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Division II
State of Washington
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NO. 51340-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SAID FARZAD, individually,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH-MEDICAL
QUALITY ASSURANCE COMMISSION; WASHINGTON
PHYSICIANS HEALTH PROGRAM, a Washington non-profit
corporation doing business in Washington State, LARRY BERG AND
“JANE DOE” BERG, and the marital community composed thereof,
CHRIS BUNDY AND “JANE DOE” BUNDY, and the marital
community composed thereof; MOLINA HEALTHCARE OF
WASHINGTON, a Washington corporation, JOHN AND JANE DOES 1-
10,

Respondents.

BRIEF OF RESPONDENTS CHRIS BUNDY, M.D.,
AND WASHINGTON PHYSICIANS HEALTH PROGRAM

Justin A. Steiner, WSBA #45314
Tracy A. Duany, WSBA #32287
Mullin, Allen & Steiner PLLC
Attorneys for Respondents Chris Bundy,
M.D., and Washington Physicians Health
Program
101 Yesler Way, Suite 400
Seattle, Washington 98104
(206) 957-7007

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I. INTRODUCTION

This case arises out of Appellant Said Farzad, M.D.'s dissatisfaction with the suspension of his medical license. Following a disciplinary hearing in July 2014, Respondent State of Washington, Department of Health—Medical Quality Assurance Commission (“MQAC”) concluded that Dr. Farzad could not safely practice medicine. As a result, MQAC indefinitely suspended Dr. Farzad’s license and imposed certain conditions before he could be reconsidered for reinstatement. As part of those conditions, MQAC required that Dr. Farzad submit to a neuropsychological examination, that Dr. Farzad discuss the results of that evaluation with Respondent Washington Physicians Health Program (“WPHP”) (an impaired physician program), that Dr. Farzad comply with any requests by WPHP for further evaluation, and that WPHP report its opinion to MQAC concerning whether Dr. Farzad was safe to return to practice. Only upon the satisfaction of those conditions would MQAC, in its sole discretion, consider reinstatement of Dr. Farzad’s medical license.

In the course of performing their official duties and in compliance with MQAC’s directives, WPHP and its agents assessed that Dr. Farzad could not practice medicine with reasonable safety and conveyed that opinion to MQAC. Dr. Farzad disagreed with WPHP’s assessment. Having appealed MQAC’s suspension of his license to no avail, Dr. Farzad filed the

underlying lawsuit against the Respondents including MQAC, WPHP, and Chris Bundy, M.D, WPHP's medical director.

As the trial court correctly concluded, Dr. Bundy and WPHP are absolutely immune from suit relating to their participation in Dr. Farzad's licensure issues. RCW 18.130.300(2) immunizes impaired physician programs, like WPHP, and their agents, like Dr. Bundy, from a civil action based on any disciplinary proceedings or other official acts performed in the course of their duties. RCW 18.71.0195(2) and RCW 18.130.070(3) provide Dr. Bundy and WPHP with two additional layers of immunity with respect to any information they provided to MQAC regarding Dr. Farzad's ability to safely practice medicine. Based on these broad and absolute immunity defenses, the trial court appropriately entered summary judgment in Dr. Bundy and WPHP's favor, and its ruling should be affirmed.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly find that RCW 18.130.300(2) absolutely immunized Dr. Bundy and WPHP against Dr. Farzad's claims where such claims are based on Dr. Bundy and WPHP's official acts performed in the course of WPHP's duties as an impaired physician program?

2. Did the trial court correctly find that RCW 18.130.070(3) and 18.75.0195(2) absolutely immunized Dr. Bundy and WPHP against Dr.

Farzad's claims where Dr. Bundy and WPHP assessed Dr. Farzad's safety to practice medicine and reported their findings to MQAC in accordance with the rules applicable to impaired physician programs?

3. Did the trial court correctly dismiss Dr. Farzad's civil conspiracy claim as a matter of law where the record was devoid of any evidence creating a genuine issue of material fact and where Dr. Farzad impermissibly sought to relitigate the issue of his safety to practice?

III. COUNTERSTATEMENT OF THE CASE

A. WPHP Is an Impaired Physician Program.

WPHP is an impaired physician program which provides education, assessment, intervention, referral, client support, and reporting for physicians and other medical providers who are potentially impaired. CP 851-54, 855-59. Notably, WPHP is not a medical clinic and does not diagnose or treat impaired physicians. CP 851-54, 855-59. WPHP contractually agreed to provide services to MQAC from July 1, 2009, through June 30, 2021. CP 851-54, 855-59.

B. MQAC Initiates Disciplinary Proceedings against Dr. Farzad for Alleged Boundary Violations.

In 2013, MQAC investigated two complaints against Dr. Farzad, then a licensed psychiatrist. CP 723. The complaints accused him of boundary violations with two female patients, one of whom was a minor. CP 723. With respect to Patient A, MQAC's investigation indicated that

Dr. Farzad prescribed Adderall and Xanax without performing a risk-benefit analysis despite her history of substance abuse, gave her \$700 for lodging and school books, took her to lunch, accompanied her on shopping trips, bought her clothes valued at approximately \$1000, “friended” her on social media, exchanged personal text messages with her, shared information about his personal life with her, asked to be named the godfather of her unborn child, offered to raise her unborn child if she did not want to do so, and continued to pursue a social relationship with her after her medical treatment had ended. CP 637-38.

