101831-2

No. 54171-8-II

SUPREME COURT OF THE STATE OF WASHINGTON

MARK ANDREW HIESTERMAN,

Plaintiff/Appellant/Cross-Respondent/Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Defendant/Respondent/Cross Appellant.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Doctor Mark Hiesterman, as an individual. Petitioner Dr. Hiesterman was the Plaintiff in the Thurston County Superior Court, and the Appellant & Cross Respondent in the Division II Court of Appeals. Respondent Washington State Department of Health ("DOH") filed a motion for summary judgment in the Thurston County Superior Court matter, which was denied in part and granted in part. The trial court's order granting Respondent's motion for summary judgment resulted in the dismissal Petitioner Dr. Hiesterman's lawsuit.

Petitioner appealed the trial court's decision dismissing his lawsuit, and the Respondent filed a cross appeal regarding the portion of its summary judgment that was denied by the trial court. Division II Court of Appeals upheld the trial court's summary judgment order dismissing Petitioner's lawsuit. Because Division II affirmed the trial court's summary judgment order, it did not consider the cross appeal by Respondent DOH.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of Mark Andrew Hiesterman v. State of Washington Department of Health, 54171-8-II, 2022 WL 17588915, December 13, 2022, hereafter "Decision."

III. ISSUES PRESENTED FOR REVIEW

1. Whether RCW 18.130.300 is unconstitutional on its face because it creates irrevocable immunity and denies injured parties remedy for torts.

2. Whether the holding in Janaszak on which the Superior Court relied is an unconstitutional extension of narrow individual immunity to absolute State immunity.

3. Whether Washington Courts find the policy behind RCW 18.13.300 is analogous to the policy of quasi-judicial immunity; and whether immunity should therefore be limited in scope to function performed.

IV. STATEMENT OF THE CASE

A. Background

Dr. Mark Hiesterman was employed as an osteopathic physician in Washington from 2011 until 2015 when the State Department of Health ("DOH") falsely reported that he was convicted of driving under the influence ("DUI") in Idaho and

was not compliant with Washington Physicians Health Program ("WPHP") recommendations. **CP 155-56, 182, 186.**

In fact, Hiesterman never received a DUI conviction in Idaho. **CP 155, 161, 163-66.** In 2013, Hiesterman was detained in Idaho for suspicion of driving while under the influence of alcohol. **CP 155, 161.** However, Hiesterman was not convicted as the court in Idaho withheld judgment on conditions and the charges were dismissed. **CP 155, 161, 163-66.** While it is true that Hiesterman was convicted for DUI in 2006 in Michigan, that conviction never impacted his ability to secure employment as a physician in Washington. **CP 155.** Furthermore, Hiesterman was compliant with WPHP recommendations as he voluntarily attended and paid for numerous clinical evaluations. **CP 155-56, 169-79.**

The DOH released false news reports in February 2015 and again in March 2016. **CR 156, 182, 186**. Shortly after the first news release, but prior to having his license temporarily suspended, Hiesterman was terminated from employment in

March 2015. **CP 156.** Even after having his license reinstated and undergoing evaluations showing he had no abuse problem, Hiesterman could not obtain employment in Washington because of the stigma arising from DOH's news release. **CP 157, 189, 191.**

The DOH's second false news report was in March 2016. **CP 184-87.** Shortly thereafter, in April 2016, Hiesterman's license was reinstated. **CP 157.** Then just two months later, on June 2, 2016, Hiesterman was denied employment at Mid-Valley hospital and removed from the hospital's roster of active-status doctors because of the news reports the hiring manager read on the DOH's website. **CP 157, 189.** This occurred regardless of Hiesterman's license being reinstated. **See CP 157.**

From October 2015 to September 2017, Hiesterman remained unemployed, despite his attempts to find new work as a physician. **CP 157.** In September 2017, Hiesterman accepted the only job he was offered, which happened to be a two-year contract position in Saipan. **CP 157.** Hiesterman's pay as a surgeon in

Saipan is nearly half of what the same work would be paid in the State of Washington. **CP 157.**

When Dr. Hiesterman attempts to verify his Washington credentials on the DOH website, it states that his license is active "with conditions," despite the fact these "conditions" were lifted over a year ago. **CP 158.** DOH has failed to change the status of Dr. Hiesterman's medical license on its website. **CP 158.** The incorrect information reported by the DOH has prevented Dr. Hiesterman from obtaining employment. **CP 158.**

