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☛ Details: Complaints

(FORM UPDATED: 08/11/2010)

## WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

**2003-04**

(session year)

**Joint**

(Assembly, Senate or Joint)

**Committee for Review of Administrative Rules...**

### **COMMITTEE NOTICES ...**

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

### **INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL**

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)  
(**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)  
(**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

\* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

March 5, 2003

WRITER'S DIRECT LINE  
414.297.5601

Honorable Glenn Grothman  
Assembly Co-Chair  
Joint Committee for Review of  
Administrative Rules  
State Capitol 15 North  
Madison, Wisconsin

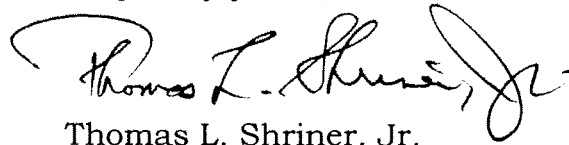
Honorable Joseph K. Leibham  
Senate Co-Chair  
Joint Committee for Review of  
Administrative Rules  
State Capitol 409 South  
Madison, Wisconsin

Re: *R.J. Reynolds Smoke Shop, Inc. d/b/a RJR Direct v.  
Department of Revenue  
Case No. 02-CV-3644 (Dane Cty.)*

Dear Representative Grothman and Senator Leibham:

In this proceeding, which was commenced as a petition for judicial review of an agency decision, we have recently, with the consent of the Attorney General, amended the pleadings to add a claim for declaratory judgment relief, thereby arguably triggering the requirement of sec. 227.40(5), Stats., that the Joint Committee for Review of Administrative Rules be served with a copy. Enclosed and served upon you herewith are copies of the Amended Petition for Review, which includes the sec. 227.40 request for relief, along with copies of the original Petition for Review and the Department's Notice of Appearance and Statement of Position, which together are all of the substantive filings in the case thus far. No further proceedings have occurred, and nothing has yet been scheduled.

Very truly yours,



Thomas L. Shriner, Jr.

Enclosures

cc: Charlotte Gibson, Esq.  
Assistant Attorney General

**R.J. REYNOLDS SMOKE SHOP, INC.,**  
**d/b/a RJR DIRECT**  
1001 Reynolds Boulevard  
Winston-Salem, North Carolina,

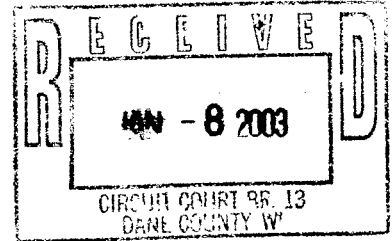
Case No. 02-CV-3644  
Case Code: 30607  
Administrative Agency Review

Petitioner,

vs.

**DEPARTMENT OF REVENUE**  
2135 Rimrock Road  
Madison, Wisconsin,

Respondent.



**AMENDED PETITION FOR REVIEW**

R.J. Reynolds Smoke Shop, Inc., d/b/a RJR Direct, the petitioner, with the consent of the respondent, the Department of Revenue, amends its petition for review herein as follows:

**PETITION FOR REVIEW**

1. The allegations of the petition for review are repeated, realleged, and incorporated herein by reference as if fully set forth herein.

**COMPLAINT FOR DECLARATORY JUDGMENT**

2. In the alternative, the decision described in paragraph 5 of the petition may constitute a "rule," within the meaning of sec. 227.01(13), Stats.

3. If and to the extent that the decision is a rule, such rule is invalid in that it exceeds the respondent's statutory authority and violates the United States Constitution, all as set

forth in the petition, and was promulgated without compliance with statutory rule-making procedures.

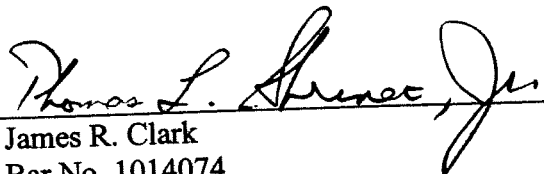
4. If and to the extent that the decision is a rule, such rule and its application to the petitioner interferes with and impairs, and threatens to continue to interfere with and impair, the petitioner's legal rights and privileges.

5. The petitioner is entitled to a declaratory judgment, pursuant to sec. 227.40, Stats., that the decision, if and to the extent that it is a rule, is invalid.

WHEREFORE, the petitioner respectfully prays that, in addition to the relief sought by its petition, if and to the extent that the decision complained of is a rule, the Court declare the rule invalid.

Respectfully submitted,

FOLEY & LARDNER

By:   
James R. Clark  
Bar No. 1014074  
Thomas L. Shriner, Jr.  
Bar No. 1015208

FOLEY & LARDNER  
777 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202-5367  
414-271-2400  
414-297-4900 Facsimile

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 13

DANE COUNTY

---

R.J. REYNOLDS SMOKE SHOP,  
INC., D/B/A RJR DIRECT,

Petitioner,

v.

Case No. 02-CV-3644

DEPARTMENT OF REVENUE,

Respondent.

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NOTICE OF APPEARANCE AND STATEMENT OF POSITION

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TO: James R. Clark/Thomas L. Shriner, Jr.  
Foley & Lardner  
777 East Wisconsin Avenue  
Milwaukee, WI 53202-5367

PLEASE TAKE NOTICE that Assistant Attorney General Charlotte Gibson appears for the Department of Revenue ("DOR") in the above-entitled action and demands that all documents hereafter filed in this action be served upon her at her office, located at 17 West Main Street, Post Office Box 7857, Madison, Wisconsin 53707-7857.

TAKE FURTHER NOTICE that DOR admits the allegations contained in paragraphs 1-3 and 5 of the petitioner's petition for writ of certiorari, denies the allegations contained in paragraphs 4, 7-9 and 11, and lacks sufficient information to admit or deny paragraph 10.

