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No. 677497-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOSEPH JANASZAK, DDS

Appellant,

v.

STATE OF WASHINGTON, *et al*

Respondents.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

A. INTRODUCTION

Appellant Dr. Joseph Janaszak, D.D.S., seeks appeal of the trial court's dismissal of his lawsuit against the State of Washington, the Washington State Department of Health, the Dental Quality Assurance Commission, and several individuals employed by same ("Defendants").

Dr. Janaszak brought his lawsuit after the Department of Health ("Department") conducted a negligent investigation, and the Dental Quality Assurance Commission ("DQAC") thereafter improperly summarily restricted his dental license. In response to the summary restriction, the Department posted several defamatory statements on its website and later refused to remove the postings when the summary restriction was lifted. Dr. Janaszak brought 14 separate causes of action which included statutory, constitutional, and common law claims.

In response to Dr. Janaszak's lawsuit, the State brought a motion for summary judgment dismissal. After a brief hearing, and no explanation of its bases, the trial court granted the motion and dismissed Dr. Janaszak's lawsuit in its entirety.

B. ASSIGNMENTS OF ERROR

Dr. Janaszak assigns error to the trial court's entry of its Order, entered on September 2, 2011, dismissing his lawsuit in its entirety. Because the proceedings were not recorded, and the Court failed to set forth its bases for dismissal in either its Order, or orally at hearing, Dr. Janaszak assigns the Court's decision, as a whole, as error.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it dismissed Dr. Janaszak's lawsuit when a question of material fact remained as to whether Defendants were immune from suit for each and every claim?

2. Did the trial court err when it dismissed Dr. Janaszak's Washington Constitution claims when Defendant sought injunctive relief from the alleged violations?

3. Did the trial court err when it dismissed Dr. Janaszak's claims of defamation when a question of material fact remained as to whether the Department posted a provably false statement on its website?

4. Did the trial court err when it dismissed Dr. Janaszak's Negligent Investigation claims when Defendants had a statutory duty to investigate and a material question remained as to whether those duties were carried out in a reasonable manner?

5. Did the trial court err when it dismissed Dr. Janaszak's claims of Outrage when a material fact remained as to whether Defendants' conduct arose to the level of extreme and outrageous?

6. Did the trial court err when it dismissed Dr. Janaszak's claims of Intentional Interference with a Business Expectancy when a material fact remained as to whether Dr. Janaszak had established a valid business expectancy?

D. STATEMENT OF THE CASE

On January 16, 2007, the Dental Quality Assurance Commission (DQAC) entered an ex parte summary restriction of Dr. Janaszak's dental license, prohibiting him from treating female patients over the age of 12. Clerk's Papers (CP) 258-60. The Order states the Commission found Dr. Janaszak had sexual relationships with two female patients and that he continued to pursue each of the patients after each had ended her relationship with him. *Id.* The Order also stated Dr. Janaszak made repeated phone calls to each woman, calling one patient 455 times and the other 298 times. *Id.* The basis for the summary restriction was Assistant Attorney General Kim O'Neal's Ex Parte Motion for Summary Restriction supported by the declaration by Department of Health Investigator Chyma Miller-Smith. *Id.*

The matter was initiated when, on January 30, 2006, the Department of Health received a complaint from Patient A, alleging Dr. Janaszak had sexual relationship with her while she was his patient. CP 262. The Department opened an investigation that day. *Id.* The investigation was not authorized by DQAC until two weeks later, on February 14, 2006. CP 388-91.

Ms. Miller-Smith was assigned to investigate the matter. On or about February 27, 2006, she emailed Patient B and stated "I have checked with the Dental Program and they have not received any new complaint on Janaszak." CP 264. Ms. Miller-Smith went on to state "So I will probably call [Patient A] today." *Id.* That same day, Ms. Miller-Smith received a copy of email correspondence between Patients A and B which indicated Patients A and B knew each other and had worked together to draft the language to be used in their respective complaints against Dr. Janaszak. CP 266-67. The following day, Patient B filed a complaint with the Department of Health alleging Dr. Janaszak had a sexual relationship with her while she was his patient. CP 269-71. DQAC did not authorize the investigation of Patient B's complaint until March 1, 2006. CP 388-94.

On March 2, 2006, Ms. Miller-Smith was assigned to investigate the matter involving Patient B and on or about March 10, 2006, she drafted a statement for Patient A to support Patient A's allegations, and on or about March 14, 2006, she drafted a statement for Patient B to support Patient B's allegations. CP 251, 273. The following day, Ms. Miller-Smith requested that Patient B track any telephone calls from Dr.

Janaszak explaining the purpose of requesting the tracking was to establish a continuation of his "MO". CP 275.

On or about March 27, 2006, Ms. Miller-Smith again received email communications verifying that Patient A and Patient knew each other and had planned to file complaints against Dr. Janaszak. CP 277-81. On multiple occasions, including on March 27, 2006 and August 22, 2006, Patient B offered to provide copies of her telephone records to Ms. Miller-Smith. CP 283-84. Ms. Miller-Smith did not follow up and never received complete copies of the telephone records in advance of completing her investigation.

On March 27, 2006, Ms. Miller-Smith stated, in email correspondence with Patient B that the plan for interviewing Dr. Janaszak was to "open the door as a billing issue and then address the unprofessional conduct of having a sexual relationship with clients." CP 286.

On April 18, 2006, Ms. Miller-Smith denigrated Dr. Janaszak in email correspondence to Patient B stating he may "attorney up" thereby making it more difficult to investigate him. She also states that "other victims" may be contacting her after "word gets out" about the allegations. CP 288.

