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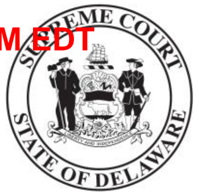

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE BRUCE GROSSINGER, D.O.'S AMENDED ANSWERING BRIEF AND CROSS-APPELLANT'S AMENDED OPENING BRIEF ON CROSS-APPEAL

POST & SCHELL, P.C.

/s/ Paul A. Logan
Paul A. Logan (DE Id. # 3339)
222 Delaware Avenue, Suite 1500
Wilmington, DE 19801
Telephone: (215) 587-6608
plogan@postschell.com

James J. Kutz (*pro hac vice*)
17 North 2nd Street, 12th Floor
Harrisburg, PA 17101
Telephone: (717) 731-1970
jkutz@postschell.com

Attorneys for Defendant below, Appellee/Cross Appellant Bruce Grossinger, D.O.

Dated: July 10, 2019

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NATURE OF PROCEEDINGS

This is an appeal from the January 23, 2019 Memorandum Opinion and Order ("Opinion" or "Op.") of the Honorable John A. Parkins, Jr. ("Judge Parkins"), Superior Court of the State of Delaware. Judge Parkins reversed all but one of the Board's findings and remanded the matter to the Board for discipline, if any, on the single surviving claim.

On October 4, 2016, the Delaware Board of Medical Licensure and Discipline (the "Board") issued its Final Order ("Final Order") imposing disciplinary sanctions against Bruce Grossinger, D.O., Appellant in the Board proceeding and in the Superior Court, hereinafter referred to as "Dr. Grossinger" or "Appellee." (A362-367).

On October 15, 2015, the Delaware Department of Justice filed an administrative complaint against Dr. Grossinger and his two partners, Steven Grossinger, D.O. and Jason Brajer, M.D., alleging violations of the Delaware Medical Practice Act. (A129-131; A362-367). Dr. Grossinger filed exceptions to the hearing officer Recommendation and subsequently appeared before the Board for argument. (A349-361). A hearing[1] was convened by a Division of Professional

[1] The hearing was consolidated with complaints against Appellee's partners Steven Grossinger, D.O. and Jason Brajer, M.D. Drs. Steven Grossinger and Brajer were not parties to Dr. Grossinger's appeal to the Superior Court.

Regulation hearing officer ("Hearing Officer") on April 21 and 22, 2016.[2] At the hearing, the parties introduced testimony and evidence, including documents and testimony of Dr. Grossinger, Dr. Steven Grossinger and Dr. Jason Brajer along with their defense expert witness, Dr. Peter Staats. (B18-92).[3] The Department of Justice did not have an expert and did introduce expert testimony. On July 13, 2016, the Hearing Officer issued his recommendation to the Board, setting forth his findings of fact, recommended conclusions of law, and recommended discipline. (A288-348). On October 4, 2016, as above-stated, the Board issued its Final Order. (A362-367). The Board was permitted to affirm or modify the hearing officer's recommended conclusions of law and sanctions, however, pursuant to Delaware law, the Hearing Officer's findings of fact were binding on the Board and the Board was prohibited from considering additional evidence. 29

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[2] Michael's mother also filed with the Secretary of State complaints against Drs. Steven Grossinger, Brajer, and Bruce Grossinger. Contrary to State's representation, the Board is not the "sole authority vested with the power to regulate the practice of medicine in the State in order to protect the public." (Op. Br. at 2). The Secretary of State also enforces certain regulations relating to the prescription of controlled substances. The hearing on the issues raised with Secretary of State was consolidated with the April 21 and 22, 2016 hearings because both complaints were based on a similar set of facts. The appeal from the Secretary of State's ruling was addressed in No. N17A-02-004 (Del. Super. Ct. 2017). Based on this same record, the Controlled Substances Advisory Committee issued an order and Dr. Grossinger was given a six-month suspension of his prescription writing privileges. The gravity of the finding of Board cannot be underestimated.

[3] For continuity and ease of reading, B18-92 has been added to Appellee's Appendix even though certain pages therein are cited in Appellant's Appendix.

Del. C. § 8735(v)(1)d. Notwithstanding this prohibition, the Board concluded Dr. Grossinger violated Board Regulations, 18.1.1, 18.3, 18.4, 18.5, and 18.7 and that Dr. Grossinger violated 24 *Del. C.* § 1731(b)(3) by virtue of Rule 8.1.13.[4] (A362-367).

On February 8, 2019, the Board filed a petition for interlocutory appeal of the Superior Court's Order. On February 15, 2019, Dr. Grossinger filed his opposition to the Board's petition. On April 16, 2019, the Supreme Court granted the Board permission to proceed with its interlocutory appeal and granted Dr. Grossinger permission to proceed with his cross-appeal of the informed consent ruling. (B337-342). The Board filed its Second Amended Opening Brief on June 4, 2019.[5] Thereafter on June 20, 2019, the Board filed its Third Amended Opening Brief ("Op. Br."). Dr. Grossinger files the within Appellee's Answering Brief and Cross-Appellant's Opening Brief on Cross-Appeal.

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[4] The Board's rules are found at 24 Del. Admin. C. Ch. 1700 and all references to the Rules are to 24 Del. Admin. C. Ch. 1700.

[5] The Board's Second Amended Opening Brief was filed with the Court and accepted as of June 4, 2019 after its Motion for Extension to file its brief was granted on June 5, 2019. Although the Board filed a Third Amended Opening Brief, Dr. Grossinger's response time was, in accordance with the Clerk's correspondence, calculated from the June 4, 2019 Second Amended Opening Brief.

SUMMARY OF ARGUMENT

1. Denied. The State's proposed reading of *Bilski* is wrong. The *Bilski* Court did not hold that an expert witness is not required to establish the standard of care in cases where the allegation is that the physician's conduct deviated from the standard of care. Rather, the *Bilski* Court found that expert testimony was not required to evaluate Dr. Bilksi's conduct where the violated standard could be objectively determined from the plain language of the regulations *and* the fact that Dr. Bilski admitted a violation of the rules.

The Superior Court correctly found that the issue respecting Dr. Grossinger's conduct was whether he deviated from the relevant standard of care. The Board's own rules require evidence of current clinical knowledge as the basis to evaluate a physician's compliance with the Board's regulations.

The Superior Court concluded, and the State conceded, that the determination of the relevant standard of medical care was an issue of fact and that establishing the standard of care requires expert evidence. The State offered none.

The Superior Court correctly concluded --- and again the State reluctantly conceded --- that the regulations did not give Dr. Grossinger specific notice of how and in what way his conduct allegedly deviated from the standard of care and therefore, denied Dr. Grossinger the right to know the charges against him in order to rebut the evidence forming the basis of the Board's conclusions.

