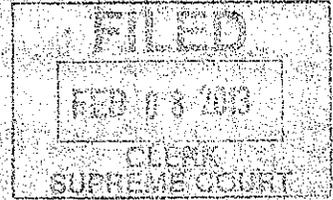


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO. 2012-SC-165-D  
(2010 -CA- 000693 & 2010-CA-000730)



JOSEPH B. CURD, JR.

APPELLANT

V.

FRANKLIN CIRCUIT COURT  
CIVIL ACTION NO. 09-CI-231

KENTUCKY STATE BOARD OF LICENSURE,  
FOR PROFESSIONAL ENGINEERS AND  
LAND SURVEYORS

APPELLEE

**BRIEF FOR APPELLANT**

\*\*\*\*\*

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CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of February, 2013, an original and ten copies of the foregoing was hand delivered to:

The Clerk of the Supreme Court of Kentucky, The Capitol, Frankfort, KY 40601

A true copy of the foregoing was mailed to: Hon. Thomas D. Wingate, Judge, Franklin Circuit Court, Division II, Franklin County Judicial Building, 669 Chamberlain Avenue, Frankfort, KY 40601; The Clerk of the Court of Appeals, and

Hon. Jonathan Doran Buckley, Kentucky State Board of Licensure for Professional Engineers and Land Surveyors, 160 Democrat Drive, Frankfort, KY 40601.

Robert V. Bullock

## **INTRODUCTION**

The Appellee Kentucky State Board of Licensure, for Professional Engineers and Land Surveyors brought a disciplinary action against the Appellant Joseph B. Curd, Jr. for his testimony as an expert witness in a land dispute case which was tried before a Judge of the Wayne Circuit Court. The Franklin Circuit Court subsequently reversed the Board's Order imposing a six month's suspension of Mr. Curd's license as a surveyor, by finding that the statutes and regulations were unconstitutionally vague as applied. On review the Court of Appeals Affirmed in Part, Reversed in Part and Remanded.

Both Mr. Curd and the Board filed Motions for Discretionary Review and both were granted. This brief will consist of Mr. Curd's brief as Appellant in 2012-SC-000165-D. The Appellee Board is Appellant in 2012-SC-000169-D.

## **STATEMENT CONCERNING ORAL ARGUMENT**

This Appellant believes that oral argument would be helpful to this Court.

## **STATEMENT OF POINTS AND AUTHORITIES**

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**I.**

**STATEMENT OF THE CASE<sup>1</sup>**

**A.**

**NATURE OF THE CASE**

Joseph B. Curd, Jr. appealed to the Franklin Circuit Court from Findings of Fact, Conclusions of Law and Order issued by the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors (hereinafter the Board) on January 16, 2009. The Board had ordered that Mr. Curd's license as a Professional Land Surveyor be suspended for a period of six (6) months. (See the Board's Order Tab 3 which can be found at the end of this Brief). By agreement of the parties, the Suspension has been stayed by the Franklin Circuit Court pending appeal. The Franklin Circuit Court reversed the Board by deciding that the statutes and regulations were unconstitutional as applied to Mr. Curd. (Tab 2) The Board then appealed to the Court of Appeals. Mr. Curd cross-appealed on issues raised, but not ruled in his favor by the Circuit Court. The Court of Appeals on February 17, 2012 issued its opinion in which it Affirmed in Part, Reversed in Part and Remanded. (Tab 1)

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<sup>1</sup> This section will include facts pertinent to both Mr. Curd's and the Board's cases on review.

The disciplinary action of the Board arose from the testimony of Mr. Curd in a Quiet Title action in the Wayne Circuit Court in which Mr. Curd testified as an Expert Witness. *Denny v. Southwood* (Wayne Circuit, Court Civil Action No. 01-CI-00201) Mr. Curd was called to testify on behalf of the Defendants, David and Karen Southwood, in a boundary dispute. The Southwoods were defending what they believed was their boundary line as well as claiming disputed land on the basis of Adverse Possession. The case was tried before the then Circuit Judge Donald H. Byorm without a jury.

Two differing opinions were issued from the Wayne Circuit Court in *Denny v. Southwood*. The first Findings of Fact, Conclusions of Law and Judgment by Judge Byorm dated November 24, 2003, denied the Denney's claim to quiet title to the property, but also did not adjudge the Southwoods to be the owners of the disputed property. (Exhibit entered during the Hearing before the Board (hereinafter Ex.), 17) After the Judge Byorm decision, cross motions to alter, amend or vacate were filed by the parties. Thereafter Judge Miniard became the Circuit Judge. The Southwoods filed a motion to recuse Judge Miniard. Following referral of the issue to the Chief Justice, the motion to recuse was denied. (Ex. 13, Ct. of Appeals

opinion, P.2) Thereafter; on February 27, 2004, Judge Miniard issued his opinion which found that the Denneys were the owners of the disputed property. (Ex. 12) The Court of Appeals affirmed Judge Miniard's determination. (Ex. 13)<sup>2</sup>

Mr. James West, a licensed surveyor, testified on behalf of the Plaintiffs Charles and Pauline Denney, both by deposition before the trial and during the trial. The Appellant, in the case before this court, Joseph B. Curd, Jr., testified that he could not understand how Mr. West came to his conclusions because it did not appear that he had done adequate research and analysis. After the trial, Ms. Southwood filed a complaint with the Board against Mr. West. The Board investigated and issued a Letter of Caution concerning some minor violations by Mr. West. (Transcript of Hearing before the Board, hereinafter, T.H. III, P. 28) Even though there was no complaint from the public regarding Mr. Curd's testimony, the Board, *sua sponte*, also directed that an investigation of Mr. Curd occur. Thereafter, the Board issued its complaint against Mr. Curd which resulted in the above noted six months suspension.

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<sup>2</sup>The Hearing Officer, either overlooked the fact that there were two opinions or failed to include this fact in his Findings of Fact. (See Finding # 55, 56 and Exhibit 17, 12)

It is from the determination of the Board that Mr. Curd appealed to the Franklin Circuit Court. The Franklin Circuit Court issued its Opinion and Order on March 16, 2010 and held that the statutes and regulations of the Board were void-for-vagueness as applied to Mr. Joseph B. Curd. It also found that Mr. Curd's argument that the Board was without jurisdiction to discipline Mr. Curd for his expert testimony in the Circuit Court was unpersuasive. The Franklin Circuit Court declined to rule on Mr. Curd's substantial evidence contention because it had determined that the Board's statutes and regulations were constitutionally impermissible as applied to Mr. Curd.

