Final Order No. BPR-2006-04986 Date: 7-14-06
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Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By: Brandon M. Nichols

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Florida Engineers Management Corporation
Clerk
CLERK Debra Baker
DATE 7-14-2006

STATE OF FLORIDA
BOARD OF PROFESSIONAL ENGINEERS

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DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ENGINEERS MANAGEMENT CORPORATION,

Petitioner,

vs.

FMEC CASE NO.: 2005041242
DOAH CASE NO.: 05-4338PL

ALAN D. STOKES,

Respondent.
_____/

FINAL ORDER

THIS CAUSE came before the BOARD OF PROFESSIONAL ENGINEERS (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on June 15, 2006, in Tampa, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order and Exceptions to the Recommended Order, and (copies of which are attached hereto as Exhibits A and B, respectively) in the above-styled cause. Petitioner was represented by Bruce A. Campbell, Esquire. Respondent was represented by Andrea Williams Stokes, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULINGS ON EXCEPTIONS

1. Petitioner's Exception One to paragraph 3 of the Findings of Fact in the Recommended Order is granted. The finding states that " . . . membership in a professional organization such as IEEE does not tend to indicate that a member holds a license to practice engineering." This finding is not supported by competent substantial evidence because it is taken out of the context of Respondent's entire Curriculum Vitae, and IEEE is a professional engineering society as it's name indicates, and as the finding acknowledges. Under Chapter 471, only a licensed individual may indicate that he or she is a "professional" engineer. This finding of fact is changed to read as follows:

> Membership in a professional organization such as IEEE tends to indicate that a member holds a license to practice engineering.

2. Petitioner's Exception Two to paragraph 4 of the Findings of Fact in the Recommended Order is granted. This paragraph is a conclusion of law in that it summarizes the evidence and applies specific language from Section 471.031(1)(b), Florida Statutes, incorrectly, to the evidence. Paragraph 4 of the Findings of Fact is deleted.

3. Petitioner's Exception Three to paragraph 7 of the Findings of Fact in the Recommended order is rejected as not within the substantive jurisdiction of the Board.

4. Petitioner's Exception Four to paragraph 8 of the Findings of Fact in the Recommended order is granted, and paragraph 8 is deleted. This finding is an incorrect interpretation of Chapter 471.

5. Petitioner's Exception Five to paragraph 11 of the Findings of Fact in the Recommended Order is granted. The only evidence in the record that supports this finding of fact is Respondent's Exhibit 2, which is hearsay which, by itself, is not competent substantial evidence upon which to base a finding of fact. In addition, Respondent's testimony in his deposition, Petitioner's Exhibit 2, demonstrates that he performs qualitative engineering testing, which is an engineering function. Paragraph 11 is deleted.

6. Petitioner's Exception Six is granted. Finding of Fact paragraph 13 is not supported by competent substantial evidence. Engineering opinions regarding automobiles sold in Florida do implicate the health, safety and welfare of the citizens of Florida.

7. Petitioner's Exception Seven is granted. Paragraphs 14, 15 and 16 are not supported by competent substantial evidence because the only evidence in the record is hearsay which, by

itself, is not competent substantial evidence upon which to base a finding of fact. As defined in Chapter 471, Respondent's activities do constitute engineering analysis. Paragraphs 14, 15 and 16 of the Findings of Fact are deleted.

8. Petitioner's Exception Eight is granted. This is a conclusion of law. It is as reasonable, or more reasonable, to interpret the practice of engineering as the solicitation of work that requires engineering skill and analysis, which Respondent solicits.

9. Petitioner's Exception Nine is granted. The last sentence of the Conclusion of Law in paragraph 27 of the Recommended Order, is deleted as irrelevant to the determination of what constitutes engineering under Chapter 471.

10. Petitioner's Exception Ten is rejected.

11. Petitioner's Exception Eleven is granted. Offering and performing forensic engineering has a direct effect on the public health and safety. Paragraph 29 of the Conclusions of Law in the Recommended Order is deleted.

12. Petitioner's Exception Twelve is granted. There is competent substantial evidence in the record that Respondent's activities constitute the practice of engineering. Paragraph 32 of the Conclusions of Law is changed to provide as follows:

> 32. Petitioner established by competent substantial evidence that Respondent engaged in the practice of engineering in Florida.