With respect to “Patient B,” a minor and the daughter of the owner of a clinic where he was then employed, MQAC’s investigation indicated that Dr. Farzad had extensive social interactions with her outside of their therapeutic relationship, routinely hugged her, told her she was beautiful, initiated a discussion with her concerning her sexual habits, made inappropriate jokes containing sexual innuendos, told her he would give her a \$100 gift certificate, and directed her not to tell her mother about the money. CP 638. Dr. Farzad did not deny the behavior he was accused of. CP 628. Instead, he insisted that his behavior was appropriate. CP 628.

At the conclusion of the investigation, MQAC authorized an informal settlement of the disciplinary matter via a Statement of Allegations and a Stipulation to Informal Disposition (“STID”). CP 628. Respondent

Larry Berg was the Department of Health staff attorney assigned to the case. CP 627. Mr. Berg prepared the Statement of Allegations and STID and served them on Dr. Farzad on January 28, 2014. CP 628, 635-50. On January 31, 2014, Dr. Farzad rejected the proposed STID, opting instead to proceed with a formal disciplinary hearing. CP 628. When Mr. Berg suggested that he consult with an attorney before making a decision, Dr. Farzad “said that all attorneys are blood sucking vampires, including every attorney who has ever professed to represent his interests.” CP 652. Dr. Farzad expressed his intention to represent himself. CP 652. He also repeatedly demanded an immediate meeting with the Commissioners to explain what happened, even though Mr. Berg told him that the STID was based on his own statements. CP 652.

C. MQAC Summarily Suspends Dr. Farzad’s License and Issues Statement of Charges.

Concerned that Dr. Farzad may be suffering from some underlying medical condition that was causing his behavior, MQAC authorized a Notice of Intent to Order Investigative Mental Examination. CP 628. Before the Notice of Intent was finalized, MQAC learned that Dr. Farzad was wanted by the Bothell Police Department for threatening to bomb and shoot staff at Molina HealthCare on May 5, 2014. CP 628-29, 655. He was subsequently arrested on five felony charges of threatening to bomb and

telephonic harassment. CP 781. Thereafter, MQAC ordered a summary suspension of Dr. Farzad's license and issued a formal Statement of Charges. CP 629.

The Statement of Charges contained allegations concerning Dr. Farzad's boundary violations with the two female patients as well as his telephone threats to Molina employees. CP 780. Based on the boundary violations and telephone threats, MQAC alleged Dr. Farzad was unable to practice medicine with reasonable skill and safety due to a mental condition in violation of RCW 18.130.170. CP 781-82.

D. MQAC Issues a Final Order Indefinitely Suspending Dr. Farzad's License and Imposing Conditions before Consideration of Reinstatement.

On July 30, 2014, a hearing was held relating to the Statement of Charges. CP 785. Dr. Farzad appeared pro se. CP 785. Multiple witnesses testified, including Dr. Farzad, and documentary evidence was introduced. CP 786-87. Following the hearing, MQAC concluded that the Department proved, by clear and convincing evidence, that Dr. Farzad's ability to practice with reasonable skill and safety was sufficiently impaired by a mental condition. CP 790. Accordingly, MQAC issued a Final Order suspending Dr. Farzad's license indefinitely and imposing conditions before reinstatement of his license would be considered. CP 792-94. The Final Order stated in part:

While the events of May 5, 2014, can be said to describe the ultimate life-threatening consequences of a mental

condition, the ongoing “inability to practice with reasonable skill and safety” issue in this case can be seen in regular conversation with the Respondent and was clearly apparent to the Commission: It is the manner in which the Respondent attempts to dominate and manipulate everyone with whom he interacts in a constant effort to gain their attention and admiration, whether it is through his grandiose presentation of self; his misleading and hyperbolic answers; his contemptuous and impatient dismissal of others; blame-shifting; launching into lengthy stories that overestimate his accomplishments or abilities; or his flagrant attempts to control every discourse to prove his superiority. The Respondent’s demeanor and presentation during his testimony was simply and fundamentally manipulative, controlling, and grandiose, and indicates some type of underlying mental condition that does interfere with his ability to practice as a physician with reasonable skill and safety. The Respondent’s testimony, the testimony of all the witnesses, the transcripts of the Respondent’s text messages to patients, and the transcripts of the interviews with Molina employees were all consistent in portraying someone whose behavior and mental state are destructively contaminated by a sense of personal entitlement.

CP 789.

The Final Order required Dr. Farzad to submit to a neuropsychological examination conducted by the Gabbard Center in Texas. CP 792-93. It also required Dr. Farzad to provide a copy of the neurological evaluation to WPHP, make an appointment with WPHP to discuss the evaluation, and comply with any request by WPHP for further evaluation. CP 793-94. Upon completion of its assessment, the Final Order required WPHP to provide a report to MQAC with an opinion of whether Dr. Farzad was safe to return to practice. CP 794. Ultimately, however, the decision whether to reinstate Dr. Farzad’s medical license

rests solely with MQAC. The Final Order precludes Dr. Farzad from seeking modification of its terms and conditions. CP 794.