B. Procedural History

Hiesterman filed a complaint against DOH in the Superior Court of the State of Washington in Thurston County, alleging that DOH was negligent in its reporting practices and seeking damages for loss of income. DOH filed a motion for summary judgment in the Superior Court to dismiss Hiesterman's claim on the basis of quasi-judicial immunity and absolute immunity pursuant to RCW 18.130.300. **CP 15-22.** On September 27, 2019, Honorable Judge Chris Lanese of the Thurston County

Superior Court granted DOH's motion for summary judgment. **Transcript of Reported Proceedings ("Transcript"), 13:14.** In his oral ruling, Judge Lanese noted that no quasi-judicial immunity applied in this case. **Tr., 4:22-25.** Judge Lanese ruled on a narrow issue, finding that RCW 18.130.300 granted DOH absolute immunity from suit in this case. **Tr., 13:19-21.** The trial court granted DOH's motion for summary judgment and entered an Order dismissing Petitioner Dr. Hiesterman's lawsuit. **CP 278-280.**

C. Division II Decision

On December 13, 2022, Division II entered its Decision affirming the trial court's summary judgment order dismissing Petitioner Dr. Hiesterman's lawsuit. Mark Andrew Hiesterman v. State of Washington Department of Health, 54171-8-II, 2022 WL 17588915, December 13, 2022. Division II considered Petitioner's argument made for the first time on appeal that by RCW 18.130.300 violates Wash. Const. Art. I, § 8 by granting irrevocable immunity to state actors the statute denies wronged

plaintiffs any remedy for negligent acts committed under the color of state law. However, Division II denied Petitioner's argument by finding Petitioner had not sufficiently establish a record showing there is no reasonable doubt RCW 18.130.300 violates the constitution.

Wash. Const. Art. I, § 8 is clear, and states, "*No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.*" Petitioner set forth facts, evidence and law showing RCW 18.130.300 grants immunity to DOH prejudicing Petitioner's right to bring a claim for negligence and damages suffered. Division II committed error in its application of the standard for considering the unconstitutionality of a statute for the first time on appeal.

V. ARGUMENT

A. Standard of Review

The only issue on appeal is interpretation of a statute. Where interpretation of a statute is at issue, Washington appellate courts' standard of review is de novo. City of Tukwila v. Garrett,

165 Wash. 2d 152, 158, 196 P.3d 681, 684 (2008). De novo review requires a court in appellate jurisdiction to make an "independent judgment" when applying the law to the facts, without deference to the lower courts' findings. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984).

Where the constitutionality of a statute is challenged, the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. Island County v. State, 135 Wash.2d 141, 147, 955 P.2d 377 (1998). The reasonable doubt standard when used to challenge a statute as unconstitutional "*refers to the fact that one challenging a statute must, by argument or research, convince the court that there is no reasonable doubt that the statute violates the constitution.*" Id. at 147.

B. RCW 18.130.300 is Unconstitutional on its Face Because it Creates Irrevocable Immunity and Denies Injured Parties Remedy for Torts.

Division II considered the issue of RCW 18.130.300's unconstitutionality for the first time on appeal, pursuant to RAP

2.5(a)(3); however, Division II failed to properly apply the standard for determining whether Petitioner's appeal resulted in manifest constitutional error requiring review. State v. WWJ Corp., 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

State v. Lynn, 67 Wash. App. 339, 345, 835 P.2d 251 (1992) set forth the four-step approach to determining an whether error claimed for the first time on appeal amounts to error requiring review:

> ***First, the reviewing court must make a cursory determination as to whether the alleged error in the fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.***

Lynn, 67 Wash App. at 345.

Division II found Petitioner met the first two steps of the Lynn test above, but determined Petitioner failed to meet the third step because consideration of the merits did not result in relief to Petitioner because Petitioner did not "*by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution.*" Island County v. State, 135 Wash.2d 141, 147, 955 P.2d 377 (1998).