13. Petitioner's Exception Thirteen is granted, and paragraph 33 of the Conclusions of Law in the Recommended Order is deleted. It is a more reasonable conclusion of law that expert witness services do implicate the health, safety and welfare of the citizens of Florida. What constitutes the practice of engineering is not restricted by Chapter 471 based on the recipient of the engineering services.

14. Petitioner's Exception Fourteen is granted as not supported by competent substantial evidence. Respondent testified, and his Curriculum Vitae indicates, that his office is in Florida, he examined the seat belt in Florida, and he testified in Florida, by deposition. Paragraph 34 of the Conclusions of Law in the Recommended Order is deleted.

15. Petitioner's Exception Fifteen is granted. The following language is added to the Conclusions of Law:

> The reports generated and provided by Respondent constitute the practice of engineering. Further, in his deposition, Respondent declared himself to be an expert in order to enhance the authority and credibility of his engineering reports, which confirmed that he engaged in the practice of engineering. Reference is made to Petitioner's Exhibit 3, page 172.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order as amended by the granting of the exceptions herein are approved and adopted and incorporated herein by reference.

2. There is competent substantial evidence to support the findings of fact as amended.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 471, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order as amended by the exceptions granted herein are approved and adopted and incorporated herein by reference.

DISPOSITION

Upon a complete review of the record in this case, the Board determines that Respondent violated Section 471.031(1)(a), Florida Statutes, as set forth in Counts One and Two of the Administrative. WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that Respondent shall pay and administrative fine of $2,000.00 within 30 days. The fine and costs shall be made payable to the Florida Board of Professional Engineers, and sent to the Board at 2507 Callaway Road, Suite 200, Tallahassee, Florida 32303.

This Final Order shall take effect upon being filed with the Clerk of the FLORIDA ENGINEERS MANAGEMENT CORPORATION.

RULING ON MOTION TO STAY

Respondent's *ore tenus* motion to stay the effect of this Final Order pending appeal is **GRANTED**.

DONE AND ORDERED this 13th day of July, 2006.

BOARD OF PROFESSIONAL ENGINEERS

Paul J. Martin, Executive Director
for Henn Rebane, P.E., Chair

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA ENGINEERS MANAGEMENT CORPORATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to ALAN D. STOKES, c/o Andrea Williams Stokes, Esquire, 9047 NE 76th Court, Gainesville FL 32609; to Don W. Davis, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Bruce A. Campbell, FLORIDA ENGINEERS MANAGEMENT CORPORATION, 2507 Callaway Road, Suite 200, Tallahassee FL 32303 and Lee Ann Gustafson, Department of Legal

Affairs, PL-01 The Capitol, Tallahassee FL 32399-1050 this _____ day of _____, 2006.

_____

STATE OF FLORIDA
FLORIDA BOARD OF PROFESSIONAL ENGINEERS

FLORIDA ENGINEERS MANAGEMENT CORPORATION, Petitioner, vs. ALAN D. STOKES, Respondent.	)	Case No. 05-4338 FEMC Case No.: 2005041242

RESPONDENT'S RESPONSE TO PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Rule 28-106.217, Florida Administrative Code, Respondent hereby responds to Petitioner's Exceptions to Recommended Order and states:

1. A Recommended Order was entered in this case by the Division of Administrative Hearings on March 29, 2006.

2. This Order recommends dismissal of the underlying Administrative Complaint.

3. Petitioner has raised 15 exceptions to this Order. The basis of many of these exceptions is that Respondent's Exhibit 2, the expert witness report of Dr. David Cartes, is not competent substantial evidence and cannot form the sole basis for a finding of fact.

4. Petitioner's arguments with respect to Respondent's Exhibit 2 are not supportable. First, this argument completely ignores the application and effect of section 120.569(2)(g), Florida Statutes (2005), which provides:

> [i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded, **but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the**

> **courts of Florida. Any part of the evidence may be received in written form,** and all testimony of parties and witnesses shall be made under oath. (emphasis added)
>
> See, Barfield v. Department of Health, 805 So. 2d 1008, 1010 (Fla. 1st DCA 2001) (ALJ excluded evidence pursuant to section 120.57(1)(c), "which provides that '[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.' In so deciding, she overlooked another provision in the Administrative Procedure Act that states all "evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida"

5. Further, Petitioner, at the beginning of the hearing, stipulated to the entry into evidence of Respondent's Exhibit 2 without raising any objections to this evidence. (Transcript, p. 6). As Florida's Supreme Court has recognized, "[a] stipulation is a voluntary agreement between opposing counsel concerning the disposition of some relevant point so as to obviate the need for proof or to narrow the range of litigable issues. The beneficial aspects of stipulations in terms of conserving time, money and effort are universally recognized." Arrington v. State, 233 So. 2d 634, 636 (Fla. 1970). Petitioner's stipulation must be given effect.