2. Denied. The Superior Court did not superimpose a "malpractice" standard of care requirement onto the Board's controlled drug prescribing regulations. Instead, the Superior Court concluded that the standard of care in medical disciplinary cases is not a question of law as the Board asserts and it is "up to the trier of fact to determine 'if the doctor has departed from the proper standards of his profession.'" Op. at 35-36. The Superior Court also recognized that this matter is not a medical negligence case while simultaneously recognizing that the "standard of care lies at the heart of any negligence claim against a physician" and that a plaintiff is required to supply expert testimony because the standard of care in medicine is not commonly known. Op. at 38.

3. Denied. There was not substantial evidence supporting the Board's finding that Dr. Grossinger was in violation of the Board's Rules. The Board deviated from correct procedures when it went outside the scope of the Hearing Officer's findings of fact to which it is bound and decided what facts it needed to evaluate Dr. Grossinger's conduct. The Board then used its facts to establish the standard of care against which to measure Dr. Grossinger's actions and used its own expertise to adjudicate whether Dr. Grossinger violated the subject regulations. The dearth of substantial evidence in support of the Board's findings supports the Superior Court's findings.

SUMMARY OF CROSS-APPEAL ARGUMENT

1. The Board's decision regarding Dr. Grossinger's alleged violation of Regulation 18.3 is not supported by substantial evidence because the Board ignored relevant testimony, including Dr. Brajer's intraoperative note and the testimony of Dr. Steven Grossinger regarding the risks and benefits of opioid treatment.

STATEMENT OF FACTS

Patient "Michael" was involved in a 2008 motor vehicle accident that resulted in objectively discernible injuries, followed by a 2011 accident that aggravated those injuries and resulted in new injuries. (A318-319). Michael treated with Dr. Ross Ufberg in 2010-2011, but was discharged from care due to "inconsistencies in his urine drug screen," although there is no evidence that Dr. Grossinger was aware of this. (A319). In March 2011, Michael started treatment with Dr. Damon Cary. (*Id.*). Dr. Cary continued to prescribe controlled substances for Michael through July 2012. (*Id.*)

On December 11, 2013, Michael began opioid dependence treatment with Suboxone for a brief period with Dr. Irwin Lifrak. (A320). Dr. Lifrak documented that Michael used heroin daily for six years with periods of sobriety, with his most recent heroin use on December 10, 2013. (*Id.*). At a January 14, 2014 visit, Dr. Lifrak noted that Michael had produced "dirty urine," and that he would no longer prescribe detox medication. (A321). The hearing officer found that Dr. Lifrak discharged Michael due to a failed urine test. (*Id.*).

On a referral from another physician, Michael presented to Grossinger Neuropain Specialists ("GNS") on January 29, 2014. (A322). GNS is the medical practice of Appellee, Dr. Steven Grossinger, and Dr. Brajer. (*Id.*). Dr. Allen Silberman is an independent psychologist that performs psychological services for

GNS patients and reports his findings to GNS physicians. (*Id.*). Appellee and Dr. Steven Grossinger are Board-certified in neurology and pain management. (*Id.*). Dr. Brajer is a Diplomate of the American Board of Anesthesiology and American Academy of Pain Management. (*Id.*). GNS utilizes diagnostic studies, such as nerve conduction studies, to diagnose and evaluate pain. (*Id.*). GNS uses various treatment modalities, including interventional procedures, and medications, including, but not limited to, controlled substances, for the treatment of pain. (*Id.*).

Michael was seen at GNS on January 29, 2014 by Dr. Steven Grossinger and Dr. Silberman. (*Id.*). Dr. Silberman prepared a "Psychotherapy Initial Evaluation." (*Id.*). In that evaluation, Dr. Silberman noted that Michael "suffers from an opiate addiction that started five years ago as the result of Oxycodone and Morphine prescriptions from this physician." (A323). Dr. Silberman also noted that Dr. Lifrak had prescribed Suboxone to Michael for opioid dependence. (*Id.*). Dr. Silberman recommended that Michael continue psychotherapy, and that Michael's chronic pain be treated. (*Id.*). The hearing officer found that Dr. Silberman's report was prepared to inform the care offered to Michael by the GNS physicians. (A323-324).

In his initial evaluation of Michael, Dr. Steven Grossinger noted some symptom improvement after Michael's 2008 motor vehicle accident, but that the symptoms were exacerbated by the 2011 accident. (A324). Dr. Steven Grossinger

diagnosed greater cervical paravertebral tenderness and spasm on the right side. (*Id*.). Dr. Steven Grossinger reviewed a 2010 MRI that showed straightening of the cervical lordosis with disc osteophyte at C3-4 and uncinated process hypertrophy on the left side at C5-6 and C6-7. (*Id*.). An electromyography and a nerve conduction study performed by Dr. Steven Grossinger on January 29th revealed evidence of right C6-7 and left C7 radiculopathy. (*Id*.). Dr. Steven Grossinger reviewed the Prescription Monitoring Program report and saw that Michael had been prescribed Suboxone in December, but that Michael did not fill the prescription. (*Id*.). Dr. Steven Grossinger also documented that Michael "was not looking to have medications prescribed." (*Id*.).

While Michael was not initially prescribed controlled substances by any of the GNS physicians, Michael signed a GNS Pain Management Agreement on January 29, 2014. (*Id*.). In the agreement, Michael agreed not to obtain controlled substances from any other practitioner without the knowledge of GNS and he agreed to use a single pharmacy to obtain medications. (*Id*.). In addition, Michael also agreed that he would comply with random drug screens that GNS deemed necessary. (*Id*.). He agreed to take medications as prescribed and that medications would not be refilled on an accelerated basis. (*Id*.). He acknowledged that the failure to comply with these terms could result in discharge from GNS. (*Id*.). He

signed another pain management agreement, co-signed by Appellee, on June 13, 2014, which also required drug testing. (A324-325).

The hearing officer set forth only a "brief summary" of the encounters between Michael and GNS physicians in the Recommendation, based upon Respondent Exhibit 4 and other evidence. (A325-326; B1).

Dr. Grossinger did not have visits with Michael for the purpose of conducting examinations, as Michael's care was provided by Dr. Steven Grossinger and Dr. Brajer. (A326). Dr. Grossinger's limited involvement with Michael's care was to write refill prescriptions for Hydrocodone 5/325 mg and Morphine Sulfate 15 mg on three occasions to provide continuity of care on behalf of his colleagues. (*Id.*). Prior to prescribing medication refills to Michael, Dr. Grossinger was aware that Dr. Brajer had performed injections, which were not successful in relieving the patient's pain. (*Id.*). He also reviewed Dr. Steven Grossinger's report and Dr. Silberman's report, each from January 29, 2014. (A326-327).