Regarding the allegation contained in paragraph 6, DOR notes that no hearing was held in this matter and no factual record developed. DOR believes that its October 24, 2002, letter may need to be treated as a rule, not an agency decision, and review thus conducted pursuant to

Wis. Stat. § 227.40. See *Frankenthal v. Wisconsin R.E. Brokers' Board*, 3 Wis. 2d 249, 253, 88 N.W.2d 352 (1958).

Dated this 11<sup>th</sup> day of December, 2002.

JAMES E. DOYLE  
Attorney General



CHARLOTTE GIBSON  
Assistant Attorney General  
State Bar #1037555

Attorneys for Respondent

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-7656

gibsoncj\rjr smoke shop\statement of position.doc

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

**R.J. REYNOLDS SMOKE SHOP, INC.,**  
**d/b/a RJR DIRECT**  
1001 Reynolds Boulevard  
Winston-Salem, North Carolina,

Petitioner,

vs.

**DEPARTMENT OF REVENUE**  
2135 Rimrock Road  
Madison, Wisconsin,

Respondent.

Case No. **02CV3644**

Case Code: 30607

Administrative Agency Review

STATE OF WISCONSIN  
CIRCUIT COURT, DANE COUNTY  
JANUARY 28, 2000  
FILED WITH THE CLERK  
OF CIRCUIT COURT

STEPH A. COLEMAN  
CLERK OF CIRCUIT COURT

CIRCUIT COURT  
02 NOV 21 AM 10:58  
DANE COUNTY, WI

**PETITION FOR REVIEW**

R.J. Reynolds Smoke Shop, Inc., d/b/a RJR Direct, the petitioner, seeks review, pursuant to sec. 227.52, Stats., of an administrative decision of the Department of Revenue, the respondent, as more fully described herein.

1. The petitioner is a Delaware corporation with its business located in Winston-Salem, North Carolina.
2. The respondent is a department within the executive branch of state government, created by sec. 15.43, Stats., and is, therefore, an "agency" within the meaning of ch. 227, Stats.
3. On or about January 28, 2000, the petitioner filed with the respondent an application for the issuance of a permit under sec. 139.34, Stats., to act as a cigarette and tobacco products distributor.

4. The petitioner paid the required fee and established that it met all the legal criteria for the issuance of the requested permit.

5. On October 24, 2002, the respondent denied the requested application and that day mailed the letter containing its decision to the petitioner, which received it on October 28, 2002. A true copy of the letter, which contains all the reasons assigned by the respondent for its decision, is attached hereto as Exhibit A and incorporated herein by reference as if fully set forth.

6. Notwithstanding the limitation contained in sec. 227.52(1), Stats., on judicial review of certain decisions of the respondent, judicial review under ch. 227 of denials of permits of the type involved herein is specifically authorized under sec. 139.34(1)(e), Stats.

7. The respondent's decision is subject to review and should be set aside upon the ground that, pursuant to sec. 227.57(5), Stats., the respondent has erroneously interpreted a provision of law, and a correct interpretation compels issuance of the requested permit.

8. Wisconsin's cigarette statutes do not require the applicant for a cigarette and tobacco products distributor permit to first obtain, as a condition precedent to issuance of a permit, a municipal retail license.

9. Wisconsin's cigarette statutes do not require sellers of cigarettes at retail who are located outside Wisconsin, as is the petitioner, and who wish to sell to customers who reside in Wisconsin, as the petitioner does, to obtain a retail cigarette license from a Wisconsin municipality prior to making such retail cigarette sales; nor do those statutes require that retail cigarette sales to customers who reside in Wisconsin be "face to face" sales.



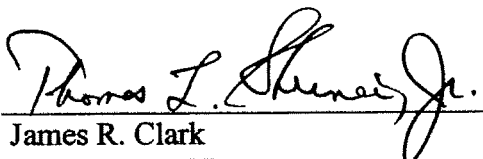
10. Alternatively, Wisconsin's cigarette statutes do not prohibit the petitioner from limiting its activities as a cigarette distributor to receiving unstamped cigarettes from the manufacturer, purchasing and affixing Wisconsin cigarette excise tax stamps to packages of cigarettes for sale to a related corporate entity, neither a subsidiary of, nor controlled by the petitioner and also located outside Wisconsin, for resale to customers who reside in Wisconsin.

11. If Wisconsin's cigarette statutes did impose the requirements described in paragraph 8-10, above, so as to prevent sales of cigarettes by sellers located outside Wisconsin to buyers located in Wisconsin, they would violate art. I, sec. 8, cl. 3 of the United States Constitution, the Commerce Clause, by unduly interfering with the sale in interstate commerce of products that are lawful to be bought and lawful to be sold in both the state where the seller resides and the state where the buyer resides.

WHEREFORE, the petitioner respectfully prays that the Court review the respondent's decision that is the subject of this proceeding and, upon such review, that it reverse and set aside the decision and compel the respondent to issue the requested permit.

