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NO. 51340-4

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

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SAID FARZAD,  
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.

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**RESPONDENTS STATE OF WASHINGTON, DEPARTMENT OF  
HEALTH-MEDICAL QUALITY ASSURANCE COMMISSION,  
AND LARRY AND “JANE DOE” BERG’S BRIEF**

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## I. INTRODUCTION

The state disciplinary authority for physicians appropriately exercised its authority to protect the public from a psychiatrist, Said Farzad, whom it determined was unable to practice with reasonable skill and safety to consumers. This Court should affirm the dismissal of Farzad's claims against the State of Washington, Department of Health-Medical Quality Assurance Commission, and Larry and "Jane Doe" Berg (collectively the State Defendants) because the superior court correctly held that they were entitled to judgment on multiple grounds: statutory immunity, quasi-judicial immunity, and Farzad's failure to produce admissible evidence demonstrating any question of material fact.

Preliminarily, Farzad's argument on appeal should be rejected because (1) his brief fails to comply with the service and content requirements set forth in the appellate rules; (2) his argument is unsupported by sufficient authority or analysis; and (3) his argument fails to address all the separate, independent grounds for the superior court's judgment. Even if this Court reaches the merits of the issues Farzad attempts to assert, it should still affirm summary judgment. The State Defendants are absolutely immune from this action under RCW 18.130.300(1) and the doctrine of quasi-judicial immunity and, alternatively, Farzad failed to adduce admissible evidence to support each essential element of his claims.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Should the Court decline to consider Farzad’s argument on appeal when he, on multiple occasions, has failed to comply with the service and content requirements imposed by the Rules of Appellate Procedure?
2. Should the Court decline to consider Farzad’s argument on appeal when he fails to provide sufficient authority or analysis to support it?
3. Should the Court affirm summary judgment in favor of the State Defendants when Farzad’s argument on appeal fails to adequately challenge both bases for the trial court’s decision granting summary judgment?
4. Should the Court affirm summary judgment in favor of the State Defendants because they are statutorily immune from this action under RCW 18.130.300(1) when the legislature has granted them immunity “from suit in any action, civil or criminal, based on any disciplinary proceedings or other official acts performed in the course of their duties?”
5. Should the Court affirm summary judgment in favor of the State Defendants because the judicial nature of the functions they performed related to the discipline of Farzad and his medical license entitles them to quasi-judicial immunity?
6. Should the Court affirm summary judgment in favor of the State Defendants when Farzad did not produce admissible evidence of each element of his claims sufficient to create any question of material fact?

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. The Medical Quality Assurance Commission Regulates Physicians in Washington**

The Medical Quality Assurance Commission (Commission or MQAC) is authorized to regulate the competency and quality of health care

delivered by physicians in order to protect the public health and safety. RCW 18.71.002, .003. MQAC accomplishes that goal in collaboration with the Department of Health (Department) through a variety of regulatory activities. *See, e.g.*, RCW 18.130.120 (the Department shall not issue any license to any person whose license has been suspended by MQAC, except in conformity with any order of suspension, order of reinstatement, or final judgment in any judicial review proceeding); *see generally* RCW 18.71, 18.130. MQAC receives complaints, authorizes investigations, and decides how to protect the public from apparent unprofessional conduct or impaired practice, governed by the Uniform Disciplinary Act, RCW 18.130, and the Administrative Procedure Act, (APA) RCW 34.05. *See* RCW 18.130.080, .100, .160, .170, 18.71.019.

**B. MQAC’s Disciplinary Process**

When a complaint is submitted to MQAC, it is presented to the Case Management Team, which may authorize additional investigation. CP 599, 695. After investigation, a member of MQAC, the Reviewing Commission Member (the reviewer) reviews the investigative file with assistance from an assigned staff attorney. CP 599. The staff attorney assembles relevant information and answers legal questions for the reviewer. CP 599. The reviewer then has sole discretion in recommending a course of action to a panel of MQAC members, who are made up almost entirely of physicians.

CP 599; RCW 18.71.015. The panel then selects a course of action, including pursuing discipline. CP 599, 695. Discipline may be either informal and consist of a Statement of Allegations and Stipulated Disposition, or a formal Statement of Charges. CP 599, 695.

After a Statement of Charges is authorized, an Assistant Attorney General (AAG) is assigned to oversee the charges and prosecute the case. Staff attorneys provide support to the AAG as needed. CP 599. Disciplinary hearings include at least three, but usually four, members of the panel authorizing the action. CP 695. At no point do MQAC staff attorneys advise the adjudicating body. CP 599.