On June 8, 2006, Ms. Miller-Smith interviewed two of Dr. Janaszak's employees and both denied any knowledge of Dr. Janaszak having sexual relations with patients. CP 290-93. Ms. Miller-Smith requested that Dr. Janaszak provide a written statement in response to the complaints and on July 27, 2006 he did so, asserting that he had never had a relationship with either Patient A or Patient B during the time they were patients. CP 253.

Ms. Miller-Smith finalized her investigative reports on September 14, 2006; the investigation was officially concluded on September 19, 2006. CP 295-301; CP 303.

On January 9, 2007, Ms. Miller-Smith signed a sworn declaration to the Commission attaching only: Dr. Janaszak's telephone records (revealing how many calls he made to each Patient), Memorandum of Interview with Patient A, Memorandum of Interview with Patient B, Treatment records of Patient A, Treatment records of Patient B, Investigation Summary regarding Patient A, Investigation Summary regarding Patient B, Complaint of Patient A and the Complaint of Patient B. CP 305-06.

Ms. Miller-Smith failed to attach: the telephone records of either Patient A or Patient B (which reveal the number of phone calls each of

the patients made to Dr. Janaszak), Dr. Janaszak's written statement, or her own memos to file regarding her interviews with Dr. Janaszak's two employees, both of whom supported Dr. Janaszak's position. *Id.*

On January 16, 2007, AAG Kim O'Neal filed an Ex Parte Motion for Summary Action based upon the limited evidence provided by Ms. Miller-Smith. CP 308-11. There was no evidence presented that non-adult females were at risk of harm. *Id.* Ms. O'Neal argued Dr. Janaszak's license should be summarily restricted from providing treatment to female patients over the age of 18. *Id.* On that same day, Lorin Peterson DDS, Commission Panel Chair, signed an Order which restricted Dr. Janaszak from treating female patients aged 12 and older. CP 258-60. The Order stated that "telephone records revealed that he [Dr. Janaszak] called them [Patients A and B] repeatedly; calling one patient 455 times and the other 298 times." The Commission panel allowing the restriction included Dr. Lorin Peterson, Dr. Pramod Sinha and Dr. Robert Faine. *Id.*

The Department of Health issued a press release on January 18, 2007, stating "Kitsap County Dentist's license restricted after having sex with patients." CP 313-14. The press release was, at the time issued, untrue as no findings had been issued against Dr. Janaszak; whether he had sexual relations with any patient were merely allegations. To date, the

press release remains on the Department of Health website, continues to be republished and has been disseminated to news organizations causing continual and substantial harm to Dr. Janaszak's professional interests.

After the summary restriction, several insurance companies refused to honor their existing contractual agreements with Dr. Janaszak. Specifically, Washington Dental Service, Premera Blue Cross, and Kits Physicians Services, refused further payment for treatment rendered by Dr. Janaszak. These three insurers made up approximately 90% of the dental claims billed by Dr. Janaszak's office. CP 351-52.

On January 29, 2007, after reviewing the press release issued by the Department of Health, a third complainant, hereinafter identified as Patient C, called the Department of Health. CP 316-19. Ms. Miller-Smith followed up with Patient C on January 30, 2007, and, on January 31, 2007, and conducted an interview with Patient C by telephone. CP 321-22. On February 6, 2007, Ms. Miller-Smith interviewed an alleged witness, PH, named by Patient C, and corresponded with Patient C's mental health counselor. *Id.* Emails between Patient C and Ms. Miller-Smith reveal Patient C specifically advised Ms. Miller-Smith that she did not want to file a complaint of her own, but would act as a witness for the ongoing investigation. CP 324-25. Ms. Miller-Smith sent Patient C a

complaint form anyway. CP 327-28. On February 7, 2007, Patient C signed a complaint against Dr. Janaszak that had been drafted by Ms. Miller-Smith. *Id.* At the time, Ms. Miller-Smith had no authority to conduct the investigation. It was not until February 9, 2007 DQAC actually approved an investigation as to Patient C's complaint, well after Ms. Miller-Smith had already initiated her investigation. CP 330.

On February 14, 2007, Ms. Miller-Smith appeared, unannounced at Dr. Janaszak's office and demanded records of Patient C. CP 351-52. Although she knew Dr. Janaszak was represented by counsel, she interrogated Dr. Janaszak regarding his compliance with the January, 2007 summary restriction. *Id.* When Dr. Janaszak informed Ms. Miller-Smith that he would need to confer with counsel, she told him, contrary to law that he was required to immediately provide her with what she requested. *Id.*

On February 21, 2007, the Commission issued an Amended Statement of Charges alleging Dr. Janaszak had sexual relations with Patient C. CP 332-35. Immediately thereafter, the Department of Health issued a press release stating Dr. Janaszak was "charged with unprofessional conduct for allegedly having sexual relationships with three patients."

On March 1, 2007, Ms. Miller-Smith sent email correspondence to the Assistant Attorney General and Department of Health staff attorneys assigned to the case against Dr. Janaszak admitting that Patient B had called Dr. Janaszak "so many" times that the number of calls was impossible to put into an Excel Spreadsheet. Patient B admitted calling Dr. Janaszak 646 times during a 30 day period. Telephone records revealed that Patient B had called Dr. Janaszak thousands of times within the period of time between January 2005, and January 9, 2006. On January 9, 2006, immediately prior to making her complaint, Patient B called Dr. Janaszak 64 times. CP 254.

