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NO. 72495-9-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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MARK L. BESOLA,

Appellant/Cross-Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH,  
VETERINARY BOARD OF GOVERNORS,

Respondent/Cross-Appellant.

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**RESPONDENT'S/CROSS-APPELLANT'S  
REPLY ON CROSS-APPEAL**

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## I. ARGUMENT

This Court should clarify that the requirements for granting a stay under RCW 34.05.550(3) are mandatory, and that RCW 34.05.550(3) requires that the requesting party make a showing and the reviewing court make findings under each of RCW 34.05.550(3)'s four criteria before an agency's final order based on public health, safety, or welfare grounds can be stayed.<sup>1</sup>

Dr. Besola argues that this Court should ignore the Veterinary Board's cross-appeal of the King County Superior Court's ruling—a ruling that reinstated Dr. Besola's veterinary license without restriction for over one year—because the issue is now moot. Dr. Besola failed to address in his response to the cross-appeal, however, that even moot issues are appropriate for this Court to consider under the “capable of repetition, yet evading review” exception adopted by the United States Supreme Court. *See Murphy v. Hunt*, 455 U.S. 478, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (Neb. 1982); *Southern Pacific Terminal Co. v. Interstate*

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<sup>1</sup> If judicial relief is sought for a stay or other temporary remedy from agency action based on public health, safety, or welfare grounds the court shall not grant such relief unless the court finds that: (a) The applicant is likely to prevail when the court finally disposes of the matter; (b) Without relief the applicant will suffer irreparable injury; (c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and (d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances. RCW 34.05.550(3).

*Commerce Comm'n*, 219 U.S. 498, 31 S. Ct. 279, 55 L. Ed. 310 (1911); *Client A v. Yoshinaka*, 128 Wn. App. 833, 116 P.3d 1080 (2005). This exception applies where there is a “‘reasonable expectation’ or a ‘demonstrated probability’ that the same controversy will reoccur involving the same complaining party.” *Murphy*, 455 U.S. at 482, 102 S. Ct. at 1184 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 96 S. Ct. 347, 46 L. Ed.2d 350 (1975)). The same scenario faced by the superior court in this case will likely be faced by every superior court that receives a stay request following the filing of a petition for judicial review of a Department of Health action based on public health, safety, or welfare grounds. Dr. Besola contends, however, that such matters are moot if the reviewing court eventually lifts the improperly granted stay. If his contention is adopted, the issue at the heart of this cross-appeal would always evade review before an appellate court. To conclude otherwise would require that in every such case:

- a) the professional health licensing board or commission seek discretionary review by an appellate court of the reviewing court’s improperly granted stay;
- b) the appellate court grant discretionary review of the interlocutory decision;
- c) the appellate court receive the parties’ briefs;
- d) the appellate court conduct oral argument, if necessary; and
- e) the appellate court issue its decision.

For the matter to remain ripe, each of these steps would have to occur *before* the judicial review pending in the lower court concludes with a final decision, during which time any restrictions or conditions imposed by the professional health board or commission would be stayed.<sup>2</sup> Not only is this approach impractical and unlikely to succeed procedurally, it would burden an already demanding appellate court system and lead to a disfavored piecemeal judicial review. *See Right-Price Recreation, LLC v. Connells Prairie Community Council*, 105 Wn. App. 813, 21 P.3d 1157 (2001), *remanded* 146 Wn.2d 370, 46 P.3d 789 (2002), *cert. denied* 540 U.S. 1149, 124 S. Ct. 1147, 157 L. Ed. 2d 1043 (2004). For those reasons, the “capable of repetition, yet evading review” exception to mootness applies in this case.

In addition to the applicability of the “capable of repetition, yet evading review” exception, this case also implicates the public interest

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<sup>2</sup> It is significant that an improvidently granted stay endangers the public health, safety, or welfare. For example, in this case the Board determined that a restriction of indefinite license suspension of Dr. Besola’s license was necessary to ensure protection of the public until he could demonstrate to the Board that he is sufficiently rehabilitated to practice safely. CABR 1041. The Board did not stay the Final Order or allow him to continue to practice while being rehabilitated, or during his appeal of his criminal convictions. To support that decision, the Board found that children visit Dr. Besola’s practice and concluded that his conduct undermined public trust in the profession. CABR 1033 at 1.2; 1038 at 2.8; 1039 at 2.11. Similarly, the criminal court found his conduct serious enough to sentence him to 35 months in prison plus 36 months of community custody, during which he is forbidden to have contact with minor children, and must register as a sex offender. CABR 1034 at 1.4. These findings and conclusions demonstrated that the threat to the public health, safety, or welfare was sufficiently serious to justify the Board’s order of restriction.

exception to mootness. The public interest exception applies where “matters of continuing and substantial public interest are involved.” See *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 496 P.2d 512 (1972). A court’s interpretations of statutes, such as RCW 34.05.550(3), are a valid use of the continuing and substantial public interest exception to mootness. *Hart v. Dep’t of Soc. & Health Servs.*, 111 Wn.2d 445, 759 P.2d 1206 (1988) (citing *In re Wilson*, 94 Wn.2d 885, 621 P.2d 151 (1980)).

