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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.

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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

Although under RCW 18.130.010 Defendants are charged with assuring “the public of the adequacy of professional competence and conduct in the healing arts,” they cannot enforce this mandate in an unlawful or arbitrary manner.

The Department of Health (“Department”) and its employees acted negligently and illegally when investigating complaints filed against Dr. Janaszak, the Dental Quality Assurance Commission (“DQAC”) summarily restricted his dental license with an Order that was arbitrarily broad, and the Department injured his personal and professional reputation by posting defamatory statements about him on its website. In sum, Dr. Janaszak has been severely injured by Defendants’ actions, and his ability to earn a living as a dentist has been significantly curtailed.

Dr. Janaszak reincorporates the facts and arguments previously briefed in his prior pleadings. In addition, he responds to arguments in Defendants’ Responsive Brief.

1. Neither RCW 18.32.0357 nor RCW 18.130.300 provide Defendants blanket immunity from Plaintiff’s claims.

Neither the plain language of RCW 18.32.0357, nor that of RCW 18.130.300, supports the contention that Defendants are absolutely immune from Plaintiff’s claims. RCW 18.32.0357 provides immunity

only to those who act in good faith; RCW 18.130.300 provides immunity only to those who act within the course of their duties.

Dr. Janaszak produced evidence that could lead a reasonable juror to conclude Defendants did not act in good faith and/or within the course of their duties when investigating and suspending his dental license. There is evidence Defendants summarily restricted his dental license in an emergency ex parte proceeding a year after the initial Complaint was filed, and after Dr. Janaszak's relationship with Patient A and Patient B ended. CP 258-260, 262. Additionally, the Ex Parte Order prohibited him from treating female patients aged 12-17, even though there was no evidence or written findings in the Order or Motion of inappropriate relations with female minors. CP 258-260; 308-311.

Dr. Janaszak also raised questions of fact about whether Department investigator Chyma Miller-Smith acted in good faith and/or outside the course of her duties. He showed Ms. Miller-Smith failed to produce potentially exculpatory evidence to DQAC, and not her summary of that evidence; coordinated the Complaints of Patients A – C; began investigating Patient C prior to authorization; and appeared unannounced at Dr. Janaszak's office and demanded he immediately produce patient

records despite knowing he was represented by counsel. CP 290-293; 305-306; 321- 322; 351-351; 391-394.

Ms. Miller-Smith, as a Department investigator, is charged with impartially investigating complaints. As evidenced by her numerous emails to Patients A – C, Ms. Miller-Smith acted not as an impartial investigator, but as an advocate. This is inappropriate, violates Department policy, and exceeds the scope of her authority.

Finally, there is evidence that the Department violated WAC 246-14-060, by allowing the 2010 Investigation to sit in disposition for over a full year. A jury should consider all these facts when deciding whether the Defendants acted in good faith and/or outside the course of their duties.

2. Quasi-judicial immunity does not provide Defendants with blanket immunity from Plaintiff's claims.

Quasi-judicial immunity extends to governmental agencies and executive branch officials performing quasi-judicial functions, and attaches to persons or entities that perform judicial acts that are similar to those performed by judges. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992). It is a defendant's burden to show he or she enjoys immunity from a suit arising from an administrative proceeding. *Id.* If applicable, the doctrine completely shields a person or entity from liability for judicial performed acts. The doctrine does not,

however, provide immunity for all possible acts, or those judicial acts beyond all jurisdiction.

In determining the scope of immunity for judicial acts, a distinction must be drawn between acting in excess of general jurisdiction and acting in clear absence of all jurisdiction. *Burgess v. Towne*, 13 Wash.App. 954, 538 P.2d 559 (1975). To find liability, the actions of a defendant must be in clear absence of all jurisdiction. *Id.* at 958. Thus, acts by a judge or judicial officer will be protected by immunity if they are intimately associated with the judicial process. *Mauro v. Kittitas Cy.*, 26 Wash.App. 538, 613 P.2d 195 (1980).

This doctrine cannot provide Defendants with blanket immunity for all possible acts, and a jury should decide whether the acts described above were beyond all jurisdiction. These acts include the investigation, scope of the Ex Parte Order, and the postings on the Department's website.