**C. MQAC Investigates Farzad and Suspends His License After Receiving Allegations He Had Threatened Molina Healthcare Employees**

In 2013, MQAC received two complaints about Farzad—then a licensed psychiatrist—alleging that he had improper relationships with two of his patients. CP 723. Mary Creeley investigated the complaints. CP 723. Dr. Michelle Terry served as the reviewer and Dr. Robert Small was retained as a consulting psychiatrist. CP 599. During the investigation, Farzad supplied a 10-page statement admitting to the alleged behavior, but denying it constituted a violation. CP 723, 726-736. MQAC initially proposed a Statement of Allegations and Stipulated Disposition (Stipulation). CP 599-600. Larry Berg, who has worked as an attorney for

the Department since 2004 and who has been a staff attorney for MQAC since 2008, prepared and negotiated the Stipulation in the Farzad case under the authority of the reviewer. CP 598-600.

In late January 2014, MQAC served the proposed Stipulation on Farzad. CP 600, 616-20. The factual allegations derived from Farzad's own admissions. CP 600, 615-22. The proposed Stipulation, in part, required Farzad to reimburse MQAC for costs of \$1,000 within 12 months of agreeing to the disposition. CP 620 (Stipulation, ¶ 3.6). Farzad rejected the proposal on January 31, 2014. CP 600. Berg informed the reviewer that Farzad rejected the Stipulation and that a formal Statement of Charges may be required. CP 600, 624-25. The reviewer recommended a Statement of Charges and a Notice of Investigation be pursued. CP 600. The panel agreed. CP 600.

Before MQAC could issue the Statement of Charges, MQAC and Berg learned that Bothell Police were attempting to locate Farzad in relation to death threats he allegedly made in phone calls to Molina Healthcare (Molina). CP 600-01, 627. According to law enforcement, Farzad allegedly threatened to kill Molina employees. CP 600-01. Berg notified Drs. Terry and Small that Farzad was wanted for the threats, and MQAC summarily suspended his license. CP 601, 627.

Farzad requested a hearing to challenge the suspension. CP 601. Prior to the hearing, Farzad and Berg discussed Farzad undergoing a voluntary evaluation. CP 601, 629-31. Farzad refused and threatened to sue MQAC, Berg, and Molina. CP 601, 629-31. Following a full hearing in July 2014, MQAC issued a Final Order suspending Farzad's license because he was "unable to practice with reasonable skill and safety to consumers" due to an impairing mental condition. CP 601, 633-45.<sup>1</sup>

Specifically, the order found that, between January and May 2014, Farzad placed more than 1,000 calls to Molina and his calls became increasingly aggressive. CP 638. Finally, on May 5, 2014, Farzad "placed five telephone calls within a 30-minute timespan to Molina and talked with several employees. During those calls, he threatened to come to Molina and shoot employees and bomb the building." CP 638. Law enforcement arrested Farzad for threatening to bomb and telephonic harassment.<sup>2</sup> CP 638. Both to the police and at his hearing before MQAC, Farzad provided

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<sup>1</sup> The Final Order issued on August 13, 2014; an Amended Final Order, with changes in bold face, issued thereafter. CP 635. Citation herein is to the Amended Final Order. CP 635-45.

<sup>2</sup> Farzad was convicted of felony telephone harassment in Snohomish County Case No. 14-1-01917-8. CP 740-41. However, the Western District of Washington later granted Farzad's petition for writ of habeas corpus as to that charge. *Said Farzad v. Snohomish County Superior Court*, No. C17-1805-MJP-BAT, 2018 WL 2059679 (W.D. Wash. May 3, 2019) (Order Adopting Report and Recommendation), *appeal filed* Case No. 18-35465 (Jun. 1, 2018); *Said Farzad v. Snohomish County Superior Court*, No. C17-1805-MJP-BAT, 2018 WL 2077832 (W.D. Wash. Mar. 19, 2018) (Report and Recommendation). An appeal of the district court's order is pending. *Id.*

contradictory statements regarding the calls to Molina, variously claiming both that he could not remember the calls, or that he remembered the calls in detail, but Molina's employees simply misunderstood him. CP 638. The order also found that Farzad "violated the proper boundaries of a psychiatric physician-patient relationship," with the two patients who were the subjects of the original investigation. CP 639.