E. The Pierce County Superior Court Denies Dr. Farzad's Petition for Judicial Review.

On September 25, 2014, Dr. Farzad petitioned for judicial review of the Final Order. CP 370-77. The Pierce County Superior Court ultimately denied Dr. Farzad's petition. CP 797-98.

F. Dr. Farzad Undergoes Evaluation at the Gabbard Center.

From September 30 to October 1, 2014, while his appeal from the Final Order was pending, Dr. Farzad underwent a two-day multidisciplinary evaluation at the Gabbard Center in Texas. CP 800-12. The Gabbard Center report stated:

Dr. Said Farzad is a 64 year-old psychiatrist from Gig Harbor, Washington who was referred for a multi-disciplinary assessment by the Medical Quality Assurance Commission Specifically, the Commission wants to know if there is an underlying mental health issue that is present in Dr. Farzad that may contribute to both the reported boundary violations and the alleged threatening phone calls to the insurance company.

CP 800. The Gabbard Center diagnosed Dr. Farzad with Major Depressive Disorder, Cognitive Disorder, and Narcissistic Personality Disorder with Obsessive-Compulsive Features. CP 811-12. The Gabbard Center recommended that Dr. Farzad: (i) undergo neurological evaluation with MRI scan; and (ii) undergo long-term psychotherapy. CP 812.

G. WPHP Assists Dr. Farzad in Accordance with the Final Order.

On November 3, 2014, WPHP interviewed and assessed Dr. Farzad in accordance with the Final Order. CP 831. Thereafter, WPHP staff had multiple telephone interactions with Dr. Farzad. CP 814. On November 14, 2014, Dr. Charles Meredith, WPHP's then Medical Director, sent a letter to Dr. Farzad advising him that WPHP was unable to make any decision regarding his safety to return to medical practice until (1) he completed a neurology evaluation as recommended by the Gabbard Center and (2) there was a resolution of the criminal proceedings against him. CP 814. In the meantime, Dr. Meredith recommended that Dr. Farzad work with a psychotherapist. CP 814.

Dr. Meredith also addressed concerning behavior Dr. Farzad exhibited toward WPHP staff:

Because of your recent behaviors with our office staff in multiple phone interactions, several of them have become intimidated by you. Thus I am directing you *not* to contact us by phone or in person any further. When you need to initiate contact with our organization, you are encouraged to do so by emailing you[r] case manager.... If you **are** unable to follow our directive to abstain from contacting us by phone as I've described, we may be unable to serve you in your attempts to return to clinical practice.

CP 814.

In an effort to guide his expectations, Dr. Meredith provided Dr. Farzad with the following information about the possible outcomes of WPHP's assessment:

- It is possible that WPHP may never endorse your return to practice
- It is also possible that WPHP may endorse your return to practice, but despite this recommendation to the MQAC at that time, they may choose not to accept it and continue your suspension nonetheless
- In past cases similar to your own, the physician in question was unable to return until completing 1-2 years of intensive psychotherapy, which led to demonstrable improvements in insight and interpersonal style.

CP 815.

H. Dr. Isenberg Believes Dr. Farzad Is Suffering from Frontotemporal Lobar Degeneration and Recommended a PET Scan.

On December 19, 2014, Dr. Farzad was evaluated by Dr. Isenberg, a well-respected behavioral neurologist. CP 817-20, 831. Dr. Isenberg found that Dr. Farzad:

demonstrates disinhibition, poor insight and lack of judgment, with relative preservation of encoding of memory, visuospatial processing. He has mild sensory neuropathy and no sign of motor neuron dysfunction. I am concerned that he has a frontotemporal lobar degeneration, and I am requesting an MRI of the brain with blood work to include CBC, CMP, HIV, homocysteine, fasting lipid profile, methylmalonic acid, syphilis testing, TSH, B12 and vitamin D.

CP 819.

On January 29, 2015, Dr. Farzad saw Dr. Isenberg again to review the results of his MRI. CP 822-24. Dr. Isenberg documented that:

The MRI demonstrates very subtle atrophy of the right greater than left frontal lobe. It was recommended that he pursue a PET scan to further delineate this, however, he does not wish to pursue. In light of his absence of any self monitoring insight and judgment, he would not be safe working as a physician. These recommendations have been communicated to team at WPHP, including Dr. Charles Meredith and Jason Green, LMHC.

CP 823.

I. WPHP Informs Dr. Farzad It Cannot Endorse His Return to Practice.

In February 2015, Dr. Farzad's concerning behavior continued. The Gabbard Center informed MQAC that Dr. Farzad was leaving threatening telephone messages with two doctors involved in his evaluation. CP 826. Thereafter, Dr. Meredith had at least two telephone conversations with Dr. Farzad. CP 828. Dr. Farzad asked Dr. Meredith to compile a "treatment plan" that Dr. Farzad could present to the Snohomish County Superior Court to assist him in his criminal proceedings. CP 828. Dr. Farzad also communicated his refusal to undergo the recommended PET scan to confirm Dr. Isenberg's diagnosis. CP 828.