Division II recognized that the trial court entered summary judgment in favor of the Respondent DOH as a result of the immunity provided in RCW 18.130.330. **CP 278-280.** The record submitted showed Petitioner lost employment as a direct result of the actions of Respondent DOH. This is not a case, like State v. WWJ Corp., 138 Wash.2d 595, 980 P.2d 1257 (1999) cited by Division II, where the record was deficient such that the court could not determine the merits of unconstitutionality of the alleged excessive fine. WWJ Corp., 138 Wash.2d at 605-606. The record in this case showed Petitioner was terminated and was

unable to obtain employment as a result of Respondent's negligent reporting. **CP 156-158; CP 182-186.**

Division II failed to properly consider Petitioner's constitutional challenge of RCW 18.130.300. Without any analysis, Division II summarily states Petitioner's argument failed to show RCW 18.130.300 violates the constitution beyond a reasonable doubt and declined to consider Petitioner's constitutional challenge. Wash. Const. Art. I, § 8 clearly states, "*No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.*" RCW 18.130.300 grants irrevocable immunity to state actors which denies wronged plaintiffs any remedy for negligent acts committed under the color of state law. Petitioner provided the law showing that absolute immunity leaves a wronged party without a remedy and, *"it runs contrary to the most fundamental precepts of our legal system."* Lutheran Day Care v. Snohomish County, 119 Wash.2d 91, 105, 829 P.2d 746 (1992). Petitioner's argument shows that RCW 18.130.300 is unconstitutional beyond a

reasonable doubt because it is in direct conflict with Wash. Const. Art. I, § 8 providing no immunity will be passed by the Legislature. There is no doubt that the plain language of RCW 18.130.300 is in direct conflict with Wash. Const. Art. I, § 8. Division II failed to properly apply the standard of review.

Division II should have considered the merits of Petitioner's constitutional challenge and made the decision whether RCW 18.130.300 was unconstitutional, as is its duty. Island County, 135 at 147. Petitioner's case was dismissed as a direct result of an unconstitutional statute, so Division II's affirmation of the trial court's summary judgment order was not harmless error.

"*A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.*" Budd v. Kaiser Gypsum Co., Inc., 21 Wash. App. 2d 56, 79, 505 P.3d 120, 134, review denied, 199 Wash. 2d 1030, 514 P.3d 640 (2022). When "*determining*

whether a particular act entitles the actor to absolute immunity, we must start from the proposition that there is no such immunity." Id., (citing Butz v. Economou, 438 U.S. 478, 506, 98 S. Ct. 2894, 2910 (1978) ("*No man in this country is so high that his is above the law. No officer of the law may set the law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.*")). In light of these policy considerations on absolute immunity, and given the clear mandate of the Washington Constitution, RCW 18.130.300 is unconstitutional on its face. Division II should have considered Petitioner's argument that RCW 18.130.300 was unconstitutional on the merits, and not simply disregarded this issue by summarily concluding there was no supporting argument showing RCW 18.130.300 was not unconstitutional beyond a reasonable doubt.

Wash. Const. Art. I, § 8 states, "*No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.*" Review should be accepted because

Petitioner's lawsuit was dismissed based on immunity provided by an unconstitutional statute that provided immunity in direct conflict with the Washington State Constitution.

C. The Holding in Janaszak on which the Superior Court Relied is an Unconstitutional Extension of Narrow Individual Immunity to Absolute State Immunity.

RCW 18.130.300 provides: "*The secretary, members of the boards or commissions, or individuals acting on their behalf are immune from suit in any action, civil or criminal, based on any disciplinary proceedings or other official acts performed in the course of their duties.*" Conspicuously absent from this statute is any mention of this immunity being extended to the State of Washington or its various departments. See Id. That is because the legislature already addressed the issue of sovereign immunity and enacted a statute against that immunity. See RCW 4.92.090. "*The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.*" Id.

Under the Washington Constitution, only the legislature - not superior court judges - have the power to provide absolute immunity to the state. See Wash. Const. Art. II, § 26 ("*The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.*"). However, the court in Janaszak ignored the Washington Constitution and RCW 4.92.090 when it held that "*the absolute immunity of RCW 18.130.300 extends to the State and the Department.*" Janaszak v. State, 173 Wash. App. 703, 719, 297 P.3d 723, 732 (2013).