The order required Farzad to undergo a physical and psychological examination and provide the results to the Washington Physicians Health Program (WPHP). CP 601, 642-45. Farzad was also required to comply with any recommendations from WPHP for additional evaluation and treatment; he could not apply for reinstatement of his license to practice until WPHP endorsed him as safe to return to practice. CP 601, 642-45.

**D. Farzad's Behavior Following the Suspension of His License**

Farzad sought judicial review of MQAC's Final Order in Pierce County Superior Court in Case No. 14-2-12758-3. CP 738, 743-44. In March 2016, that court denied Farzad's petition for judicial review, thereby affirming MQAC's Final Order. CP 738, 743-44; *see also* RCW 34.05.574. Farzad did not seek further review before this Court.

While his petition for judicial review was pending, Farzad underwent a neuropsychological evaluation at the Gabbard Center (Gabbard evaluation). After receiving the Gabbard evaluation, WPHP directed Farzad

to undergo an additional evaluation and therapy. CP 602, 647-48. WPHP also noted that they could not predict how long it would be before it would endorse his return to practice, if ever. CP 602, 647-48. In March 2015, after further evaluation by Dr. Nancy Isenberg, WPHP wrote to Berg that Farzad was likely suffering from a progressive neurodegenerative illness that rendered him unable to safely practice and that, “Return to practice is not a realistic or safe goal for this individual.” CP 602, 650-51.

In April 2016, however, Berg received an email from the Department’s Adjudicative Clerk’s Office (ACO). CP 602, 653. Farzad—without receiving an endorsement from WPHP—had submitted a purported request for reinstatement along with medical records (the Harborview evaluations) to the ACO. CP 602, 653. Those documents never arrived at MQAC. CP 602, 655. On April 15, 2016, Berg emailed Farzad asking for a copy of the request for reinstatement; Farzad did not respond. CP 602, 657. Six days later, Berg requested the documents from the attorney who represented Farzad during his petition for judicial review, but she did not reply. CP 602, 659. Four days later, Berg again emailed Farzad, asking him if he could provide the documents. CP 603, 661.

The next day, for the first and only time, Berg met Farzad in the lobby of MQAC’s office. CP 603. Farzad brought copies of his Harborview medical evaluations and Berg copied them. CP 603. Farzad was apologetic

and polite, and expressed that he was financially insecure and wanted to pursue a limited license to allow him to practice at State-run facilities CP 603. Berg, who had been working as an attorney for the Department for over a decade, did not request money from Farzad; nor did he state or imply he could protect Farzad's license or have it reinstated. CP 598, 603. Farzad, however, alleges that, after receiving the accusations against him in January 2014, he met with Berg and Berg asked for a \$50,000 "bribe" to ensure Farzad's license would not be jeopardized, and that this was an increase from an earlier written request for \$1,000. CP 71, 124; Appellant's Brief (App. Br.) at 23.

After the April 2016 meeting, Berg forwarded Farzad's documents to Dr. Chris Bundy at WPHP. CP 603, 663. Two weeks later, Berg spoke with Farzad and explained that whether the Harborview evaluations supported Farzad's return to work was a doctor-level decision, and not a decision Berg could make. CP 603. Berg then emailed Dr. Robert Small to discuss the Harborview records. CP 603, 665-66.

In May 2016, Berg asked Dr. Small to review records that included the Harborview evaluations. CP 604, 668. A few days later, Berg wrote Farzad asking him to authorize release of complete records to MQAC. CP 604, 670-72. The letter informed Farzad that the evaluation at Harborview "did not include records from WPHP, Dr. Isenberg, the Gabbard Center,

Snohomish County Superior Court [regarding Farzad’s criminal trial], or the Medical Commission [MQAC].” CP 604, 670-72. It also asked Farzad to be evaluated at Harborview and to allow Harborview to review all pertinent records. CP 604, 670-72.

Berg began communicating with Farzad’s then attorney John Rorem. CP 604. In June 2016, Berg sent Rorem an email explaining MQAC’s position on Farzad’s reinstatement, including the May 2016 letter. CP 604, 674-76. In July 2016, Berg forwarded that email and the attached letters to Farzad. CP 604, 678-82. Despite the clear communication from MQAC of how to reinstate his license and the retention of his own legal counsel, Farzad responded that he did not understand the requirements for his reinstatement. CP 604, 684-86. Berg then informed Farzad that he was preparing a checklist for Farzad and began working with Farzad to compile the releases for his evaluation. CP 607, 688. As part of that effort, Berg reached out to the psychiatrist who performed the Harborview evaluations. CP 604-05, 688. Thereafter, Berg attempted to help Farzad and his latest lawyer, Christopher Keay, understand: (1) the prerequisites to Farzad’s application for reinstatement; and (2) why the Harborview evaluations did not support Farzad’s claim that he did not need treatment. CP 605.