On March 17, 2015, Dr. Meredith sent Dr. Farzad a letter stating as follows:

Dr. Isenberg is concerned that you are suffering from a progressive neurodegenerative condition called frontal temporal lobar degeneration (FTLD), behavioral variant. She recommended that you undergo a PET scan to confirm this diagnosis but you have stated you do not intend to do

this. Despite that, she believes you are demonstrating a number of behavioral signs of this syndrome such as worsening executive function, significant grandiosity and worsening anosognosia with little insight into these symptoms...Currently, there are no effective pharmacological or behavioral treatments that can modify the progression of this condition. There is some evidence that SSRI medications may provide some symptom relief on a case by case basis, particularly mitigating behavioral disinhibition and problems with declining impulse control ... Given this diagnosis and what we have observed to be your current level of functioning, WPHP is unable to endorse your return to clinical practice as safe and does not believe it is a realistic goal for your future ... In terms of treatment planning, I strongly encourage you to enter into care with a geriatric psychiatrist and to provide them with the treatment record that Dr. Isenberg produced. Hopefully, through an SSRI trial, they can offer you symptomatic relief from some of the aspects of this progressive neurological condition.

CP 829.

J. WPHP Advises MQAC of Its Opinion that Dr. Farzad Is Not Safe to Return to Practice.

On March 24, 2015, as required by the Final Order, Dr. Meredith provided a report to MQAC regarding Dr. Farzad's safety to return to practice. CP 831-32. The report stated in part:

At the direction of the Commission, Dr. Farzad completed a fitness for duty evaluation at the Gabbard Center in October of 2014. That evaluation team concluded that Dr. Farzad was suffering from narcissistic personality disorder as well as cognitive disorder not otherwise specified. The latter was primarily identified by multiple abnormalities on the neurocognitive testing battery performed.

After meeting with us, we directed Dr. Farzad to complete a neurological assessment with Dr. Nancy Isenberg, a well-

respected behavioral neurologist. Based on her assessment, we have concluded that Dr. Farzad's level of functioning is impaired to the extent that he cannot practice medicine with reasonable safety to patients at this time. There is not a therapeutic intervention that can significantly improve his level of functioning, given his underlying health condition and its underlying progressive and irreversible nature. Return to clinical practice is not a realistic or safe goal for this individual.

Subsequently, we are communicating to you that we have completed our assessment, and that there is no utility to Dr. Farzad in working further with WPHP.

Despite requests that he refrain from such behavior, Dr. Farzad has been periodically calling our office and interacting with me on the phone in a way that could be considered telephone harassment. This involves making threats and yelling profane insults at me. It's important to note I believe this behavior is at least in part due to his underlying neurodegenerative condition.

CP 831-32. Having satisfied MQAC's directives in the Final Order, and not being a medical clinic that provides diagnosis and treatment, WPHP closed its file. CP 832.

K. WPHP Assists Dr. Farzad with Disability Paperwork.

Roughly two months later, Dr. Farzad was seeking disability benefits and asked Dr. Meredith for assistance. CP 834. Dr. Meredith drafted a letter, dated May 19, 2015, which stated that Dr. Farzad had been diagnosed with frontal temporal lobar degeneration—behavioral variant, described Dr. Farzad's behavioral dysfunction, and remarked on the futility of treatment. CP 834.

L. WPHP Remains Concerned about Dr. Farzad and Advises Him to Establish Ongoing Care for His Medical and Psychiatric Issues.

On May 2, 2016, more than a year after WPHP had resolved his case, Dr. Farzad left a voicemail for Dr. Chris Bundy, Dr. Meredith's successor as the Medical Director of WPHP. CP 836. Dr. Bundy responded to Dr. Farzad by letter dated May 4, 2016:

We have resolved your case and are unable to assist you at this time.

We remain concerned about your circumstances and encourage you to establish ongoing care in the community for your health issues. We do not think it will be useful to have further contact with you until you have demonstrated an extended period of intensive treatment for your medical and psychiatric conditions.

CP 836.

M. Dr. Farzad Independently Seeks Out Additional Medical Evaluations but Withholds His Full History.

In the years following the MQAC proceedings, Dr. Farzad independently sought out additional medical evaluations. CP 440-97. Glaringly absent from these evaluations is any attempt by Dr. Farzad to comply with the conditions MQAC placed on his ability to seek reinstatement of his license—namely, that he satisfy WPHP's requests that he complete the PET scan recommended by Dr. Isenberg to confirm the diagnosis of a neurogenerative condition and that he successfully complete a period of psychotherapy relating to the Gabbard Center's diagnosis of

Narcissistic Personality Disorder. CP 440-97, 812, 828-29, 836. Instead, Dr. Farzad withheld and/or misrepresented information from his history in an unsuccessful effort to establish a “track record” that he was safe to practice medicine. CP 440-97. Indeed, the physicians Dr. Farzad sought out repeatedly acknowledged that they did not have the benefit of his full history and that their evaluations were not part of the process for reinstatement of his medical license. CP 440-97.

N. Dr. Bundy and WPHP Decline to Reopen Dr. Farzad’s Case.

In or around February 2017, Dr. Farzad called Dr. Bundy and requested that WPHP reopen his case. CP 861. In response, Dr. Bundy discussed the case with two neurologists who had separately evaluated Dr. Farzad—Dr. Isenberg, the neurologist who determined that Dr. Farzad was suffering from frontal temporal lobar degeneration, behavioral variant, and Dr. Meshner, a neurologist independently sought out by Dr. Farzad. CP 861. In March of 2017, based on his discussions with Dr. Isenberg and Dr. Meshner and his review of various medical records, Dr. Bundy concluded there was no basis for reopening Dr. Farzad’s case. CP 861. Dr. Bundy communicated this decision to MQAC and Dr. Farzad. CP 861.

