

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN,	)	
	)	CASE NO. CV 8682
Petitioner,	)	
	)	RESPONSE TO PETITIONER'S
vs.	)	SUPPLEMENTAL MEMORANDUM
	)	IN OPPOSITION TO
STATE OF IOWA	)	RESPONDENT'S
	)	MOTION TO DISMISS
Respondent.	)	

I. RESPONSE TO MOTION

Petitioner has filed a Motion for Leave to File Supplemental Memorandum in Opposition to Motion to Dismiss, and a corresponding Supplemental Memorandum in Opposition to Motion to Dismiss. Respondent does not oppose the filing of the Petitioner's supplemental memorandum.

II. RESPONSE TO SUPPLEMENTAL MEMORANDUM

In response to Petitioner's supplemental memorandum, Respondent submits the following:

1. *The Requested Declaratory Order Will Not Resolve A Controversy.*

Petitioner seeks an order resolving an abstract question – specifically, whether marijuana has an accepted medical use for treatment in the United States. That question was formerly relevant – under Iowa law – to just one issue: *whether the Pharmacy Board would recommend to the legislature that marijuana be removed from controlled substance schedule I.* Iowa Code § 124.203 (2011).

However, on February 17, 2011 the Pharmacy Board made a recommendation to the Iowa legislature that marijuana be moved from controlled substance schedule I to schedule II.<sup>1</sup> Once that recommendation had been made, the question of whether marijuana has a medical use in the United States ceased to have relevance to any case, controversy or activity of Iowa government.

Petitioner did not and does not now oppose the Board's recommendation; instead Petitioner deems it irrelevant to his petition. Petitioner also acknowledges that the efficacy of marijuana is not a matter of law. See *Resistance to Motion to Dismiss*, p. 4.

Litigation relating to the Pharmacy Board's recommendation, to the Board's application of Iowa Code § 124.203 (2011) to questions presented to the Pharmacy Board, and to the medical value of marijuana is moot. *Junkins v. Brandstad*, 421 N.W.2d 130,133 (Iowa 1988) (case is moot when judgment, if rendered would have no practical effect on an existing controversy). There is no longer a justiciable controversy because the Pharmacy Board's activities relating to medical use of marijuana are complete, and issues connected to the Pharmacy Board's action have become academic. Moreover, the Board has made a recommendation which Petitioner does not oppose.

Further, as Respondent noted in its Motion to Dismiss, declaratory judgment is only available under Iowa R. Civil P. 1.1101 to "declare rights, status and other legal relations . . . ." *Fox, et al. v. Polk County Board of Supervisors*,

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<sup>1</sup> In connection with its recommendation, the Board made *no* finding regarding whether

569 N.W.2d 503, 507 (Iowa 1997) ("declaratory judgment is an action in which a court declares the rights, duties, status or other legal relationships of the parties"). To justify a declaratory judgment, there must be a substantial, immediate and real controversy between parties having adverse legal interests. *Erickson v. Christensen v. Van Dorn*, 261 N.W.2d 171, 172 (Iowa 1978).

Even if this court were to find that marijuana does have an accepted medical use – as a matter of law – the finding would resolve nothing. Petitioner could **not**, for example, use such a finding to force the legislature to pass legislation moving marijuana from controlled substance schedule I to schedule II, for that is purely a legislative decision. See Iowa Code chapter 124 (2011); *Klouda v. Sixth Judicial District*, 642 N.W.2d 255, 260 (Iowa 2002) (separation of powers doctrine).

In light of the fact there is no substantial, immediate legal controversy, and the issues presented are moot, this court may refuse to render a declaratory judgment because the judgment would serve no purpose. Iowa R. Civil P. 1.1105. Where no justiciable controversy exists, courts will not issue an order simply because a litigant desires a decision on an abstract point of law or fact. *Bechtel v. City of Des Moines*, 225 N.W.2d 326 (Iowa 1975).

2. *Applicability of Res Judicata/Issue Preclusion.* As mentioned at the September 23, 2011 hearing on Respondent's Motion to Dismiss, the question presented by the Petition for Declaratory Judgment was previously resolved by

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marijuana has an accepted medical use in the United States.