The Board appealed to the Court of Appeals based upon the Franklin Circuit Court's determination that the statutes and regulations were unconstitutionally vague as applied. The Board also contended that the Franklin Circuit failed to consider a preservation issue or issues. Mr. Curd cross-appealed to the Court of Appeals based upon the Franklin Circuit Court's determination that the Board could discipline its licensee based upon his opinion expert testimony given in a Circuit Court and for the Court's determination that it should not rule on the question of substantial evidence because it had determined that the statutes and regulations were

unconstitutional as applied.

**B.**

**PERTINENT FACTS**

Joseph B. Curd Jr. is a highly respected professional land surveyor who has been licensed by the Board since 1985. Mr. Curd earned a B.A. from Virginia Tech in 1978 and a M.S. in Geography from Virginia Tech in 1988. (Transcript of the Hearing before the Board, hereinafter, T.H. V, P. 2) He was an investigator for the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors from 1994 until 2003. (T.H. V, P. 4) He has written professional articles and taught continuing education seminars that were approved by the Board. (T.H. V, P. 5) Even the Board witnesses testified that Mr. Curd is a good surveyor. (T.H. II, P. 14, T.H. III, P. 26)

The Board's unsolicited complaint against Mr. Curd resulted primarily from his expert testimony about two issues involving the property ownership in *Southwood v. Denny* noted above. First, Mr. Curd questioned the adequacy of research for a survey completed by the Denny's expert witness, Mr. James West. Second, the Board claimed that Mr. Curd's expert testimony that a "deed plot" overlaid on a topo map showing the deed plot

lines extending beyond a highway was misleading. A deed plot is a preliminary working document that plots the exact calls of direction and distance from the deed description. The positioning of the topographical map in relation to the deed plots calls are within the sound discretion of the expert surveyor. During the Hearing before the Board, John Mandt, the attorney for the Southwoods, testified that his case was mainly about adverse possession. (TH. Vol III, pg. 120) Mr. Mandt also testified that Mr. Curd did not claim or imply that he knew the actual boundary of the Southwood property. (Vol III, pg 107-108, 121)

Staff witnesses for the Board disagreed with Mr. Curd's opinions presented during the deposition and at trial and characterized them as misleading and in violation of the Board's regulations. Notwithstanding the expert testimony supporting Mr. Curd from Professor Andrew Kellie, of Murray State University, who teaches surveying, and the testimony of Mr. William Ralph Paris, another well qualified expert, the Board sustained its complaint against Mr. Curd.

In addition to the expert testimony, the Hearing Officer and the Board found that Mr. Curd falsely testified that he was an investigator for the Board from 1994 to present. Mr. Curd had testified from reading a long

resume. Actually, the Board had failed to renew his contract to be its investigator some 3 months earlier. The Board did not clearly inform Mr. Curd that his contract would not be renewed, they had been late in renewing his contract in the past, and they never asked him to return his Board identification or badge. (Finding of the Board No. 53). The Hearing Officer and the Board acknowledged that this issue of Mr. Curd's alleged misrepresentation of his status as an investigator for the Board would not normally be one that would generate any significant disciplinary action. (Board Conclusion of Law No. 46). Notwithstanding this concession by the Board, the Hearing Officer found that Mr. Curd testified dishonestly and incorrectly at trial concerning his qualifications. (Conclusion of Law No. 49.)

The Franklin Circuit Court issued its Opinion and Order on March 16, 2010 and, as noted above, held that the statutes and regulations of the Board were void-for-vagueness as applied to Mr. Joseph B. Curd. It also found that Mr. Curd's argument that the Board was without jurisdiction to discipline Mr. Curd for his expert testimony in the Circuit Court was unpersuasive. The Franklin Circuit Court declined to rule on Mr. Curd's substantial evidence contention because it had determined that the Board's

statutes and regulations were constitutionally impermissible as applied to Mr. Curd.

The Court of Appeals issued a 31 page opinion in which it Affirmed in Part, Reversed in Part and Remanded. (See the Opinion of the Court of Appeals Tab 1.) The primary findings of the Court of Appeals were as follows:

A. The Court agreed with the circuit court's conclusion that the statutes and regulations at issue were unconstitutionally vague as applied to Mr. Curd, with the exception of only one provision: namely, 201 KAR 18:142 Section 3. The Court characterized that provision as providing that expert testimony in court shall be both objective and truthful and found that this portion of the regulation was not unconstitutionally vague as applied to Mr. Curd. (Opinion pg. 15)

B. The Board's action in disciplining Mr. Curd for expressing his opinion as an Expert Witness in a Circuit Court did not violate the Separation of Powers sections of the Kentucky Constitution. (Opinion pg. 26)

C. Mr. Curd was not entitled to Witness Immunity for his testimony in the Circuit Court. (Opinion P. 28)

D. The issue of whether Mr. Curd could be disciplined for failure of the Trial Attorneys to ask the proper questions was not preserved for appellate review. (Opinion pg. 29)

E. The Court declined to rule on the whether the Board's Order was arbitrary and not supported by substantial evidence. (Opinion pg. 30)

F. The Court found various portions of the lower court's opinion to be *dicta*. (Opinion Pg. 22 *et.seg.*)

## II.

### ARGUMENT

#### A.

#### **THE BOARD'S STATUTES AND REGULATIONS WERE UNCONSTITUTIONALLY VAGUE AS APPLIED TO MR. CURD<sup>3</sup>**

##### 1.

#### **An Expert in a Circuit Court Trial Must Not be Required to Guess as to whether his opinion will later subject him to disciplinary action by an Administrative Agency**

It is clear from reading the opinion, that the Court of Appeals had a difficult time with this issue. They determined that most of the statutes and

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<sup>3</sup>This issue was preserved - See Mr. Curd's Answer - Board Record (BR) Tab 3; Mr. Curd's Petition before the Circuit Court - Transcript of Record P. 1).

regulations challenged by Mr. Curd were unconstitutionally vague or unconstitutional as applied, but concluded that a portion of one regulation and/or statute passed constitutional muster in this case. The flaw in their reasoning lies with their unwillingness to accept the principal that an expert's honest opinion in a court of law cannot be challenged as dishonest and be subject to disciplinary action absent clear and convincing evidence of perjury. If their determination were allowed to stand, not only would it have a chilling effect on all expert testimony in the courts, but it would open the door to all licensees who give expert testimony, regardless of agency, to possible chicanery and a loss of license. The Franklin Circuit Court was correct when it noted in its opinion that ". . . [T]he Board should not be second-guessing the determination of the Court absent truly extraordinary circumstances. . ." (Court Opinion, Tab 3, P. 8)

The standard for determining whether a statute and presumably a regulation is unconstitutional because of vagueness or unconstitutional as applied is not in dispute. The test is whether a person disposed to obey the law could determine whether contemplated conduct would amount to a violation. Stated another way the statute or regulation must place someone to whom it applies on actual notice as to what conduct is prohibited; and, it

must be written in a manner that does not encourage arbitrary and discriminatory enforcement. A statute or regulation can be constitutional on its face, but be applied in an unconstitutional manner.