The criteria for applying the public interest exception include 1) whether the issue is of a public or private nature; 2) whether an authoritative determination is desirable for future guidance of public officers; 3) whether the issue is likely to reoccur; and 4) whether there is genuine adverseness between parties and quality advocacy on the issues. *Hart*, 111 Wn.2d at 448. All four criteria are met in this case and therefore the public interest exception should apply.

First, this matter is public in nature. It involves a statute that permits a party to seek a stay from agency action based on public health, safety, or welfare grounds. A reviewing court’s determination under RCW 34.05.550(3) affects the ability of this State’s boards and



commissions to protect public health, safety, or welfare.<sup>3</sup> This is particularly true when a reviewing court incorrectly stays a board or commission's final order without first making the mandatory findings under the four criteria in RCW 34.05.550(3)(a)-(d).

Second, an authoritative determination is desirable for future guidance of public officers. A clear directive from this Court would instruct subsequent reviewing courts that it must articulate its findings addressing each of the four prongs of the statute when considering a stay of an agency action based on public health, safety, or welfare grounds. The superior court that granted Dr. Besola's stay made no such statement of findings. In his stay request, Dr. Besola failed to provide any basis on which the superior court could find that he satisfied all four of the statute's required criteria. CP 1-6. Specifically, his motion failed to even address two of the four required criteria—that the Veterinary Board would not be harmed by a stay, and that the Veterinary Board's order was not justified by danger to the public. *Id.*

Third, without an authoritative determination by this Court, it is highly likely that a future reviewing court will again grant a stay of an

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<sup>3</sup> "Safeguarding the public's health and safety is the paramount responsibility of every disciplining authority." RCW 18.130.160.

agency action based on public health, safety, or welfare grounds pursuant to RCW 34.05.550(3) without first making findings under each of the statute's four criteria. The final orders of professional health licensing boards and commissions are appealable under the APA, RCW 34.05.<sup>4</sup> And as part of those appeals, a stay request is available after a petition for judicial review has been filed. RCW 34.05.550(2). The same scenario faced by the superior court in this case—whether the requirements are met under RCW 34.05.550(3)—will be faced by every superior court that receives a stay request following a petition for judicial review of a Department of Health action based on public health, safety, or welfare grounds. A high likelihood therefore exists that a reviewing court will again grant a stay pursuant to RCW 34.05.550(3) without first making findings under each of the four criteria, thereby repeating the same error as here.

Fourth, there is genuine adverseness between the parties and the issue has been adequately presented. There is no question that Dr. Besola and the Veterinary Board are adverse on the requirements necessary for a reviewing court to grant a stay pursuant to RCW 34.05.550(3). The Veterinary Board asserts that RCW 34.05.550(3) requires the reviewing

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<sup>4</sup> Judicial review of a Department of Health board or commission's final order is governed by the Administrative Procedure Act (APA), RCW 34.05. RCW 18.130.140; RCW 34.05.510.

court to make explicit findings on each of the statute's four required prongs before a stay can be lawfully granted. Dr. Besola, however, failed to even address two of the four required criteria in his stay motion to the superior court, namely that the Board would not be harmed by a stay, and that the Board's order was not justified by danger to the public. CP 1-6. This issue has also been extensively briefed by both parties throughout this case. There is therefore genuine adverseness between the parties and adequate presentation of the matter at issue.

## **II. CONCLUSION**

RCW 34.05.550(3) explicitly requires that a court granting a stay of an agency order make findings on each of the four required prongs. In its order granting Dr. Besola a stay from agency action based on public health, safety, or welfare grounds, the superior court made no findings supporting its decision. Because that error is capable of repetition, this Court should clarify that the requirements for granting a stay under RCW 34.05.550(3) are mandatory, and they require the requesting party to make a showing, and the reviewing court to articulate findings, under each

of RCW 34.05.550(3)'s four criteria before an agency's final order based on public health, safety, or welfare grounds can be stayed.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of April, 2015.

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