There are also questions about whether this quasi-judicial immunity is even applicable to some Defendants. Ms. Miller-Smith, for example, as a Department Investigator, is not comparable to a judge, or even a prosecutor. Even assuming the doctrine does apply to her, a jury should decide whether her investigation was outside the scope of

jurisdiction. A summary finding that all Defendants are immune was improper.

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

There can be liability for official acts under §1983: a Department investigator can violate §1983 even if he or she does not personally revoke a license, so long as there is a sufficient connection between an investigator's acts (evidence fabrication) and the violation (license wrongful revocation). *Jones v. State of Washington and its Department of Health*, 170 Wn.2d 338, 351, 242 P.3d 825 (2010).

There are issues of fact about whether Ms. Miller-Smith's violated Dr. Janaszak's constitutional rights through the course of her investigation, and when presenting evidence to DQAC for the Ex Parte Order. The evidence previously referenced (failing to produce potentially exculpatory evidence, coordinating the complaints of Patients A – C, investigating prior to authorization, and improperly demanding records) supports such a finding. Summarily dismissal of this claim was improper.

4. Plaintiff brought a cognizable claim for injunctive relief under the Washington State Constitution.

Dr. Janaszak's Complaint specifically sought injunctive relief, which has been recognized by the Supreme Court of Washington. *See*

Darrin v. Gould, 85 Wn.2d 859, 540 P.2d 882 (1975). The trial court should have recognized this and should not have dismissed these claims on summary judgment.

5. There are questions of fact regarding whether Defendants placed provably false statements on their website.

In their Responsive Brief, Defendants argue Dr. Janaszak's defamation claim fails for two reasons: privilege and falsity. These issues will be addressed separately.

Defendants argue the "official duty privilege," serves as an absolute bar against liability for defamation claims levied against public officials discharging their duty. There are two problems with this argument. First, the "official duty privilege," like any other privilege, does not bar liability for all acts committed by a public official; instead the privilege only protects public officials "properly discharging an official duty." *Liberty Bank v. Henderson*, 75 Wn. App. 546, 562, 878 P.2d 1259 (1994). If an official is not properly discharging an official duty, the privilege does not apply. There is evidence that Defendants were not properly discharging their official duties when posting the inflammatory statements on their website, and when they refused to removed such statements after repeated requests.

Second, in Washington there is no absolute privilege available for the Department Defendants. Specifically, Washington Supreme Court stated,

An absolute privilege or immunity is said to absolve the defendant of all liability for defamatory statements. *McNeal v. Allen*, 95 Wash.2d 265, 267, 621 P.2d 1285 (1980); *Gold Seal Chinchillas, Inc. v. State*, 69 Wash.2d 828, 830, 420 P.2d 698 (1966). A qualified privilege, on the other hand, may be lost if it can be shown that the privilege has been abused. *Gem Trading Co. v. Cudahy Corp.*, 92 Wash.2d 956, 960, 603 P.2d 828 (1979). Absolute privilege is usually confined to cases in which the public service and administration of justice require complete immunity. Legislatures in debate, judges and attorneys in preparation or trial of cases, statements of witnesses or parties in judicial proceedings, and statements of executive or military personnel acting within the duties of their offices are frequently cited examples. *See Twelker v. Shannon & Wilson, Inc.*, 88 Wash.2d 473, 475–78, 564 P.2d 1131 (1977). Generally, some compelling public policy justification must be demonstrated to justify the extraordinary breadth of an absolute privilege.

Bender v. City of Seattle, 99 Wash.2d 582, 600, 664 P.2d 492. The Court then goes on to hold,

release of information to the press and public by police officers is a very important function, we are persuaded that such communications do not rise to the level of such compelling public policy as to require an absolute privilege. We believe a qualified privilege will adequately protect police officers in releasing information to the public and press.

Bender, 99 Wash.2d at 601.

Like police officers, Department Defendants are charged with educating and protecting the public. And also like police officers, and

unlike legislatures in debate, judges and attorneys in preparation or trial of cases, statements of witnesses or parties in judicial proceedings, and statements of executive or military personnel acting within the duties, Department Defendants do not fall within the very limited class of individuals who enjoy absolute immunity from defamation claims. As such, a qualified immunity is waived if abused. *Gem Trading Co.*, 92 Wash.2d at 960.