Michael was first scheduled for a urine drug screen on June 18, 2014, but Michael cancelled the appointment. (A325). There was no indication that Michael had been non-compliant with treatment or that he was exhibiting aberrant behavior. Dr. Grossinger prescribed refills of Michael's medications to provide continuity of care on July 9, 2014. (A326). Michael was next evaluated by Dr. Brajer on July

30, 2014. (*Id.*). Thereafter, Michael cancelled two scheduled appointments. (*Id.*). On November 12, 2014, Dr. Grossinger was to refill Michael's prescriptions on behalf of his colleagues. (*Id.*). On that date, Dr. Grossinger noted the missed appointments and, deeming it unacceptable, made a note that Michael must keep his appointments to receive his medications. (*Id.*). At the next visit on December 8, 2014, a urine drug screen was performed. (*Id.*).

GNS received the results on December 15, 2014. (A327-328). Michael's urine tested positive for heroin and negative for prescribed medication. (A327-328). Michael was discharged from GNS by letter due to the failed urine drug screen and violation of the treatment agreements. (A327). Unfortunately, Michael had died on December 12, 2014 due to heroin intoxication. (*Id.*). GNS physicians did not cause or contribute to the heroin overdose. (A327-328).

ARGUMENT

I. DR. GROSSINGER WAS DEPRIVED OF HIS DUE PROCESS RIGHTS WHEN THE BOARD FAILED TO OFFER EXPERT TESTIMONY TO ESTABLISH THE STANDARD OF CARE TO SUPPORT ITS CONCLUSIONS, INSTEAD BASING ITS CONCLUSIONS ON INFORMATION NOT IN THE RECORD AND DENYING DR. GROSSINGER THE RIGHT TO REBUT THE EVIDENCE THAT FORMED THE BASIS OF THE BOARD'S CONCLUSIONS

A. Question Presented

Was Dr. Grossinger deprived of his due process rights when the Board failed to require evidentiary support for its conclusions, instead basing its conclusions on information not in the record and denying Dr. Grossinger the right to rebut the evidence forming the basis of the Board's conclusions?

B. Scope of Review

This Court's function, in reviewing the appeal before it, is to "replicat[e] the role of the Superior Court, [and] review[] the Board's decision to determine whether its factual findings are supported by substantial evidence." *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998) (citation omitted). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Turbitt*, 711 A.2d at 1215 (quotations and citation omitted). Questions of law are reviewed *de novo*. *Christman v. State Dep't of Health & Soc. Servs.*, 99 A.3d 226 (Del. 2014). "Like the Superior Court, this Court considers the record in the light most favorable to the party prevailing on the Board's appeal," here, Dr. Grossinger. *Murphy & Landon, P.A. v. Pernic*, 121

A.3d 1215, 1221 (Del. 2015). The Supreme Court "does not weigh the evidence, determine questions or credibility, or make its own factual findings." *Id*.

C. Merits of Argument

In the State's complaint against Dr. Grossinger, the State alleged several violations of Rule 18. (A129-143). During the April 2016 hearings, the State made no attempt to introduce competent substantial evidence in support of several of its allegations against Dr. Grossinger. While Dr. Grossinger introduced expert testimony, the State failed to introduce expert evidence of the applicable standard of care which governed Dr. Grossinger's conduct. (B18-92). For these reasons, Dr. Grossinger was deprived of his constitutional right to due process.

"A necessary element of any judicial review is that claims of unfairness in the administrative process be seriously addressed." *Sokoloff v. Board of Medical Practice*, 2010 WL 5550692, at *5 (Del. Super. Ct. Aug. 25, 2010). "A professional license is considered property that is afforded protection under the due process clause of the Fourteenth Amendment to the United States Constitution." *Id.*; *see also Bilski v. Board of Medical Licensure and Discipline*, 2014 WL 3032703, at *6 (Del. Super. Ct. June 30, 2014), *aff'd* 115 A. 3d 1214 (Table) (Del. 2015); *see also Schaller v. Board of Medical Licensure and Discpline*, 2015 WL 3654963, at *8 (Del. Super. Ct. June 8, 2015). "The United States Supreme Court has recognized that the due process protections of a fair trial before an unbiased

tribunal apply to administrative adjudications as well as court proceedings." *Sokoloff*, 2010 WL 5550692, at *5; *Schaller*, 2015 WL 3654963, at *8.

This Court has set forth essential requirements of a fair hearing before an unbiased tribunal in administrative adjudications as follows:

> [D]ue process as it relates to the requisite characteristics of the proceedings entails providing the parties … with the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question…

Bell Atlantic-Del., Inc. v. Public Service Commission, 705 A.2d 601, 605 (del. 1997) (quoting *Carousel Studio v. Unemployment Insurance Appeal Board*, 1990 WL 91108, at *3-4 (Del. Super. Ct. June 26, 1990)).

The Delaware Superior Court, in addressing the constitutional danger of an administrative agency considering factors outside of the evidence offered a summation, *in dicta*, of procedural due process as it relates to that issue:

> [P]rocedure before an Administrative Agency must be essentially fair otherwise the party involved in the Administrative Process has not been afforded procedural due process, and this includes the party's right to be given the opportunity… to explain, rebut, contradict or impeach the testimony and documents relied on by the Administrative Agency for the action it takes on the matter before it.

Wilmington Vitamin & Cosmetic Corp. v. Tigue, 183 A.2d 731, 736 n.6 (Del. Super. Ct. 1962) (internal quotations and citations omitted). "No determination can be permitted to rest upon undisclosed findings or information *dehors* the record. If

such could be the parties would be denied the essence of a hearing, they would be kept in ignorance of the things controlling the action of the board, and due process would be floated." *Id.*

Moreover, this Court has stated, unequivocally, that due process in administrative proceedings "includes the right to cross-examine … on any information which may be considered by the tribunal in reaching an administrative decision." *Pusey v. Alcoholic Beverage Control Commission*, 596 A.2d 1367, 1370 (Del. 1991). An administrative agency may not withhold information from a party and then use that information as a basis for its decision.

1. The State Admitted That The Regulations Do Not Put Dr. Grossinger On Notice Of The Very Requirements The Board, On Its Own, Determined Dr. Grossinger Violated

In this instance, the Board's rules require an established standard of care to assess any alleged violations of those rules. Nothing in the language of the regulations expressly provided notice to Dr. Grossinger of most of the requirements of the regulations. Indeed, the State *conceded* this at oral argument:

> THE COURT: Let's go through…the violations and point to me… in the regulations where it specifically puts Dr. Grossinger on notice.
>
> THE STATE: I'm happy to engage Your Honor in that exercise but… **I don't know if it will be fruitful for you because I think I'm going to just wind up reading the plain language of the regulation. <u>I can agree and stipulate that the regulations do not put practitioners on notice of every factual scenario for treatment of a patient</u>**.