O. Dr. Farzad Files Suit Against MQAC, Mr. Berg, WPHP, Dr. Bundy and Molina.

Dr. Farzad filed the underlying lawsuit against MQAC, Mr. Berg, WPHP, Dr. Bundy, and Molina. CP 12-21. Dr. Farzad’s allegations against Dr. Bundy and WPHP relate to their official duties, *i.e.*, conducting an

assessment as required by MQAC's Final Order and reporting the outcome of that assessment to MQAC. CP 12-21. Specifically, Dr. Farzad alleged:

MQAC conditioned plaintiff's ability to reinstate his license contingent on WPHP final assessment to the MQAC that plaintiff was safe to return to practice.

* * *

WPHP has now refused to have anything to do with plaintiff ... MQAC has taken the position that it will not consider re-licensing plaintiff until and unless WPHP supports his licensure, thus creating a "circular shield" locking plaintiff from having any reasonable, fair chance to obtain his license to practice medicine.

* * *

MQAC and [WPHP] have refused to give full credit to plaintiff's medical evaluations....

* * *

WPHP and MQAC have refused to meet with or properly consider plaintiff for practice....

CP 16-18. Dr. Farzad also accused all defendants, including Dr. Bundy and WPHP, of engaging in a civil conspiracy. CP 19.

P. The Trial Court Summarily Dismissed Dr. Farzad's Claims Against Dr. Bundy and WPHP.

On November 14, 2017, Dr. Bundy and WPHP moved for summary judgment based on the absolute immunity granted to impaired physician programs under RCW 18.130.300(2), RCW 18.75.0195(2), and RCW 18.130.070(3). CP 974-91. MQAC, Larry Berg, and Molina also moved

for summary judgment based on their own immunity defenses. CP 573-97, 880-95. In a global response, Dr. Farzad contended that Dr. Bundy and WPHP were not entitled to immunity because “they were not engaging in their statutorily protected duties...in their dealings with him.” CP 90. Dr. Farzad also submitted a declaration which accused Larry Berg of soliciting a \$50,000 bribe and accused Mr. Berg, MQAC and Dr. Bundy of “playing a shell game” with Dr. Farzad’s efforts to acquire reinstatement of his license. CP 82, 124. Dr. Farzad argued, albeit unconvincingly, that “the factual mosaic suggests the operation of ulterior motives” and was sufficient to form the basis of a civil conspiracy claim. CP 82.

The trial court entered summary judgment in favor of all the Respondents, including Dr. Bundy and WPHP. CP 758-60, 874-76, 967-70. The trial court expressly acknowledged that there was no “evidence to support this notion of civil conspiracy....” RP 17. The trial court also stated as follows:

Now, as it relates to Dr. Bundy, I think that the nature and the charter, if you will, of WPHP requires—this is an Impaired Physician Program which is required to comply with directives from the MQAC relating to evaluation, training, monitoring, and treating and so on, Dr. Farzad was subject to that entity’s direction. I think that there is Title 18 absolute immunity as it relates to this. And Washington law provides an absolute immunity to the Impaired Physician Program for I think obvious societal reasons. Title 18.71.0195(2) and 18.130.070(3) immunized Dr. Bundy and

immunized WPHP. Motion is granted I think they're immune.

RP 19. This appeal followed. CP 108-110.

IV. ARGUMENT

A. Standard of Review

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Janaszak v. State et al.*, 173 Wn. App. 703, 711, 297 P.3d 723 (2013). Summary judgment is proper if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.*; *see also* CR 56(c).

B. The Trial Court Correctly Concluded Dr. Bundy and WPHP Are Entitled to Absolute Immunity.

1. WPHP Is an Impaired Physician Program Required to Comply with Directives from MQAC Relating to the Assessment, Referral, Monitoring, and Reporting of Impaired Physicians Like Dr. Farzad.

At all relevant times, MQAC contracted with WPHP to be an impaired physician program. CP 851-54, 856-59. RCW 18.71.300 through .340 provides the statutory framework for impaired physician programs like WPHP. In accordance with RCW 18.71.310(1):

The commission shall enter into a contract with the entity to implement an impaired physician program. The commission may enter into a contract with the

entity for up to six years in length. The impaired physician program may include any or all of the following:

- (a) Entering into relationships supportive of the impaired physician program with professionals who provide either evaluation or treatment services, or both;
- (b) Receiving and assessing reports of suspected impairment from any source;
- (c) Intervening in cases of verified impairment, or in cases where there is reasonable cause to suspect impairment;
- (d) Upon reasonable cause, referring suspected or verified impaired physicians for evaluation or treatment;
- (e) Monitoring the treatment and rehabilitation of impaired physicians including those ordered by the commission;
- (f) Providing monitoring and continuing treatment and rehabilitative support of physicians;
- (g) Performing such other activities as agreed upon by the commission and the entity; and
- (h) Providing prevention and education services.

RCW 18.71.310(1).