A more appropriate ruling to apply to the case here is Savage v. State, 127 Wash. 2d 434, 899 P.2d 1270 (1995) because there the Washington Supreme Court recognized the constitutional problem where absolute immunity of an individual extends to the state and leaves an injured party with no remedy. The court in Savage held that the personal immunity afforded to a parole officer did not extend immunity to the state for the officer's negligent conduct. Id. at 449, 899 P.2d at 1277. Drawing from the Restatement (Second) of Agency § 217

(1958), the court in Savage noted, "*[a]n agent's immunity from civil liability generally does not establish a defense for the principal.*"

The court in Savage further noted that the Restatement (Second) of Torts § 895D cmt. j, at 420 (1979) recognizes: "*With respect to some government functions, the threat of individual liability would have a devasting [sic] effect, while the threat of governmental liability would not significantly impair performance.*" Savage, 127 Wash. 2d at 446, 899 P.2d at 1276. This idea, that government liability for individual conduct does not impair the performance of government functions, speaks to the underlying policy that the court laid out in Janaszak:

> *The same policy considerations that control the extension of absolute immunity to governmental entities for the official acts of their prosecutors and judges are present in this case. Analogous to the immunity afforded prosecutors and judges, the immunity afforded by* ***RCW 18.130.300 exists not to protect individuals but to protect the integrity of a uniform disciplinary process for health care professionals. It guarantees the independence of these individuals and allows them to protect the***

> ***adequacy of professional competence and conduct without fear of suit.***

Janaszak v. State, 173 Wash. App. 703, 719, 297 P.3d 723, 732 (2013) (emphasis added).

If the policy of RCW 18.130.300 is to protect the independent disciplinary process of health care professionals, then extending absolute immunity to the state in no way serves that purpose. The threat of government liability in no way impairs the independent judgment of individuals involved in the disciplinary process. This is why the plain language of RCW 18.130.300 only includes individuals, not the state. Therefore, the court's holding in Janaszak is not reasonable in light of the policy expressed therein. Since the holding in Janaszak violates the Washington State Constitution and goes against the policy adopted by the Washington Supreme Court in Savage, here Janaszak should not be the controlling case that deprives Dr. Hiesterman of his right to pursue his claim on its merits.

D. Washington Courts Find that the Policy Behind RCW 18.13.300 is Analogous to the Policy of Quasi-Judicial Immunity; Therefore, Immunity Should Be Limited in Scope to Function Performed.

When examining immunity, Washington "*[c]ourts look to the function being performed, instead of the person who performed it, to determine if immunity applies.*" Janaszak, 173 Wash. App. at 713, 297 P.3d at 723. DOH is seeking immunity based on its reporting functions pursuant to RCW 18.130.300. Washington courts find that the immunity provided by RCW 18.130.300 is analogous to quasi-judicial immunity given to state employees for acts in the administration of justice. Janaszak, 173 Wash. App. at 713, 718-719. In this regard, Washington courts have stated, "*this immunity does not exist for the benefit of the judge; rather, it protects the administration of justice by ensuring that judges can decide cases without fear of personal lawsuit.*" Id. at 713; citing, Taggart v. State of Washington, 118 Wash.2d 195, 203, 822 P.2d 243 (1992). "*Analogous to the immunity afforded prosecutors and judges, the immunity afforded by RCW*

18.130.300 exists not to protect individuals but to protect the integrity of a uniform disciplinary process for healthcare professionals." Janaszak, 118 Wash. App. at 719.

Dr. Hiesterman is not challenging the DOH's disciplinary process. Rather, his claim is based on the misrepresentations contained in the subsequent reporting at the conclusion of the disciplinary proceedings. DOH's reporting at the conclusion of the disciplinary proceedings is an administrative act outside the immunity provided by RCW 18.130.300. Dr. Hiesterman is claiming damages related to the negligent reporting that occurred subsequent to his license suspension, and after the completion of the disciplinary proceedings, which is a purely administrative function. Immunity should not extend to administrative actions taken in the course of employment, as stated by the Washington Supreme Court:

> *Thus, when a parole officer performs functions such as enforcing the conditions of parole or providing the Board with a report to assist the Board in determining whether to grant parole, the officer's actions are protected by quasi-judicial immunity. But when the officer takes purely*

supervisory or administrative actions, no such protection arises.

Taggart, 118 Wash.2d at 213.

As is the case with judges and prosecutors, the purpose of the immunity afforded by RCW 180.130.300 is for the protection in the administration of justice without fear of lawsuits in performing this function. Janaszak, 173 Wash. App. at 719. Immunity should not apply to administrative actions at the conclusion of the judicial action. Mauro v. Kittitas Cty., 26 Wash. App. 538, 613 P.2d 195, 196 (1980) (finding no immunity in relation to delivery of an order and withdrawing a warrant after the order was entered, because these were ministerial tasks).

