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STATE OF WISCONSIN

BEFORE THE PSYCHOLOGY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY

PROCEEDINGS AGAINST:

ANDREW W. KANE, Ph.D.,	MOTION DECISION AND ORDER REGARDING COSTS
RESPONDENT	LS9805081PSY

Mr. John R. Zwieg

Department of Regulation & Licensing

Division of Enforcement

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PROCEDURAL HISTORY

On March 8, 2000, the Honorable Donald R. Rittel issued the Final Decision and Order in this matter in which he dismissed all eight counts contained in the Complaint. Dr. Kane filed a Motion for Fees and Costs on April 12, 2000. The Complainant filed its Response to the motion on May 4, 2000. Dr. Kane filed a supplementary affidavit on May 11, 2000. The Complainant filed a response to it on May 19, 2000. In turn, Dr. Kane filed a reply on May 25, 2000.

This matter was subsequently reassigned to the undersigned administrative law judge in February of 2001. Pursuant to the Psychology Examining Board's Order of July 1, 1998, the decision of the administrative law judge in this proceeding constitutes the final decision of the Board. Accordingly, the administrative law judge adopts the following Order.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that pursuant to §227.485, Wis. Stats., costs and fees are awarded to Andrew W. Kane, Ph.D., in the amount of $21,146.59.

DISCUSSION

At issue is whether Dr. Kane is entitled to receive costs associated with the above-captioned matter. Costs may be awarded to certain prevailing parties under section 227.485, Wis. Stats. This section is premised upon the federal Equal Access to Justice Act, 5 U.S.C. §504, and the Wisconsin Legislature intended that hearing examiners and courts be guided by the applicable federal case law interpreting the equivalent federal act. §227.485 (1), Wis. Stats. In determining whether costs should be awarded, several different sections of 227.485, Wis. Stats., must be examined.

To begin, §227.485 (3), Wis. Stats., states in relevant part:

> In any contested case in which an individual . . . is the prevailing party and submits a motion for costs under this section, the hearing examiner ***shall*** award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust. (emphasis added)

Dr. Kane maintains that he is the prevailing party. He further asserts that because the Psychology Examining Board (Board) was not substantially justified in taking its positions, he is entitled to receive costs for defending this matter.

The Board, on the other hand, maintains that Dr. Kane is not entitled to receive costs because he failed to file in a timely manner evidence that his federal adjusted gross income was less than $150,000 in each of the three calendar years or corresponding fiscal years immediately prior to the commencement of the case as provided in §227.485 (7), Wis. Stats. Additionally, the Board believes that because it was substantially justified in taking its positions that an award of costs is not warranted. However, if an award of costs is deemed appropriate, the Board argues that there are certain ones that should not be reimbursed. Each of these issues will be addressed in turn.

Whether Dr. Kane's Motion for Costs was timely filed

To determine whether Dr. Kane filed his motion for costs in a timely manner, the following provisions of §227.485, Wis. Stats., must be considered:

> (5) The prevailing party shall submit, within 30 days after service of the proposed decision, to the hearing examiner and to the state agency which is the losing party an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The state agency which is the losing party has 15 working days from the date of receipt of the application to respond in writing to the hearing examiner. The hearing examiner shall determine the amount of costs using the criteria specified in s. 814.245 (5) and include an order for payment of costs in the final decision.
>
> (7) An individual is not eligible to recover costs under this section if the person's properly reported federal adjusted gross income was $150,000 or more in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the case. This subsection applies whether the person files the tax return individually or in combination with a spouse.
>
> (10) If the examiner finds that the motion under sub. (3) is frivolous, the examiner may award the state agency all reasonable costs in responding to the motion. In order to find a motion to be frivolous, the examiner must find one or more of the following:
>
> > (a) The motion was submitted in bad faith, solely for purposes of harassing or maliciously injuring the state agency.
> >
> > (b) The party or the party's attorney knew, or should have known, that the motion was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The Board argues that because Dr. Kane failed to file any information concerning his income at the same time he filed his application for costs that he is ineligible to recover them. The Board's position is not persuasive.