Op. at 25-26; (B208-209)(emphasis added).

It is not Dr. Grossinger's position that each and every regulation requires expert testimony to establish the standard of care a reasonable physician must follow. For example, where the law specifically prohibits a doctor from signing a death certificate prior to the actual time of death in violation of 24 *Del. C.* § 1731(20), the specific requirements are set forth in the statute and are clear. In other words, the doctor knows that they cannot sign the certificate prior to the actual time of death and the determination of whether a doctor signed a death certificate before the time of death is not a matter requiring expert testimony, it is a fact question determinable by the trier of fact.

However, in this case, the allegations against Dr. Grossinger required expert testimony of the standard of care, which the State failed to offer. (B18-92). Rules 18.1, 18.4, 18.5, and 18.7 fail to provide adequate notice of the standard of care of a reasonable physician – and the State failed to offer the requisite expert testimony to establish these standards.

Rule 18.1.1 fails to provide fair notice that this regulation requires a physician to sometimes obtain the records of prior treatment providers. 24 *Del. Admin. C.* § 1700-18.1.1. To the contrary, and even as admitted by the Hearing Officer, the regulation does not require a physician obtain the records of **every** prior treatment of a patient. (A332); Op. at 27. Without expert testimony as to the

standard of care, against which the doctor's conduct is evaluated, it is impossible to determine compliance with the regulation.

Rule 18.4 similarly fails to provide fair notice as to the frequency or timing of mandated toxicology screens. 24 *Del. Admin. C*. § 1700-18.4. As written, the regulation leaves it to a practitioner's discretion of when to require such a test. The hearing officer here observed that the frequency "is, properly, left to the informed discretion of the physician." (A337-338)); Op. at 29. Without expert testimony, the duty of a physician cannot be determined.

Rule 18.5 provides that a "licensed practitioner *shall periodically review* the course of pain treatment," with some degree of precision as to *what* a physician is required to review. 24 *Del. Admin. C.* § 1700-18.5. However, Rule 18.5 provides no information as to the frequency of circumstances under which a "periodic" review must be undertaken. Accordingly, without expert testimony, Dr. Grossinger had no way of knowing whether he was complying with the regulation or not.

Rule 18.7 provides that a physician shall keep accurate and complete records of, among other things, medical history, discussions of risks and benefits, and periodic reviews. 24 *Del. Admin. C.* § 1700-18.5. However, Rule 18.7 provides no information as to the standard of care applicable to such medical records. Without

expert testimony as to the standard of care, against which the doctor's conduct is evaluated, it is impossible to determine compliance with the regulation.

Moreover, the State's own admission references a standard of care. During oral argument, the State admitted that "[t]he regulation does not specifically state that any provider absolutely has to obtain prior provider records." (B300). Rather, "[w]hat we're relying upon is what ***a reasonable physician in the field*** should do which Dr. Grossinger should know." (B302).

Furthermore, use of the standard of care to supply missing critical information is consistent with the letter and intent of the Regulations. The Preamble to the Regulations expressly states that "[t]he board may refer to current clinical practice guidelines and/or ***expert review*** in approaching cases involving the management of pain." 24 *Del. Admin. C.* § 1700-18.0. Rather than supplanting the standard of care, the Regulations are intended to promote compliance with that standard. As confirmed by the language of the Preamble, "[t]hese regulations have been developed to define specific requirements applicable to pain control … and to minimize practices that deviate from the appropriate standard of care" and are intended to encourage "the appropriate application of up-to-date knowledge and treatment modalities." *Id.* Similarly, the Preamble contains multiple other references to the standard of care and current state of medical knowledge. 24 *Del. Admin. C.* § 1700-18.0.

The standard of care is an issue of fact. In particular, the standard of care to which a physician will be held is a question of fact to be determined by the testimony of an expert witness. *Di Filippo v. Preston*, 173 A.2d 333, 336 (Del. 1961). Moreover, this Court has continually found that where one party "intends to make an argument involving an issue that is within the knowledge of experts only and not within the common knowledge of laymen, the party must present competent expert testimony to support that argument." *Davis v. Maute*, 770 A.2d 36, 40 n.3 (Del. 2011); *see, e.g., Campbell v. DiSabatino*, 947 A.2d 1116, 1118 (Del. 2008).

Further, the Board cannot supply missing evidence by relying on its own expertise. As Judge Parkins correctly observed, the State's assertion that the "Board's Order is a 'classic example of an administrative agency's application of facts to a question of interpretation of its disciplinary statutes,' and that the Board was 'interpreting' its own regulations when it found Dr. Grossinger violated them," is fundamentally flawed. Op. at 39. Indeed, the Board's *post-hoc* interpretation did not give Dr. Grossinger the required advanced fair notice to which he is constitutionally entitled. The Board's interpretation was after the fact, and did not provide the fair notice required before Dr. Grossinger treated Michael.

Moreover, an administrative board cannot consider additional evidence. The statute, 24 *Del. C.* § 1734, prohibited the Board from considering evidence not

introduced in the hearing. The Board's use of its "own expertise" violates this statutory right. Indeed, the Board here was not evaluating competing experts, but instead, determined its own applicable standard of care based on its own personal views. The Board chose not to proffer expert testimony to establish a standard of care nor to rebut Dr. Grossinger's expert. (B18-92)

Due process requires an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelley*, 397 U.S. 254, 269 (1970). For that reason, the Board may not use its own expertise to supply missing evidence without giving the parties an opportunity to respond to it. The Superior Court of New Jersey offers guidance concerning this dual role and concluded that "[a] board of experts, sitting in a quasi-judicial capacity, cannot be silent witnesses as well as judge." *New Jersey Bd. of Optometrists v. Nemitz*, 90 A.2d 740, 745 (N.J. Super. 1952). This violative procedural framework is similar to that which the Supreme Court of Pennsylvania prohibited in *Lyness v. Commonwealth*, 605 A.2d 1204 (PA Supr. 1992) wherein a physician appealed his license revocation after the equivalent board initiated disciplinary proceedings and concluded the physician violated the applicable medical acts. *Lyness,* 605 A.2d at 1204. The Pennsylvania Supreme Court found that "commingling of prosecutorial and adjudicative functions within a single multi-member administrative board…is not consistent with the notion of due process embodied in the Pennsylvania Constitution." *Lyness,* 605 A.2d at

1204. Here, when the Board went outside the Hearing Officer's findings of fact and created its own facts and evidence, then originated the standard of care against which it measured those facts and evidence, and finally, made findings based on that evidence without giving the Dr. Grossinger an opportunity to respond, the Board dived head-on into improperly comingling its functions.