Falsely reporting that Dr. Hiesterman was convicted of a DUI in Idaho and was not compliant with treatment, after the completion of the disciplinary proceedings to suspend his medical license, has no relation to the administration of justice. The DOH's misrepresentations in its reporting is simple

negligence, and DOH is not immune from the resulting damages. See Supra at 6-7; see also RCW 4.92.090.

VI. CONCLUSION

Considering the facts and law stated above, this Court should reverse the lower court's granting of summary judgment to DOH and remand this case for a determination on the merits. Dr. Hiesterman should be able to pursue his rights at law on the merits of his claim. He should not be prevented from seeking justice on the sole basis that the court in Janaszak interpreted RCW 18.130.300 far too broadly. Extending the individual immunity in RCW 18.130.300 to allow absolute state immunity both violates the Washington Constitution and contradicts the policy that Washington courts agree stands behind the statute. If this statute continues to be interpreted by Washington courts to shield the state from any liability, this Court risks setting a precedent that would prevent injured citizens from seeking remedy no matter what act is performed by the State, including negligence.

This document contains 3,853 number of words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 23rd day of March 2023.

ROBERTS FREEBOURN, PLLC

/s/ Chad Freebourn
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY certify that on the 23rd day of March 2023, I caused to be served a true and correct copy of the foregoing document to the following on the Respondents via counsel of record using the Washington State Appellate Courts' Portal:

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February 22, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK ANDREW HIESTERMAN, an individual, Appellant/Cross-Respondent, v. STATE OF WASHINGTON DEPARTMENT OF HEALTH, Respondents/Cross-Appellants.	No. 54171-8-II ORDER GRANTING MOTION TO PUBLISH

Respondent, Department of Health, moved this court to publish its December 13, 2022 opinion. After consideration, we grant the motion. it is now

ORDERED that the final paragraph in the opinion which reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED that the opinion will now be published.

Panel: Jj. Cruser, Veljacic, Worswick.

FOR THE COURT:

Veljacic, J.

Filed
Washington State
Court of Appeals
Division Two

December 13, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK ANDREW HIESTERMAN, an individual, Appellant/Cross-Respondent, v. STATE OF WASHINGTON DEPARTMENT OF HEALTH, Respondents/Cross-Appellants.	No. 54171-8-II UNPUBLISHED OPINION

VELJACIC, J. — Mark A. Hiesterman was arrested twice for driving under the influence (DUI). He was reported to the Board of Osteopathic Medicine and Surgery (Board), which received two complaints. He was also reported to the Board by the Washington Physicians Health Program (WPHP) after he voluntarily sought program assistance and then refused to comply with its recommendation. The Board conducted an investigation and issued charges. Eventually it suspended Hiesterman's license to practice medicine. As required by statute, the Board reported his charges and later suspension to the public via a news release. It incorrectly stated that he had been convicted of DUI. Hiesterman sued the Department of Health (DOH), arguing he was owed damages due to its error in reporting he was convicted of DUI. DOH moved for summary judgment dismissal, arguing it was immune from suit under RCW 18.130.300(1). The trial court granted DOH's motion.

Hiesterman appeals, arguing that RCW 18.130.300(1) violates the Washington Constitution. He also argues that *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013),

which interpreted RCW 18.130.300(1) and expanded its immunity to DOH, was incorrectly decided. He also argues that RCW 18.130.300(1) does not protect administrative acts like DOH's reporting in this case. We decline to consider Hiesterman's constitutional challenges under RAP 2.5(a)(3) because he failed to preserve this argument for appeal and the alleged constitutional errors are not manifest. We also conclude that the plain language of RCW 18.130.300(1) provides immunity to the Board and those performing the reporting function on its behalf. We affirm the trial court's summary judgment order.

FACTS

Hiesterman practices osteopathic medicine and is licensed to practice in Washington. Hiesterman was arrested twice for DUI, once in Michigan and once in Idaho. For the Michigan charge, he pleaded guilty to driving while intoxicated. For the Idaho charge, he pleaded guilty in exchange for a withheld judgment. The Idaho charge was eventually dismissed.

Hiesterman self-referred to the Washington Physicians Health Program (WPHP), an organization that assists doctors who present with a condition that may affect their ability to practice. After a consultation, WPHP directed Hiesterman to undergo a "comprehensive evaluation at a WPHP-approved facility." Clerk's Papers (CP) at 61. He chose the Betty Ford Center's clinical diagnostic evaluation. The Betty Ford team concluded that Hiesterman required 90 days of residential chemical dependency treatment. Hiesterman refused to follow the recommendation, and WPHP gave him the opportunity to have an additional evaluation conducted. He never sought an additional evaluation.