Respectfully submitted,

FOLEY & LARDNER

By:   
James R. Clark  
Bar No. 1014074  
Thomas L. Shriner, Jr.  
Bar No. 1015208

FOLEY & LARDNER  
777 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202-5367  
414-271-2400  
414-297-4900 Facsimile



**State of Wisconsin • DEPARTMENT OF REVENUE**

AUDIT BUREAU • 2136 RIMROCK RD • MAIL STOP 5-107 • MADISON, WISCONSIN 53713  
TELEPHONE (608) 266-8701 • FAX (608) 261-7048 • <http://www.dor.state.wi.us>

October 24, 2002

ADDRESS MAIL TO:  
Excise Tax Section/Mail Stop 5-107  
PO Box 8008  
Madison, WI 53708-8008

MARK TOLLAND  
SENIOR TAX COUNSEL, REGULATORY AFFAIRS  
RJ REYNOLDS TOBACCO COMPANY  
WINSTON-SALEM, NC 27102

Dear Mr. Tolland:

This is to advise you that the application for a Wisconsin Cigarette Permit by R. J. Reynolds Smoke Shop, Inc. d/b/a RJR Direct is being denied. The Wisconsin Cigarette Tax statutes require all sellers of retail cigarette in the State of Wisconsin obtain a local retail cigarette license prior to making any retail cigarette sales, and that there be a face to face sale.

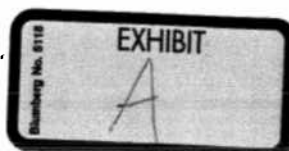
James Jenkins, Chief  
A&T Enforcement Section  
(608) 266-2479  
FAX (608) 266-1703  
[Jjenkins@dor.state.wi.us](mailto:Jjenkins@dor.state.wi.us)

John Nordlie, Chief  
Excise Tax Section  
(608) 267-3556  
FAX (608) 261-7049  
[Jnordlie@dor.state.wi.us](mailto:Jnordlie@dor.state.wi.us)

RECEIVED

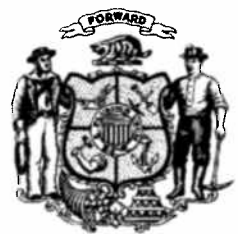
OCT 28 2002

TAX DEPT.





# WISCONSIN STATE LEGISLATURE



WILLIAM J. HISGEN, M.D  
1215 Garfield Street  
Madison, WI 53711,

Plaintiff

v.

Case No. 04-CV-3612  
Case Code: 30701 Declaratory Judgment

MEDICAL EXAMINING BOARD,  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708-8935

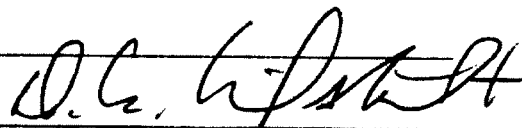
and

WISCONSIN DEPARTMENT OF REGULATION  
AND LICENSING,  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708-8935

Defendants.

**ADMISSION OF SERVICE**

Receipt of a copy of the Summons and Complaint for Declaratory Judgment and Injunction and Plaintiff's First Set of Written Discovery filed in the above-captioned case is hereby admitted this 16<sup>th</sup> day of November, 2004. The undersigned acknowledges that he or she is authorized to accept service of the Complaint for Declaratory Judgment and Injunction and First Set of Written Discovery on behalf of Senator Joseph Leibham, Senate Co-Chair of the Joint Committee for the Review of Administrative Rules.

Name:  16-NOV-04  
Title: LEGISLATIVE AIDE  
(DANIEL LINDSTEDT)

November 16, 2004

**VIA MESSENGER**

Ms. Judith A. Coleman  
Clerk of Circuit Court  
Dane County Courthouse  
210 Martin Luther King, Jr. Blvd.  
Madison, WI 53703

Re: *William J. Hisgen, M.D. v. Medical Examining Board and Wisconsin Department  
of Regulation and Licensing*

Dear Ms. Coleman:

Enclosed for filing please find the original and eight copies of the Summons and  
Complaint for Declaratory Judgment and Injunction in reference to the above matter.

Very truly yours,

MICHAEL BEST & FRIEDRICH LLP



Edward J. Pardon

Enclosures

cc: Medical Examining Board  
Wisconsin Department of Regulation & Licensing  
Attorney General Peg Lautenschlager  
Joint Committee for the Review of Administrative Rules  
Jeanette Lytle, Esq.

PATRICK J. FIEDLER  
CIRCUIT COURT 605 S

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH \_\_\_\_\_

DANE COUNTY

WILLIAM J. HISGEN, M.D.  
1215 Garfield Street  
Madison, WI 53711,

Plaintiff

v.

**04CV3612**

Case No. \_\_\_\_\_  
Case Code: 30701 Declaratory Judgment

MEDICAL EXAMINING BOARD,  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708-8935

and

WISCONSIN DEPARTMENT OF REGULATION  
AND LICENSING,  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708-8935

Defendants.

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**SUMMONS**

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THE STATE OF WISCONSIN

To each Defendant named above:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer

must be filed with the Court, whose address is Clerk of Circuit Court, Dane County Courthouse, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53703, with copies sent or delivered to attorneys for the plaintiff: Edward J. Pardon, Michael Best & Friedrich LLP, One South Pinckney Street, Suite 700, Post Office Box 1806, Madison, Wisconsin 53701-1806.

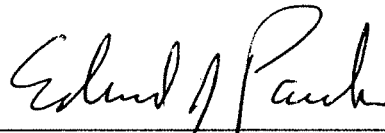
You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 16<sup>th</sup> day of November, 2004.

MICHAEL BEST & FRIEDRICH LLP  
Attorneys for William J. Hisgen, M.D.

By:



---

James R. Troupis, SBN 1005341  
Edward J. Pardon, SBN 1036155

MICHAEL BEST & FRIEDRICH LLP  
One South Pinckney Street, Suite 700  
P.O. Box 1806  
Madison, WI 53701-1806  
Telephone: (608) 257-3501

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

BRANCH

.../10 | 30711 '04

WILLIAM J. HISGEN, M.D.  
1215 Garfield Street  
Madison, WI 53711,

Plaintiff

v.

Case No. **04CV3812**  
Case Code: 30701 Declaratory Judgment

MEDICAL EXAMINING BOARD,  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708-8935

and

WISCONSIN DEPARTMENT OF REGULATION  
AND LICENSING,  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708-8935

Defendants.