6. Respondent's responses to each of Petitioner's exceptions are set forth below:

Exception 1

Petitioner takes exception to the second sentence of Finding of Fact 3 as a conclusion of law. This position is erroneous. The challenged sentence is nothing more than a reasonable inference from the substantial, competent evidence presented at hearing. This exception should be denied.

Exception 2

Petitioner takes exception to the entirety of Finding of Fact 4 as a conclusion of law. This position is erroneous. The challenged finding of fact is just that. No legal conclusion is reached in this finding. This finding merely summarizes the evidence presented. The ALJ is fully competent and empowered to make findings regarding Respondent's use of engineering titles, designations, and devices indicating that he is licensed as an engineer in Florida. This exception should be denied.

Exception 3

Petitioner takes exception to the entirety of Finding of Fact 7 as a conclusion of law. This position is erroneous. The challenged sentence is nothing more than a reasonable inference from the substantial, competent evidence presented at hearing. This exception should be denied.

Exception 4

Petitioner takes exception to the second sentence of Finding of Fact 8 as unsupported by competent, substantial evidence. This position is erroneous. The challenged sentence is nothing more than a reasonable inference from the substantial, competent evidence presented at hearing. This exception should be denied.

Exception 5

Petitioner takes exception to the entirety of Finding of Fact 11 as not supported by competent, substantial evidence. This position is erroneous. The challenged finding is supported by Respondent's Exhibit 2, the testimony of Dr. Cartes (Transcript, pp 31-32), and by Petitioner's Exhibit 3. This finding of fact is well supported by the record and this exception should be denied.

Exception 6

Petitioner takes exception to the entirety of Finding of Fact 13 as not supported by competent, substantial evidence. This position is erroneous. The challenged finding is supported by Respondent's Exhibit 2 and by Petitioner's Exhibits 2 and 3. This finding

of fact is well supported by the record, is a reasonable interpretation of the evidence presented, and this exception should be denied.

Exception 7

Petitioner takes exception to the entirety of Findings of Fact 14, 15, and 16 as not supported by competent, substantial evidence and that these findings are conclusions of law. This position is erroneous. The challenged findings are supported by Respondent's Exhibit 2, the testimony of Dr. Cartes (Transcript, pp 31-32), and by Petitioner's Exhibits 2 and 3.

At most, these findings are mixed questions of fact and law. However, an administrative agency "may not reject a finding which is substantially one of fact by simply treating it as a legal conclusion." Gordon v. Commission on Ethics, 609 So. 2d 125, 127 (Fla. 4th DCA 1992); see also Greseth v. Dept. of Health & Rehab. Serv., 573 So. 2d 1004 (Fla. 4th DCA 1991) ("an administrative agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred.")

Moreover, an agency "is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its ultimate conclusion." Heifetz v. Dept. of Bus. Reg., 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985).

These findings of fact are well supported by the record, supported by competent, substantial evidence, and are reasonable inferences of this evidence. These findings are not pure conclusions of law and thus should be denied.

Exception 8

Petitioner takes exception to conclusion of law 25. However, this conclusion of law is an entirely reasonable and rational interpretation of the applicable statutory language and application of the law to the facts found by the ALJ.

Exception 9

Petitioner takes exception to the last sentence of conclusion of law 27. However, this portion of the conclusion of law is an entirely reasonable and rational interpretation of the applicable statutory language, and an accurate statement of the law.

Exception 10

Petitioner takes exception to conclusion of law 28. The fact that other state's engineering boards have addressed a similar issue as that raised in the Administrative Complaint, while not controlling, is highly persuasive and is a legitimate conclusion of law in this proceeding.

Exception 11

Petitioner takes exception to conclusion of law 25. However, this conclusion of law is an entirely reasonable and rational interpretation of the applicable statutory language and application of the law to the facts found by the ALJ.

Exception 12

Petitioner takes exception to conclusion of law 32. Petitioner invites the Board to commit reversible error by adding a finding of fact not found by the ALJ. This conclusion of law flows directly from an application of the law to the facts found by the ALJ.