“Entity” means “a nonprofit corporation formed by physicians who have expertise in the areas of alcohol abuse, drug abuse, alcoholism, other drug addictions, and mental illness who broadly represent the physicians of the state and that has been designated to perform any or all of the activities set forth in RCW 18.71.310(1) by [MQAC].” RCW 18.71.300(1). An “impaired physician program” means a “program for the prevention, detection, intervention, monitoring, and treatment of impaired physicians established by [MQAC] pursuant to 18.71.310(1).” RCW 18.71.300(3). An

“impaired” physician refers to the “inability to practice medicine with reasonable skill and safety to patients by reason of physical or mental illness including alcohol abuse, drug abuse, alcoholism, other drug addictions, or other debilitating conditions.” RCW 18.71.300(2). Under RCW 18.71.330, if MQAC has reasonable cause to believe that a physician is impaired, it is required to: (i) cause an evaluation of such physician to be conducted by an impaired physician program or its designee to determine if the physician is impaired; and (ii) receive a report of the evaluation from the impaired physician program or its designee.

2. Dr. Bundy and WPHP Are Immune from Dr. Farzad’s Claims under RCW 18.130.300(2).

RCW 18.130.300 provides in relevant part:

[A]n impaired practitioner program approved by a disciplining authority, or individuals acting on [its] behalf, [is] immune from suit in a civil action based on any disciplinary proceedings or other official acts performed in the course of [its] duties.

RCW 18.130.300(2). RCW 18.130.300(2) is plain, unambiguous, and requires no statutory construction: the Washington Legislature granted absolute immunity for impaired physician programs and their agents relating to acts performed in the course of the impaired physician program’s duties. *See State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) (recognizing that plain language that is not ambiguous does not require construction).

Although there is no authority interpreting RCW 18.130.300(2), there is authority interpreting RCW 18.130.300(1), the portion of the statute which provides identical civil immunity to governmental actors.¹ In *Janaszak*, a dentist sued the Dental Quality Assurance Commission (“DQAC”) alleging that an investigator acted improperly in investigating complaints against him. 173 Wn. App. at 711. The dentist argued that immunity did not apply because the investigator acted outside the scope of her official duties. *Id.* at 714. Specifically, the dentist alleged that the investigator showed bias and bad faith by speaking with a second complainant before the DQAC had authorized an investigation of her complaint. *Id.* at 714-15. The dentist also alleged that the investigator colluded with the complainants to falsely accuse him of misconduct. *Id.* at 715. The *Janaszak* court rejected the dentist’s position and held RCW 18.130.300(1) immunized DQAC and its investigator:

On its face, [RCW 18.130.300(1)] grants absolute immunity for acts performed in the course of a covered individual’s duties.

* * *

While *Janaszak* may disapprove of how Miller-Smith conducted her investigation, he presents no

¹ RCW 18.130.300(1) provides: “[t]he 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.”

genuine issue that her actions exceeded the scope of her duties as an investigator for the Department of Health. RCW 18.130.300 bars Janasak's claims

Id. at 714-15.

Like the dentist in *Janaszak*, Dr. Farzad failed to come forward with any evidence that the actions of WPHP, or Dr. Bundy acting on WPHP's behalf, exceeded the scope of WPHP's duties as an impaired physician program. On the contrary, the record demonstrates that all of Dr. Bundy and WPHP's actions were performed within the scope of their duties. MQAC contracted with WPHP as an impaired physician program and issued specific directives to WPHP with respect to the assessment of Dr. Farzad. CP 785-95, 851-54, 856-59. In accordance with those directives, WPHP received and reviewed a copy of the Gabbard Center's evaluation and interviewed and assessed Dr. Farzad in connection with same. CP 831. Based on the Gabbard Center's recommendation, WPHP referred Dr. Farzad for a neurological evaluation by Dr. Nancy Isenberg. CP 831. Dr. Isenberg completed her evaluation, informed WPHP she did not believe Dr. Farzad was safe to practice medicine, and recommended that Dr. Farzad undergo a PET scan to confirm her diagnosis of frontal temporal lobar degeneration – behavioral variant. 822-24. When Dr. Farzad refused to undergo a PET scan, WPHP informed MQAC that its assessment was complete and, based on the Gabbard Center and Dr. Isenberg's evaluations,

that Dr. Farzad was unsafe to practice medicine due to deficiencies in judgment, social awareness, and intellectual function. CP 831-32. WPHP also informed Dr. Farzad of its opinion regarding his fitness to practice medicine and recommended he initiate treatment with a geriatric psychiatrist. CP 829. Having fulfilled its obligations under the Final Order, WPHP closed its file. CP 832.

When Dr. Farzad contacted Dr. Bundy in May 2016, more than a year after WPHP had resolved his case, he still had not completed a PET scan as recommended by Dr. Insenberg or any long-term psychotherapy as recommended by the Gabbard Center. Dr. Bundy encouraged Dr. Farzad to establish ongoing care for his health issues and explained that WPHP could not assist him until he demonstrated an extended period of intensive treatment for his medical and psychiatric conditions as recommended by the Gabbard Center. CP 836.

When Dr. Farzad again contacted Dr. Bundy in February 2017 requesting that WPHP reopen his case, Dr. Bundy conferred with two neurologists who had separately evaluated him—including one independently sought out by Dr. Farzad—and reviewed Dr. Farzad's additional medical records. CP 861. Dr. Bundy subsequently informed Dr. Farzad and MQAC that WPHP still could not endorse Dr. Farzad as safe to practice medicine and would not reopen its file. CP 861.