At her deposition, taken on February 16, 2007, Patient A confirmed that Mr. Miller-Smith wrote her statement and confirmed that she and Patient B colluded in filing of complaints against Dr. Janaszak. *Id.*

On March 6, 2007, the Commission withdrew the Amended Statement of Charges alleging Dr. Janaszak had sexual relations with Patient C. CP 337. On March 21, 2007, the Commission withdrew all charges against Dr. Janaszak and removed the summary restriction. CP 339-41. The Department did not issue a press release announcing withdrawal of the charges until April 20, 2007. That announcement of

the withdrawal was buried in a release of information covering disciplinary action against numerous other practitioners, unlike the initial press release that was solely devoted to Dr. Janaszak.

The Department of Health had in effect, at the time pertinent to the investigation of Dr. Janaszak, a "Standard Operating Procedure" ("SOP") for investigators. CP 343. The SOP requires that investigators "impartially and professionally investigate alleged wrongdoing." (SOP 7a) The SOP also requires that investigators leave the premises of licensees and not interrogate them against their wishes. *Id.* The SOP's "Code of Professional Conduct" requirements further included, but were not limited to:

- It is important that all investigators ensure there is not any actual or perceived conflict of interest, or any breach of ethical behavior. In a government agency whose duty includes investigative and regulatory functions, personnel are scrutinized even more closely because of their power to affect the livelihood of those whom they investigate. Therefore, every investigator's conduct should be above reproach.

- All investigators shall conduct themselves in a manner that will raise no question or doubt as to their discretion, objectivity, open mindedness, and freedom from bias and prejudice.

- Investigative duties are to be performed without bias or prejudice of any kind.

- Only investigative assignments officially assigned or authorized by supervisors are to be undertaken.

- The disciplinary authority performs final case reviews and make all decisions regarding disciplinary action.

CP 255.

In January 2010, Dr. Janaszak filed a Tort Claim arising out of the investigation and summary restriction. CP 255. On March 9, 2010, Dr. Janaszak received notice of that investigation. CP 345. Dr. Janaszak was never contacted by the Department of Health regarding the complaint, the investigation, nor was he asked to provide information regarding the allegations. Although the investigator (Shaun Atkinson) closed the investigation on April 5, 2010, the Department kept the matter open until April 19, 2011 before advising Dr. Janaszak the matter had been closed. CP 347. The matter sat in case disposition for 378 days, in direct violation of WAC 246-14-060, which provides only 140 days for case disposition. There appears to be no basis for "sitting" on the closed investigation for 238 days beyond the statutory limits. It was not until Dr. Janaszak's attorneys insisted the Department handle the matter within the statutory guidelines that the matter was closed in 2011. CP 349-50.

E. ARGUMENT

1. The standard of review for summary judgment is *de novo.*

Dr. Janaszak brings this appeal pursuant to the authority granted in RAP 2.2(a)(1) permitting for appellate review of the final judgment of any action or proceeding. The Appellate Court reviews the trial court's ruling on summary judgment *de novo*. Allen v. State of Washington, 118 Wn.2d 753, 757, 826 P.2d 200 (1992). The Appellate Court, like the trial court before it, analyzes whether any genuine issues of material fact exist and whether one party is entitled to judgment as a matter of law. *Id.*

2. Defendants do not enjoy blanket immunity to each and every claim when each claim arises from the administrative process.

There is no bright line as to whether the State or its departments and employees are immune from suits arising from administrative processes. It is Defendants' burden to show each of them enjoys absolute immunity from a suit arising from an administrative proceeding. See Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 829 P.2d 746 (1992). "In order for a government official to make this showing, he or she must establish three things. First, the official must show that he or she performs a function which is analogous to that performed by persons entitled to absolute immunity, such as judges or legislators. Second, the

official must show how the policy reasons which justify absolute immunity for the judge or legislator also justify absolute immunity for that official. And third, the official must show that sufficient safeguards exist to mitigate the harshness to the claimant of an absolute immunity rule." *Id.* at 106. The Lutheran Day Care court thereafter held that dismissal of the plaintiff's case on the basis of immunity of both the government employees and the defendant County was reversible error because a question remained as to whether the alleged conduct by the defendants amounted to that which was "arbitrary, capricious, unlawful, or exceed lawful authority," violating statutory mandate. *Id.* at 111-112.

Just as in Lutheran Day Care, a question of material fact exist here as to whether each of the Defendants violated the statutory mandates which define the scope of investigations as well as the adjudication of disciplinary action for licensed health care professionals. For example, when fashioning an Order of discipline, such as the Order on Summary Restriction, RCW 18.130.160 provides:

> "Where the schedule allows flexibility in determining the appropriate sanction, the disciplining authority must first consider what sanctions are necessary to protect or compensate the public. Only after such provisions have been made may the disciplining authority consider and include in the order requirements designed to rehabilitate the license holder."

When DQAC reviewed the matter and decided summary restriction of Dr. Janaszak's license was appropriate, a question remains whether the ensuing Order restricting Dr. Janaszak's license was consistent with the Commission's findings. The Assistant Attorney General requested, and the DQAC Panel found, that Dr. Janaszak should be restricted from treating adult female patients; yet when the Order was drafted and signed by Lorin Petersen, Dr. Janaszak was suddenly prohibited from treating female minors. Accordingly, the Order goes beyond what the Commission ordered and includes the "over 12 years old" language. Critically, there was not (and is not) a scintilla of evidence establishing that minor females (aged 12-17) were at risk of harm. The inclusion of this inflammatory, and unapproved, language in the Order that presents a question of whether the members of DQAC violated the statutory requirement to consider what sanctions are necessary to protect the public because the "public" at issue were *adult* females.

a. A question of fact remains as to whether RCW 18.32.0357 or RCW 18.130.300 provide Defendants immunity from Dr. Janaszak's claims of violation of the Uniform Disciplinary Act.