As noted by the Court in *Commonwealth v Foley*, 798 S.W.2d 947, 951 (Ky. 1990), overruled on other grounds, *Martin v Commonwealth*, 96 S.W.3d 38 (Ky. 2003):

From the foregoing authorities, we conclude that a proper analysis of a statute claimed to be facially unconstitutional for vagueness is whether a person disposed to obey the law could determine with reasonable certainty from the language used whether contemplated conduct would amount to a violation.

The *Foley* analysis would hold true for a regulation as well as a statute and should serve as a test to determine whether the application of a statute or regulation is unconstitutionally vague.

In finding that the use of the word “activities” to be vague, the Kentucky Supreme Court in *State Board for Elementary and Secondary Education v. Howard, et. al* 834 S.W.2d 657, 662 (Ky. 1992) observed:

In reviewing the standard for vagueness, this Court and the United States Supreme Court have followed two general principles underlying the concept of vagueness. First, a statute is impermissibly vague if it does not place someone

to whom it applies on actual notice as to what conduct is prohibited; and second, a statute is impermissibly vague if it is written in a manner that encourages arbitrary and discriminatory enforcement. *Cf. Musselman v. Commonwealth, Ky., 705 S.W.2d 476 (1986)*

Mr. Curd was found by the Board to have violated K.R.S. § 322.180

(2)(12) which states that the board may suspend a license when the licensee has:

(2) Engaged in gross negligence, incompetence, or misconduct in the practice of . . . land surveying;

(12) Engaged in conduct likely to deceive or defraud the public;

The Board also found that Mr. Curd had violated regulation 201 KAR

18:142 which provides in pertinent part:

Section 2. The engineer or land surveyor shall conduct his practice in order to protect the public health, safety, and welfare . . .

Section 3. A licensee shall issue all professional communications and work products in an objective and truthful manner.

(1) A licensee shall be objective and truthful in all professional reports, statements or testimony and shall include all material facts.

(2) When serving as an expert or technical witness before an

tribunal, a licensee shall express an opinion only when it is founded on adequate knowledge of the facts in issue, on the basis of technical competence in the subject matter, and upon honest conviction of the accuracy and propriety of that testimony, and shall act with objectivity and impartiality. He shall not ignore or suppress a material fact.

(4) A licensee shall not maliciously injure the professional reputation, prospect, practice or employment of another licensee. . .

Section 9. The professional engineer or professional land surveyor shall avoid conduct likely to discredit or reflect unfavorable upon the dignity or honor of his profession. . .

Because Mr. Curd gave his honest opinion, he could not, with reasonable certainty, have anticipated that he might be disciplined for his testimony as an expert witness in a boundary dispute case in this Wayne Circuit Court case for:

A. Engaging in gross negligence, incompetence, or misconduct  
(K.R.S. § 322.180 (2))

B. Engaging in conduct likely to deceive or defraud the public  
(K.R.S. § 322.180 (12))

The regulations Mr. Curd was charged with violating by his expert testimony were even more vague as applied. He could not have anticipated that he would be disciplined for giving his expert opinion for:

C. Failing to conduct his practice in order to protect the public health, safety, and welfare.

D. Failing to issue all professional communications and work products in an objective and truthful manner.

E. Expressing an opinion which the Board later concludes:

1. Is not founded upon adequate knowledge of the facts;
2. Is not founded upon the basis of technical competence in the subject matter;
3. Is not founded upon an honest conviction of the accuracy and propriety of his testimony;
4. Is not founded upon objectivity and impartiality;
5. Is not founded upon material facts that he ignored or suppressed;

F. Expressing an opinion which maliciously injured the professional reputation, prospect, practice or employment of another licensee;

G. Expressing an opinion that would likely discredit or reflect unfavorably upon the dignity or honor of the profession.

It would be foolish for a licensed expert to offer his or her expert testimony in a court of law if an Administrative Board is able to later second

guess their testimony using such vague criteria. The Board has converted what should be guidelines into a hammer which will have the effect of requiring the Expert Witness to either alter his or her opinion or express it with such caution that the person's license will not be in jeopardy. Such a state of affairs would not be helpful to the courts and would not be conducive to the effective administration of justice.

It is impossible for a person of reasonable intelligence to guess as to what opinions he or she could express in a court of law that would not, for instance, reflect unfavorably upon the dignity or honor of the profession, or is not founded upon objectivity and impartiality. Likewise, when the judge and attorneys do not challenge an opinion or ask the proper questions during direct or cross examination, how could a expert witness be sure he or she was giving testimony that the Board may not later decide was misleading? How would a potential witness ever measure what he or she might legitimately say in court when the Board might later apply a criteria of fraud for what was an honest expert opinion? The answer is that the Board has fired a shotgun of vague allegations and findings at Mr. Curd for giving expert testimony with which they disagree. An expert's opinion is their opinion and does not belong to anyone else. That expert cannot be required

to skew their opinion in order to later satisfy an administrative Board or Agency. The statutes and regulations were unconstitutionally vague as applied.

In the Court of Appeals, the Appellee Board relied on *Posey v. Commonwealth*, 185 S.W. 3d 170 (Ky. 2006), *Gurnee v. Lexington-Fayette Urban County Government*, 6 S.W. 3d 852 (Ky. App. 1999), *Alliance for Kentucky's Future, Inc. V. Environmental and Public Protection Cabinet* 310 S.W. 3d 681 (Ky. App. 2008) and *Fowler v. Board of Educ. Of Lincoln County, Ky.*, 819 F. 2d 657 (6<sup>th</sup> Cir. 1987). Unquestionably a statute or regulation must be interpreted as Constitutional if possible. Likewise, a regulation must be considered as a whole, unless to do so would cause an arbitrary or unconscionable result or there are specific sections that were meant to stand alone. However, as noted in *Fowler*, an individual cannot be required to guess as to its meaning as it relates to his conduct, especially if to do so would cause arbitrary and discriminatory enforcement. (*id.* at 664) It must be remembered that in the case *sub judice* it is not just a question of whether the statutes and regulations are unconstitutional, but the core issue is whether they were unconstitutionally applied to Mr. Curd's expert testimony.