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**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION**

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Plaintiff William J. Hisgen, M.D., by his attorneys Michael Best & Friedrich LLP, and for his complaint against the Defendant, states and alleges as follows:

**THE PARTIES**

1. Plaintiff William J. Hisgen, M.D., is duly licensed in the State of Wisconsin to practice medicine and surgery (license #16404). Dr. Hisgen has a principal place of business at 202 S. Park St., 2 North, Madison, WI 53715.

2. Defendants Medical Examining Board ("Board") and Department of Regulation and Licensing ("Department") are agencies of the State of Wisconsin as defined in Wis. Stats.



§ 227.01. The Board exists pursuant to Chapter 448 of the Wisconsin Statutes for the purposes, among others, of enforcing the provisions of Chapter 448 and promulgating rules related to the practice of medicine and surgery and the licensure of physicians. The Department exists pursuant to Chapter 440 for the purposes, among others, of promulgating rules for filing and investigating disciplinary proceedings and prosecuting disciplinary complaints before the Board.

3. The Board and the Department have been properly named as defendants in this action pursuant to Wis. Stats. §§ 227.40(1) and 806.04(1). Venue in this Court is proper pursuant to Wis. Stats. §§ 227.40(1) and 801.50(3).

### **BACKGROUND**

4. This action arises out of a disciplinary proceeding initiated by the Board and prosecuted by the Department against Dr. Hisgen. A copy of the complaint in the proceeding, Complaint LS# 0410281 MED and Division of Enforcement Case No. 01 MED 225 (hereafter the “disciplinary complaint”) is attached hereto as Exhibit 1. The allegations made in the disciplinary complaint (but not the truth thereof) are incorporated by reference.

5. The disciplinary complaint charges Dr. Hisgen with unprofessional conduct pursuant to Wis. Admin. Code § MED 10.02(p), which defines unprofessional conduct as providing controlled substances “otherwise than in the course of legitimate professional practice, or as otherwise prohibited by law.”

6. The disciplinary proceeding arises out of care and treatment that Dr. Hisgen provided to patient S.R. beginning in or about 1998. At that time, Dr. Hisgen assumed primary care for patient S.R. He continued to do so at all times during the period set forth in the disciplinary complaint.

7. According to the disciplinary complaint, S.R. appeared to have legitimate pain and an addiction specialist had determined that she did not exhibit evidence of addiction.

8. Dr. Hisgen also sought to have patient S.R. evaluated by other medical professionals, specializing in, among other things, physical medicine and rehabilitation, pain management, neurosurgery, and physical therapy.

9. None of the additional evaluating medical professionals diagnosed patient S.R. as having a drug addiction.

10. At all times during the period set forth in the disciplinary complaint, Dr. Hisgen and/or his employer maintained all records required by law regarding the dispensation or administration of pain medication to patient S.R. Dr. Hisgen likewise maintained a written pain agreement and maintained adequate charting, setting forth clear goals for patient S.R. In addition, Dr. Hisgen conducted medically appropriate physical examinations of patient S.R. and identified a supportable diagnosis. He also considered alternative modes of treatment.

11. Wis. Stat. § 448.01(9) defines the practice of medicine and surgery as, *inter alia*:

(a) To examine into the fact, condition or cause of human health or disease, or to treat, operate, prescribe or advise for the same, by any means or instrumentality.

(b) To apply principles or techniques of medical sciences in the diagnosis or prevention of any of the conditions described in par. (a) and in sub. (2).

12. Wis. Stat. § 448.01(2) defines “disease” to mean: “any pain, injury, deformity or physical or mental illness or departure from complete health or the proper condition of the human body or any of its parts.”

13. At all times during the period set forth in the disciplinary complaint, Dr. Hisgen’s actions with respect to patient S.R. were for the purpose of examining into the fact, condition or cause of patient S.R.’s health and/or disease, and to treat, operate, prescribe and/or advise her with respect to her health and/or disease.

14. At all times during the period described in the disciplinary complaint, Dr. Hisgen's actions with respect to patient S.R. applied the principles or techniques of medical sciences in the diagnosis and treatment of her health conditions and/or in the prevention of disease.

15. At no time did Dr. Hisgen prescribe or provide controlled substances to patient S.R. for any purpose other than for the treatment of what he believed to be legitimate disease.

16. The disciplinary complaint does not allege that Dr. Hisgen prescribed or provided controlled substances to S.R. for any purpose other than for the treatment of what he believed to be legitimate disease.

17. At all times, Dr. Hisgen's actions with respect to S.R. constituted the legitimate practice of medicine and surgery as defined by Wis. Stat. § 448.01(9).

18. The disciplinary complaint does not allege that Dr. Hisgen prescribed controlled substances in violation of any applicable law.

#### **FIRST CAUSE OF ACTION**

##### **Wis. Admin Code § MED 10.02(p) as Applied is Unconstitutionally Vague**

19. The allegations of paragraphs 1 – 18 are incorporated herein by reference.

20. The definition of "unprofessional conduct" as defined by Wis. Admin Code MED 10.02(p) fails to provide objective standards for determining that Dr. Hisgen's actions did not take place "in the course of legitimate professional practice" and lack the requisite specificity needed to provide fair notice to those who wish to obey the law that their conduct falls within the proscribed area.

21. As applied to Dr. Hisgen, Wis. Admin Code § MED 10.02(p) is void for vagueness under the due process provisions of the United States and Wisconsin constitutions.

22. The Board's investigation and enforcement action against Dr. Hisgen, by which the Board is enforcing and administering a regulation that is unconstitutionally vague, interferes with, impairs and threatens to interfere with and impair the legal rights and privileges of Dr. Hisgen.

