

IN THE SUPREME COURT OF IOWA

NO. 09–1789

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GEORGE McMAHON and BARBARA DOUGLASS,  
Petitioners-Appellants,

and

CARL OLSEN,  
Intervenor-Appellant

v.

IOWA BOARD OF PHARMACY,  
Respondent-Appellee.

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Reply to Appellee's Resistance to  
Vacation of Lower Court's Judgment

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Come Now the Petitioners-Appellants, George McMahon and Barbara Douglass, and respectfully reply to the Appellee Board's Resistance to Vacation of Judgment as follows:

1. To the extent that the Appellee may simply be arguing that vacation of the judgment below is unnecessary because it believes dismissal of the appeal will not preclude Appellants or the Intervenor from asserting any of their legal arguments in future litigation, Appellants have no issue with such a result—so long as the dispositive order is quite clear on that point.

2. To the extent that the Appellee is arguing that the proper course is to dismiss this appeal in such a manner as to impose an issue preclusive effect on Appellant's undecided legal claims, such as the proper interpretation and application of Iowa Code Section 124.203(2), appellants take firm issue. Appellants should not lose future rights to assert their arguments on the merits simply because this case has been mooted by other developments.

3. The Appellee cites two cases to suggest that dismissal without vacation is the proper course in this case.<sup>1</sup> These two cited cases did not directly hold that vacation of a decision under appeal is inappropriate when a case becomes moot, and are quite distinguishable from the present case, because in each of those appeals, the claims being asserted were not capable of being resurrected in future litigation. In this case, it is entirely conceivable that a future Board of Pharmacy may resurrect this legal dispute among the parties by simply reversing the action of the present Board.

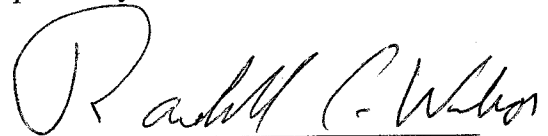
4. The Appellee's resistance overlooks the black letter law recited in U.S. v. Munsingwear, 340 U.S. 36 (1950). Ordinarily, when an appeal becomes moot, *res judicata* should **NOT** bar re-litigation of undecided issues that are capable of being raised in a future case. *Id.* {In *Munsingwear*, the government did not seek the usual remedy of remand with instructions to vacate and instead, unwisely accepted a dismissal with prejudice. The result in *Munsingwear* was thus, an acknowledged aberration.}

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<sup>1</sup> Martin-Trigona v. Baxter, 435 N.W.2d 744 (Iowa 1989) and State v. Wilson, 234 N.W.2d 140 (Iowa 1975).

WHEREFORE, Petitioners-Appellants continue to move this Court vacate the final decision and judgment below and to remand this case with instructions to the district court to dismiss the action without prejudice or to otherwise dismiss this appeal without future prejudice to Appellants' legal claims.

Respectfully Submitted:



**Randall C. Wilson, Esq.** PK 0007857

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CERTIFICATE OF SERVICE & FILING

The undersigned certifies that on April 22, 2010 four copies of this document were placed in the U.S. Mail for filing with the Clerk of the Iowa Supreme Court and one copy was served by mail upon opposing counsel and *pro se* litigant Carl Olsen, at the addresses shown below:

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