The Hearing Officer and the Board lumped several regulations and statutes together while deciding each issue. It is impossible to ascertain the amount of weight given each statute or regulation when they are lumped together in this manner. Did the Board determine a violation and assess a penalty on a constitutional or an unconstitutional statute or regulation? The Court must therefore determine that each statute and regulation named may be the basis for the decision and the penalty. Thus if any one statute or regulation is unconstitutional on any one charge, the entire opinion and order of the Board must fail.

In the Court of Appeals, the Appellee Board repeatedly used the term "dishonest" in characterizing the expert testimony of Mr. Curd. Such characterization is completely unfounded. Reasonable experts may disagree on whether Mr. West conducted "research" that was necessary for a survey of the Southwood property. Reasonable experts may disagree on the positioning of calls and measurements on a topo map. Such disagreement does not justify branding Mr. Curd dishonest. No person of reasonable intelligence could have anticipated that Mr. Curd's testimony would have been interpreted in this way. The statutes and regulations were therefore unconstitutionally vague as applied to Mr. Curd.

Likewise, parts of other statutes and regulations are inherently vague. Perhaps the most clearly unconstitutional regulation relied on by the Board was 201 KAR 18:142, Section 9 which the Board contended was a basis for suspending Mr. Curd's license. It states:

The professional engineer or professional land surveyor shall avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of his or her profession.

When contemplating his or her expert testimony before a Court, the Board would have a licensee guess as to whether his or her testimony would discredit or reflect unfavorably upon the dignity or honor of the profession. Likewise, the other statutes and regulations of the Board were unconstitutionally vague as applied to Mr. Curd.

Neither a deed plot or a topographic (topo) map are defined, nor are their use limited in any of the statutes or regulations of the Board. (Elliott testimony Vol II, P. 38, Lns 10-12; Prof. Kellie testimony TH Vol IV, pp. 66, Lns 5-7) A licensee therefore has no notice that his testimony concerning a deed plot might be subject to Board discipline. Since there are no standards for such a preliminary document as this, if the Board and the Court of Appeals decisions are upheld, a licensee will be subjected to a process in which he or she must guess whether that expert's testimony will

result in censure.

The Franklin Circuit Court cited *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) in finding the statutes and regulations were void for vagueness as applied. The Court in *Grayned* enunciated the standards for evaluating vagueness:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

(See also *Craig v Kentucky State Bd for Elementary and Secondary Educ.*, 902 S.W.2d 264 (Ky. App.1995). The determination of the Franklin Circuit Court must be upheld and the order of the Board must be reversed. The Court of Appeals decision in which it found a part of a statute or regulation was constitutional as it applied to Mr. Curd, must be reversed.

2.

The Circuit Court Did Not Commit Error by  
Deciding the Constitutional Vagueness Issue

Before the Preservation Issues

Before the Court of Appeals the Board relied on *Louisville/Jefferson County Metro Government v. TDC Group, LLC, 283 S.W.3d 657 (Ky., 2009)* to support its contention that the Circuit Court should have considered preservation issues before finding the Board's statutes and regulations unconstitutionally vague as applied. It should be noted that, although distinguished by the *TDC Group* case, the court in *D.F. v. Codell, 127 S.W.3d 571 (Ky. 2003)*, held a statute to be unconstitutional and then declined to address other issues raised in the case because they were moot.

In the lower courts, the Board has suggested that Mr. Curd was not specific enough in his exceptions before the Board to preserve certain findings and conclusions of the Board for appellate review. (The Exceptions may be found at Board Hearing Record Vol. 1, tab 28) Their preservation contentions are without merit. It was not seriously contended that the void for vagueness issue was not preserved. Mr. Curd preserved the unconstitutionally vague issue by his Fifth Defense found in his Answer filed with the Board. The issue was presented before the Franklin Circuit Court in Mr. Curd's petition before that Court. (See the Answer found at Board Hearing Record , Vol 1. Tab 3) and Mr. Curd's Petition before the

Circuit Court Transcript of Record pg. 1) Furthermore, if the statutes and regulations were void for vagueness as applied to Mr. Curd, there was no need to determine whether specific findings or conclusions were preserved. The Franklin Circuit Court did not commit error in its determination.

B

THE BOARD WAS WITHOUT JURISDICTION  
TO DISCIPLINE A LICENSEE FOR HIS  
EXPERT TESTIMONY IN A COURT OF LAW.<sup>4</sup>

1.

Mr. Curd's testimony was within  
the exclusive jurisdiction of the Circuit Court.

**Section 109** of the Kentucky Constitution states in part:

“The judicial power of the Commonwealth shall  
be vested exclusively in one Court of Justice . . .”

**Section 27** of the Kentucky Constitution states:

The powers of the government of the  
Commonwealth of Kentucky shall be divided into  
three distinct departments, and each of them be  
confined to a separate body of magistracy, to wit:  
Those which are legislative, to one; those which  
are executive, to another; and those which are  
judicial, to another.

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<sup>4</sup> This issue was preserved. See Mr. Curd's Answer to Board's Complaint BR Tab 3; this Appellant's Petition and Brief before the Circuit Court and the Opinion of the Franklin Circuit Court. The Circuit Court and the Court of Appeals found for the Board on this issue.

**Section 28** of the Kentucky Constitution states:

No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

**Section 116** of the Kentucky Constitution states:

The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

Collectively these sections of the Kentucky Constitution form the Separation of Powers Doctrine applicable to this case.

Testimony and evidence in a Circuit Court is directed by the Circuit Judge and the attorneys for the parties. The Court determines what evidence is admissible and the attorneys determine what questions to ask the witness on direct and cross exam. An expert witness uses his or her experience, knowledge and research to give an opinion for the purpose of aiding the trier of facts in his, her or its findings of fact, conclusions of law and judgment. More often than not, expert witnesses directly differ in their opinions. The trier of fact must make the determination as to the weight to be given each opinion in making the judgement of the court. In the case

*sub judice*, the trier of fact was a judge without a jury.

If an administrative board or agency were allowed to control the testimony that is given during a trial through later discipline of a licensee, it would interject itself into the judicial process and interfere with the judicial power of the court. Allowing an Administrative Board to discipline a licensee because it differs with his or her expert opinion testimony given during a circuit court trial would have a "chilling effect" on future expert testimony. Article 109 of the Kentucky Constitution, noted above, does not permit this.

When a licensee testifies in court during a trial, he or she must be free of the shackles of an administrative board or agency in order to effectively give his or her expert opinion without the fear of the licensing agency second guessing their opinion after the case has been concluded. To allow otherwise would be to hamper the administration of justice.