## SECOND CAUSE OF ACTION

### Failure To Promulgate an Administrative Rule

23. The allegations of paragraphs 1 – 22 are incorporated herein by reference.

24. Upon information and belief, the Board has expressly refused to adopt standards for chronic pain management.

25. Upon information and belief, the Board and the Department have investigated and prosecuted over 24 disciplinary proceedings involving excessive prescription of medication.

26. In doing so, the Board is operating pursuant to policies that have never been made public and have never been promulgated as rules.

27. Pursuant to Wis. Stat. §§ 15.08(5)(b) and 448.015(4), the Board is empowered to promulgate rules to define unprofessional conduct. The Board's actions in prosecuting Dr. Hisgen constitute an attempt to initiate a policy to enforce Wis. Stat. §§ 15.08(5)(b), 448.015(4), and 448.02(3) without having properly promulgated that policy as an administrative rule under the Board's rule-making powers and pursuant to Wis. Stat. Ch. 227.

28. The Board has used or attempted to apply a particular policy to enforce or administer Wis. Stat. §§ 15.08(5)(b), 448.015(4), and 448.02(3) without having properly promulgated that policy as an administrative rule under the Board's rule-making powers and pursuant to Wis. Stat. Ch. 227, Subch. II.

29. The Board's attempt to enforce or administer Wis. Stat. §§ 15.08(5)(b), 448.015(4), and 448.02(3) pursuant to a policy that has not been properly promulgated as an administrative rule under Wis. Stat. Ch. 227, Subch. II, constitutes an invalid exercise of the Board's authority.

30. The Board's investigation and enforcement action against Dr. Hisgen, by which the Board is enforcing and administering Wis. Stat. §§ 15.08(5)(b), 448.015(4), and 448.02(3) pursuant to a policy which has not been properly promulgated as an administrative rule, interferes with, impairs and threatens to interfere with and impair the legal rights and privileges of Dr. Hisgen.

### **THIRD CAUSE OF ACTION**

#### **Injunctive Relief**

31. The allegations of paragraphs 1-30 are incorporated herein by reference.

32. As alleged herein, the Board's efforts to enforce Wis. Stat. §§ 15.08(5)(b), 448.015(4), 448.02(3), and Wis. Admin. Code § MED 10.02(p) have resulted in irreparable injury to the rights and interests of Dr. Hisgen and threaten to cause further irreparable injury to Dr. Hisgen and others.

33. Further efforts by the Board to enforce Wis. Stat. §§ 15.08(5)(b), 448.015(4), 448.02(3), and Wis. Admin. Code § MED 10.02(p) against Dr. Hisgen will result in additional substantial and irreparable injury to the rights and interests of Dr. Hisgen including his rights under the United States and Wisconsin constitutions.

34. The irreparable injury to Dr. Hisgen's rights and interests that has occurred and will occur in the future cannot be adequately compensated through legal remedies. Dr. Hisgen has no adequate remedy at law.

35. Dr. Hisgen is entitled to an injunction from this Court permanently enjoining the Board and the Department from (a) enforcing or seeking to enforce the disciplinary complaint against Dr. Hisgen by pursuing its pending enforcement action, or otherwise, for actions stemming from his treatment of S.R.; and (b) enforcing or seeking to enforce Wis. Stat. §§ 15.08(5)(b), 448.015(4), 448.02(3) and/or and Wis. Admin. Code § MED 10.02(p) in the absence of a properly promulgated administrative rule.

WHEREFORE, Plaintiff William J. Hisgen, M.D., demands judgment in his favor and against the Board and the Department, as follows:

A. For an Order declaring Wis. Admin. Code § MED 10.02(p) as applied to Dr. Hisgen in the disciplinary complaint unconstitutionally vague under the due process provisions of the United States and Wisconsin constitutions;

B. For an Order declaring that the Board's attempt to enforce or administer Wis. Stat. §§ 15.08(5)(b), 448.015(4), and 448.02(3) pursuant to a policy that has not been properly promulgated as an administrative rule under Wis. Stat. Ch. 227, Subch. II, constitutes an invalid exercise of the Board's authority;

C. For an injunction permanently enjoining the Board and the Department from (a) enforcing or seeking to enforce the disciplinary complaint against Dr. Hisgen by pursuing this pending enforcement action, or otherwise, for actions stemming from his treatment of S.R.; and (b) enforcing or seeking to enforce or administer Wis. Stat. §§ 15.08(5)(b), 448.015(4), 448.02(3), and/or Wis. Admin. Code § MED 10.02(p) in the absence of a properly promulgated administrative rule.

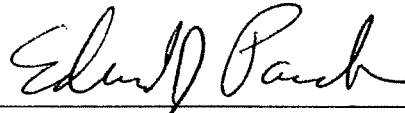
D. For the costs and attorney's fees incurred in this action to the full extent permitted by law.

E. For such further relief as the Court deems just and equitable.

Dated this 16<sup>th</sup> day of November, 2004.

MICHAEL BEST & FRIEDRICH LLP  
Attorneys for Plaintiff

By:



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STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY  
PROCEEDINGS AGAINST

WILLIAM HISGEN, M.D.,  
RESPONDENT.

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:  
:  
:  
:

COMPLAINT  
LS # 0410281 MED

Division of Enforcement Case No. 01 MED 225

The Division of Enforcement, upon information and belief, alleges:

1. Respondent William Hisgen (d.o.b. 6/20/1941) is duly licensed in the state of Wisconsin to practice medicine and surgery (license #16404). This license was first granted on July 10, 1968. Respondent's specialty is internal medicine.