The Board is not free to establish its own findings based on its "general institutional experience." *Turbitt,* 711 A.2d at 1215. As in this case, the *Turbitt* court observed "[t]his is not a case where the Board was presented with differing medical testimony and was free to reject, in full or in part, the testimony of one physician based on its experience in gauging the testimony of witnesses who give conflicting testimony." *Id.* "It is improper for an administrative agency to base a decision on information outside of the record without notice to the parties." *Turbitt,* 711 A.2d at 1216. "Whatever 'institutional experience' or administrative expertise the Board possesses may be used as a tool for *evaluating* evidence but not as a source for *creating* evidence." *Id.*

The ability to confront and dispute evidence is fundamental to due process. The *Turbitt* Court observed:

> The Board operates in a quasi-judicial capacity and is, therefore, ***bound to observe fundamental principles of justice, such as due process. As a general rule, an award of compensation cannot be supported by facts ascertained by the Board, but not put in evidence so as to permit scrutiny and contest***.

Id. (internal citations omitted; emphasis added) (citing *General Chem. Div. Allied Chem. & Dye. Corp. v. Fasano*, 94 A.2d 600 (Del. Super. Ct. 1953)).

As evidenced above, Dr. Grossinger was deprived of his due process rights. At no point did the State present expert testimony, as was required, to establish the standard of care applicable to Dr. Grossinger's conduct. A standard of care, which was unknown to Dr. Grossinger, guided how the Hearing Officer and Board understood and interpreted the regulations. Importantly, the hearing officer frequently referenced the "discretion of the physician" and how a "reasonable physician" would act. (A330-331; 337-338)

By failing to provide expert testimony to determine the factual issue, that is to determine the applicable standard of care, and instead using its "general institutionalized knowledge" to create its own standard of care, the Board violated Dr. Grossinger's constitutional right of due process.

2. *Bilski* Does Not Permit The Board To Create Evidence Of Current Clinical Knowledge Under The Guise Of Its Institutional Experience

The Superior Court correctly found that the State's interpretation of *Bilski* is too expansive. The *Bilski* Court did not express the "blanket view that expert testimony is not required in *any* disciplinary case." Op. at 47. Instead, the *Bilski* court found that expert testimony was not required under the particular set of facts in *Bilksi*. *Bilski* does not address the issue in this matter regarding constitutional due process. Finally, the facts in *Bilski* are critically different than the facts here.

In *Bilski*, Dr. Bilski argued that section 6853 of the Medical Negligence Act required that the State introduce expert evidence at his hearing. *Bilski*, 2014 WL 3032703, at *10. This argument was rejected because in the Medical Negligence Act made it applicable to disciplinary proceedings before the Board. Significantly, here, Dr. Grossinger never made this argument. Op. at 48.

The Superior Court also correctly recognized the significant different facts and circumstances in *Bilski* and the present matter. Dr. Bilski was charged with violating Regulation 18 because of his poor documentation. *Bilski*, 2014 WL 3032703, at *16. Moreover, Dr. Bilski "[did] not dispute, that his documentation practices did not conform to the requirements of the [Regulations]." *Id.* at *6, n.20; Op. at 49. By contrast, Dr. Grossinger has consistently disputed the allegations against him.

Accordingly, the State's contention that expert testimony is not required is unsupported. As set forth above, the State was required to establish the applicable standard of care, a fact issue, through expert testimony. Having failed to do so, Dr. Grossinger was denied his right to due process. Nothing in *Bilski* limits the requirements and opinion as expressed in *Turbitt*, *supra*.[6]

In *Turbitt*, a truck driver was injured on the job and brought a worker's compensation claim for permanent partial disability. *Turbitt*, 711 A.2d at 1214.

[6] As discussed by Judge Parkins, the resolution of *Bilski* was by way of a judgment order. *Turbitt* was a signed *en banc* opinion of the Court. Op. at 53.

During the hearing before the Industrial Accident Board ("IAB") he introduced expert medical testimony. *Id.* at 1215. That testimony indicated that Turbitt suffered a 34 percent permanent partial disability of his spine. Blue Hen Lines, his employer, offered no expert testimony. The Board found Turbitt's expert testimony was not credible and, "relying primarily on its own experience in these matters," substituted and inserted its own judgment that Turbitt suffered only a 15 percent disability. *Id.;* Op. at 44.

In reversing the IAB decision, this Court found that the IAB was free not to accept Turbitt's expert's 34 percent evaluation and that it "was not free to select a different figure based simply on its general institutional experience." *Turbitt*, 711 A.2d at 1215. To reiterate, in *Turbitt*, as here, "[t]his is not a case where the Board was presented with differing medical testimony and was free to reject, in full or in part, the testimony of one physician based on the Board's experience in gauging the testimony of witnesses who give conflicting testimony." *Id.* Turbitt was clear in stating well-established Delaware law that "[i]t is improper for an administrative agency to base a decision on information outside of the record without notice to the parties." *Id.* at 1216. "Whatever 'institutional experience' or administrative expertise the Board possesses may be used as a tool for *evaluating* evidence but not as a source for *creating* evidence." *Id.*

As Judge Parkins observed, the resolution in *Bilski* was by way of judgment order. *Turbitt* was a signed *en banc* opinion of the Court. Op. at 53. "'[N]o subsequent panel can overrule a prior holding of the Court without consideration by the Court *en banc.*' Ch. IX(6) *Delaware Supreme Court Internal Operating Procedures*. The absence of such an *en banc* hearing suggests that this Court did not think it was overruling or limiting *Turbitt*." Op. at 53. For that reason, the propositions, cited above, for which *Turbitt* stands are guiding principles on this matter.

The State also relies on *Centers v. Del. Bd. Of Med. Licensure & Discipline,* 2017 Del. LEXIS 282 (Del. June 12, 2017), a more recently decided Superior Court case that involves a complaint against a physician for, *inter alia*, "fail[ure] to adequately maintain and properly document patient records" in violation of Rule 8.1.13 and for "misconduct, incompetence, gross negligence or a pattern of negligence" in violation of 24 *Del. C.* § 1731(b)(11). *Id*. at *3; Op. Br. at 17-19. In *Centers*, the Court held expert testimony was not necessary. As Judge Parkins states in his Opinion, *Centers* is distinct for the same reasons as *Bilski* is distinct from Dr. Grossinger's case. Op. at 49. Dr. Centers admitted that his records were "replete with errors and deficiencies" and were insufficient to inform him or any subsequent medical provider of the patient's medical history or course of treatment. *Centers*. at *10. Moreover, the *Centers* Court was able to identify

numerous errors and omissions in holding that there was substantial evidence to conclude that Dr. Centers did not properly document his appointments with patients. *Id*. at *10-11.