A Board may require through regulation that a licensee tell the truth. A Board may not; however, dictate the content of the expert opinion of a licensee. This Board appears to have confused the two issues and has suggested that Mr. Curd was being untruthful, when in fact he was stating his well reasoned opinions based upon the facts of the case. If a Board

dictates the opinion that an expert must give in a court of law, it has crossed the line and infringed on the exclusive jurisdiction of the Court.

In the present case, Mr. Curd questioned whether James West's survey research was adequate in his deposition testimony.<sup>5</sup> He also testified that he constructed a deed plot which showed the measurement calls from the Southwood deed description extending across the Eadesville Highway when placed on a topo map. His opinions were based upon his research, knowledge and experience. Further questions or any clarification of his opinions were within the purview of the Court and the Attorneys. The Court and the opposing attorneys were free to extensively cross examine him on these opinions. The Board and its personnel, cannot be allowed to later interject itself into the judicial process by disciplining an expert witness for expressing his or her opinion in court. Likewise, this Board should not be allowed, through the administrative disciplinary process, to retry *Denny v Southwood* and substitute its judgment for that of the Court and its attorneys. Pursuant to the Separation of Powers Doctrine as expressed by the Kentucky Constitution, the Board was without jurisdiction

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<sup>5</sup> Mr. Curd's testimony before the Wayne Circuit Court was marked Exhibit 2, and introduced as evidence during the Board's Hearing of this matter. Mr. Curd's testimony before the Board can be found in Vol. V of the Board's Transcript of Hearing.

to discipline Mr. Curd for his expert testimony before the Circuit Court..

It must be remembered that the Wayne Circuit Court litigation was primarily an adverse possession case. Furthermore, Mr. Curd did not testify as to the location of the boundary lines. Instead, he testified about a graphical deed plot from the description calls of measurement and directions overlaid on a topographic map (topo) as a preliminary working drawing.

(TH Ex. 2, pp 20, 21) Notwithstanding the above, the Board Concluded as a Matter of Law that:

26. It was a material fact in the boundary line litigation that the Southwoods' southern boundary could not cross the Eadesville Highway under the minimum standards of surveying practice.

27. Curd did not comply with his duty to be truthful, objective, and not suppress a material fact, by his failure to advise the court of the material fact that the Southwoods' boundary line could not have been south of the Eadesville Highway or west of the Matthews tract under the minimum standards of surveying practice.

28. Furthermore, Curd's conduct and failure to so advise was purposely intended to deceive a public court as to the location of the boundary under applicable minimum standards of surveying practice. . . .

(The Board's Findings and Conclusions P. 17)

Mr. Curd was not required to volunteer that the southern boundary could not

cross the Eadesville Highway. Furthermore, if there was adverse possession, the line would have crossed the Highway. It is obvious from the Court's questions and the original opinion that the Court was not misled. By dictating what Mr. Curd was to volunteer during his testimony, the Board has unconstitutionally interfered with the exclusive jurisdiction of the court and has acted in excess of its granted powers. *American Beauty Homes Corp. V. Louisville and Jefferson Co. Planning and Zoning Commission, et al.*, 379 S.W. 2d 450,456 (Ky., 1964).

Likewise, Mr. Curd was justified in giving his opinion in response to a question concerning Mr. West's survey that "... it appears that he did not conduct research involving a determination of boundary lines." (TH, Exhibit 1, Pg. 22, emphasis added) As will be discussed in more detail later in this brief, Mr. Curd based his opinion on Mr. West's prior deposition testimony as well as the research requirements for conducting a proper survey. Reasonable experts may differ during a trial. The Board was without jurisdiction to censure Mr. Curd's expert testimony in this case.

The Board and the Franklin Circuit Court relied on *Maggard v. Commonwealth, Board of Examiners of Psychology*, Ky 282 S.W. 3d 301 (2008) in deciding this issue. *Maggard* is easily distinguished because, as

that Court noted, “. . .Maggard was neither court-appointed **nor an integral part** of the judicial process. . .*id. at 303* (emphasis added) Here, Mr. Curd was an integral part of the judicial process. As an Expert Witness during a trial he was subject to the direction of the judge and was subjected to examination and cross-examination by the respective attorneys. The rules of the Court of Justice applied to his testimony. His opinion testimony was not subject to second guessing by an administrative agency. *Maggard* must be explained, distinguished or overruled on this issue.

2.

**Mr. Curd may not be disciplined  
for the failure of the attorneys or the court  
to ask the proper questions.<sup>6</sup>**

As part of the Civil Rules and the Jurisdiction of the Judiciary, during a trial the attorneys ask questions on direct and cross examination. During the Trial in the Wayne Circuit Court, the court also asked questions. The presentation of the case, exhibits and evidence pertaining thereto is therefore not directed by the witness. Attorneys and the court must ask the right questions in order to elicit the proper testimony. They also direct the

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<sup>6</sup>While the order of proceedings was not independently listed as part of the Exceptions before the Board, it appeared in Mr. Curd's brief before the Franklin Circuit Court and is considered by Appellant to be a part of the issue concerning the unconstitutional interference with the judiciary by an administrative agency. The Circuit Court and the Court of Appeals found for the Board on this question.

introduction of evidence.

The Board found that Mr. Curd failed to advise the court of material facts by his testimony and evidence presented to the Wayne Circuit Court; however, he answered the questions asked by the court and the attorneys. (See the Board's Findings No. 16-18 and 26-29) Mr. Curd was not responsible for the introduction of evidence at trial. Likewise, he was not required to offer testimony that was not asked for by the attorneys or the court. Basically the Hearing Officer and the Board made their own findings and penalized Mr. Curd for any evidence or opinion testimony which he might have submitted to the contrary. The attorneys and the court asked the questions. Mr. Curd supplied the answers. The court did not indicate it had been misled. In fact, the Court thanked Mr. Curd for coming in and noted that he had "enlightened us" with his testimony. (Ex 2.- Testimony of Mr. Curd before the Circuit Court p. 44) Since the Board erroneously disciplined Mr. Curd for failure to offer testimony and evidence which it believed should have been introduced, and since such action would have been beyond the scope of an expert witness in a Circuit Court trial, the Board intruded on the province of the Judiciary and the Order of the Board must be reversed.

**The Board was without Jurisdiction  
As a Result of the Doctrine of Witness  
Immunity.<sup>7</sup>**

As part of the Separation of Powers issue stated above, Mr. Curd was entitled to Witness Immunity for his testimony in the Circuit Court trial.