In their Motion for Summary Judgment, Defendants sought dismissal of Dr. Janaszak's Uniform Disciplinary Act (RCW 18.130 *et seq*) claims asserting RCW 18.32.0357 and RCW 18.130.300 provided

immunity from suit. RCW 18.32.0357 provides immunity to DQAC members if they act in good faith; RCW 18.130.300 provides immunity to the remaining defendants only when acting within the course of their duties. Whether any of the Defendants enjoy immunity from this claim is a question that should have been submitted to the jury, as there are questions of fact as to whether the DQAC members acted in good faith when they summarily restricted Dr. Janaszak's license and whether the remaining defendants were acting within the course of their duties when they investigated and presented information to DQAC.

i. The DQAC members did not act in good faith when they summarily restricted Dr. Janaszak's dental license.

A material question remains whether the DQAC members acted in good faith when they summarily restricted Dr. Janaszak's license in the absence of an immediate danger. Patient A's complaint was received on January 30, 2006, the Department took nine months to investigate the matter (until September 30, 2006), and the Commission did not summarily restricted Dr. Janaszak's license until January, 16, 2007; a full year after receipt of the initial complaint. It strains reason that if Dr. Janaszak's conduct truly constituted an emergency or immediate danger, the Commission would have summarily restricted Dr. Janaszak's license far sooner.

The DQAC members summarily restricted Dr. Janaszak's dental license to address an "immediate danger to public health, safety, and welfare," without any evidence of any such immediate danger. The investigation upon which DQAC relied revealed the consensual sexual relationships between Dr. Janaszak and both Patient A and Patient B had *already concluded* by the time the Complaints were filed; there was no alleged continuing sexual relationship nor doctor-patient relationships between Dr. Janaszak, and therefore *no emergency* and *no basis for a summary restriction.*

Of utmost importance is the issue of whether DQAC members acted in good faith when they agreed to, and signed, an Order prohibiting Dr. Janaszak from treating female patients over the age of 12, implying Dr. Janaszak had acted inappropriately with minors. There was absolutely no evidence Dr. Janaszak was having sexual relations with anyone but adult females; critically, the AG's Motion for Summary Suspension specifically requested DQAC prohibit Dr. Janaszak from treating female patients *over the age of 18.*

This conduct of the DQAC members was not in good faith and they are therefore not immune from this, or any other, of Dr. Janaszak's

claims. At the very least, a jury question exists as to whether the DQAC members acted in good faith.

ii. DOH investigator Chyma Miller-Smith acted outside the course of her duties when investigating Dr. Janaszak.

Ms. Miller-Smith acted outside the scope of her duties when she failed to comply with Department of Health Standard Operating Procedures for Investigators. The procedures require an investigator to conduct an impartial investigation. Ms. Miller-Smith failed to impartially investigate the complaints of Patient's A and B and she was acting outside the scope of her duties. Further, 18.130.080 prohibits investigators from initiating an investigation before the disciplining authority (in this case DQAC) authorizes an investigation.

Ms. Miller-Smith did not conduct an impartial investigation regarding Patients A and B. Not only did Ms. Miller-Smith fail to gather all of the pertinent information, she failed to attach any documentation she did gather that would support Dr. Janaszak's position. Specifically, Ms. Miller-Smith failed to gather all of Patient A and Patient B's phone records, which would have revealed the total number of times each of the patients called Dr. Janaszak and therefore supporting Dr. Janaszak's statement that, in fact, each of the patients were repeatedly contacting him; he was simply returning their calls.

Further, Ms. Miller Smith drafted the complaint statements for Patients A and B, knowing the two patients knew each other and were in communication with one another to coordinate the specific language of their complaints. Rather than interviewing the patients and providing them a complaint form, as she is authorized to do, she drafted their complaints in an effort to convince DQAC of some wrongdoing by Dr. Janaszak.

When Ms. Miller-Smith presented her investigative findings to DQAC in her declaration, she failed to attach *any* of the evidence that would contradict Patient A or Patient B's allegations, even though she had such evidence in the file. She didn't attach Dr. Janaszak's written statement, she didn't attach Patient A or Patient B's phone records, and she didn't attach her memo to file discussing her interviews with Dr. Janaszak's two employees. Instead, she simply included her own summary of this information. This one-sided investigation was far from impartial, thereby beyond the scope of her duties. In fact, Ms. Miller-Smith was not investigating complaints, she was building a case against Dr. Janaszak, again beyond the scope of her duties. Whether or not Ms. Miller-Smith was acting outside the scope of her duties, and therefore immune to suit, is a question the trial court should have allowed the jury to consider.

Ms. Miller-Smith again acted outside the scope of her duties when she initiated an investigation of Patient C's non-existent complaint against Dr. Janaszak and then drafted that complaint. Ms. Miller interviewed Patient C, a witness identified by the patient, and communicated with Patient C's mental health counselor *all before DQAC approved the investigation.* Not only is this in violation of the Operating Procedures, it is prohibited by statute.

iii. The Department of Health is not immune to suit when it acted outside its scope by sitting on an investigative matter in retaliation for Dr. Janaszak's lawsuit.

Just as with Ms. Miller-Smith, Washington State and the Department of Health (through its employees) does not enjoy immunity from suit when those employees are acting outside the scope of their duties. The Department of Health employees violated WAC 246-14-060 when they allowed the 2010 matter to sit in disposition for over a full year. Not only did the Department fail to adhere to the Code requiring disposition within 140 days, there is evidence this was done in retaliation for Dr. Janaszak's filing of this lawsuit.