There is evidence Defendants abused their qualified privilege by posting inflammatory statements, and by refusing to remove the posts after repeated requests. A jury should decide whether these actions constituted abuse and whether the privilege was waived.

A jury should also consider whether the statements were false and defamatory. When a statement is both false and true, Washington courts will consider both parts and deny summary judgment if the false parts affect a statement's overall thrust. *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)(holding a 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). Under these cases, a jury should have decided whether the false parts of the statements (the bold and underlined headings) affected the thrust of the whole statement. Since this is a jury question, summary dismissal was improper.

6. The Department had a statutory duty to investigate.

Washington courts have recognized a claim for negligent investigation when a state employee has a statutory duty to investigate. *Lesley v. State of WA on Behalf of the Department of Social and Health Services*, 83 Wn. App. 263, 263, 921 P.2d 1066 (1996).

In the instant case, the Department and DQAC were required to investigate after they received complaints from Patients A – C.¹ Dr. Janaszak has a claim of negligent investigation since he produced evidence (referenced above) to support his contention the investigation was negligently conducted in violation of the law and the Department’s internal policies.

¹ RCW 18.130.080(2) provides “[t]he disciplining authority shall investigate to determine whether there has been unprofessional conduct.” (emphasis added)

7. Whether Defendants' conduct was extreme and outrageous is a jury question.

Whether conduct is sufficiently outrageous is ordinarily a question for the jury. *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989). Based on the evidence presented, a reasonable juror could conclude Defendants' conduct was outrageous since they illegally and negligently investigated Dr. Janaszak, summarily and arbitrarily restricted his ability to treat female minor patients 12 – 17, and placed and refused to remove defamatory statements on its website. The results of these acts effectively ruined Dr. Janaszak's professional and personal reputations. Whether these actions rose to the level of extreme and outrageous are traditional questions of fact for a jury to consider.

8. A question of fact remains about whether Plaintiff had a valid business expectancy with which Defendants wrongfully and intentionally interfered.

Dr. Janaszak established a prima facie case for his claim Defendants wrongfully interfered with a valid business expectancy. There is evidence that prior to the Ex Parte Order Defendants knew Dr. Janaszak had a valid dental license, earned his livelihood as a dentist, and had a business relationship with his patients, some one whom were females aged 12 – 17. Defendants also knew summarily suspending his dental license

and publishing defamatory statements on their website would interfere with his ability to treat and retain patients. CP 258-260; 308-311. By illegally and negligently investigating this matter, summarily suspending his dental license with an Order that was arbitrarily broad, and posting on their website, Defendants improperly interfered with Dr. Janaszak's business relations. This caused Dr. Janaszak severe economic damages by ruining his ability to practice as a dentist. CP 351-352.

Taking this evidence in the light most favorable to Dr. Janaszak, all elements of this claim are satisfied, and summary dismissal was inappropriate.

B. CONCLUSION

In their pleadings Defendants have argued they are absolutely immune for liability. This blanket assertion is not supported by the law or policy, and it was improper to dismiss this entire lawsuit based on such.

At issue in this case is the manner in which Defendants investigated Dr. Janaszak, summarily suspended his dental license, and communicated with the public. Although Defendants are tasked with the important job of regulating dental care, they must do so in a lawful manner. In this case Dr. Janaszak has shown Defendants failed to follow the applicable statutes, laws, and their own internal policies. As a result,

Dr. Janaszak had his career, reputation, standing in the community, and livelihood severely injured.

Plaintiff set forth claims supported by evidence, and as such this case should have been presented to a jury. Dr. Janaszak respectfully requests that this Court reverse the trial court's summary dismissal and remand for trial.

Respectfully submitted this 19th day of March, 2011.

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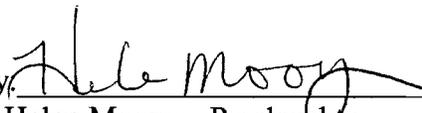
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I sent *Reply Brief of Appellant*, by Email and ABC Legal Messenger, a true copy of this document as follows:

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