Centers is factually and legally distinguishable from the instant matter. Much of Dr. Grossinger's focus in his appeal of the Board's decision was and is that there are Board rules that impose specific obligations and other rules that do not dictate specific obligations, but instead leave room for doctors to rely on evolving standards and clinical judgment. As above-referenced, the Preamble to the Regulations expressly states that "[t]he board may refer to current clinical practice guidelines and/or expert review in approaching cases involving the management of pain." 24 *Del. Admin. C.* § 1700-18.0. The rules subject to this appeal expressly defer to Delaware-licensed doctors' clinical judgment. Where a rule defers to clinical judgment, the Board stated that it shall judge the physician conduct under the rule by reference to the evidence of current clinical knowledge and scientific research. The rule at issue in *Centers* is distinct in that they did not require specific reference to or compliance with evidence of current clinical knowledge and scientific research. The rule at issue for Dr. Grossinger is significantly different and materially distinguishable. In adopting Rule 18, the Board specifically stated that Delaware physicians must base their treatment and decision-making on "current clinical knowledge" and scientific research and the

Board actually informed physicians that their conduct would be evaluated on the basis of current clinical knowledge. The Preface to Rule 18 states:

> The Board may refer to current clinical practice guidelines and/or expert review in approaching cases involving the management of pain. The medical management of pain should consider current clinical knowledge and scientific research and the use of pharmacologic and non-pharmacologic modalities according to the judgment of the license practitioner.

Rule 18, Preface. 24 Del. Admin. C. § 1700-18.0.

The Preface provides that when a certain rule does not mandate or prohibit specific action, the text of the Board's own rule required the State to introduce evidence to define the parameters for determining whether a physician's behavior was in accordance with such evidence. This is exactly what was *not* done in Dr. Grossinger's case, instead the Board gap-filled evidence and made a decision consistent with that improper process.

3. The APA Is Not Dispositive Of The Issues Raised On Appeal

The Superior Court found that the Administrative Procedures Act ("APA") did not apply because it was not enacted until July of 2017, after the hearing in April of 2016 and after the Board's decision in October of 2016. Op. at 16-17. The Board argues that the APA did apply and that the APA "contemplated case decisions do not require expert testimony." Op. Br. at 15. The Superior Court would not have reached a different conclusion had it "applied" the APA because decisional case law, as discussed herein, does not stand for the proposition that

expert testimony is not necessary, nor does it stand for the proposition that the Board can use its own experience and specialized competence to determine the standard of care against which it evaluates physician conduct. The APA's applicability is not material to the Superior Court's correct reasoned decision and therefore does not impact this Court's analysis of the appellate issues before it.

II. THE SUPERIOR COURT DID NOT SUPERIMPOSE A MEDICAL NEGLIGENCE STANDARD OF CARE AND INSTEAD CORRECTLY REQUIRED EXPERT TESTIMONY TO ESTABLISH THE APPROPRIATE STANDARD OF CARE FOR PHYSICIANS IN MEDICALLY RELATED ADMINISTRATIVE MATTERS

A. Question Presented

Did the Superior Court appropriately look at medical negligence cases for guidance in finding that expert testimony is required to establish the standard of care in medically related administrative matters?

B. Scope of Review

This Court's function, in reviewing the appeal before it, is to "replicat[e] the role of the Superior Court, [and] review[] the Board's decision to determine whether its factual findings are supported by substantial evidence." *Turbitt,* 711 A.2d at 1215 (citation omitted). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Turbitt*, 711 A.2d at 1215 (quotations and citation omitted). Questions of law are reviewed *de novo*. *Christman,* 99 A.3d at 226 (Del. 2014). "Like the Superior Court, this Court considers the record in the light most favorable to the party prevailing on the Board's appeal," here, Dr. Grossinger. *Murphy*, 121 A.3d at 1221 (Del. 2015). The Supreme Court "does not weigh the evidence, determine questions or credibility, or make its own factual findings." *Id*.

C. Merits of Argument

As acknowledged by Judge Parkins, and as admitted by Dr. Grossinger, while this matter is not a medical negligence case, the underlying principles of medical testimony, including the standard of care, is integral to medical negligence cases. For that reason, the requirement of expert testimony for medically related administrative matters naturally flows from that same requirement in medical negligence cases. Indeed, the State acknowledges, "[a] ruling that the State must present 'standard of care' evidence is a ruling that expert testimony is required." (A394-395); Op. at 39.

Contrary to the State's argument, the Superior Court concluded that the standard of care in medical disciplinary cases is not a question of law and that it is "up to the trier of fact to determine 'if the doctor has departed from the proper standards of his profession.'" Op. at 35-36. The Superior Court also recognized that this matter is not a medical negligence case while simultaneously recognizing that the "standard of care lies at the heart of any negligence claim against a physician" and that a medical negligence plaintiff is required to supply expert testimony because the standard of care in medicine is not commonly known. Op. at 38. The Superior Court is consistent in its determination of the need for expert testimony to adequately inform the trier of fact in its decision making role. The Superior Court found it essential that plaintiff supply expert testimony to enable

the jury to determine whether the doctor departed from the proper standard of his profession.

The State's own argument that "[t]his analysis ignores the requirement that Dr. Grossinger's conduct be analyzed ***within the norms of the medical community***…" necessarily implies a standard of care. Op. Br. at 29 (emphasis added). As set forth in *Hornbeck v. Homeopathic Hospital Association of Delaware*, 197 A.2d 461 (Del. Super. Ct. 1964):

> In a medical malpractice case, in order that a jury might be able to draw an inference of negligence from the circumstances, they must be able to understand the **nature of the doctor's failure to exercise the proper standards of competence and care which other doctors in good standing would ordinarily adhere to in this or similar communities**."

Hornbeck, 197 A.2d at 463 (emphasis added); *see also* Op. at fn. 99. The necessity for expert testimony is not to prove all elements of negligence, but instead to show the alleged departure from some standard of care applicable to the facts of the case. In this instance, expert testimony was required to prove the relevant standards under which Dr. Grossinger was required to comply.

III. DR. GROSSINGER'S CONDUCT COMPLIED WITH EXISTING REGULATIONS REGARDING PRESCRIBING PAIN MEDICATION AND THE SUPERIOR COURT CORRECTLY DETERMINED THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S IMPROPER FINDINGS

A. Question Presented

Did Dr. Grossinger's conduct comply with the existing regulations regarding prescribing pain medication and was the Superior Court correct in determining that the Board's findings were not based on substantial evidence?