The 2010 matter was commenced on February 28, 2010, when it received a complaint from another practitioner alleging sexual misconduct by Dr. Janaszak. The investigation was quickly closed when the

complainant withdrew his complaint. Although the investigation was closed and forwarded to case disposition status on April 6, 2010 the Department sat on the matter all the while making notes in the file regarding Dr. Janaszak's initiation of this lawsuit and requesting records from the trial Court. It was not until the Department received a stern letter from Dr. Janaszak's attorney on March 31, 2011, that the Department finally closed the matter on *April 19, 2011.*

This retaliatory conduct by the Department of Health employees certainly falls outside the scope of their duties and whether the Department should be immune to these claims should be determined by a jury.

b. A question of fact remains as to whether Defendants are immune from Dr. Janaszak's §1983 claims.

Defendants do not enjoy immunity from Dr. Janaszak's §1983 claims because they knowingly and clearly violated Dr. Janaszak's constitutional right to his professional license. *See* Nguyen v. State, Department of Health Medical Quality Assurance Commission, 144 Wn.2d 516, 527, 29 P.3d 689 (2001)(Washington Supreme Court recognizes a professional license as a constitutionally protected property right). Defendants' only basis for seeking dismissal of these claims was the proposition that Defendants are immune from §1983 suits.

To receive immunity under section 1983, a state official performing discretionary functions must show that the officials' conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Lesley v. State of WA on Behalf of the Department of Social and Health Services, 83 Wn. App. 263, 279, 921 P.2d 1066 (1996). In Lesley, the court held questions of fact existed concerning whether an investigator's actions deprived the plaintiffs to their fundamental right to their child's companionship when the child protective services investigator failed to report all of her findings before having a child removed from its home. It further found that the plaintiffs' allegations of conduct of more than mere negligence created a jury question and that the State failed to sustain its burden in showing that a reasonable case-worker would not have known the contours of the well-established family unity right. *Id.* at 279.

Just as in Lesley, questions of material fact exist as to whether any of the Defendants' actions deprived Dr. Janaszak of his constitutionally protected right to his professional license. Defendants maintain the summary restriction of Dr. Janaszak's license was due to his own conduct; Dr. Janaszak maintains it was the non-impartial investigation and intentional skewing of the known facts by the investigator, the

Department, and the Attorney General's Office which resulted in the loss. Clearly, a jury could reasonably find that the summary restriction was not due to Dr. Janaszak's actions, because after the State was presented with additional information, it withdrew the Statements of Charges and lifted the summary restriction.

This is further supported by a recent Washington Supreme Court decision in Jones v. State of Washington and its Department of Health, 170 Wn.2d 338, 242 P.3d 825 (2010). There, the Pharmacy Board summarily suspended a pharmacist's license after a negligent investigation by the Department of Health, regardless of the Defendant's claims of immunity.

The Jones court found when considering governmental immunity in these circumstances, the court has two questions before it: (1) whether the plaintiff's allegations establish a connection between the defendant's conduct and violation of a constitutional right; and (2) whether the defendants' conduct was objectively reasonable in light of clearly established law. *Id.* at 379. There, the Court reversed dismissal of the plaintiff pharmacist's §1983 claims holding a question of material fact remained when reasonable persons could disagree as to whether the Department of Health investigators impermissibly fabricated an emergency

with their capricious manner in which they conducted their investigation. *Id.* at 353-357. The same question exists here; whether the Department investigator created an emergency: a scenario in which it appeared Dr. Janaszak was involved with patients and making excessive phone calls to each of them. Critically, contrary to Defendants' assertions in their Reply in Support of their Motion for Summary Judgment, the Jones case discusses the fabrication of an emergency, not the fabrication of evidence.

The Jones court also discussed the well-settled law that a health professional's license is a property interest protected by the Constitution. (citing Ongom v. Dep't of Health, 159 Wn.2d 132, 139, 148 P.3d 1029 (2006)) and found that while an investigator might not initiate or decide the outcome of the proceeding, the inspector still can cause the violation of a procedural due process rights. "As long as a sufficient causal connection is established between the defendant officials conduct and the violation, a §1983 plaintiff does not have to prove that he defendant official personally violated the plaintiff's right. Under §1983, every person who, under color of any statute...subject, *or causes to be subjected*, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." Jones, 170 Wn.2d at 351 (2010)(emphasis in original).

As in Jones, Ms. Miller-Smith drafted Patient A and Patient B's complaints for them so as to create an emergency and arbitrarily compiled only a portion of the evidence she discovered during her investigation and presented this to the DQAC. She consciously failed to include statements by Dr. Janaszak, his office manager, and his dental assistant, and instead drafted her own summary referring to same, therefore undermining its importance. She further failed to include the information from the complainants' phone records, in the declaration presented to DQAC; yet, significantly, she *attached copies* of the evidence that she knew would support restriction or suspension of Dr. Janaszak's dental license. Such blatant biased behavior unquestionably raises the possibility that Ms. Miller-Smith *subjected and caused* Dr. Janaszak's constitutional right to his professional license to be violated. A genuine issue of material facts exists as to whether Ms. Miller-Smith's conduct caused a violation of Dr. Janaszak's constitutional right, and Dr. Janaszak's §1983 claims should not have been dismissed.

c. A question of fact remains as to whether Defendants abused their privilege to post information on the Department of Health website and therefore lost their immunity from Dr. Janaszak's defamation claim.