In November 2016, Farzad wrote to Melanie de Leon, the Executive Director of MQAC, claiming that “Larry Berg has been refusing to forward

my file to commission for review, for past two years. There is absolutely no reason for the continuous suspension of my medical license.” CP 695. Thereafter, de Leon received a phone call from Farzad while he was with his treating psychiatrist. CP 696. De Leon attempted to explain that MQAC’s order required WPHP to sign off on Farzad’s safety to practice before he could petition for reinstatement. CP 696. Farzad walked out during the call. CP 696. Thereafter, de Leon sent Farzad a letter again explaining MQAC’s requirements and the issues with the Harborview evaluations. CP 696, 705. Farzad responded with a letter accusing Berg, “Ted Bundy,” “Christian Brewer,” de Leon, and MQAC, of “corruption.”<sup>3</sup> CP 720-21.

**E. Proceedings Below**

In June 2017, Farzad filed this action, asserting a host of tort claims, including negligence, civil conspiracy, discrimination, retaliation, intentional infliction of emotional distress, defamation, false light, and claims for injunctive and declaratory relief, against the State Defendants, WPHP, Chris and “Jane Doe” Bundy, Molina Healthcare, and John and Jane Does 1-10. CP 12-21. All defendants filed motions for summary judgment. CP 573-97, 863-73, 880-95. The State Defendants moved on multiple

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<sup>3</sup> It appears that Farzad was referring to Christopher Bundy of WPHP and AAG Kristin Brewer.

grounds: statutory immunity under RCW 18.130.300(1); quasi-judicial immunity; and Farzad's failure to adduce admissible evidence of each essential element for his various claims. CP 573-97. Farzad filed a global opposition to the various motions for summary judgment, which relied entirely on his self-serving declaration.<sup>4</sup> CP 67-93. In his opposition, Farzad abandoned his claims for injunctive and declaratory relief, and his negligence claims. *See* CP 83-89.

After oral argument the superior court granted the State Defendants summary judgment and dismissed Farzad's suit against them. CP 758-60.<sup>5</sup> In his oral ruling, Judge Jack Nevin stated that the State Defendants were "entitled to summary judgment on all the areas that [defense counsel] touched." VRP 16:20-21. The Court ruled that the State Defendants were immune from suit under RCW 18.130, and specifically relied on *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013), and *Dutton v. Wash. Physicians Health Program*, 87 Wn. App. 614, 943 P.2d 298 (1997), in finding that the State Defendants were absolutely immune from suit. VRP 16:17-17:3. In addition, the Court went further and found that, even if the State Defendants were not immune from suit, they were still entitled to

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<sup>4</sup> The State Defendants moved to seal Farzad's declaration as it contained unredacted names and psychiatric treatment information of former patients, including a minor. The superior court granted the State Defendants' motion. CP 761-63.

<sup>5</sup> The court also granted the co-defendants' motions for summary judgment. CP 829-31, 922-25.

summary judgment because there was an absence of material fact on the remaining causes of action. VRP 17:4-7. Farzad now appeals the judgment in favor of the State Defendants.

#### **IV. ARGUMENT**

##### **A. Farzad’s Argument on Appeal Is Facially Insufficient and This Court Should Not Consider It**

Judgment in favor of the State Defendants should be affirmed because Farzad’s argument on appeal is facially insufficient to reverse the judgment below. First, Farzad’s brief fails to comply with basic requirements imposed by the Rules of Appellate Procedure, which exist to permit this Court to fully review the issues presented. Second, and relatedly, Farzad has failed to support his argument with sufficient authority or analysis. Third, and finally, Farzad has, at best, challenged only one basis for the superior court’s order—immunity, without addressing the other independently sufficient grounds for the court’s judgment. Thus, affirmance of summary judgment is appropriate.

##### **1. Farzad’s Argument on Appeal Should Be Rejected as His Brief Again Fails to Comply with This Court’s Service and Content Requirements**

The Rules of Appellate Procedure impose minimum requirements on parties to ensure (1) that the parties adequately and cogently address the issues before the Court, *see* RAP 10.3(a)(5)-(6), RAP 10.4(f); and (2) that

each party serve their brief upon the other, *see* RAP 10.2(h). Farzad has failed to comply with either requirement on multiple occasions, including in the amended brief accepted for filing on December 21, 2018.<sup>6</sup> This Court should reject his argument in his latest brief on those bases alone. *See* RAP 1.2(c), 10.7, 18.8(a).

