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№ 72495-9-I

BEFORE THE COURT OF APPEALS, DIVISION I IN AND FOR THE STATE OF WASHINGTON

MARK L. BESOLA

Appellant,

v.

DEPARTMENT OF HEALTH, STATE OF WASHINGTON

Respondent.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY,
CAUSE № 13-2-24470-5 KNT
THE HONORABLE MARY ROBERTS, PRESIDING

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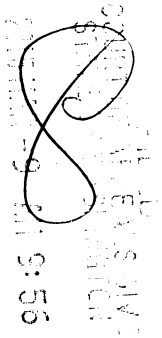

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I. ARGUMENT

Dr. Besola and the Department largely agree on what law governs this case. Where the parties differ is on how to determine whether someone's alleged misconduct "relates to" his or her professional practice under RCW 18.130.180(1) and (17). Contrary to the clear language of *Haley*[1] and *Ritter*,[2] the Department asserts *Haley* established a single test applicable to all professions. *Au contraire*, *Haley* and *Ritter* explicitly hold there is one test applicable to professionals responsible for the public health and a separate test for professionals not responsible for the public health.

A. The Department misrepresents Dr. Besola's argument.

The Department claims Dr. Besola "argues that *Haley* should be read to apply exclusively to physicians and that no other health care provider is critical to maintaining public health."[3] This statement misapprehends Dr. Besola's argument.

Dr. Besola's true argument, clearly set forth in his Opening Brief, is: *Haley v. Medical Disciplinary Board* established **two** distinct tests for determining whether a professional license holder's

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[1] *Haley v. Medical Discplinary Board*, 177 Wn.2d 720, 818 P.2d 1062 (1991).
[2] *Ritter v. State, Bd. of Registration for Professional Engineers and Land Surveyors*, 161 Wn.App. 758, 255 P.3d 799 (2011)
[3] Brief of Respondent, p. 13-14.

misconduct was "related to" his or her profession for purposes of RCW 18.130.180(1) and (17): one test for professions related to the public health, and one test for professions not related to the public health.[4]

B. The Department misstates the law regarding whether a professional's alleged misconduct "relates to" his professional practice.

The Department argues:

> ... [T]he Board concluded that Dr. Besola's conduct and resulting convictions were related to the practice of his profession because they lowered the standing of the profession in the eyes of the public. Such conduct is related to the practice of the profession because it affects the ability of all members of the profession to discharge their duties to protect the public health.[5]

This paragraph reveals the fundamental flaw in the Department's logic and legal analysis. The Department ignores language in *Haley* that explicitly holds there is generally no legitimate State interest in protecting the reputation of a profession but that the special status of physicians in protecting the health of the public creates a legitimate State interest in protecting the reputation of physicians.

In *Haley*, the Washington Supreme Court adopted two tests for determining whether a professional's conduct related to his or her

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[4] Appellant's Opening Brief, p. 10-21.
[5] Brief of Respondent, p. 13.

profession: a general test applicable to all professionals and a separate test applicable to professions related to the public health that included a broader range of misconduct than the generally applicable test.

1. The "related to" test generally applicable to all professions.

The *Haley* court "construe[d] the 'related to' requirement as meaning the conduct must indicate unfitness to bear the responsibilities of, and to enjoy the privileges of, **the profession**."[6] This is the generally applicable legal test announced by *Haley* to determine whether or not a professional's conduct "relates to" his or her profession.

2. The broader "related to" test applicable only to physicians.

Due to the special role of physicians and professionals who provide medical treatment and advice (collectively, "physicians") in our society, however, the *Haley* court also adopted the broader test that the conduct of a ***physician*** was "related to" that physician's practice if the conduct "lowers the standing of the ***medical*** profession in the public's eyes."[7]

Haley acknowledged "constitutional constraints mandate that

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[6] *Haley*, 117 Wn.2d at 731, 818 P.2d 1062 (emphasis added).

any state-imposed requirement for practicing a profession must be rationally related to a legitimate state interest" and "the concern with protecting the medical profession, if viewed as a concern with preserving the interests of physicians themselves, is difficult to regard as a legitimate state interest or as rationally related to fitness to practice medicine."[8] *Haley* then explains why the State had an interest in protecting the reputation of **physicians** due to the function of **physicians** in protecting the public health:

> As an interest of the state, however, ***preserving [medical] professionalism is not an end in itself. Rather, it is an instrumental end pursued in order to serve the state's legitimate interest in promoting and protecting the public welfare.*** To perform their professional duties effectively, ***physicians*** must enjoy the trust and confidence of their patients. ***Conduct that lowers the public's esteem for physicians erodes that trust and confidence, and so undermines a necessary condition for the profession's execution of its vital role in preserving public health through medical treatment and advice.***[9]