Thus, the undisputed evidence demonstrates that at all relevant times, Dr. Bundy and WPHP were acting within the scope of their duties as an impaired physician program or agent thereof by overseeing the evaluation of Dr. Farzad's safety to practice medicine and reporting the results of the evaluation to MQAC. Although Dr. Farzad may disapprove of WPHP's assessment of the evaluations and its ultimate conclusions, the fact that Dr. Bundy and WPHP were acting within the scope of their duties when performing that evaluation and reaching those conclusions immunizes them against Dr. Farzad's claims as a matter of law. Accordingly, RCW 18.130.300(2) immunity applies and the trial court's ruling granting summary judgment in Dr. Bundy and WPHP's favor should be affirmed.

3. Dr. Bundy and WPHP Are Immune from Dr. Farzad's Claims under RCW 18.71.0195(2) and RCW 18.130.070(3).

In addition to RCW 18.130.300(2), two additional interrelated statutes immunize Dr. Bundy and WPHP from Dr. Farzad's claims. Under RCW 18.71.0195(2):

Every...agency of the federal, state, or local government, or the entity established by RCW 18.71.300 and its officers, agents, and employees are immune from civil liability, whether direct or derivative, for providing information to the commission under RCW 18.130.070."

RCW 18.71.0195(2) (emphasis added).

RCW 18.130.070(3) builds on RCW 18.71.0195(2):

A person is immune from civil liability, whether direct or derivative, for providing information to the disciplining authority pursuant to the rules adopted under subsection (1) of this section.

RCW 18.130.070(3). Subsection (1) of RCW 18.130.070 requires MQAC to establish rules requiring impaired physician programs to report when a physician "...may not be able to practice his or her profession with reasonable skill and safety to consumers as a result of a mental or physical condition." RCW 18.130.070(1)(b)(ii).

Thus, RCW 18.71.0195(2) and RCW 18.130.070(3) provide Dr. Bundy and WPHP two additional layers of immunity. Firstly, WPHP is an impaired physician program as defined by RCW 18.71.300. CP 851-54, 856-59. Secondly, Dr. Bundy is an employee and agent of WPHP. Thirdly, Dr. Bundy and WPHP were required by MQAC to assess Dr. Farzad's safety to practice medicine and report their findings back to MQAC. CP 792-94. Finally, Dr. Bundy and WPHP did assess Dr. Farzad's safety to practice medicine and reported their findings to MQAC. CP 831-32. RCW 18.71.0195(2) and 18.130.070(3) therefore immunize Dr. Bundy and WPHP against civil liability for providing information to MQAC about Dr. Farzad's safety to practice medicine, and the trial court's order granting summary judgment ruling in their favor should be affirmed.

C. The Trial Court Correctly Concluded that Dr. Farzad's Civil Conspiracy Claim Was Insufficient to Defeat Dr. Bundy and WPHP's Absolute Immunity Defense.

In an effort to avoid WPHP's absolute immunity defense, Dr. Farzad accused all the Respondents of engaging in a civil conspiracy. CP 19. An actionable civil conspiracy exists if two or more persons combine to accomplish an unlawful purpose or combine to accomplish some purpose not in itself unlawful by unlawful means. *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 528, 424 P.2d 290 (1967). In order to establish a conspiracy, a plaintiff must show that the alleged co-conspirators entered into an agreement to accomplish the object of the conspiracy. *Id.* at 528-29. A plaintiff must establish the existence of an alleged conspiracy by clear, cogent, and convincing evidence. *Id.* at 529.

While a finding that a conspiracy exists may be based on circumstantial evidence, mere suspicion of a conspiracy is not enough. *Id.* "The test of the sufficiency of the evidence to prove a conspiracy is that the circumstances must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy." *Id.* Where the inferences urged by a plaintiff are not the only possible ones, and it is equally possible to attribute a lawful motive to the alleged co-conspirators' conduct, a claim for civil conspiracy must fail. *Id.* at 531.

1. No Jury Could Reasonably Conclude that WPHP or Dr. Bundy Was Party to a Civil Conspiracy.

Dr. Farzad failed to come forward with any evidence, much less clear, cogent, and convincing evidence, that either Dr. Bundy or any WPHP representative was in cahoots with Mr. Berg or MQAC to prevent Dr. Farzad from having his medical license reinstated by unlawful means. Indeed, the only evidence Dr. Farzad introduced concerning any misconduct is his own self-serving testimony that a single individual, Mr. Berg, solicited a bribe. CP 124. An allegation that a single individual engaged in an unlawful act is neither factually nor legally sufficient to form the basis of a civil conspiracy claim involving other individual and entities, especially where, as here, the Legislature granted those individuals and entities absolute immunity in the performance of their duties. As the trial court succinctly observed, the record is devoid of “any evidence [whatsoever] to support this notion of civil conspiracy.” RP 17.