Witnesses in a civil trial are generally immune from suit. This facilitates the free flow of information from a witness who might otherwise measure every statement he or she makes in fear of civil suit. Witness immunity should be followed in this disciplinary proceedings because:

▣ An expert witness in a Circuit Court trial might otherwise be hesitant to make a full disclosure of all pertinent information within their knowledge if they might be disciplined by their licensing board. The failure to grant expert witness immunity would have a chilling effect on the administration of justice in the Court of Justice.

▣ An expert witness in a Circuit Court trial might otherwise be hesitant to testify or express his or her opinion if he or she might be disciplined by their licensing board for their testimony.

▣ Experts often disagree. The losing expert before a circuit court must not suffer disciplinary proceedings because the licensing Board disagrees with an expert's opinion.

In the case *sub judice* every allegation against Mr. Curd was based

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<sup>7</sup>While witness immunity was not independently listed as part of the Exceptions before the Board, it appeared in Mr. Curd's brief before the Franklin Circuit Court and is considered by Appellant to be a part of the issue concerning the unconstitutional interference with the judiciary by an administrative agency. The Circuit Court and the Court of Appeals found for the Board on this question.

upon his conduct as a witness in Wayne Circuit Court case. The separation of powers doctrine requires that each branch of government is sovereign. Control of the courtroom is soundly vested with the judiciary and no other branch of government may infringe upon that power. *Turner v Kentucky Bar Association, Ky., 980 SW2d 560 (1998)*. At no time during Mr. Curd's testimony was he reprimanded by the Court for his conduct or testimony. The judiciary, in particular a trial judge, has full power and authority to address issues with witnesses. It did not do so. The Board did not have the authority to later do so in this case.

The Franklin Circuit Court's reliance on *Maggard v. Commonwealth, Board of Examiners of Psychology, Ky 282 S.W. 3d 301 (2008)* for the proposition that Witness Immunity does not apply, was misplaced. The Court's reliance is answered by the first two sentences quoted from the **Maggard** opinion:

We likewise reject Maggard's argument that he was entitled to absolute immunity because he was participating in a civil judicial proceeding. Maggard was neither court appointed nor an integral part of the judicial process in the case. (Id. at 302)

As noted above, it is clear that the Maggard case must be distinguished from

the matter *sub judice*. Unlike Mr. Curd, Mr. Maggard was not a trial witness in a court proceedings.

Mr. Curd's testimony before the Wayne Circuit Court was not misleading and did not involve perjury or fraud. He gave his honest opinion and properly answered the questions that were asked him. His testimony was therefore immune from disciplinary proceedings by the Board.

C.

**THE FRANKLIN CIRCUIT COURT DID NOT COMMIT ERROR BY INCLUDING IN ITS OPINION STATEMENTS THAT WERE PART OF ITS REASONING OR WERE DICTA**

In the Court of Appeals, the Board contended that the trial Judge considered matters not in the record. Specifically the Board questioned the following statements in the Circuit Court's Opinion and Order:

The Board certainly enjoys an inherent right to disagree with Mr. Curd's methods, but it is simply not proper to selectively police expert testimony.  
(Opinion P. 7)

Mere disagreement over the proper technique for plotting in an adverse possession claim is not enough.  
(Opinion P.8)

In fact, general acceptance within the land surveying community is no longer a prerequisite for the admission of Mr. Curd's testimony, and certainly cannot provide the basis for

administrative discipline  
(Opinion P. 8)

... (T)he Board should not be second-guessing the determination of the Court (as to expert testimony) absent truly extraordinary circumstances.  
(Opinion P. 8)

A reading of the Judge's comments clearly shows that they were designed to explain the Court's reasoning and were not designed to introduce evidence not in the record. The Court's reasoning and decision was sound and should be upheld by this Court. At most the comments were *dicta*.

**D.**

**THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD WERE ARBITRARY, AND WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE<sup>8</sup>**

In a twenty-four (24) page document, the Hearing Officer issued an opinion which was adopted by the Board, consisting of sixty four (64) paragraphs of findings and fifty seven (57) paragraphs of conclusions. To argue each of these paragraphs would cause this brief to exceed this Court's page limitation. The Board's Findings and Conclusions can be grouped into

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<sup>8</sup> This issue was preserved. See the Exceptions to the proposed Hearing Officer Order - BR Tab 8; this Appellant's Petition and Brief before the Circuit Court - Transcript P. 1. The Circuit Court and the Court of Appeals declined to rule on this issue.

two main categories and one or two minor categories.<sup>9</sup> These categories will be listed and discussed below:

1.

**The Board's order finding that Mr. Curd violated statutes and regulations regarding his boundary testimony was arbitrary and without substantial evidence**

The Board's main conclusion on this issue was that Mr. Curd violated statutes and regulations by failing to advise the court of the material fact that the Southwoods' boundary line could not have been south of the Eadesville Highway or west of the Matthews tract. (Board's Conclusion # 27) This issue was one of the ultimate questions before the court in *Denny v Southwood*. By finding that Mr. Curd was under an obligation to testify in the Denny's favor on this issue, the Board essentially dictated what the ultimate decision of the Circuit Court on that issue should be. It is obvious that our system of justice does not operate in this manner. Mr. Curd was under no obligation to volunteer what the Court's determination should be to the trial judge. Furthermore, as an expert, Mr. Curd was under no obligation to come to the same conclusion as the Board.

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<sup>9</sup> An issue concerning a "partial survey" could be considered to be another category; however, it will not be included since the Board found in Mr. Curd's favor on that issue.

The Hearing Officer and the Board also criticized the introduction into evidence of a deed plot overlaid on a topo map produced by Mr. Curd. As noted earlier, a deed plot overlaid on a topo map is a preliminary document and working drawing used by surveyors to place the measurement calls recited in a deed onto a topo map. (See Ex. 10 from the Board's Hearing.) Mr. Curd clearly testified that he did not perform a survey of the property. (Ex. 1, pg. 8, Curd Deposition; Ex.2, pg. 30, Trial Testimony) The use of the topo map and its introduction into evidence was controlled by the attorney for the Southwoods and the Trial Judge, and not Mr. Curd. Mr. Curd clearly stated in his trial testimony:

. . . And this is just kind of to generally try to place the property on here and it's used for working purposes. It's not—I don't sign and stamp this document. I use it to try to figure out what's going on. (Ex. 2, pg. 29)

The Hearing Officer and the Board also criticized the placement of the call at the "forks of the drain". (Conclusion # 16) The Order terms this an "ambiguous monument" even though it represents a natural monument which appeared in a relevant historical description in the chain of title. (TH V, pp. 28, 130) Once again, the Hearing Officer and the Board attempted to substitute their judgment for the expert opinion of Mr. Curd. The Board's

conclusion that Mr. Curd “inferentially” and erroneously represented where the boundary line was located was not supported by substantial evidence.