Section 227.485 (5), Wis. Stats., identifies the items that must be included with a motion for costs. More specifically, it requires an "itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." But it does not require that such motions include an assertion that the moving party is eligible to recover costs. Instead, §227.485 (10), Wis. Stats., provides that if the party or the party's attorney knew or should have known that the motion was without any reasonable basis, the motion would be frivolous thereby entitling the Board to recover costs associated with that motion.

Although §227.485 (7), Wis. Stats., prevents an individual from recovering costs when his income exceeds $150,000 in the three years prior to the commencement of an action, it does not require that information be filed simultaneously with the motion for costs. A similar situation was faced in *Dunn. v. United States,* 775 F.2d 99 (3rd Cir. 1985). Under the Equal Access to Justice Act, Janis Dunn and others filed a petition for costs on the last day allowed under the Act. Although the petition was timely filed, it was arguably deficient in content. *Id.* The

court had no "[q]uarrel with the general proposition that time bars with respect to the filing of claims against the United States should be strictly construed." However, the court recognized "[t]hat while the time for filing a claim must be strictly complied with, deficiencies in the contents of the claim may be corrected if the government cannot show any prejudice arising from the later correction of those deficiencies." *Id.* (citations omitted).

Additionally, the court held:

> Requiring the filing of a fee claim (or any other) with the court or adjudicative agency serves the purpose of establishing a means certain for proving compliance with a time bar. Such certainty is required in most situations in the interest of finality and reliance. But once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied. What remains is the fleshing out of the details, and the government has pointed out no governmental interest which is in any way affected by the fact that the details of the fee claim came shortly after the claim was filed. *Id.* (citations omitted).

In conclusion, the court found:

> So long as a fee petition is filed within the thirty-day period which puts the court, and eventually the government, on notice that the petitioner seeks fees under the Equal Access to Justice Act, the court may consider the petition, and may, absent prejudice to the government or noncompliance with court orders for timely completion of the fee determination, permit supplementation. *Id.*

It is undisputed that Dr. Kane's actual motion for costs was timely filed. What remains to be determined is whether its content was deficient and, if it was, whether it was properly supplemented. Under *Dunn*, a deficient request for fees can be supplemented subsequent to the actual filing unless the government can show it would be prejudiced by it. Here, although a statement regarding income was not included with the original costs' motion, there has been no showing by the Board that it is in any way prejudiced by Dr. Kane's subsequent supplementation via an affidavit. Absent such prejudice, the supplementation is permitted.

Alternatively, §227.485 (5), Wis. Stats., provides a specific list of items required to be filed with the motion for costs. It is undisputed that Dr. Kane submitted the requisite information under that provision, which included an itemized application for fees and other expenses expended in defending this matter. Had the legislature intended prevailing parties to submit information regarding their income levels, such a requirement would have been plainly stated in that section of the statute. Instead, the statute provides elsewhere a sanction for those parties who file motions without having a reasonable basis for doing so. Accordingly, Dr. Kane was not required to provide information about his income level at the same time he submitted his motion for costs.

Whether the Board's positions were substantially justified

Both the Wisconsin and federal courts have held that merely because the government loses a case, an award under §227.485, Wis. Stats., is not justified. *Behnke v. DHSS*, 146 Wis. 2d 178, 183 430 N.W.2d 600 (Ct. App. 1988) (additional citations omitted). The test is essentially one of reasonableness, without more. *Id.* In determining whether the governmental action had a reasonable basis in fact and law, Wisconsin has adopted an "arguable merit" test. *Id.* The arguable merit test lies somewhere between frivolous actions at one end of the spectrum and the substantial evidence test at the other. *Id.* In other words, the government's position must have some arguable merit. What constitutes "arguable merit" must be resolved on a case-by-case basis. *Id.* However, a position with arguable merit is one which lends itself to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy. *Id.* at 184.