Exception 13

Petitioner takes exception to conclusion of law 33. However, this conclusion of law is an entirely reasonable and rational interpretation of the applicable statutory language and application of the law to the facts found by the ALJ. Further Petitioner's argument erroneously frames the issues.

Exception 14

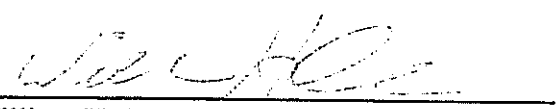
Petitioner takes exception to conclusion of law 34. However, this conclusion of law is an entirely reasonable and rational interpretation of the applicable statutory language.

Exception 15

Petitioner requests inclusion of an additional conclusion of law. Again, Petitioner invites the Board to commit reversible error. There are no findings of fact which would support the requested conclusion of law; thus, the requested action would require the Board to "[re]weigh the evidence . . . or otherwise interpret the evidence to fit its ultimate conclusion." Heifetz., 475 So. 2d at 1281-82. The Board should decline this request as it contrary to the requirements of Florida law.

WHEREFORE, for all the above reasons, Respondent respectfully requests that the Board deny all of Petitioner's exceptions and enter a final order adopting the ALJ's recommended order in toto.

Respectfully submitted this 14th day of April, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that foregoing was served on the following via first class mail this 15th day of April, 2006.

Bruce Campbell
Florida Board of Professional Engineers
2507 Callaway Road, Suite 200
Tallahassee, FL 32303
Facsimile: (850) 521-0621

William H. Hollimon

STATE OF FLORIDA
FLORIDA BOARD OF PROFESSIONAL ENGINEERS

FLORIDA ENGINEERS
MANAGEMENT CORPORATION,

Petitioner,

v.

Case No. 05-4338PL
FEMC Case 2005041242

ALAN D. STOKES, P.E.,

Respondent.
_____/

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioner files with the Florida Board of Professional Engineers these exceptions to the Recommended Order entered in this case by the Division of Administrative Hearings on March 29, 2006.

INTRODUCTION

This case presents the issue of whether Chapter 471, Florida Statutes, authorizes the Florida Board of Engineers to regulate persons who provide analysis and testimony about engineering subjects based on engineering education, training and experience. The Recommended Order narrows the issue to "whether Respondent, by holding himself out as an expert and testifying as an expert witness, engaged in the unlicensed practice of engineering." Unfortunately, narrowing the issue that way ignores the allegations of the Administrative Complaint. The Administrative Complaint charges unlicensed practice because of

the representations made and the actions taken by Respondent in the context of serving as an expert witness.

The Recommended Order contains 16 Findings of Fact which the Board may reject or modify if they are not based on competent substantial evidence, or if they are mislabeled and are, in reality, conclusions of law. These exceptions will repeat objections that Respondent's Exhibit 2, a letter opinion from David Cartes, Ph. D., is not competent substantial evidence. The judge received it into the record, acknowledging that it was hearsay and could not be the basis of a finding of fact. (Transcript, pp. 25, 26). Despite his stated limitation, many of his findings have no other source in the record. Objections to individual findings will therefore be stated in shorthand, "No basis other than Resp. Ex. 2."

Respondent's Exhibit 2 suffers from the additional defect that it expresses opinions about the meaning of the engineering statutes. Legal opinions from the letter invade the substantive jurisdiction of the Board. Expert testimony is never admissible to interpret law. The judge acknowledged this at the final hearing by sustaining objection to Cartes testimony about the engineering statute. (Transcript, p. 29)

Some of the purported "findings of fact" in the Recommended Order also invade the substantive jurisdiction of the Board. Objections to those findings will therefore be stated in shorthand, "Issue of Law."

EXCEPTION ONE

Petitioner takes exception to the second sentence of Finding of Fact 3 which

states:

> Thus, membership in a professional organization such as IEEE does not tend to indicate that a member holds a license to practice engineering.

This statement is a Conclusion of Law. It ignores the issue of whether advertising such membership is a device that would lead a lay person to believe that the member is a professional and, if so, a professional engineer. The Board must review the entire resume of Respondent to conclude whether, as a whole, it is a device tending to indicate Respondent is an engineer.

EXCEPTION TWO

Petitioner takes exception to Finding of Fact 4 which states:

> 4. No competent evidence was presented that Respondent uses engineering designations, titles and devices tending to indicate that Respondent holds an active license as an engineer in Florida.