Judge Novak in *McMahon et al. v. Iowa Board of Pharmacy*, Polk County District Court case CV 7415. Petitioner was an intervenor in that proceeding, and joined in a Motion to Expand Ruling, filed November 10, 2009 by the petitioners, which included the following request (p. 5): "This Court should rule on Petitioner's requests to determine as a matter of law that marijuana does have "accepted medical use in treatment in the United States," based on the undisputed accepted medical use of marijuana in 13 states, and does, therefore fail to satisfy the criteria for listing in Schedule I of Iowa's Controlled Substance Act." In his Ruling on Motion to Expand Ruling, Judge Novak concluded as follows:

As to paragraph C [of the petitioner's Motion to Expand Ruling] this court rules that it does not believe that it can determine as a matter of law that marijuana does have "accepted medical use and treatment in the United States" based upon the medical use of marijuana in thirteen states and therefore fails to satisfy the criteria for listing in Schedule I of Iowa's Controlled Substance Act.

Thus, to the extent a determination of the accepted medical use of marijuana is relevant in these proceedings, Judge Novak has already ruled that such a conclusion cannot be reached as a matter of law.

The preclusive effect of Judge Novak's ruling is determined by *Fischer v. City of Sioux City*, 654 N.W.2d 544, 547 (Iowa 2002), which held that issue preclusion may be invoked, *even without mutuality of the parties*, if four prerequisites are met: (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must

have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

In his supplemental memorandum, Petitioner appears to contend that a ruling in a judicial review proceeding does not preclude re-litigation of the identical issue in a declaratory judgment proceeding. Petitioner asserts that, because the court is not a trier of fact in judicial review proceedings, the rules of res judicata/preclusion do not apply. Petitioner cites no authority for his proposition.

Because Petitioner now seeks a ruling on a *matter of law*, it makes no sense to contend that Judge Novak's ruling on a *matter of law* – though in a judicial review proceeding – would be denied preclusive effect. Indeed, Judge Novak's responsibility in an appellate capacity was primarily to resolve issues of law, not questions of fact. Iowa Code § 17A.19(10) (2011). Moreover, identity of types of judicial proceedings is not one of the prerequisites mentioned in *Fischer v. City of Sioux City*.

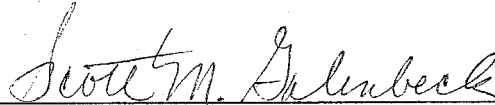
Instead, the prerequisites detailed in *Fischer v. City of Sioux City*, 654 N.W.2d at 547, appear to be satisfied. (1) The issue presented in the two cases is identical, (2) the issue was raised and litigated in the earlier case, *McMahon et al. v. Iowa Board of Pharmacy*, (3) the issue was material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action was essential to the resulting judgment. The identity of the issue

presented, raised and litigated is established by the fact that each case seeks a ruling, as a matter of law, that marijuana has an accepted medical use in treatment in the United States. Where the Petitioner vigorously sought to expand the ruling in the prior case, any argument that Judge Novak's final, expanded ruling was immaterial and non-essential would be a wholesale reversal of Petitioner's prior position.

### III. CONCLUSION

For the foregoing reasons, Respondent renews its motion to dismiss.

THOMAS J. MILLER  
ATTORNEY GENERAL OF IOWA



~~SCOTT M. GALENBECK PK30008153~~  
Assistant Attorney General  
Administrative Law Division  
Hoover Building, 2<sup>nd</sup> Fl.  
Des Moines, IA 50319  
Tele: (515) 281-6658  
FAX: (515) 281-7551  
[scott.galenbeck@ag.state.ia.us](mailto:scott.galenbeck@ag.state.ia.us)

Copy to:

George McMahon  
902 4<sup>th</sup> Street  
Livermore, IA 50558

Ladd Huffman  
210 S. 2<sup>nd</sup> Street  
Calumet, IA 51009

Robert Manke  
1603 10<sup>th</sup> Street  
Nevada, IA 50201

Alan Koslow  
2716 Jordan Grove  
West Des Moines, IA 50265-6462

Carl Olsen  
130 East Aurora Avenue  
Des Moines, Iowa 50313-3654

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**CERTIFICATE OF SERVICE**

I, the undersigned hereby certifies that a true copy of the  
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of all parties in the above-entitled cause by en-  
closing the same in an envelope addressed to each such  
party at his respective address as disclosed by the plead-  
ings of record herein, with postage fully paid, and by de-  
positing said envelope in a United States Post Office depo-  
sitory in Des Moines, Iowa, on the 7<sup>th</sup>

of Oct., 2011.  
V. Navel