2. Respondent's latest address on file with the Department of Regulation and Licensing is 202 S. Park St., 2 North, Madison, WI 53715.

3. Respondent became the primary physician of patient S.R., also known as patient S.Y. or patient S.Y.R., in or about 1998. Prior to 1998 patient S.R. had been seen by others at Respondent's clinic and was suspected by others of drug seeking behaviors. The drug seeking behaviors were documented in S.R.'s chart.

4. Patient S.R. was diagnosed with bulging discs in her back and sciatic nerve problems. Although she did appear at times to have pain, she claimed that her pain was not controlled with normal doses of pain medication and requested unusually large amounts of opiates for her pain.

5. Patient S.R. was referred by another physician for an addiction consultation. Based solely on an oral interview with S.R., it was determined that there was no evidence of addiction.

6. Despite the appearance of some legitimate pain and an evaluation based on an oral interview that did not find evidence of addiction, there were numerous signs that S.R. was in fact drug-seeking, including but not limited to:

- (a) Patient using two names and having two clinic charts;
- (b) Patient denying or altering personal information during interviews;
- (c) Patient frequently visiting ER requesting pain medications;
- (d) Patient not showing up for referrals to pain clinic and other treaters;
- (e) Patient claiming to have lost medication, disposed of medication or had medication stolen and asking for early refills on several occasions;





- (f) Patient requesting early refills on a frequent basis because of alleged increases in her pain;
- (g) Patient requesting early refill because she left her pills at home when visiting new grandchild (yet she lived near the hospital where the grandchild was born);
- (h) Patient requesting early refills with no clear explanation for running out of medication;
- (i) Patient showing 5/5 Waddell signs (signs indicating non-organic pain);
- (j) Patient appeared to others to be very medicated, with slurred speech and slowed movement;
- (k) Patient reportedly has a "tendency to lie";
- (l) Patient lost custody of children for reportedly giving her medications to her four year old child;
- (m) Patient reports having "jars of morphine tablets at home";

7. Respondent was informed of S.R.'s behaviors as described above, but insisted that Respondent was not a drug seeker and simply had a high tolerance for opiates. Respondent failed to implement reasonable measures to monitor S.R. for addiction, such as:

- (a) Conducting a risk assessment;
- (b) Requiring S.R. to enter into an agreement regarding her medication use and drug seeking behaviors;
- (c) Requiring S.R. to undergo drug testing to determine what and how much she was taking;
- (d) Requiring S.R. to bring in her medications for a pill count;

8. Respondent himself made the following notations in S.R.'s chart regarding her drug-seeking behaviors:

- (a) "In any event things have gotten out of hand." 5-18-99
- (b) "She does have a tendency to lie according to her friends. This seems to be a pathological habit. It does not mean that she does not have any pain, it is just that it makes her appear to be less trustworthy." 5-18-99
- (c) "Part of the problem with [S.R.] is that she loses control. She clearly has pain but becomes very desperate when pain medication does not work and then takes the pain medication in excess. This certainly exhibits addictive behavior despite the fact that she has a real reason for pain." 7-26-99

9. Patient S.R. was arrested on or about August 24, 2001 for allegedly selling her narcotics.

10. On or about October 24, 2001, after Patient S.R.'s arrest, Respondent asked a physician at a pain clinic to take over management of S.R.'s pain medication.

11. On November 17, 2001, after another physician had taken over management of S.R.'s pain medications, S.R. called Respondent stating that her medications were stolen, and Respondent wrote her a new prescription.

12. The physician who took over management of S.R.'s pain medications required drug tests and on at least two occasions the tests were positive for street drugs including cannabinoids, cocaine and benzodiazepines, as well as hydrocodone (for which she did not have a current prescription).


#### CAUSE OF ACTION

1. Complainant realleges and incorporates by reference the allegations contained in paragraphs 1 through 12 above.

2. Respondent's conduct with respect to S.R., as described above, constitutes a violation of Wis. Stat. § 448.02(3)(c) and Wis. Admin. Code § MED 10.02(2)(p).

WHEREFORE, Complainant requests that the Medical Examining Board hear evidence relevant to the matters recited herein, and determine and impose discipline as warranted. Complainant further requests that the Board assess against the respondent all costs of the proceeding and order them paid to the Department of Regulation and Licensing, pursuant to sec. 440.22, Stats.

Dated this 5th day of October, 2004.

  
\_\_\_\_\_  
Jeanette Lytle  
Attorney  
Division of Enforcement  
Department of Regulation and Licensing  
1400 E. Washington Ave.  
Madison, WI 53704  
(608) 266-9840

WILLIAM J. HISGEN, M.D  
1215 Garfield Street  
Madison, WI 53711,

Plaintiff

v.

Case No. 04-CV-3612  
Case Code: 30701 Declaratory Judgment

MEDICAL EXAMINING BOARD,  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708-8935

and

WISCONSIN DEPARTMENT OF REGULATION  
AND LICENSING,  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708-8935

Defendants.

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**PLAINTIFF'S FIRST SET OF WRITTEN DISCOVERY**

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Plaintiff William J. Hisgen, M.D., , by his attorneys Michael Best & Friedrich LLP, hereby request, pursuant to Wis. Stat. §§ 804.08 and 804.09 that the Medical Examining Board ("Board") and the Wisconsin Department of Regulation and Licensing ("Department"), respond in writing, under oath and within thirty (30) days to the following Interrogatories and Document Requests and produce within thirty (30) days all documents which are responsive thereto. Documents should be produced at the offices of Michael Best & Friedrich LLP, One South Pinckney Street, Madison, Wisconsin 53703, unless reasonable prior notice is given that such

documents will be produced at an alternate location consistent with the Wisconsin Rules of Civil Procedure.