Despite Dr. Farzad’s insinuations of a purported “shell game,” there is ample record evidence demonstrating that Dr. Bundy and WPHP’s dealings with MQAC were consistent with a lawful and honest purpose—namely, performing WPHP’s official duties, as an impaired physician program, to assess Dr. Farzad’s ability to safely practice medicine and report its conclusions to MQAC. While Dr. Farzad may suspect, albeit

wrongly, that the “factual mosaic suggests the operation of ulterior motives,” Washington law dictates that mere suspicions are insufficient to create a genuine issue of material fact. *Corbit*, 70 Wn.2d at 529. Accordingly, the trial court’s ruling should be affirmed, and Dr. Bundy and WPHP are entitled to summary judgment as a matter of law.

2. Additional Evaluations Do Not Evidence Civil Conspiracy.

Contrary to his assertion, the evaluations Dr. Farzad independently obtained following the suspension of his license do not evidence that he is safe to practice medicine, much less that Dr. Bundy and WPHP engaged in a civil conspiracy. Indeed, a review of the medical records on which Dr. Farzad relies reveals not only that they are based on incomplete and incorrect information, but also that the opinions contained therein were not intended to be part of the process for reinstatement of Dr. Farzad’s license. CP 440-97. The mere fact that Dr. Farzad subjectively believes he is safe to practice medicine does not a civil conspiracy make. More importantly, any decision regarding the weight and interpretation of Dr. Farzad’s additional neurological or psychiatric evaluations falls squarely within the scope of official acts entitling Dr. Bundy and WPHP to absolute immunity. The trial court therefore correctly entered summary judgment in Dr. Bundy and WPHP’s favor, and its ruling should be affirmed.

3. Dr. Farzad's Civil Conspiracy Claim Is an Impermissible Attempt to Relitigate the Issue of His Safety to Practice Medicine.

In addition to being unsupported by the evidence, Dr. Farzad's civil conspiracy claim cannot survive because it constitutes an impermissible attempt to relitigate the issue of his safety to practice medicine. Dr. Farzad was afforded all required due process relating to the suspension of his medical license, including unsuccessfully petitioning for judicial review of the Final Order. CP 797-98. Having exhausted his right to appeal, Dr. Farzad must abide by the non-modifiable terms of the Final Order. CP 785-95. Those terms preclude Dr. Farzad from applying for reinstatement of his credential until WPHP provides a final assessment to MQAC indicating Dr. Farzad is safe to return to practice. CP 794. WPHP has not done so. CP 831-32, 836, 861.

The Final Order also required Dr. Farzad to comply with any request by WPHP for further evaluation. CP 793-94. WPHP requested that Dr. Farzad undergo long-term psychotherapy, as recommended by the Gabbard Center, and undergo a PET scan, as recommended by Dr. Isenberg. CP 812, 814, 823, 828-29, 836. Dr. Farzad failed to come forward with any evidence suggesting compliance with either request. Instead, Dr. Farzad pointed to evaluations he independently obtained based on incomplete and incorrect information and contends those evaluations somehow evidence a civil

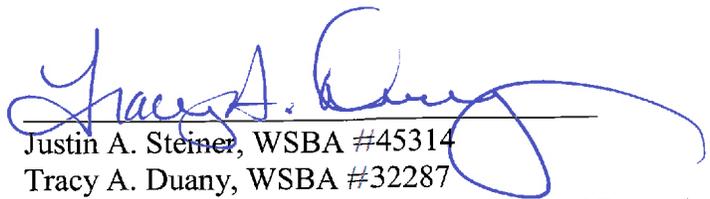
conspiracy. CP 440-97. Dr. Farzad's cries of "civil conspiracy" are nothing more than a thinly veiled attempt to circumvent the non-modifiable, non-appealable terms of the Final Order. His impermissible attempt to relitigate the issue of his safety to practice is insufficient to overcome the merits of Dr. Bundy and WPHP's absolute immunity defense. Accordingly, the trial court's ruling should be affirmed, and Dr. Bundy and WPHP are entitled to summary judgment in their favor.

V. CONCLUSION

For the foregoing reasons, the trial court's Order Granting Defendants Chris Bundy, M.D., and WPHP's Motion for Summary Judgment should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of March, 2019.

MULLIN, ALLEN & STEINER, PLLC


Justin A. Steiner, WSBA #45314
Tracy A. Duany, WSBA #32287
Attorneys for Respondents Chris Bundy, M.D., and
Washington Physicians Health Program

CERTIFICATE OF SERVICE

I hereby certify that I electronically served a true and correct copy of the foregoing in Court of Appeals Cause No. 51340-4-II upon the following parties:

Appellant:

Said Farzad
3512 A Street NW
Gig Harbor, WA 98355

And at

4614 Holly Lane NW
Gig Harbor, WA 98335
Sfarzad1950@gmail.com

Counsel for Respondent

Molina Healthcare:

Timothy Parker
Jason Anderson
Carney Badley Spellman
701 5th Ave Suite 3600
Seattle, WA 98104-7010
parker@carneylaw.com
andereson@carneylaw.com

**Counsel for Respondents Berg
and WA-DOH:**

Jonathan E. Pitel, AAG
Office of the Attorney General
PO Box 40126
Olympia, WA 98504-0126
United States
jonathanp@atg.wa.gov

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

DATED this 22nd day of March, 2019.

MULLIN, ALLEN & STEINER PLLC



Emily Boehmer
Paralegal

MULLIN ALLEN AND STEINER PLLC

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