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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT B. VANCE, D.O. Appellant and Plaintiff, v. PAUL T. FORDHAM, Director of the Department of Registration, Department of Registration and Osteopathic Committee, Respondents and Defendants.	:	Case No. 18176

BRIEF IN OPPOSITION TO PETITION FOR REHEARING

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE CHRISTINE M. DURHAM, JUDGE
AFFIRMING THE ORDER OF
THE DEPARTMENT OF REGISTRATION

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AUTHORITIES CITED

STATUTES CITED

Utah Code Annotated §58-1-36 (1953) 10

Utah Code Annotated §58-12-35.1 (1953) 10, 11

Utah Code Annotated §58-12-36(15) (1953) 10, 11

CASES CITED

Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1913) 8

Dahlquist v. Denver Rio Grande Railroad Co., 52 Utah 438, 174 P. 833 (1918) 8

Davis v. Ogden City, 118 Utah 461, 223 P.2d 412 (1950) 8

Ducheneau v. House, 4 Utah 483, 11 P. 618 (1886) 7

Garner v. Thomas, 99 Utah 299, 77 P.2d 529 (1938) 9

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In re Lowe's Estate, 68 Utah 49, 249 P. 128 (1926) 8

In re MacKnight, 4 Utah 237, 9 P. 299 (1886) 8

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Swanson v. Sims, 51 Utah 485, 170 P. 774 (1918) 8

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Rule 76(e) 7

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT B. VANCE, D.O. Appellant and Plaintiff, v. PAUL T. FORDHAM, Director of the Department of Registration, Department of Registration and Osteopathic Committee, Respondents and Defendants.	:	Case No. 18176

BRIEF IN OPPOSITION TO PETITION FOR REHEARING

STATEMENT OF THE NATURE OF THE CASE

This case is before the Supreme Court as a petition for rehearing of the majority opinion of this court dated August 22, 1983, affirming the judgment of the District Court and the Utah Division of Business Registration revoking Appellant's license to practice medicine as an osteopathic physician and surgeon.

DISPOSITION IN THE COURTS

These proceedings began as an administative hearing before the Osteopathic Committee of the Division of Registration on January of 1981. On February 6, 1981,

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Appellant's license was revoked by the Division for conduct which the Osteopathic Committee had found to be unprofessional. That decision was appealed to the Third District Court of the State of Utah on February 9, 1981. On February 19, 1981, a temporary stay of revocation was ordered by the District Court. Since February 19, 1981, up to and including the present time, Appellant has been permitted to continue his practice under a succession of stays issued by the District Court and by this Court. After a complete review of the transcript and evidence involved, the District Court upheld the findings of the Osteopathic Comittee and affirmed the revocation of Appellant's license. Thereafter Appellant appealed to this Court. On August 22, 1983, in majority opinion, this Court affirmed the finding of the District Court and the Division of Business Registation.

RELIEF SOUGHT

Respondents seek a denial of the Petition for Appellant for Rehearing.

STATEMENT OF FACTS

Respondents reject Appellant's "statement of facts" as argumentative. However, Respondents see no benefit in burdening this Court with a recapitulation of facts already before the Court and refer it to the Statement of Facts contained in Repsondents' Brief filed with this Court April 19,

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1983, in the above entitled matter and are herein incorporated by reference.

ARGUMENT

POINT I

REHEARING IS PROPER ONLY WHEN THE PETITION FOR REHARING ALLEGES NEW THEORIES OR LEGAL CONCEPTS THAT HAVE NOT ALREADY BEEN SUBMITTED TO AND CONSIDERED BY THE COURT

The procedural rules governing petitions for rehearing before this Court are found in Utah Rules of Civil Procedure, Rule 76(e) 1 and 2. Rule 76 does not specifically address the burden which a petitioner must overcome in order to be granted a rehearing. However, this Court in its opinions has established the standard for judicial review of petitions for rehearing. Appellant's petition fails to meet this burden.

One of the earliest proclamations by this Court with respect to the standard to be followed in reviewing petitions for rehearing is found in the companion cases of Ducheneau v. House, 4 Utah 483, 11 P. 618 (1886), and Jones v. House, 4 Utah 484, 11 P. 619 (1886). Therein, this Court stated that:

> We have repeatedly called to the attention the fact that no re-hearing will be granted where nothing new and important is offered for our consideration . . . We cannot grant a re-hearing unless a strong showing therefore be made. A re-argument, or an argument with the court upon the points of

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the decision, with no new light given, is not such a showing.

Subsequent to the _House_ opinion, this Court has continued to provide guidance as to the appropriate standard. Rather than afflict the Court with a prolonged historical review, Respondents submit that a conscientious examination of the case law establishes that in order to justify a petition for rehearing one of the following three facts must be substantiated by the petition:

(1) The court misconstrued or failed to consider a material fact or point of law that would affect its decision, or;

(2) The court based its decsion on a wrong principle of law, or;

(3) Facts or points of authority have been discovered which were unknown at the time of the original hearing.

See _In re MacKnight_, 4 Utah 217, 9 P. 299 (1886); _Cummings v. Nielson_, 42 Utah 157, 129 P. 619 (1913); _Harrision v. Harker_, 44 Utah 485, 142 P. 716 (1914); _Swanson v. Sims_, 51 Utah 485, 170 P. 774 (1918); _Dahlquist v. Denver Rio Grande Railroad Co._, 52 Utah 438, 174 P. 833 (1918); _In Re Lowe's Estate_, 68 Utah 49, 249 P. 128 (1926); _Davis v. Ogden City_, 118 Utah 461, 223 P.2d 412 (1950).