### **DEFINITIONS AND INSTRUCTIONS**

1. The term "Defendant," "you" or "your" shall mean and refer to the Board, the Department, and any and all of their, agents, employees, attorneys, representatives or others acting on their behalf or at their direction.

2. The term "document" or "documents" is used in the broadest sense to include all documents and things within the scope of Wis. Stat. § 804.09, and includes information that is stored electronically.

3. The terms "constituting," "referring to" or "relating to" shall mean concerning, relating to, pertaining to, consisting of, constituting, reflecting, evidencing or concerning in any way logically or factually the subject matter of the request.

4. The term "person" includes individuals, corporations and other entities.

5. If you exercise your option to produce business records in lieu of responding to any interrogatory, please identify the records in the interrogatory answer and, in producing such records, designate for each record the interrogatory or interrogatories to which such records respond.

6. If you refuse to produce any documents based on a claim of a privilege, identify or describe the exact privilege and furnish a list signed by your counsel giving the following information with respect to each such document:

- (a) the type of document (e.g., letter, memorandum, etc.);
- (b) the general subject matter of the document;
- (c) the identity of the sender and recipient(s) of the document;

- (d) the identity of each person to whom the document or its contents have been disclosed;
- (e) a complete statement of the basis upon which the privilege is claimed; and
- (f) the paragraph number of the request to admit, interrogatory or document request to which the document is responsive or otherwise pertains.

### **INTERROGATORIES**

**Interrogatory No. 1:** Identify each and every person who participated or assisted in the preparation of the Defendant's Answer to the Plaintiff's Complaint in this matter.

**Interrogatory No. 2:** Identify each and every person who participated or assisted in the preparation of the Defendant's responses to these written discovery requests, and for each person identified state the specific response(s) in which he or she participated or assisted.

**Interrogatory No. 3:** Identify each and every person who, on behalf of the Board, has been involved in construing and/or applying the definition of "unprofessional conduct" pursuant to Wis. Admin. Code § MED 10.02(p) at any time within the past ten (10) years.

**Interrogatory No. 4:** Identify each and every person who has knowledge or information concerning case LS #0410281 MED.

**Interrogatory No. 5:** Identify each and every case within the past ten (10) years in which the Board has conducted an investigation and/or pursued any action against a physician for alleged "unprofessional conduct" pursuant to Wis. Admin. Code § MED 10.02(p).

**Interrogatory No. 6:** Identify each and every instance within the past ten (10) years where the Board has considered adopting standards or policies related to pain management or controlled substances, and each and every person who was involved in any such discussion or consideration.

## DOCUMENT REQUESTS

**Request No. 1:** Produce each and every document including, without limitation, written policies, memoranda and/or correspondence or communications referring or related to the manner in which the Board has construed and/or applied the definition of “unprofessional conduct” pursuant to Wis. Admin. Code § MED 10.02(p).

**Request No. 2:** Produce each and every document referring or relating to any and all cases within the past ten (10) years in which the Board has conducted an investigation and/or pursued any action against a physician for alleged “unprofessional conduct” pursuant to Wis. Admin. Code § MED 10.02(p).

**Request No. 3:** Produce each and every document referring or relating to case LS #0410281 MED.

**Request No. 4:** Produce each and every document referring or relating to the Board’s review of any and all rules concerning the definition of “unprofessional conduct” set forth at Wis. Admin. Code § MED 10.02(p), including, without limitation, any review conducted for the purpose of determining whether such definition is consistent with current medical practice or the enforcement policies of the Board or the Department.

**Request No. 5:** Produce each and every document referring or relating to Dr. William J. Hisgen.

**Request No. 6:** Produce each and every document referring or relating to any consideration by the Board of standards or policies related to pain management or controlled substances.

**Request No. 7:** Produce all documents referring or relating to Interrogatory Nos. 1-6 that are not included in Request Nos. 1-6.

Dated this 16<sup>th</sup> day of November, 2004.

MICHAEL BEST & FRIEDRICH LLP  
Attorneys for William J. Hisgen, M.D.

By: 

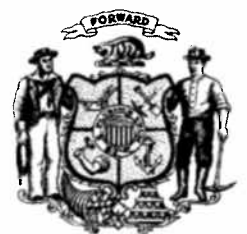
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# WISCONSIN STATE LEGISLATURE





STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

ROBERT H. OWEN, JR.,

03 MAR -6 AM 8:00

Petitioner,

Case No.//

03CV0699

v.



Administrative Agency Review: 30607

PUBLIC SERVICE COMMISSION  
OF WISCONSIN,

Respondent.

THIS IS AN AUTHENTICATED COPY OF THE  
ORIGINAL DOCUMENT FILED WITH THE DANE  
COUNTY CLERK OF CIRCUIT COURT.

**PETITION FOR JUDICIAL REVIEW**

JUDITH A. COLEMAN  
CLERK OF CIRCUIT COURT

Petitioner hereby petitions this Court, pursuant to Wis. Stat. §§ 227.52 and 227.53, to review a final decision mailed by the Public Service Commission of Wisconsin ("PSCW"), docket nos. 05-AE-109, 05-CE-117, 6650-CG-211 and 137-CE-104, on December 20, 2002, approving an application by Wisconsin Energy Corporation and three affiliated companies to build two large natural gas-fired power plants at Port Washington and also approving related affiliated-interest transactions and gas and electric construction. This PSCW decision was not accompanied by an environmental impact statement.