B. Scope of Review

This Court's function, in reviewing the appeal before it, is to "replicat[e] the role of the Superior Court, [and] review[] the Board's decision to determine whether its factual findings are supported by substantial evidence." *Turbitt,* 711 A.2d at 1215 (citation omitted). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Turbitt*, 711 A.2d at 1215 (quotations and citation omitted). Questions of law are reviewed *de novo*. *Christman,* 99 A.3d at 226 (Del. 2014). "Like the Superior Court, this Court considers the record in the light most favorable to the party prevailing on the Board's appeal," here, Dr. Grossinger. *Murphy*, 121 A.3d at 1221 (Del. 2015). The Supreme Court "does not weigh the evidence, determine questions or credibility, or make its own factual findings." *Id*.

C. Merits of Argument

The State incorrectly asserts that there was "ample evidence" to support the Board's findings. Op. Br. at 32. Compounding this error, the Board improperly

cited to portions of the hearing transcript in addition to the Hearing Officer's findings of fact in the recommendation. Moreover, the Board wrongly reached beyond the Hearing Officer's findings of fact and relied on sections of the transcript that the Hearing Officer did not include in his findings of fact, possibly because he did not find them credible or reliable.

It is "improper for and administrative agency to base a decision on information outside of the record without notice to the parties." *Turbitt*, 711 A.2d at 1216. The Board's Rule 18.0 provides that physicians will be judges for compliance, particularly where the Rule itself does not require or prohibit a specific action, based upon "current clinical knowledge and scientific research and the use of pharmacologic and non-pharmacologic modalities according to the judgment of the licensed practitioner." 24 *Del. Admin. C.* § 1700-18.0. For the Board to evaluate whether facts establish a violation of certain sections of Rule 18, it must be bound to consider current clinical knowledge and scientific research established in the record as a matter of fact. Where there is no such evidence as a basis for a finding of fact regarding a standard required by such knowledge and research, the Board is necessarily basing a decision on information outside the record.

In *United Water Delaware, Inc. v. Public Services Commission*, this Court held that where there was no evidence that a corporate grandparent would be a

source of future financial support, the agency could not input the corporate grandparent's capital structure on United Water as a matter of "evaluating evidence" based on its institutional experience. 723 A.2d 1172, 1175-76 (Del. 1999). Indeed, the Board's "findings must, in all events, be supported by competent evidence, not supposition." *Id.* at 1176. Here to, and as more fully set forth above, the Board cannot rely on its institutional experience to create factual evidence.

The State failed to present, and the Board improperly found, that substantial evidence existed to establish violations under Rules 18.1, 18.3[7], 18.4, 18.5, and 18.7. Instead, the Board's decision that Dr. Grossinger violated these rules is not based on substantial evidence.

1. Rule 18.1.1 – Medical History and History of Substance Abuse

Specifically, Rule 18.1.1 provides that a physician must obtain, document, and evaluate a medical history, including a history of substance abuse. Michael's medical history of substance abused was documented by GNS, specifically, in Dr. Silberman's report. (A323; 331). Moreover, the hearing officer found this report was prepared the direction of GNS, and that Dr. Grossinger was aware of this history. (A323-324; 326-327). Further, the hearing officer found that Dr. Steven Grossinger documented that Michael was prescribed suboxone for opioid

[7] As discussed in the Cross-Appeal Argument below.

dependence treatment, and that Dr. Grossinger was aware of this report. (A324). Despite such, evidence, the Board adopted the hearing officer's unsupported conclusion of law that Dr. Grossinger violated Rule 18.1.1 because he did not request a copy of Dr. Lifrak's chart, or otherwise contact Dr. Lifrak.

The hearing officer wrote, "in my view the reasonable physician practicing under the strictures of Bd. Reg. 18 would have inquired further in order to develop a complete, timely, pertinent medical history." (A332). This statement supports not only the requirement for expert testimony (to establish the appropriate standard of care for a "reasonable physician"), it fails to provide a basis for such view – i.e. fails to show any evidence to support this view.

In short, the evidence that *was* introduced included the chart for Michael, which documented a history of substance abuse, a history of the etiology of the patient's injuries, past medical history, as well as diagnostic imaging and treatment with Dr. Ufberg and Dr. Lifrak. The State offered no evidence to establish the applicable standard of care for gathering and documenting a history – and the Board merely agreed with the hearing officer's unsupported view that Dr. Lifrak should have been contacted. Accordingly, there is not substantial evidence to find that Dr. Grossinger violated Rule 18.1.

2. Rule 18.4 – Urine Drug Testing

Rule 18.4 does not dictate when a physician must require a patient to submit to a urine drug screen – such a conclusion requires evidence of the standard of care. The Board's conclusion that Dr. Grossinger violated Rule 18.4 because he did not order a urine drug screen at a particular time is not based on any evidence in the record.

Michael signed two pain management agreements wherein he agreed to random urine drug screen. GNS schedule a urine drug screen on June 18, 2014, but Michael cancelled it due to cancellation of his insurance. Michael had been compliant with treatment and gave no indication that he was seeking controlled substances for other than a valid medical reason. While Michael cancelled two additional appointments, Dr. Grossinger noted on November 12, 2014, while covering for his colleagues, that Michael must "MAKE and KEEP next appointment for further medication refills." (A326; B1). Indeed, at the next visit, a urine drug screen was performed.

Despite this evidence, the Board concluded that Dr. Grossinger had to reorder the June 2014 missed drug test before any subsequent prescription refills could be given. However, no evidence is in the record to support this conclusion – and as such, the Board's conclusion was not based on substantial evidence.

3. Rule 18.5 – Periodic Review

Rule 18.5 does not dictate when a physician must periodically review a patient's course of treatment; such a decision is left to the treating physician. Evidence of the standard of care is required to conclude that a physician providing medical refill prescriptions was *required* by Rule 18.5 to perform a periodic review as a *specific* time.

The evidence established that Dr. Grossinger was not involved in the treatment of Michael, aside from writing three prescriptions for refills of medication ordered by his colleagues. There was no evidence that Dr. Grossinger was involved in planning or executing the course of Michael's treatment pursued by Dr. Steven Grossinger and Dr. Barjer. (A339). The hearing officer specifically found that over the course of about nine months, Dr. Steven Grossinger met with Michael three times and Dr. Brajer met with Michael five times. (A326). The Board concluded that with respect to Dr. Steven Grossinger's and Dr. Brajer's matters, that both physicians *did* periodically review Michael's course of treatment – thereby finding that Michael's course of care had been adequately, periodically reviewed by two physicians within the same practice. Moreover, the hearing officer found that Dr. Grossinger *did review* records prior to authorizing the refills. (A326-327).