Thus, aside from professions that play a vital role in preserving public health through medical treatment and advice, the State has no legitimate interest in maintaining the public reputation of any profession. The test that a professional's conduct is "related to" that

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[7] *Haley*, 117 Wn.2d at 733, 818 P.2d 1062 (emphasis added).
[8] *Id.*

professional's practice if that conduct "lowers the standing of the profession in the public's eyes" is applicable only to physicians because such professionals play an intimate role in preserving public health and the State has a legitimate interest in promoting and maintaining the public health. Therefore, the broader "lowers the standing of the profession in the public's eyes" test is applicable only to determining whether or not a ***physician's*** conduct is related to the ***physician's*** practice.

3. The Department ignores the plain language of Haley where the court stated it had adopted two "related to" tests.

Haley makes clear it adopted two tests and that Haley's conduct violated *both* of those tests:

> We reject Dr. Haley's argument that his conduct was unrelated to the practice of medicine...As we explained above, conduct may indicate unfitness to practice the profession ***either*** by raising concerns that the individual may use the professional position to harm members of the public, ***or*** by tending to lower the standing of the profession in the public's eyes, thereby affecting the quality of public health which is a legitimate public concern. Dr. Haley used the trust and confidence he established, as a surgeon, with a minor child of 16 years to develop a relationship of sexual exploitation, a relationship that harmed both the child and her parents. Such conduct demonstrates unfitness to practice medicine for purposes of RCW 18.130.180(1).[10]

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[9] *Haley*, 117 Wn.2d at 733-734, 818 P.2d 1062 (emphasis added).
[10] *Haley*, 117 Wn.2d at 738, 818 P.2d 1062 (emphasis added).

For professional license holders whose profession does not impact the public health, misconduct is "related to" the profession if it "rais[es] concerns that the individual may use the professional position to harm members of the public." For physicians, because their profession *does* impact the public health, misconduct is "related to" their profession if it "tend[s] to lower the standing of the profession in the public's eyes, thereby affecting the quality of public health." *Haley* found Dr. Haley's conduct violated both tests: "Dr. Haley's conduct indicates unfitness to practice medicine in two ways: it raises concerns about his propensity to abuse his professional position, **and** it tends to harm the standing of the profession in the eyes of the public, which both lead to reasonable apprehension about the public welfare."[11]

Dr. Besola's argument is not that *Haley* applies only to physicians. *Haley* applies to all professionals but *Haley* adopted two different tests for determining whether a professional's misconduct "relates to" their profession and that one of those tests applies only to individuals whose profession maintains the public health.

C. As a veterinarian, Dr. Besola's profession is not necessary for maintaining the public

[11] *Haley*, 117 Wn.2d at 736, 818 P.2d 1062 (emphasis added).

health; therefore the narrower of the *Haley* "related to" tests applies to him.

The Department argues "there is no principled basis to accept Dr. Besola's suggestion that only physicians are 'critical to maintaining public health."[12] The Department continues: "[Dr. Besola's] suggestion would exclude every other health care profession governed by the very same provision of the Uniform Disciplinary Act."[13] This argument misrepresents Dr. Besola's argument in this appeal, has no evidentiary basis in the record, and ignores the facts of this case.

1. Dr. Besola does not argue that physicians are the only professionals necessary to maintaining the public health.

The boards and commissions of numerous professions, including the Veterinary Board of Governors, are governed by the Uniform Disciplinary Act. RCW 18.130.040. Dr. Besola does not argue physicians are the only profession necessary to maintaining the public health. Dr. Besola makes a two pronged argument in this appeal: (1) *Haley* established two "related to" tests for purposes of RCW 18.130.180(1) and (17), one test for all professionals whose profession does not relate to maintaining the public health and one

[12] Brief of Respondent, p. 17.
[13] Brief of Respondent, p. 17.

test for professionals whose professions do relate to maintaining the public health; and (2) the practice of veterinary medicine is not a profession that relates to the maintenance of public health. Dr. Besola does not and has never argued that physicians are the only profession necessary to maintaining the public health.

Haley and *Kindschi* discussed physicians because the licensed professionals whose conduct was at issue in both *Haley* and *Kindschi* were physicians. What *Haley* and *Kindschi* establish is that there is one "related to" test applicable to professionals whose professions relate to the maintenance of public health and there is another test applicable to professionals whose professions do not relate to the public health.