(Board’s Conclusion 23) An alleged inference cannot be the basis for disciplinary action by the Board.

The Board also criticized Mr. Curd for his alleged failure to give deference to the monumentation of the Eadesville Highway. (Board Finding of Fact # 37 and Conclusion 14). Through his testimony in the Wayne Circuit Court, Mr. Curd made it clear that generally monumentation has more control than course and distance. He also noted that the exception would be in the case of unwritten rights, being adverse possession if you’re trying to locate adverse rights, or other such rights. (Transcript of Mr. Curd’s Wayne Circuit Court Testimony - Board’s Exhibit 2, p. 31) The Board repeatedly overlooked the fact that the Southwood’s case and Mr. Curd’s testimony primarily involved the issue of adverse possession. A line resulting from course and distances called for in a deed is not the same as a boundary line resulting from a full survey, taking into consideration monumentation.

2.

**The Board's order finding that Mr. Curd  
violated statutes and regulations regarding his testimony  
concerning the omissions of surveyor James West  
was arbitrary and without substantial evidence**

James West was a surveyor who testified for the Denneys (Plaintiffs) in the boundary dispute which was tried in the Wayne Circuit Court. The Board ruled that the questions Mr. Curd raised during his testimony about the adequacy of Mr. West's research of the property in question, violated the Board's statutes and regulations. (Board's Conclusion # 44)

Notwithstanding the fact that the ultimate determination in this litigation had to be made by the Trial Judge, the Board once again insisted that Mr. Curd should have agreed with West's and the Plaintiffs contention as to the placement of the boundary lines. (Board's Conclusion # 33)

The Hearing Officer and the Board's main contention concerning Mr. Curd's testimony about James West appears to be Mr. Curd's statement that Mr. West did not do any work in the deed room. This statement appeared in Mr. West's deposition which Mr. Curd used to prepare for his testimony in the Circuit Court. This part of Mr. West's deposition read as follows:

Q (Southwoods Attorney) What work did you do  
in the deed room prior to surveying this property?

A (James West) I didn't do any. Mr. Jones furnished me with the research on it. I did look up adjoining deeds and so forth, but I didn't do any title work on this deed.

Q Okay. Now the. . .how far back did the chain of title go on this property do you know?

A I don't know. I didn't do that. Mr. Jones did that.

Q You don't know whether it went back to the Commonwealth of Kentucky or a common grantor?

A No sir. I didn't run it back.

Q Do you know if the deed description changed on any of these tracts as. . .?

A Not that I know of.

Q Okay. As far as you know it's the same all the way back?

A. Yes.

Q So the actual description that you surveyed was. . .is the description that's given in this deed, deed book 234, 104?

A. Yes sir. Uh-huh. (Indicating affirmative)

(T.H. Exhibit # 5, pp. 5,6)

The Hearing Officer and the Board also alleged that Mr. Curd, both during trial and the deposition, made other direct and indirect statements

that Mr. West apparently did not do any research, or if he did, it was inadequate. Those several statements are as follows:

**Mr. Curd's Testimony during his Deposition:**

Well, based on his deposition and a review of some of his field, I mean plats, it appears that he did not conduct any research involving a determination of boundary lines." Ex. 1, pg. 22, line 11-14.

. . . I don't understand how he arrived at those conclusions except I do know that if he didn't do the research, then I don't know how he arrived at any conclusions." Ex. 1, pg. 27, line 3.

Question: . . . (F)or the work that you've been asked to review by Mr. West you've indicated that in your opinion that he did not do research that would have assisted in his preparation of his surveys. Is that correct?

Answer: "That is correct." Exhibit 1, pg. 41, line 4-9.

**Mr. Curd's Testimony during the Circuit Court Trial:**

During the trial, Mr. Curd was asked if he had an opinion regarding the work done by Mr. West. Mr. Curd read the deposition transcript of Mr. West word for word, gave an explanation of the minimum standards, and stated "And I just felt from reading his deposition that he didn't conduct deed research in the process of performing his survey." Exhibit 2, pg. 11.

Based upon these statements the Hearing Officer and the Board

concluded that Mr. Curd was intentionally attempting to falsely discredit Mr. West. The significant wording during the deposition is that Mr. Curd said that "it appears", in the sense that it did not appear to him, Mr. Curd, that Mr. West had done the necessary research. The Board failed to recognize these statements by Mr. Curd were an expert's valid opinion, not a statement of fact..

The investigators for the Board acknowledged that Mr. West's deposition testimony about his deed research was "unfortunate," but stated that Mr. West cleared it up later in his trial testimony. Their opinion was that Mr. West did do adequate research. (T.H. Vol. III, pg. 7) The Board's investigator, Mr. Elliott, acknowledged that when he first read Mr. West's deposition he thought that it would be easy to prove Mr. West had not done research. It was only after Mr. Elliott read Mr. West's trial testimony and talked to Mr. West that he changed his mind. (T.H. Vol. II, Pg. 21-22) Mr. Curd did not have the luxury of investigating Mr. West after the fact. Because the witnesses were separated, he did not hear Mr. West's trial testimony.

Mr. Curd's opinion was bolstered by Mr. West's deposition testimony that he did not know that the Denney property description changed in the

chain of title, including monument changes and one tract changing from a 90 acre tract to a 60 acre tract. (Exhibit 5, pg. 5-6) Even Board employee and investigator, Mr. Elliott, agreed that Mr. West's lack of knowledge of these facts would indicate that he did not do research. (T.H. Vol. II, Pg. 59-61). Judge Byorm of the Wayne Circuit Court found that Mr. West's survey did not meet the Minimum Standards of Practice for Professional Land Surveyors (KAR 18: 150) (Board Exhibit 17, P. 11). Judge Miniard in his later opinion found otherwise. (Board Exhibit 12, P. 7)

Mr. Curd's testimony about the deed research performed by Mr. West was a reasonable opinion based upon Mr. West's sworn deposition testimony, especially in light of the fact that the two trial judge's opinions varied on the issue. Mr. Curd clearly testified as to the facts upon which his opinion was based. There is nothing false or misleading about having an opinion and giving a basis for it.

From the foregoing, it is apparent that the Board's order finding that Mr. Curd violated statutes and regulations regarding his deposition and trial testimony was arbitrary and without substantial evidence. The order of the Board must therefore be reversed by this Court.

3.