In their Motion and Reply in Support, Defendants asserted absolute immunity from Dr. Janaszak's defamation claims; however, the

Defendants do not enjoy absolute immunity, and, at best, enjoy only qualified immunity. "Because an absolute privilege absolves the defendant of all liability for defamatory statements, it is generally limited to 'cases in which the public served and administration of justice require complete immunity.'" Wood v. Battle Ground School District, 107 Wn. App. 550, 568, 27 P.3d 1208 (2001)(finding a school board president did not enjoy absolute immunity from Plaintiff's defamation claim)(citing Bender v. Seattle, 99 Wn.2d 582, 600, 664 P.2d 492 (1983)). The Wood court recognized examples of persons who do enjoy absolute immunity including legislatures in debate, judges, attorneys, parties and witnesses in judicial proceedings, and executive or military personnel acting within their duties. *Id.* Even police officers do not enjoy absolute immunity. Moore v. Smith, 89 Wn.2d 932, 937, 578 P.2d 26 (1978). The Wood court recognized the distinction between the defendant and those few who the courts have recognized as enjoying absolute immunity to defamation claims.

Just as in the Wood case, here, the Defendants, most notably the DOH employees who posted the false information on the website, do not fall within the very limited class of individuals who enjoy absolute immunity from defamation claims. Asking this Court to include DOH

employees immunity beyond that which police officers enjoy is beyond reason. Best case, the Defendants in this matter enjoy qualified immunity from Dr. Janaszak's defamation claims.

As set forth in Dr. Janaszak's Opposition to Defendants' Motion for Summary Judgment, a qualified privilege may be lost if abused. Bender, 99 Wn.2d at 600 (1983); *see also*, Momah v. Bharti, 144 Wn. App. 731, 182 P.3d 455 (2008) When the Department of Health repeatedly refused to remove the blatantly false and defamatory posting from its website, it abused its privilege and no longer has an immunity defense to Dr. Janaszak's defamation claim. Here, Dr. Janaszak repeatedly requested the website posting be removed after the Statement of Charges was withdrawn. (March 11, 2007; March 21, 2007; March 22, 2007; March 27, 2007; March 29, 2007; April 10, 2007; April 16, 2007; March 6, 2008; and October 21, 2009) The Department was well aware that it had posted false information on the website, and has, to this day, refused to remove the posting. Unlike a newspaper or magazine article, a website posting is, in essence, being republished to the public over and over again. Whether the DOH employees' conduct amounts to abuse should have been presented to the jury.

The DOH's abuse of its privilege warrants a denial of an immunity defense as to Dr. Janaszak's defamation claims, and the trial court erred when it dismissed those claims.

d. A question of fact remains as to whether Defendants carried out their statutory duty to investigate according to procedures dictated by statute or superiors in a reasonable manner, and are therefore immune from Dr. Janaszak's Negligent Investigation claims.

Defendants do not enjoy immunity from Dr. Janaszak's negligent investigation claims because they failed to act according either statutory mandates or Department procedures. Further, the investigation and suspension procedures were not carried out in a reasonable manner. The court in Lesley specifically addressed state-employed investigators and the State's immunity from negligent investigation lawsuits. The court found the investigator, in order to receive qualified immunity from the negligent investigation claim, must (1) carry out a statutory duty, (2) according to procedures dictated by statute or superiors, and (3) act reasonably. Lesley, 83 Wn. App. at 274 (1996).

Per statutory mandate and Department of Health internal policies, Defendants are required to investigate and adjudicate complaints against licensed health care providers in good faith. *See* RCW 18.32.0357 (The members of the commission are immune from suit in an action, civil or

criminal, based upon its disciplinary proceedings or other official acts performed in good faith as members of the commission)(emphasis added); Department of Health Standard Operating Procedures for Investigators, Sec. 1:C(1) requires investigators conduct an impartial investigation.(emphasis added)

Here, Ms. Miller-Smith failed to conduct an impartial investigation when she failed to collect all of the available evidence in the form of telephone records before submitting her report to her superior and presenting her declaration to DQAC at the summary suspension hearing. She instilled her plan for investigating Dr. Janaszak by way of "open[ing] the door as a billing issue and then address the unprofessional conduct of having a sexual relationship with clients," failing to include the statement of Dr. Janaszak regarding the allegations when presenting her investigative findings to DQAC, when she drafted complaints for patients A and B, and when she encouraged patient C to file a complaint even after the patient specifically told her she did not want to file her own complaint.

Just as in Lesley, whether Ms. Miller-Smith acted according to procedures, and whether she acted reasonably presents issues of fact that should be considered by a jury. Further, because there is a material question of immunity for Ms. Miller-Smith, there remains the question of

whether the State enjoys such immunity as well. *See,* Savage v. State, 127 Wn.2d 434, 438, 447 P.2d 1270 (1995)(State did not share its parole offers' qualified immunity even when liability was based solely on respondeat superior).

Similarly, a jury question remains as to whether DQAC acted in good faith when they found, without any evidence, an emergency existed as to Patient A and Patient B's allegations. A more important question remains of whether DQAC acted reasonably when it restricted Dr. Janaszak from treating female patients aged 12-18 with absolutely no basis to do so.

3. Dr. Janaszak brought a cognizable claim of Washington State Constitution violations when he sought injunctive relief from Defendants' conduct.

Dr. Janaszak sought both damages and injunctive relief for the conduct of Defendants and therefore had a basis to bring claims of Washington State Constitution violations. Dr. Janaszak's complaint specifically sought the following injunctive relief:

> A Declaratory Order stating that the Department of Health had no lawful authority to conduct an investigation into the dental practice of Joseph Eric Janaszak DDS.
>
> A Declaratory Order stating that all charges against Dr. Janaszak brought in 2007 were entirely without merit and directing the Department of Health, Dental Quality Assurance Commission, to

publically exonerate Dr. Janaszak of all charges levied against him in 2007.