This is a pure conclusion of law. It summarizes the evidence and applies specific language from Section 471.031(1)(b), Florida Statutes. Application of that statute to Respondent's resume (in evidence attached as exhibit 1 to Deposition of Wall) is a matter of law for the Board.

Paragraph 4 should be deleted in its entirety.

EXCEPTION THREE

Petitioner takes exception to Findings of Fact 7 which states:

> 7. Graduates of accredited engineering programs are commonly referred to as "engineers" by universities and potential employers.

No basis other than Resp. Ex. 2. Additionally, this finding is totally irrelevant to the allegations which do not concern universities or potential employers of

university graduates. It is misleading if it suggests that any graduate of an engineering program can refer to himself as an engineer. Application of Section 471.031, Florida Statutes, is a matter of law for the Board.

Finding of Fact 7 should be deleted in its entirety:

EXCEPTION FOUR

Petitioner takes exception to the second sentence of Finding of Fact 8, which states:

> 8. . . . Respondent does not hold himself out as an "engineer" or a "licensed" or "professional engineer".

There is no testimony or other competent substantial evidence that Mr. Stokes does not hold himself out as an engineer. Application of the law to his resume and testimony in the product liability case should be a conclusion of law. If the word "engineer" is deleted, the rest of this sentence duplicates Finding of Fact 6.

The second sentence of Finding of Fact 8 should be deleted.

EXCEPTION FIVE

Petitioner takes exception to Finding of Fact 11 which states:

> 11. Respondent's expert witness testimony consisted only of giving opinions based on observation, not on engineering theory and testing.

No basis other than Resp. Ex. 2. As stated, this finding eliminates any influence of education, training and experience as bases for the opinion, which is contrary to Respondent's testimony in the product liability case and contrary to the

definition of engineering in Section 471.005(7), Florida Statutes. Whether testimony containing opinions may be engineering is a matter of law. Rule 61G15-19.001(6), Florida Administrative Code, defines misconduct in the practice of engineering to include "expressing an opinion publicly on an engineering subject without being informed as to the facts relating thereto and being competent to form a sound opinion thereupon."

Paragraph 11 should be deleted in its entirety.

EXCEPTION SIX

Petitioner takes exception to Finding of Fact 13 which states:

> 13. Respondent's opinions were directed to a discrete litigation event – the Tennessee Case – and do not implicate the health, safety, or welfare of the public in general or to the citizens of Florida in particular.

There is a complete absence of any testimony or evidence to support this finding except as an extrapolation of Resp. Ex. 2. Otherwise this is argument and, in part, an attempt to apply law. It is somewhat bizarre to contend that design defects in popular cars produced by Chrysler, or lawsuits based on such defects, do not "implicate" citizens of Florida.

Finding of Fact 13 should be deleted.

EXCEPTION SEVEN

Petitioner takes exception to Finding of Fact 14, 15 and 16 which state:

> 14. Engineering analysis consists of complex scientific analysis of collected data or material. In a case like the Tennessee Case, engineering analysis would consist of the performance of scientific discovery based upon mathematics, physics, or engineering and/or a statistical evaluation of seatbelts for the make and model of

automobile in question to determine seatbelt-related failure modes and rates.

15. Respondent's written reports in the Tennessee Case do not contain engineering analysis; rather, they are based only upon observation and opinion.

16. Respondent's opinions in the Tennessee Case do not constitute engineering analysis.

No basis other than Resp. Ex. 2. Definitions of engineering are issues of law. These "findings" are more bizarre argument than either fact or law. They seem to conclude that Respondent did such an incompetent job, and failed to utilize his education, training and experience to such an extent, that he did not practice engineering. The competent substantial evidence contradicts these arguments because Respondent examined detailed drawings and specifications and had the actual seat-belt assembly shipped to his office in Florida for examination and testing. (Reports of Respondent, exhibits 3 and 4 to Wall deposition; testimony of Wall, pp. 14-16)

Findings of Fact 14 through 16 should be deleted in their entirety.

EXCEPTION EIGHT

Petitioner takes exception to Conclusion of Law 25, which is an argument that compares parts of Sections 471.005(5) and (7), to apparently conclude that Chapter 471 cannot be applied to anyone unless the terms "licensed engineer" or "professional engineer" are clearly communicated by his actions or communications. This argument ignores the expansive definition of engineering used by the Legislature.

Conclusion of Law 25 should be deleted in its entirety.