Around the time Hiesterman received his Betty Ford evaluation and recommendation, the Board received two complaints about Hiesterman. One complaint pertained to his arrest for DUI in Idaho. Meanwhile, WPHP informed Hiesterman that he was required to undergo treatment or

seek an additional evaluation, and that if he failed to comply, WPHP would contact the Board. WPHP contacted the Board after Hiesterman failed to either seek treatment or reevaluation.

The Board conducted an investigation and issued a statement of allegations. The Board later sent Hiesterman a statement of charges. Pursuant to RCW 18.130.110(2)(c),[1] the Board issued a news release, that included the inaccurate sentence: "Hiesterman was convicted of driving while intoxicated in 2006 in Michigan and in 2013 in Idaho." CP at 144.

Following a hearing, the Board suspended Hiesterman's license. The Board issued another news release informing the public that Hiesterman's license was suspended. Eventually, the Board reinstated Hiesterman's license and removed all conditions. It issued a news release informing the public of the reinstatement.

Hiesterman sued the DOH in tort for damages because it reported he had been convicted of driving while intoxicated in Idaho.[2] DOH moved for summary judgment, arguing it was immune from suit under RCW 18.130.300(1).

Hiesterman never challenged the constitutionality of RCW 18.130.300(1) or the constitutionality of the *Janaszak* holding in the trial court. The trial court granted DOH's motion for summary judgment. Hiesterman appeals.

ANALYSIS

I. THE DEPARTMENT OF HEALTH'S DISCIPLINARY PROCESS

In passing the Uniform Disciplinary Act (UDA), the legislature intended to standardize the licensing and disciplinary procedures for health care professions. RCW 18.130.010. The UDA

[1] RCW 18.130.110(2)(c) requires the Board to report to the public via a news release any time it issues a statement of charges or a final order.

[2] Hiesterman asserted claims of negligence, defamation, tortious interference with business expectancy, and invasion of privacy.

established boards to oversee the licensure and discipline of such professions, including the Board relevant here. RCW 18.57.003. The Board oversees the licensure and discipline of osteopathic medical professions pursuant to the UDA. RCW 18.57.005(1); RCW 18.57.011. The Board does not have its own staff and instead relies on DOH to provide staff.

The Board, as a disciplining authority, receives complaints made against medical professionals and determines whether such complaints merit investigation. RCW 18.130.080(1)(a), (2). DOH must report the issuance of charges or a final order to the public via a press release sent to local news media and major news wire services. RCW 18.130.110(2)(c). After a hearing and a finding that a professional has acted unprofessionally, the Board may discipline the professional through revocation or suspension of their license. RCW 18.130.160.

The UDA also includes an immunity provision that states in relevant part, "The secretary, members of the boards or commissions, or individuals acting on their behalf are immune from suit in any action, civil or criminal, based on any disciplinary proceedings or other official acts performed in the course of their duties." RCW 18.130.300(1).

II. CONSTITUTIONALITY OF RCW 18.130.300

Hiesterman argues that RCW 18.130.300(1) is facially unconstitutional because it provides absolute immunity, which is barred by article I, section 8 of the Washington Constitution. DOH first argues that Hiesterman failed to preserve his constitutional claims. Alternatively, it argues that RCW 18.130.300(1) is constitutional. We decline to address Hiesterman's facial challenge to RCW 18.130.300(1) because he failed to preserve his constitutional claims and the claimed error is not a manifest error affecting a constitutional right.

We consider only the issues and evidence the parties called to the trial court's attention on the motion for summary judgment. RAP 9.12. But we will consider an issue raised for the first

time on appeal if the claimed error is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Vernon v. Aacres Allvest, LLC*, 183 Wn. App. 422, 427, 333 P.3d 534 (2014). An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "'plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.'" *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). "The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

Lynn sets out a four-step approach to determining whether an error claimed for the first time on appeal amounts to a manifest constitutional error requiring review:

> First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

67 Wn. App. at 345.

First, Hiesterman's claim that RCW 18.130.300 violates article I, section 8 of the Washington Constitution clearly suggests a constitutional issue. Second, the alleged error is manifest because the immunity provided by RCW 18.130.300 is a core issue resulting in judgment for DOH here. But Hiesterman stumbles on the third step because a consideration of the merits of the constitutional issue does not result in relief to Hiesterman. That is because Hiesterman must "by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution." *Island County. v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). Instead, Hiesterman asserts in conclusory fashion that RCW 18.130.300 grants irrevocable

immunity, which denies plaintiffs recourse, which in turn "'runs contrary to the most fundamental precepts of our legal system.'" Br. of Appellant at 8 (quoting *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 105, 829 P.2d 746 (1992)). This argument fails to show that there is no reasonable doubt that the statute violates the constitution.