A Declaratory Order stating that the investigation initiated against Dr. Janaszak in March 2010, was initiated without merit and directing the Department of Health, Dental Quality Assurance Commission, to close the investigation, with prejudice.

Injunctive relief directing the Department of Health to publish and republish the order on exoneration in the same manner and for the same amount of time which it published negative information about Dr. Janaszak.

Injunctive relief directing the Department of Health to remove all negative press releases from its website.

Injunctive relief against the Department of Health to enjoin any future investigation of Dr. Janaszak absent compliance with statutory requirements.

Contrary to Defendants' assertions in their Motion for Summary Judgment, claims for violation of the Washington State Constitution have been recognized by the Supreme Court of Washington. *See* Darrin v. Gould, 85 Wn.2d 859, 540 P.2d 882 (1975). In Darrin, plaintiffs brought Washington State Constitution violation claims against Wishkah Valley School District when the school refused to allow two female students to play on the high school football team. The plaintiffs sought injunctive relief, seeking an order to compel the high school to allow the girls to play on the team; the Supreme Court reversed the Superior Court's denial of relief.

Here, just as in Darrin, Dr. Janaszak is seeking injunctive relief for Defendants' violations of Dr. Janaszak's rights protected by the Washington State Constitution. Defendants requested the trial Court dismiss Dr. Janaszak's State Constitution claims asserting Washington does not recognize a private action for damages for violation of the State Constitution but ignored the fact Dr. Janaszak sought injunctive relief *in addition to* damages. Specifically, Dr. Janaszak alleged violation of Article I, Sec. 3 (due process); Article I, Sec. 7 (intrusion into private affairs), and Article I, Sec. 5 (right to freely speak) for the arbitrary and capricious summary restriction of his dental license, as well as commencement of an additional investigation in retaliation for Dr. Janaszak's filing of this lawsuit.[1] The trial Court should have recognized Dr. Janaszak's right to bring distinct claims affording both injunctive relief and recovery of damages.

4. The Defendants placed provably false statements on its website regarding Dr. Janaszak, therefore engendering his Defamation claims.

Dr. Janaszak's defamation claims were based upon the Departments' posting the following false statement on its website: "Kitsap County

[1] This distinction was recognized in Gregoire v. City of Oak Harbor, 2007 WL 3138044, * 2(Wash.App. Div. 1), in which the court dismissed the plaintiff's State Constitution violation claims because plaintiff was seeking damages for such violations, as opposed to injunctive relief, like that in the *Darrin* case.

dentists [sic] license restricted after having sex with patients." That Dr. Janaszak had sex with his patients is a false statement. What Defendants cannot deny, is a provably false statement was placed on the DOH website, and even after the Statement of Charges was withdrawn, the Department repeatedly refused to remove the posting. Critically, it was the bolded and underlined heading of the website posting that sets forth the false statement.

Dr. Janaszak does not disagree that truth is an absolute defense to a defamation claim; however, whether Dr. Janaszak had sexual relations with any of his patients continues to be hotly contested by the parties. The evidence is that neither Patient A or Patient B were patients of Dr. Janaszak when a relationship occurred. There is undoubtedly a question of material fact that a jury must consider to appropriately adjudicate Plaintiff's defamation claim. In all but extreme cases the jury should determine whether [a party's statement] was libelous per se. Caruso v. Local Union No. 690 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 100 Wn.2d 343, 670 P.2d 240 (1983) (citing Miller v. Argus Pub'g Co., 79 Wn.2d 816, 490 P.2d 101 (1971)).

In cases where a portion of the statement is provably false, Washington courts will consider both the true and false portions of the statement, and deny a Defendant's motion for summary judgment if the false statement affects the "sting" of a report. *See* Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 943 P.2d 350 (citing Mark v. Seattle Times, 96 Wn.2d 473, 496, 635 P.2d 1081 (1981)). *See also,* Herron v. KING Broadcasting Co., 112 Wn.2d 762, 776 P.2d 98 (1989)(held Plaintiff's defamation claim should go to the jury when the jury could conclude the Plaintiff was damaged by the falsehood in a way that was distinct from any damaged inflicted by the true statements in the report).

Here, there are arguably both false and true statements in the DOH website posting, as the title of the article sets forth a false statement (that Dr. Janaszak's dental license was restricted after he had sex with patients) and a true statement (that Dr. Janaszak *allegedly* had sex with patients). Critically, the *false* statement is the heading of the posting, underlined and in bold print, whereas the remainder of the posting is not. By setting forth this false statement in the heading the reader is undoubtedly likely to assume the Department had already determined Dr. Janaszak had sex with his patients. This is a perfect example of how a portion of a statement provides the "sting" of the report. Essentially, the statements by the

Department are inaccurate when viewed contextually. It should be for the jury to determine whether the false portion of the posting, in itself, caused Dr. Janaszak damage.

5. The Department had a statutory duty to investigate allegations regarding Dr. Janaszak, creating a cognizable claim of Negligent Investigation when the Department failed to follow its own internal policies.

The Uniform Disciplinary Act creates a statutory duty to investigate complaints against licensed health care providers. The State of Washington, by way of the Department of Health, the Dental Quality Assurance Commission and each of its actors had a statutory duty to investigate Dr. Janaszak, and he therefore had a cognizable claim of negligent investigation. A claim of negligent investigation has been recognized by the Washington State courts in circumstances where a state employee has a statutory duty to investigate. Lesley, 83 Wn. App. 263 (1996).