While Dr. Grossinger does not dispute the Board's finding regarding Dr. Steven Grossinger and Dr. Brajer's periodic review and treatment, it necessarily

shows the subjectivity and utilization of the Board's "institutional experience" to determine compliance with Rule 18.5. The State introduced no evidence to show that one physician meeting with a patient three times, versus a physician meeting five times, met the standard. Further, there is no evidence that a third physician-partner who, after reviewing the records prior to authorizing a refill of a prescription, must independently periodically review the course of treatment. For that reason, the Board's conclusion was not based on substantial evidence.

4. Rule 18.7 – Keeping Accurate and Complete Medical Records

Rule 18.7 provides that a physician shall keep accurate and complete records of, among other things, medical history, discussions of risks and benefits, and periodic reviews.[8] However, there was no evidence that the standard of care required Appellant to obtain Dr. Lifrak's records or speak with Dr. Lifrak. There *was* documentation that GNS physicians discussed the risks and benefits of medication with Michael corroborating Dr. Steven Grossinger's testimony; such documentation was ignored by the hearing officer and the Board without citing specific evidence of record to support disbelief of such documentation. Further, there was no evidence to controvert Dr. Staats' expert opinion that GNS physicians more than adequately reviewed Michael's course of care and that Dr. Grossinger's

[8] Although it does not appear the Superior Court expressly discusses this claim, the Court's analysis is subsumed in its Opinion.

limited involvement in that treatment was well within the standard of practice of pain management physicians in a group practice.

Accordingly, the Board's conclusion that Dr. Grossinger violated Rule 18.7 is not supported by substantial evidence.

CROSS-APPEAL ARGUMENT

I. THE BOARD'S DECISION REGARDING DR. GROSSINGER'S ALLEGED VIOLATION OF REGULATION 18.3 IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE THE BOARD IGNORED RELEVANT TESTIMONY, INCLUDING DR. BRAJER'S INTRAOPERATIVE NOTE AND THE TESTIMONY OF DR. STEVEN GROSSINGER REGARDING THE RISKS AND BENEFITS OF OPIOID TREATMENT

A. Question Presented

Was there substantial evidence to support the Board's finding that Dr. Grossinger violated Regulation 18.3? (B102, 133-134, 287-288, 341).

B. Scope of Review

This Court's function, in reviewing the appeal before it, is to "replicat[e] the role of the Superior Court, [and] review[] the Board's decision to determine whether its factual findings are supported by substantial evidence." *Turbitt,* 711 A.2d at 1215 (citation omitted). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Turbitt*, 711 A.2d at 1215 (quotations and citation omitted). "Like the Superior Court, this Court considers the record in the light most favorable to the party prevailing on the Board's appeal," here, Dr. Grossinger. *Murphy*, 121 A.3d at 1221 (Del. 2015). The Supreme Court "does not weigh the evidence, determine questions or credibility, or make its own factual findings." *Id.*

C. Merits of Argument

Preliminarily, Dr. Grossinger does not argue with Judge Parkins' assessment that Regulation 18.3 provides adequate specificity on its face about what is

required under the Regulation. Op. at 60. Instead, Dr. Grossinger disputes that there was substantial evidence to support the alleged violation.

Regulation 18.3 provides, "18.3 Informed Consent – The practitioner must discuss the risks and benefits of the use of controlled substances with the patient…." (A334); 24 *Del. Admin. C.* § 1700-18.3. The Board, as well as Judge Parkins, held that there was sufficient evidence in the record to support a factual finding that Dr. Grossinger violated Regulation 18.3. Op. at 57-58. These conclusions are based on the hearing officer's findings of fact that such discussion never occurred, despite Dr. Steven Grossinger's testimony that he discussed risks and benefits of controlled substances with Michael. Further, the only factual finding that the Board cites in support of its conclusion of a violation of Rule 18.3 regarding documentation of a discussion of risks and benefits is the absence of documentation. (A362-366; A335-336).

Indeed, as correctly pointed out by Judge Parkins, the adage that "if it's not in the chart it didn't happen," is not a rule of evidence. Op. at 59. Regulation 18.3 itself does not require documentation – only discussion. Dr. Steven Grossinger's testimony, which was summarily dismissed without any basis to do so by the Hearing Officer and the Board, clearly evidences such discussion regarding opioid treatment.

Moreover, the forms which Judge Parkins indicated related solely to the "Informed Consent for Injections and Other Diagnostic Procedures" unequivocally state that "the relevant risks, benefits and side effects related to alternatives" to the scheduled interventional procedure were fully explained, including the treatment alternative of "oral medication." (A193). This necessarily includes the oral medications Michael was being prescribed, including those prescribed by Dr. Grossinger, and there is no evidence to contradict such fact. Indeed, these same forms were signed on April 9, 2014, April 30, 2014, May 28, 2014, and December 8, 2014. (A193, 201, 208, 213).

The Hearing Officer failed to mention these facts in his binding findings of fact, and as a direct result of the omission, the Board was unaware of the existence of the documentation. While the hearing officer may weigh evidence, he may not ignore evidence; there must be some basis on the record to discount the documentation and the testimony of Dr. Steven Grossinger and Dr. Brajer's intraoperative reports. *Turbitt*, 711 A.2d at 1216.

Neither the hearing officer nor the Board can be permitted to simply ignore the existence of evidence and then base a legal conclusion on the lack of such evidence. For that reason, the Board's decision regarding Dr. Grossinger's alleged violation of Regulation 18.3 is not supported by substantial evidence.

CONCLUSION

For all the foregoing reasons, and the reasons that may be explained at oral argument, Appellee, Dr. Grossinger respectfully requests this Court affirm the Superior Court's decision below, except, Dr. Grossinger respectfully requests this Court reverse the Superior Court's determination as to Dr. Grossinger's purported violation of Regulation 18.3.

POST & SCHELL, P.C.

By: *_/s/ Paul A. Logan_*

Dated: July 10, 2019

Paul A. Logan, Esquire

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This 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 9,165 words, which were counted by Word 2010.

POST & SCHELL, P.C.

By: */s/ Paul A. Logan*
Paul A. Logan, Esquire

Dated: July 10, 2019

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Appellee.	:	

CERTIFICATION OF MAILING/SERVICE

I hereby certify that on July 10, 2019, I electronically filed the original Appellee Dr. Bruce Grossinger's Amended Answering Brief and Cross-Appellant's Amended Opening Brief 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:

Patricia A. Davis, Esquire
Zoe Plerhoples, Esquire
Department of Justice
Carvel State Office Building
820 N. French Street, 6th Floor
Wilmington, DE 19801
Attorneys for Appellant

James Ligouri
Liguori & Morris
46 The Green
Dover, DE 19901

Adam Balick
Nathan Trexler
Balick & Balick LLC
711 King Street
Wilmington, DE 19801

POST & SCHELL, P.C.

By: */s/ Paul A. Logan*
Paul A. Logan, Esquire

Dated: July 10, 2019