**The Board's order finding that Mr. Curd violated statutes and regulations regarding his testimony concerning his status as an investigator for the Board was arbitrary and without substantial evidence**

The Board, through its Hearing Officer concluded that Mr. Curd violated ethical standards when he testified on October 2, 2003 at the trial that he was an investigator for the Board. The pertinent testimony occurred at the beginning of Mr. Curd's trial testimony when he was being asked his qualifications. Mr. Curd read those qualifications from his resume. When asked about his degrees, professional education, licensure, what professional organizations he belonged to and "what about government service." Mr. Curd responded as follows:

I served as an investigator for the Kentucky Board—Kentucky State Board of Licensure for Professional Engineers and Land Surveyors from '94 to present. I'm a member of the City of West Liberty Planning Commission. I have been the county surveyor of Morgan County, Kentucky since 1990. I was on the Board of Directors of Gateway ADD from '87 to 1990. (Exhibit 2, pg. 4).

Mr. Curd had in fact been an investigator for the Board from 1994 until June 30<sup>th</sup>, 2003 when his last contract expired. He was not aware that his contract would not be renewed. Although Mr. Fentress testified that

he had told Mr. Curd in 2002 the Board was doing away with contract investigators, Mr. Curd received another contract after that. The Hearing Officer acknowledged that Mr. Curd had never been formally notified that his contract would not be renewed, that previous contracts had been back dated to July 1<sup>st</sup>, and the Board had not retrieved Mr. Curd's badge or ID cards, but found that Mr. Curd knew he was no longer an investigator for the Board and intentionally testified that he was presently an investigator in order to bolster his credibility. These findings and conclusions amount to an illogical and arbitrary stretch of the evidence in an effort to justify a finding of an ethical violation.

**4.**

**Mr. Curd testified he was at the site.**

The Board has contended that Mr. Curd violated various statutory and regulatory prohibitions by testifying inconsistently at trial that he had not been to the site to look for monumentation when he previously testified at deposition that he had made two physical inspections of the property. (Findings of Fact 37, 39, and 40 ) In fact, Mr. Curd had testified during his deposition that he had been to the site on two occasions and during the trial that he walked what Mr. West's survey showed as the boundary lines of the

property. When asked whether he had been to the property specifically for the purpose of looking for monumentation, he stated he had not been there for the purpose of conducting a field survey. The two statements were not inconsistent. (TH Ex. 2, pp. 23, 25 and 40; see also Professor Kellie's testimony TH Vol IV, pp. 102,103)

The Findings and Conclusions of the Board were arbitrary and were not supported by substantial evidence. The Board's Order must be reversed.

**5.**

**The Six month's suspension of Mr. Curd was Arbitrary and Excessive**

Joseph B. Curd, Jr. is a 24 year veteran of the profession of surveying. During that time he has never been reprimanded or suspended for any violation of Board statutes or regulations. (Ex. 21, Sheet 5, Pg. 18) As noted earlier, he has a Masters degree from Virginia Tech. His Master's Thesis was on general property descriptions and he wrote professional articles with Professor Kellie of Murray State University. Furthermore, Mr. Curd taught Continuing Education courses which were approved by the Board, and was an Investigator for the Board from 1994 to 2003. (TH V, pp. 2-5)

Here, we are not faced with someone who has stolen money or

defrauded a client or the public. Mr. Curd was not accused of the illicit use of drugs or alcohol or inappropriate sexual conduct. His only imaginable offence was that he stated his opinion in such a way that it differed with what the Board and its staff believed was appropriate. If we were to suspend every licensee of a Board or Agency who expressed an opinion in court that might differ from a majority of a Board, there would be few licensees, and no sensible person would offer his or her testimony as an expert in a court of law.

In *Hughes v Kentucky Horse Racing Authority*, 179 S.W.3d 865, 869 (Ky. App. 2004) the court upheld a Personnel Board Hearing Officer who stated:

The Hearing Officer finds the penalty of termination excessive and erroneous under the circumstances. There are mitigating factors which powerfully influence the evaluation of the seriousness of the offense and the appropriateness of the penalty. Hughes's situation is examined under K.R.S. § 18A, a statute that requires a just and proper cause.

In the present case the six (6) months suspension for what could at most be termed technical deficiencies was arbitrary, excessive and erroneous. At most there was a difference of professional opinion. That difference of opinion could not reasonably justify a six (6) months suspension. Because

the six (6) month suspension was excessive, the Order of the Board must be reversed.

**6.**  
**Preservation Questions**

The Board has repeatedly raised preservation questions. The Substantial Evidence issues were preserved through Mr. Curd's Motion for Summary Judgment before the Board - BR Tab 16; Mr. Curd's Exceptions before the Board - BR Tab 28; and his Petition filed with the Franklin Circuit Court. Transcript of Record P. 1. The Unconstitutional Vagueness question was preserved through Mr. Curd's Answer to the Board's Complaint - BR Tab 3 and the Petition filed in the Franklin Circuit Court TR P. 1; and the Separation of Powers question was preserved by the Answer -BR Tab 3 and the Petition filed with the Franklin Circuit Court TR P. 1. Mr. Curd has consistently treated the Failure to Ask the Proper Questions and the Witness Immunity questions to be a part of the Separation of Powers issue.

**III.**

**CONCLUSION**

Mr. Curd has dedicated his life to the profession of land surveying.

He has advanced his experience and education so that he is highly effective. If the Board's Order is allowed to stand, it will affect his livelihood, his reputation and his credibility in future expert testimony.

The issue of whether a licensee can be disciplined by an administrative agency for giving his or her expert opinion in a trial before a court of law is one of the more important issues to come before this Court. It goes to the heart of the Judicial System. An administrative agency is not a Court. It should not be allowed to directly or indirectly interfere with the determinations of a trial court through the use of unconstitutional statutes or regulations.

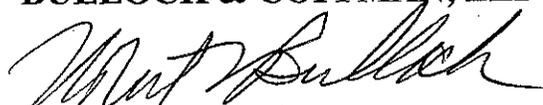
The six months suspension by the Board is not justified by the facts or the law. The intimidation factor of the Board's Order, if not reversed, will effect the future expert testimony of other land surveyors who will be concerned that a staff member or a Board member might disagree with his or her opinions. Such a precedent could have a wide spread effect of chilling expert testimony.

For the reasons stated above, the Opinion and Order of the Franklin Circuit Court must be affirmed as it relates its determination that the statutes and regulations of the Board were unconstitutionally vague as applied, and

reversed or extended as it relates to the Board's jurisdiction to discipline an expert witness for his testimony in a Circuit Court issue and the substantial evidence issue. The Court of Appeals decision must be reversed and modified as well.

**Respectfully submitted,**

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