Wisconsin courts have also held that "[i]n evaluating the government's position to determine whether it was substantially justified, we look to the record of both the underlying government conduct at issue and the totality of circumstances present before and during litigation." *Bracegirdle v. Board of Nursing*, 159 Wis. 2d 402, 425, 464 N.W.2d 111 (Ct. App. 1990) (additional citations omitted). To satisfy its burden, the government must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. *Id.*

To determine whether the Board was "substantially justified" in pursuing this matter, a brief review of the facts is necessary. In the Fall of 1983, Dr. Kane began a psychotherapeutic relationship with Ms. A. Prior to that, however, Ms. A and Dr. Kane had been involved in a brief, sexual relationship in 1973. Dr. Kane and Ms. A discussed the pros and cons of entering into a therapeutic relationship given their past personal history. Ms. A told Dr. Kane that he was the only therapist that she could trust; that she had nowhere else to turn; that she could not go on living feeling the way she did; and that she was suicidal. Dr. Kane agreed to begin providing therapy, but the two agreed to re-evaluate the situation after one month. Ms. A remained in therapy with Dr. Kane through January of 1987.

In October of 1983, Dr. Kane consulted with another psychologist, Dr. Ackerman, about whether or not he should provide therapy to Ms. A. Dr. Kane disclosed to Dr. Ackerman that he (Kane) and Ms. A had a brief sexual

relationship approximately ten years before but that she nevertheless wanted to enter therapy with him. Dr. Kane also told Dr. Ackerman that Ms. A had seen other therapists without success and that she was presently suicidal. In response, Dr. Ackerman said it was not a "great idea" to enter into therapy with Ms. A, but would not advise against it given the need to take her "suicide threat seriously." Dr. Ackerman also said it was a good idea to establish a one month "trial" period and to make sure that their past personal relationship was discussed further before deciding whether to provide additional therapy.

In March of 1984, Dr. Kane loaned Ms. A $1800.00. Ms. A needed the loan in order to postpone or eliminate a foreclosure action. Dr. Kane had Ms. A execute a promissory note for the loan, with an interest rate of 15% per annum to be paid monthly. In turn, he was given a lien on Ms. A's home. Prior to loaning Ms. A the money, Dr. Kane discussed the matter with Dr. Ackerman. Dr. Ackerman indicated that he would not loan money to anyone he had ever seen in therapy but could not say that he never would. He further suggested that it be handled as a straight business transaction and that they should sign a formal contract.

In April of 1984, Ms. A brought poison and razor blades to Dr. Kane, informing him that she was afraid she would hurt herself if they were too handy. During that same year, Ms. A provided miscellaneous office duties for Dr. Kane. She was paid less than $500.00 for her work.

During the time in which Dr. Kane provided therapy to Ms. A, the Board's statutes and rules were silent with respect to whether or not it was a violation to provide psychotherapy to a patient with whom the psychologist had a prior sexual relationship. However, Principle 6 (a) of the American Psychological Association (APA) Ethics Code, in effect at the time, provided the following:

> Psychologists are continually cognizant of their own needs and of their potentially influential position vis-à-vis persons such as clients, students, and subordinates. They avoid exploiting the trust and dependency of such persons. Psychologists make every effort to avoid dual relationships that could impair their professional judgment or increase the risk of exploitation. Examples of such dual relationships include, but are not limited to, research with and treatment of employees, students, supervisees, close friends, or relatives. Sexual intimacies with clients are unethical.

After a thorough analysis of this provision, Judge Rittel concluded that if exceptional circumstances were present, as they were in Dr. Kane's case, there was not a *per se* prohibition against providing psychological services to individuals with whom a "dual relationship" existed. Furthermore, Judge Rittel found that the APA standard failed to address in any fashion the professional propriety of providing psychological services to a patient with whom the psychologist had previously been sexually involved. Indeed, taking on a patient with whom a psychologist had a previous sexual relationship did not become a specifically enumerated violation of the Psychology Examining Board until 1995. Accordingly, he concluded that Dr. Kane's conduct was neither unprofessional nor grossly negligent under Wisconsin law as it existed at the time.