2. *Veterinarians are not necessary to maintenance of the public health, thus the narrower "related to" test adopted in Haley applies to Dr. Besola's alleged misconduct.*

The first prong of Dr. Besola's argument, that *Haley* established two "related to" tests for professionals' misconduct, is discussed at length in his Opening Brief as well as above.

The second prong of Dr. Besola's argument is self-evident. Dr. Besola is a veterinarian; Dr. Besola's patients are animals, not

people. Animals are property,[14] and animals are not members of the public. Dr. Besola therefore has no role in the quality of public health. Washington courts have already held that the laws and standards governing health care professionals do not apply to veterinarians.[15] The Department therefore errs in asserting veterinarians are in the same professional category as physicians for purposes of determining which of the two *Haley* tests applies to veterinarians.

The "related to" test applicable to Dr. Besola is the narrower test applicable to non-physicians: his conduct "must indicate unfitness to bear the responsibilities of, and to enjoy the privileges of, the profession."[16] As in *Ritter v. State, Bd. of Registration for Professional Engineers and Land Surveyors*,[17] Dr. Besola's alleged misconduct does not "relate to" his profession because the record in Dr. Besola's case does not establish that Dr. Besola would — or even

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[14] *See e.g. Sherman v. Kissinger*, 146 Wn.App. 855, 870, 195 P.3d 539 (2008) ("It is well established...that as a matter of law pets are characterized as personal property."); *Mansour v. King County*, 131 Wn.App. 255, 267, 128 P.3d 1241 (2006) ("[A]lthough we have recognized the emotional importance of pets to their families, legally they remain in many jurisdictions, including Washington, property.")

[15] *E.g. Sherman v. Kissinger*, 146 Wn.App. 855, 864-869, 195 P.3d 539 (2008) (Medical malpractice act applies only to human health care, and does not apply to veterinarians or veterinary clinics).

[16] *Haley*, 117 Wn.2d at 731, 818 P.2d 1062.

[17] 161 Wn.App. 758, 255 P.3d 799 (2011).

could — take advantage of his status as a professional license holder to commit the kinds of misconduct he allegedly committed.

D. The Department's cross-appeal of the Superior Court's stay of the suspension of Dr. Besola's license should be dismissed as moot and the subject of a separate petition for discretionary review.

King County Superior Court initially granted a stay of the enforcement of the Department's Order suspending Dr. Besola's veterinary license. CP 109-111. However, on September 12, 2014, King County Superior Court lifted the stay after Dr. Besola's criminal convictions were affirmed by the Court of Appeals. CP 115.

On September 24, 2014, Dr. Besola brought a motion before the Court of Appeals to stay enforcement of the Superior Court order lifting the stay of enforcement of the Department's Order. Dr. Besola's motion was denied and Dr. Besola has sought discretionary review of this court's denial of his motion for a stay at the Supreme Court.

The Department cross-appealed the King County Superior Court ruling granting the stay of the Department's Order, arguing that the Superior Court had failed to comply with RCW 34.05.550(3).[18]

[18] Brief of Respondent, p. 26-34.

An appeal is moot when "it presents purely academic issues and where it is not possible for the court to provide effective relief."[19] Generally, the Court of Appeals court must dismiss an issue on appeal if the question presented is moot.[20]

The Department's cross-appeal was rendered moot when King County Superior Court lifted the stay of enforcement of the Department's Order. This court cannot provide any relief to the Department since the Department has already obtained the relief it was seeking- a lift of the stay of its Order. This court should ignore section D of the Respondent's Brief since the Department's cross-appeal is moot.

II. CONCLUSION & PRAYER

Dr. Besola prays this Court set aside the agency Order suspending his license, hold Dr. Besola's criminal convictions do not relate to his practice of veterinary medicine, and enjoin the Department from pursuing any further disciplinary actions against Dr. Besola based on his criminal convictions related to this case.

Dr. Besola further prays this court find the Department's actions were without a reasonable basis, Dr. Besola is the prevailing

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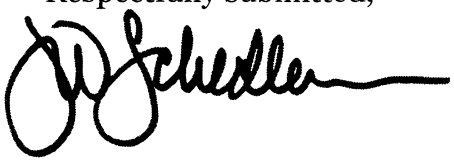
[19] *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1993).
[20] *State v. Enlow*, 143 Wn.App. 463, 470, 178 P.3d 366 (2008).

party and he is therefore entitled to an award of attorney's fees and expenses under RCW 4.84.340 and RCW 4.84.350.

DATED this 5th day of March, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2015, I caused to be served a true and correct copy of the foregoing document on the party listed below via:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Mercer Island, Washington, Thursday, March 5, 2015.

John W. Schedler, | WSBA № 8563