Hiesterman fails in the *Lynn* four-step approach, and therefore, fails to show that the alleged constitutional error was manifest. RAP 2.5(a). Accordingly, we decline to consider Hiesterman's constitutional challenge to RCW 18.130.300(1).

III. HIESTERMAN'S *JANASZAK* CHALLENGE

Hiesterman also argues for the first time on appeal that *Janaszak* violates article II, section 26 of the Washington Constitution. But we consider only the issues and evidence the parties called to the trial court's attention on the motion for summary judgment. RAP 9.12. However, as stated above, we will consider an issue raised for the first time on appeal if the claimed error is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Vernon*, 183 Wn. App. at 427. Also as set out above, we review Hiesterman's argument under the four-step approach set forth in *Lynn*. We conclude that as to the first step, his argument suggests a constitutional issue because it alleges a conflict with a state constitutional provision, article II, section 26. Second, if *Janaszak*, and its application of liability to DOH in that case, is prohibited by article II, section 26, then it would have a practical and identifiable consequence to Hiesterman's case below. But as to the third factor, again, Hiesterman would not be entitled to relief. That is because we agree with *Janaszak* and its reasoning.

Hiesterman argues that the *Janaszak* court violated article II, section 26 of the Washington Constitution and ignored RCW 4.92.090 because it granted immunities to the State and its departments when interpreting RCW 18.130.300. He next argues that the *Janaszak* decision

conflicts with *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995). We conclude that *Janaszak* was correctly decided.

When examining whether to extend the immunity protections of a given statute, courts must conduct a "detailed policy-oriented factual inquiry." *Lutheran Day Care*, 119 Wn.2d at 100. Relying on conclusory holdings alone "carries with it the risk of finding immunity based on analogy to a case where the title held by the relevant official is the same as the one at issue, but the functions, procedures, and inherent protections available are quite different." *Id*. at 100-01. The *Janaszak* court specifically examined RCW 18.130.300(1) and its grant of statutory absolute immunity. 173 Wn. App. at 713-14. The court concluded that the statute "grants absolute immunity for acts performed in the course of a covered individual's duties." *Id*. at 714. It also considered whether the statute granted immunity to the state and DOH. *Id*. at 717-18.

The court examined the statutory scheme of the UDA, which covers the investigation and regulation of the practice of medicine. *Id*. at 718. It concluded that when it passed the UDA, including RCW 18.130.300(1), the legislature intended to provide absolute immunity "for the secretary of health, members of the commissions, and individuals acting on their behalf for official acts performed by any of these individuals in the course of their duties under the act." *Id*. Because the investigative and enforcement duties of such roles mirrored prosecutorial and judicial roles, the court determined it should examine cases addressing the extension of prosecutorial and judicial immunity. *Id*.

Its examination revealed that the policy protecting prosecutors and judicial staff was not intended solely to protect individuals (though it certainly has that effect), but rather to protect "'the public and to insure active and independent action of the officers charged with the prosecution of crime, for the protection of life and property.'" *Id*. (internal quotation marks omitted) (quoting

Creelman v. Svenning, 67 Wn.2d 882, 884, 410 P.2d 606 (1966)). The court explained that the Washington Supreme Court has stated that such immunity should be extended to the state and the "entity employing the prosecutor." *Janaszak*, 173 Wn. App. at 719. The court concluded that the same policy considerations applied to RCW 18.130.300(1) because that statute was also not intended to protect individuals but to protect the integrity of the disciplinary process. *Id*. at 719. The court held that the absolute immunity in RCW 18.130.300(1) applied to the state and DOH. *Id*.

We agree with the *Janaszak* decision and adopt its reasoning here.

Hiesterman asserts that *Janaszak* violated the Washington Constitution because only the legislature may grant immunity under article II, section 26.[3] However, he relies on *Savage* which contradicts his position because it provides that courts may extend immunity upon the appropriate policy examinations. *See* 127 Wn.2d 440-41. *Janaszak* is consistent with *Savage*.