In *Gilbert v. Medical Examining Board*, 119 Wis. 2d 168, 196, 349 N.W.2d 68 (1984), the Wisconsin Supreme Court defined "unprofessional conduct" to mean actions which do not exhibit minimal competency. The *Gilbert* case involved a physician whose treatment of a patient was alleged to have constituted unprofessional conduct. In analyzing Dr. Gilbert's situation, the court found that it was analogous to negligence law. Under the negligence standard, the court held that it is not the evidence of other physicians utilizing a different treatment or procedure that proves negligence but, rather, that reasonable care and skill usually possessed by physicians of the same school was not exercised. *Id.* at 197 (citations omitted). Similarly, negligence is not demonstrated by an expert simply indicating that he would have used different measures. Instead, the expert's testimony must unequivocally indicate that a minimally competent practitioner would have chosen a different course of treatment which would have avoided or minimized the unacceptable risks. *Id*.

The *Gilbert* case is highly persuasive. Here, as in *Gilbert*, there is an analogous relationship that existed between a patient (Ms. A) and her treatment provider (Dr. Kane). There, as here, the issue was whether the practitioner utilized reasonable skill and care in treating a patient. Although it was ultimately decided that Dr. Kane's conduct did not fall below the minimally accepted standards, one could reasonably argue, given Principle 6 (a) of the American Psychological Association Ethics Code, that because a dual relationship was created when Dr. Kane agreed to loan Ms. A money and when he hired her as an office employee, he was not adhering to the minimally acceptable standards and could therefore be subject to disciplinary action. Likewise, one could reasonably argue that given the prior, albeit brief, sexual history between Ms. A and Dr. Kane, he should not have entered into a therapeutic relationship with her nor should he have continued it over the course of several years. The fact that the Board did not ultimately prevail on those allegations is not to say that they were without arguable merit. Indeed, given the record, a reasonable connection appears to exist between the facts alleged and the legal theory advanced.

However, such is not the case with respect to the allegations wherein gross negligence is alleged. Under the *Gilbert* rationale, the testifying expert must unequivocally indicate that a minimally competent practitioner would have chosen a different course of treatment which would have avoided or minimized the unacceptable risks. According to *Gilbert*, an expert cannot merely indicate that he would have used different measures to treat a

patient. On direct examination, the Board's expert, Dr. Stamps, testified that he believed that Dr. Kane was grossly negligent for having entered into therapy with Ms. A and for having continued that therapy for several years. He also testified on direct examination that Dr. Kane's conduct was grossly negligent because he loaned Ms. A money and also because he employed her while she was a patient.

But Dr. Stamps' conclusions on direct are severely undermined by his testimony on cross-examination wherein the following exchange occurred:

Q: (by Attorney Erickson) Can you define for me what negligence is?

A: Negligence is the failure to do what would be appropriate for a person in need.

Q: Where did you get that definition?

A: I just pulled it out of my hat.

Q: If you don't know the answer to my questions, would you tell me that?

A: Sure.

Q: I don't want you speculating here. Do you know what the definition of negligence is in the State of Wisconsin?

A: Offhand? Today? When?

Q: Yeah, today. You're on the witness stand. You're under oath.

A: At this point I would have to look at it.

Q: Well, you understand that you've been asked to testify that Dr. Kane is grossly negligent; true?

A: True.

Q: Well, to determine whether or not he was even negligent, you'd have to know what the definition is, wouldn't you?

A: Sure.

Q: And gross negligence according to the questions that you were directed by Mr. Zwieg to answer is more serious than negligence?

A: Yes.

Q: You understand that?

A: Yes.

Q: So you don't even know where the bar is set yet, do you?

A: Well, I don't know that.