In applying this standard, this court has noted, "As a general rule courts will not grant rehearings to consider

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questions which could have been argued in the first hearing but were not". Garner v. Thomas, 99 Utah 299, 77 P.2d 529 (1938). It is the position of the Respondents that in Appellant's brief in support of petition for rehearing no new arguments are made. Every concern raised by Appellant in his petition was fully addressed by all parties in their briefs and by this Court in its opinion. It is clear that under Utah law the Appellant is not entitled to a rehearing based on a repetition of arguments which have already been fully ajudicated. Appellant's petition for rehearing must be denied.

Point II

APPELLANTS PETITION FOR REHEARING ASSERTS ARGUMENTS AND FACTS WHICH HAVE ALREADY BEEN FULLY AJUDICATED BY THIS COURT

In Appellant's petition for rehearing, five separate points are raised as grounds for rehearing. Each and every point fails to state any new theories, laws or issues. For example, in Point II of Appellant's brief, Appellant argues that;

> "The Supreme Court erred by affirming the erroneous interpretation of the law regarding appeals for Osteopaths"

This exact issue was raised by Appellant as Point VI of Appellant's appeal brief and as Point I of Appellant's reply brief. Respondents addressed the issue in Point I of our initial brief, and this Court addressed the issue on pages 2, 3 and 4 of the majority opinion. Point II is a direct

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repeat of the position taken by Appellant on appeal. It raises no new issues or arguments and brings forth no new law. Likewise, Points III, IV and V or Appellant's brief on Rehearing simply restate Point I, II, III, IV, V and VII of Appellant's brief on appeal. Absent a showing of failure to consider a material fact, new facts or new case law, a rehearing should not be granted.

Under Point I or Appellant's petition for rehearing, Apellant maintains:

> "The Supreme Court erred by allowing the licensure of an Osteopath to be revoked under the provisions of the medical practice act, which applies only to mds."

Once again, Point I addresses issues which have already been addressed by appellants and respondents briefs and by this Court in its opinion. Throughout the proceedings before this Court, Appellant has maintained that this appeal was under Utah Code Ann. §58-1-36 and not Utah Code Ann. §58-12-35.1 (See Appellant's brief page 46 and Appellant's reply brief page 11). In addition, it has always been the position of the Appellant that the Osteopathic Commitee's failure to have a prior elaboration or publication of rules or regulations with respect to "unprofessional conduct" was error.

The Division's petition which inititiated this action was filed under Utah Code Ann §58-12-36(15). The hearing went forward using §58-12-36(15) as the applicable standard. Section 58-12-36 was specifically applied in the findings and

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conclusions of the Osteopathic Committee. As noted by Justice Oakes,

> In this case, appellant's peers on the Osteopathic Committee judged his treatment of his patients. Granted, the Committee did not codify or publish standards of conduct for osteopaths in advance of the hearing, but the statutes do not mandate advance publication. Section 58-1-13(6) required the Committee to "[d]efin[e] unprofessional conduct," but in respect to patient care the Committee may do that on a case-by-case basis by drawing on the statutory standards quoted below and on its own knowledge of the patient-care standards of the profession." Vance v. Fordham No. 18176, Slip op at 7 (Utah, August 22, 1983)

Section 58-12-36(15) was applied in the District Court. Apellant never challenged the adequacy of appropriateness of §58-12-36(15) at the hearing before the Osteopathic Committee or at the District Court. In fact, Appellants appeal to the Third District Court was filed under the provisions of §58-12-35.1 of the Medical Practice Act. Again, Justice Oaks in the majority opinion maintained that:

> On the facts of this case, we need not determine whether this section of the Medical Practice Act was formally applicable to a doctor of osteopathy at that time. The record is silent on why the parties did not apply or rely on §58-12-18, which the dissent represents as the solely applicable expression of "unprofessional conduct" for osteopaths. There is no doubt that the parties to this controversy could mutually adopt the language of §58-12-36(15) as a suitable expression of the patient-care standard of the osteopathic profession, and the record shows that they did so in this case. Significantly, this same statutory formula was included in the Osteopathic Medicine Licensing Act, effective May 12,

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1981, U.C.A., 1953, §58-12-7(15). Vance v. Fordham, No. 18176, Slip op. at 8, footnote 3 (Utah, August 22, 1983).

Similar to the other points raised in Appellant's petition, Point I raises arguments and facts which have already been fully considered and ajudicated by this Court. Appellant has not met his burden. The petition must be denied.

CONCLUSION

It is the position of the Respondents that the brief in support of the petition for rehearing submitted by the Appellant states no new theories or legal concepts not already submitted to and considered by this Court in its published opinion. Rearguing what has been fully discussed and explored by the Court is not appropriate as per House, supra. The decision of this Court did not lack factual information, was not based on mistake and was not in error. The Osteopathic Committee, a committee of the Appellant's peers, found Appellant's treatment of his patients to constitute unprofessional conduct. Since that time, the Appellant has been afforded two separate opportunities for review of the Committee's decision. Both the Third District Court and this Court have fully reviewed this matter. Appellant's petition is

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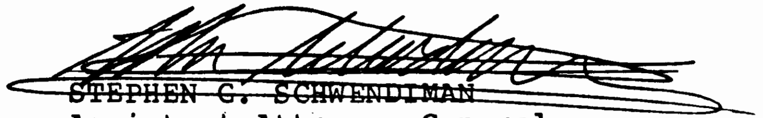
without merit and must be denied. This Court's decision of August 22, 1983, should be affirmed.

DATED this 3rd day of October, 1983.

DAVID L. WILKINSON
Attorney General



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MAILING CERTIFICATE

I hereby certify I mailed two true and exact copies of the foregoing Brief, first-class, postage prepaid to M. RICHARD WALKER, Suite 202, 4685 Highland Drive, Salt Lake City, UT 84117.

DATED this 3rd day of October, 1983.

Vickie L. Walker

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