Hiesterman also argues the policy of protecting the disciplinary process under RCW 18.130.300(1) does not warrant extending immunity to the state or DOH. But the *Janaszak* court spent considerable time analyzing the policy reasons that *do* warrant extending the immunity of RCW 18.130.300(1) to DOH and the state. 173 Wn. App. at 718-19.

Hiesterman's assertion that *Janaszak* is contrary to article II, section 26 of the Washington Constitution, RCW 4.92.090, and the Supreme Court's *Savage* decision fails. Accordingly, step three of the *Lynn* four-step approach is unmet and the alleged constitutional error is not manifest. Because it is not manifest, we do not review the issue per RAP 2.5(a)(3).

[3] WASH. CONST. art. II, § 26 states: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state."

IV. ADMINISTRATIVE VERSUS QUASI-JUDICIAL ACTIONS UNDER RCW 18.130.300(1)

Hiesterman argues "DOH's reporting at the conclusion of the disciplinary proceedings is an administrative act outside the immunity provided by RCW 18.130.300." Br. of Appellant at 12. Further, he argues that because RCW 18.130.300(1) provides immunity for quasi-judicial action, it should not be applied to DOH's reporting action here because such action was administrative. DOH argues that by its plain language RCW 18.130.300(1) applies to the reporting at issue here. We agree with DOH.

A. Legal Principles

The primary goal of statutory construction is to determine and give effect to the legislature's intent. *SEIU Healthcare 775NW v. Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 398, 377 P.3d 214 (2016). To decipher legislative intent, we examine the plain language of the statute, the context of the statute in which the provision is found, and related statutes. *Id*. at 398. "'[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" *Green v. Pierce County*, 197 Wn.2d 841, 850, 487 P.3d 499 (2021) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2022)).

RCW 18.130.300(1) states, "The secretary, members of the boards or commissions, or individuals acting on their behalf are immune from suit in any action, civil or criminal, based on any disciplinary proceedings or other official acts performed in the course of their duties."

B. Analysis

RCW 18.130.300(1) is unambiguous. It applies to the reporting action required of DOH. Hiesterman spends most of his brief discussing why RCW 18.130.300(1) should not apply to DOH's action here based on the distinction between administrative and quasi-judicial actions, in

that the reporting of his DUI history was an administrative action, rather than a quasi-judicial function. He does so at the expense of any interpretation of RCW 18.130.300(1) itself. We hold that DOH's fulfillment of its reporting duty is conduct protected by statutory immunity under RCW 18.130.300(1).

Hiesterman's reliance on the administrative policy underlying DOH's actions in this case is misplaced because RCW 18.130.300(1) makes no distinction between the investigative and administrative work of DOH staff. Hiesterman directs our attention to a purpose of the statutory immunity as discussed in the *Janaszak* opinion, he misreads the point of the *Janaszak* court. Hiesterman asserts that the immunity in RCW 18.130.300(1), is not intended to protect the individual, but instead to protect only the decision making process, and that immunity therefore should not extend to those performing acts that are non-quasi-judicial, such as reporting.

While it is true that an underlying policy is to protect the decision making process, we will not read the policy to nullify the plain unambiguous language of the statute, which grants immunity to "[t]he secretary, members of the boards or commissions, or individuals acting on their behalf . . . based on any disciplinary proceedings or other official acts performed in the course of their duties." RCW 18.130.300(1). And since notification via press release is an official act performed in the course of their duties, those performing those non-quasi-judicial acts on behalf of the Board are also protected by the statutory immunity.

The immunity under RCW 18.130.300(1) includes the reporting mandate of RCW 18.130.110(2)(c). We affirm the trial court's summary judgment order.[4]

[4] DOH conditionally cross-appeals, arguing that Hiesterman's affidavit includes inadmissible evidence that should be stricken. DOH concedes that we should only review this argument if it reverses the trial court's summary judgment order. Because we affirm the trial court's summary judgment order, we do not consider DOH's conditional cross-appeal.

CONCLUSION

We decline to consider Hiesterman's constitutional challenges under RAP 2.5(a)(3) because the alleged constitutional errors are not manifest. We also conclude that the plain language of RCW 18.130.300(1) provides immunity to the Board and those performing the reporting function on its behalf. We affirm the trial court's summary judgment order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Worswick, J.P.T.

Cruser, A.C.J.