It is apparent from this exchange that Dr. Stamps did not have an understanding of what constituted either negligence or gross negligence. As a result, his testimony on direct examination with respect to the four counts of gross negligence must be discredited. It is not sufficient for an expert to simply recite a legal formula. He must understand the meaning behind what it is he is saying. Moreover, there is no evidence in the record that Dr. Stamps' testimony on cross-examination was subsequently rehabilitated. Consequently, there is no reasonable connection between the facts alleged and the legal theory advanced. Costs shall therefore be awarded to Dr. Kane concerning the four counts which alleged gross negligence.

Whether the costs that have been submitted are appropriate

Dr. Kane submitted an itemized list of the costs and fees attributable to defending this matter. Complainant argues that even if Dr. Kane is entitled to an award of costs, some of them are inappropriate or otherwise not permitted by statute. Section 227.485 (5), Wis. Stats., provides, in part, that a hearing examiner "shall determine the amount of costs using the criteria specified in s. 814.245 (5)." Section 814.245 (5), Wis. Stats., states:

> If the court awards costs under sub. (3), the costs shall include all of the following which are applicable:
>
> (a) The reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for

> the preparation of the case and reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:
>
> 1. No expert witness may be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency which is the losing party.
>
> 2. Attorney or agent fees may not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee.

Additionally, the court of appeals in *Stern v. DHFS*, 212 Wis. 2d 393, 569 N.W.2d 79 (Ct. App. 1997), held that the "[m]ovant bears the burden of producing satisfactory evidence of the prevailing market rate for the kind and quality of services rendered." (citation omitted).

Section 227.485 (4), Wis. Stats, further provides:

> In determining the prevailing party in cases in which more than one issue is contested, the examiner shall take into account the relative importance of each issue. The examiner shall provide for partial awards of costs under this section based on determinations made under this subsection.

The complainant has determined that there were a total of 332.005 hours billed for Dr. Kane's attorneys' fees. Of those hours, 320.405 of them were billed at a rate that was greater than $75/hour; 11.60 of those hours were billed at $30/hour. Dr. Kane's attorneys do not dispute that assertion, nor do they justify why their higher rates are warranted. But because there has been no showing as to why the higher rates are justified, they will not be awarded. Similarly, there is an itemized statement from Dr. Gonsiorek, one of Dr. Kane's experts, in which he billed 3.5 hours at $165/hour. Under §814.245 (5), Wis. Stats., experts are not entitled to be compensated at a rate that exceeds what the agency paid its expert witnesses. In this case, the agency paid its expert at a rate of $75/hour. Accordingly, Dr. Kane is only entitled to recover his expert fees at the $75/hour rate.

If the fees are readjusted under the rates set forth above, the following totals result: 320.405 hours @ $75/hour = $24,030.38; 11.60 hours @ $30/hour = $348.00. The combined attorney fees therefore total $24,378.38. The other itemized costs in this matter, which include a downward adjustment for Dr. Gonsiorek's fees, total $3123.80.

For purposes of determining the costs to be awarded in this matter, it must be noted again that Dr. Kane prevailed on four of the eight counts alleged in the Complaint. The four counts on which he prevailed alleged gross negligence, which is one of the most serious charges that a licensed professional can face. In order to mount a defense to such charges, expert testimony must be sought, extensive research must be conducted, and considerable time must be expended interviewing witnesses, taking deposition, obtaining documents and so forth. In defending the allegations involving gross negligence, Dr. Kane was simultaneously defending the allegations that his conduct had fallen below the minimal standards of his profession. Because those are, in effect, the lesser-included allegations in this case, they would ultimately warrant far less effort to defend once the research, investigation, and time had been expended on the allegations involving gross negligence. Accordingly, it is reasonable for Dr. Kane to recover the majority of his expenses as follows: three-quarters of his attorney fees and all of the non-attorney fee costs. The total amount to be reimbursed is $21,146.59.

Dr. Kane has also requested that his attorneys be reimbursed for the work they expended on the issue of costs. Because this is not the proper forum for that matter, it will not be addressed here.

Dated this 19th day of April, 2001.

STATE OF WISCONSIN

DEPARTMENT OF REGULATION & LICENSING

Jacquelynn B. Rothstein

Administrative Law Judge