EXCEPTION NINE

Petitioner takes exception to the last sentence of Conclusion of Law 27, which makes a false comparison of the definition of engineering with limitations in medical malpractice actions. The limitation on medical experts does not appear in the definitions of the applicable practice statutes and only limits testimony as to the standard of car for health care practitioners. No such limit applies to forensic testimony about medical subjects such as cause of injury or possible cures or surgical corrections. Similarly, forensic testimony may address engineering subjects such as safety of structures or corrective measures for after storm damage.

Because it is misleading, the last sentence of Conclusion of Law 27 should be deleted.

EXCEPTION TEN

Petitioner takes exception to Conclusion of Law 28, because it is not a conclusion of law. It presents argument about the actions of courts of other states in selected cases. The cases are not controlling authority in Florida. They cannot be persuasive because the argument does not compare the specific facts in those cases to the facts in this case. It gives no indication of the language of statutes being applied and does not purport to be a complete survey of all court cases or actions of state boards.

Conclusion of Law 28 should be deleted in its entirety.

EXCEPTION ELEVEN

Petitioner takes exception to Conclusion of Law 29, which argues Chapter 471 only applies to activities that have a "direct effect on public health and safety" (emphasis added). This argument imposes a limitation contrary to the expansive language of Section 471.005(7), which includes the phrase, "insofar as they involve safeguarding life, health, or property". In any event, testimony that design defects exist in popular models of cars does affect public health and safety. The existence of the federal Consumer Products Safety Commission refutes the argument of this Conclusion of Law.

Conclusion of Law 29 should be deleted in its entirety.

EXCEPTION TWELVE

Petitioner takes exception to Conclusion of Law 32, which states:

32. Petitioner failed to meet its burden of proof.

If the Board finds that the resume and testimony of Respondent constitute the practice of engineering, this Conclusion of Law should be changed to state that Petitioner met its burden of proof.

EXCEPTION THIRTEEN

Petitioner takes exception to Conclusion of Law 33, which states:

33. Offering expert witness services which do not implicate the health, safety, and welfare of Florida citizens does not constitute the unlicensed practice of engineering in Florida.

As stated, this Conclusion does not address the allegations of the Administrative Complaint. The statement is certainly true if the expert offers to

testify about medical or financial facts. On the other hand, a person who performs engineering analysis and testing cannot later claim his actions do not fall under Chapter 471 because he intends to testify as an expert witness.

Conclusion of Law 33 should be deleted in its entirety.

EXCEPTION FOURTEEN

Petitioner takes exception to Conclusion of Law 34 which states:

> 34. Providing expert witness services in support of litigation in Tennessee cannot constitute the provision of engineering services in Florida.

Respondent testified and his resume indicates that his office is in Florida. He examined the seat belt in Florida and testified by deposition in Florida. A Florida engineer cannot claim freedom from regulation because his customer is in another state or his plan, design or analysis is intended to be used in another state. Again, labeling oneself an expert witness does not immunize the individual or his actions.

Conclusion of Law 34 should be deleted in its entirety.

EXCEPTION FIFTEEN

Petitioner takes exception to the failure of the Recommended Order to provide a Conclusion of Law that applies the law to the substance of Respondent's two written reports (exhibits 3 and 4 to Wall deposition) and deposition (Exhibit P3) listed in Finding of Fact 10. It is within the Board's jurisdiction to determine whether communications from Respondent constitute the practice of engineering. Petitioner suggests the following Conclusions of Law:

> A. The written reports by Respondent are engineering reports which were generated by the practice of engineering.

B. In his deposition Respondent declared himself to be an engineer in order to enhance the authority and credibility of his engineering reports, which confirmed that he engaged in the practice of engineering. (P3 – p. 172)

CONCLUSION

Adoption of the foregoing exceptions will result in a Final Order with one violation of Section 455.228, Florida Statutes provide for an administrative penalty not to exceed $5,000 per incident.

The appropriate penalty for the violations in this case must consider that Respondent had been provide a warning in the Notice to Cease and Desist not to engage in the type of activity charged. The evidence in this case arguably proves a single incident, but the penalty should be enhanced by the fact that it is part of a continuing business enterprise.

Date

Bruce A. Campbell
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Tallahassee, FL 32303-5267
Ph (850) 521-0500
Florida Bar No. 191163

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Exceptions has been furnished to the attorney for Respondent by U. S. Mail to William Hollimon, Moyle, Flanagan, Katz, 118 N. Gadsden Street, Tallahassee, Florida 32301, on the 5th day of April, 2006.

Bruce A. Campbell