334.100.2(4) and (5), RSMo, he respectfully requests that this Court reverse the Commission's decision and the Board's imposition of discipline.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Substitute Appellant's Brief of Respondent, Faisal J. Albanna, M.D. complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

- (A) It contains 15,155 words, as calculated by counsel's word processing program;
- (B) A copy of this Brief is on the attached 3 ½" disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

James B. Deutsch

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Substitute Appellant's Brief of Respondent, Faisal J. Albanna, M.D. was sent by U.S. Mail, postage prepaid, this 16th day of March, 2009, to:

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