As grounds for this Petition, Petitioner alleges:

1. Petitioner Robert H. Owen, Jr. is an adult resident of Dane County living at 1311 Middleton Street, Middleton, Wisconsin 53562, and a wind energy consultant.
2. Respondent Public Service Commission of Wisconsin ("PSCW") is an administrative agency of the State of Wisconsin regulating power plant construction with its principal office located at 610 North Whitney Way, Madison, Wisconsin 53707.
3. Before constructing a large new power plant in Wisconsin, a party must obtain permission from the PSCW ("CPCN") under Wis. Stat. § 196.491.

4. Before taking any major action significantly affecting the quality of the human environment in a CPCN case, the PSCW must prepare and circulate and hold a public hearing on an environmental impact statement (“EIS”) under Wis. Stat. § 1.11(2)(c).

5. Approval of a CPCN for two natural gas-fueled power plants totaling 1090 MW in capacity is a major action significantly affecting the quality of the human environment requiring an EIS whether or not the new gas-fired plants are placed at a site formerly used for several coal-fired power plants of much smaller capacity owned by a different entity.

6. In approving a power plant CPCN, the PSCW is supposed to give effect to a statutory priority scheme under Wis. Stat. § 1.12 giving priority to energy efficiency, first, and renewable energy, second, over fossil fuel sources such as natural gas where the energy efficiency and renewable sources are technically feasible and cost-effective.

7. Wisconsin Energy Corporation, on behalf of itself and several subsidiaries (herein collectively “WE”), seeks to build two 545-MW natural gas-fired combined-cycle power plants at Port Washington (hereinafter referred to as “PWGS”).

8. If operated, WE’s PWGS will emit very large amounts of carbon dioxide to the atmosphere, whereas wind energy and energy efficiency alternatives to PWGS both have zero emissions and CT alternatives have lower emissions of carbon dioxide.

9. Carbon dioxide is a major greenhouse gas, which is emitted by power plants and other facilities burning fossil fuels and is causing earth’s atmosphere to heat up.

10. If new power plants used renewable energy in lieu of natural gas and/or if fewer or smaller new gas-fired power plants were built due to energy efficiency improvements or conservation measures, earth’s atmosphere would heat up less rapidly.

11. Petitioner is an avid cross-country (“X-C”) skier already experiencing reduced

recreational opportunities to X-C ski on Wisconsin's many fine trails due to global warming to date. Global warming reduces the duration of sufficient snow cover for X-C skiing in Wisconsin. PWGS will worsen future global warming by increasing carbon dioxide emissions as compared to cleaner options.

12. Petitioner's interest in recreational use of Wisconsin's ski trails is within the zone of interests protected by Wis. Stat. §§ 1.11 and 196.491(3)(d)3 & 4.

13. As a wind-energy consultant, Petitioner has an economic interest in increased Wisconsin wind energy development and income from it protected by Wis. Stat. § 1.12.

14. Petitioner participated as a full party in the proceedings, including the hearings, before the PSCW and requested an EIS early in the proceedings.

15. After the hearing process ended, the PSCW determined that its rules under the Wisconsin Environmental Policy Act ("WEPA"), Ch. PSC 4, Wis. Adm. Code, did not require an EIS for PWGS because the 1090 MW of new gas-fired capacity were to be installed at a site previously used for a much smaller, 320 MW, coal-fired plant by a different WE subsidiary owner. Petitioner challenged this determination in a November 13, 2002, letter. However, the PSCW issued its CPCN decision on PWGS on December 20, 2002, without issuing an EIS and without considering the comparative effects of PWGS and efficiency/renewable/CT gas alternatives thereto on global warming.

16. The City of Port Washington filed a petition for rehearing of the PSCW Decision under Wis. Stat. § 227.49 on January 8, 2003, which was denied by operation of law on February 7, 2003. The PSCW granted an alternative City of Port Washington Petition for Reopening in an order mailed February 28, 2003.

17. Petitioner is aggrieved and adversely affected by the increased global warming

flowing from the PWGS CPCN approved by the PSCW Decision uninformed by an appropriate EIS alternatives discussion and by diminished income from reduced wind energy development in Wisconsin caused by the violation of Wis. Stat. §§ 1.11 and 1.12.

18. The PSCW findings under Wis. Stat. § 1.12 (pp. 11-16) are unsupported by substantial record evidence and inconsistent with § 1.12 (Wis. Stat. §§ 227.57 (6) & (8)).

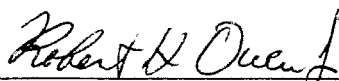
19. The PSCW's decision to approve PWGS and associated agreements and construction (which would serve no purpose without the CPCN) without first filing an EIS is:

- a. based on an erroneous interpretation of and inconsistent with Wis. Stat. § 1.11 (Wis. Stat. §§ 227.57 (5) & (8));
- b. inconsistent with its own rules, including PSC 4.10(1) & (5)a, Wis. Adm. Code (Wis. Stat. § 227.57(8)); and
- c. even if consistent with its rules, such rules are *ultra vires* and violate Wis. Stat. §§ 1.11(2)(c) and 1.12, if construed to permit dispensing with an EIS while granting a CPCN for a 1090-MW gas-fired power plant (Wis. Stat. § 227.57 (8)).

WHEREFORE, Petitioner requests that the Court grant an early hearing and enter judgment against the Public Service Commission of Wisconsin as follows:

1. reversing and remanding the entire decision of the PSCW forthwith with directions to prepare an EIS under Wis. Stat. § 1.11(2)(c) considering alternatives to the proposed PWGS plants, including renewable energy and energy efficiency and CT's (combustion turbines), and revise its unsupported findings and inadequate, incomplete, findings under Wis. Stat. § 1.12 in light of the EIS and hearing record and
2. granting such other and further relief as may be appropriate.

Respectfully submitted this 6th day of March, 2003

  
Robert H. Owen, Jr., Petitioner  
P.O. Box 620858  
Middleton, WI 53562  
(608) 831-6150