The Washington legislature created a duty to investigate when it passed the Uniform Disciplinary Act in 1984. *See,* RCW 18.130 *et. seq.* Specifically, RCW 18.130.080(2) mandates the disciplinary authority investigate complaints involving licensed health care providers. The statute defines "disciplinary authority" as the agency, board, or commission having the authority to take disciplinary action against a

holder of, or applicant for, a professional or business license. RCW 18.130.020(6). There is no question the Department of Health and the Dental Quality Assurance Commission are the appropriate entities having authority to take disciplinary action against Dr. Janaszak's dental license. Defendants point to Corbally v. Kennewick School District, 94 Wn. App. 736, 973 P.2d 1074 (1999), to assert there is no cause of action for negligent investigation. Their reliance is misguided. Although the Corbally court confirms that, in general, a claim for negligent investigation does not exist under the common law of Washington, it recognized the exceptions when a statutory duty is imposed upon the defendants. In fact, it was due to the lack of a specific statutory duty that the court affirmed dismissal of the plaintiff's claim. ("The plain language of WAC 180-86-110 does not establish a duty to investigate as did the statue in *Lesley*." *Id.* at 741) Here, the plain language of RCW 18.130.080 (2) *requires* the disciplinary authority to investigate in circumstances of complaints regarding licensed health care professionals. (The operative language of the statutory section being: "[t]he disciplining authority shall investigate to determine whether there has been unprofessional conduct.") Accordingly, because each of the named Defendants had an undeniable statutory duty to

investigate Dr. Janaszak, a cognizable claim of negligent investigation has been created.

6. The conduct of each of the Defendants was extreme and outrageous when, with their combined intentional conduct, they essentially branded Dr. Janaszak a pedophile.

The choice to include the "over 12 years old" language in the Order restricting Dr. Janaszak's dental license, and the conduct leading up to that decision was sufficiently extreme and outrageous to provide a basis for Dr. Janaszak's Outrage claims. The Defendants essentially branded Dr. Janaszak a pedophile. Defendants conducted an incomplete and far from impartial investigation of Dr. Janaszak with the obvious goal of building a case rather than gathering *all* of the relevant facts surrounding the allegations. With that investigation, Defendants created a non-existent emergency as an excuse to summarily restrict Dr. Janaszak's dental license. However, perhaps the most outrageous is the inflammatory language in the Order, referencing under-aged females; that dealt the final blow to Dr. Janaszak's personal and professional reputation. That Defendants thereafter refused to remove the posting after the complaints were dismissed simply adds to the atrocity.

Whether conduct is sufficiently outrageous is ordinarily a question for the jury. Dicomes v. State, 113 Wn.2d 612, 782 P.2d 1002 (1989).

There is absolutely no reason a jury should not consider the circumstances of this claim and make a finding of whether Defendants' conduct is sufficiently outrageous to award damages.

7. Dr. Janaszak had valid business expectancy with multiple insurance companies with which Defendants wrongfully intentionally interfered.

There is a material question of fact to be determined by the jury as to whether Defendants' conduct interfered with Dr. Janaszak's business expectancies. When Defendants summarily restricted Dr. Janaszak's dental license, he had valid contractual relationships with dental insurers which paid claims for Dr. Janaszak's treatment to their insureds. CP 351-52. By publishing and continuously re-publishing the statement "Kitsap County Dentist's license restricted after having sex with patients", defendants knowingly published and re-published false and damaging information about Dr. Janaszak to all persons viewing the Department of Health website, thus attacking Dr. Janaszak's reputation and standing in the community. By retaliating against Dr. Janaszak for filing a notice of claim, they knowingly interfered with his ability to obtain patients by, among other things, impacting his ability to maintain insurance coverage and/or enter into contracts to perform dental services.

Defendants' false and malicious publications and retaliatory actions were done with the knowledge that the publications would result in Washington patients determining not to seek out Dr. Janaszak for dental services. Specifically, several dental insurance carriers refused to honor their contracts with Dr. Janaszak after his license was restricted. *Id.* Kits Physicians Services, Washington Dental Services, and Premera Blue Cross, which provided 90% of dental claims by Dr. Janaszak's dental office, all refused any further payment for Dr. Janaszak's treatment. *Id.* As a direct result, Dr. Janaszak was unable to bill for any treatment he provided to any patients covered under these plans. *Id.* Furthermore, not being allowed to treat 12 to 17 year old females interfered with the business expectance from that patient population.

Dr. Janaszak presented a prima facie case of intentional interference with business expectancy, and should have been presented to a jury.

E. CONCLUSION

The Defendants, as a whole, do not enjoy blanket absolute immunity from Dr. Janaszak's multiple claims. Each of these claims arises from the administrative process and Defendants failed to meet their burden to support dismissal based solely upon immunity. Ultimately, Dr.

Janaszak's constitutionally protected interest in his licensure and professional reputation was taken away under the guise of "public protection", based upon a biased investigation and an emotional, passionate response, without careful consideration of the facts and circumstances. Providing Defendants protection from suit when they fail to comply with not only their own internal policies, but also those set out in statute, is reprehensible. Dr. Janaszak presented a prima facie case for each and every one of his claims. At the very least, Dr. Janaszak should be afforded the opportunity to present his case to a jury. For the aforementioned reasons, Dr. Janaszak respectfully requests this Court reverse the trial court's dismissal and remand for trial.

Respectfully submitted this 8th day of December, 2011.

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