First, the rules require that Farzad include “a fair statement of the facts and procedure relevant to the issues presented for review.” RAP 10.3(a)(5). And they require that “reference to the record [] be included for each factual statement.” *Id.* Of equal importance, each party must include argument “with citations to legal authority and reference to relevant parts of the record.” RAP 10.3(a)(6). Reference to the record should designate the page and part of the record. RAP 10.4(f). Further, each party is required to “serve one copy on every other party . . . and file proof of service with the appellate court.” RAP 10.2(h). Such proof of service must comply with RAP 18.5 and 18.6. *Id.* Finally, the rules require every brief to be signed and dated by the party or the party’s attorney. RAP 18.7.

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<sup>6</sup> *See* Letter from Court Clerk to Farzad, Case No. 51340-4-II (May 24, 2018) (rejecting Farzad’s initial brief for filing and requiring an amended brief that complied with the content provisions of RAP 10.3 and 10.4); Ruling by the Court Clerk, Case No. 51340-4-II (Nov. 28, 2018) (rejecting Farzad’s amended brief for filing and requiring an amended brief that complied with the service and content provisions of RAP 10.2, 10.3, 10.4, and 18.7); Ruling by the Court Clerk, Case No. 51340-4-II (Dec. 21, 2018) (accepting Farzad’s amended brief, which was received by the Court on December 17, 2018, for filing).

Farzad's accepted brief fails to comply with these requirements. His brief contains legal citation limited only to the standard of review, *see* App. Br. at 12-14, and sparse citations to the record to support his factual assertions throughout his brief, *see, e.g.*, App. Br. at 4-12 (statement of the case). Indeed, an entire section of his brief purports to cite the report of proceedings before the superior court, in which Farzad was represented by counsel, but appears to relate to testimony before another tribunal in which he claims to have represented himself. *See* App. Br. at 30-32. Finally, Farzad failed to sign, date, and serve his brief on State Defendants.

This Court previously—and correctly—rejected Farzad's non-conforming briefs. *See* page 15 n.5 *supra*. At this late date, with no indication that a brief in compliance with the appellate rules would be forthcoming, this Court should decline to consider the argument Farzad raises on appeal and affirm the judgment of the superior court. *See* RAP 1.2(c) (appellate court may waive or alter the provisions of the rules to serve the ends of justice); RAP 10.7 (the appellate court will ordinarily impose sanctions on a party who files a brief that fails to comply with the rules); RAP 18.8(a) (the appellate court may waive or alter the provisions of any of the rules in order to serve the ends of justice).

**2. This Court Should Not Consider Farzad’s Argument on Appeal Because It Is Not Supported by Sufficient Authority or Analysis**

Farzad was also required to provide “[a] separate concise statement of each error [he] contends was made by the trial court, together with the issues pertaining to the assignments of error.” *See* RAP 10.3(a)(4). However, “[w]ithout adequate, cogent argument and briefing, this court should not consider an issue on appeal.” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009) (internal citations omitted); *see also, e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“[T]he three grounds argued are not supported by any reference to the record nor by any citation of authority; we do not consider them.”).

Except for the standard of review, Farzad’s brief includes *no* legal authority to support his argument. *See* App. Br. at 15-36. Indeed, his argument consists of nothing but bald assertions without legal analysis. For example, in what appears to be an attempt to argue the State Defendants are not immune, Farzad baldly states that Berg committed a crime unrelated to his job performance. *See* App. Br. at 28. Farzad’s argument is markedly insufficient and should not be considered.

**3. Summary Judgment Should Be Affirmed Because Farzad Fails to Adequately Challenge Both Independent Bases Supporting the Superior Court's Order**

Before this Court, Farzad asserts only a general assignment of error, that the trial court improperly granted summary judgment based on the facts, and sets forth four general issues related thereto. App. Br. 3-4. Taken in the most generous light possible, however, the argument in Farzad's brief addresses only the issue of immunity in any discernably coherent manner. *See id.* at 25, 28. There is no similar discernably coherent discussion of how his evidence on summary judgment supports each essential element of his various claims, so as to create a question of material fact. *See id.* at 15-36. Farzad's failure to challenge the trial court's ruling to the contrary, which is an independent basis supporting summary judgment, is fatal to his appeal. *See Calhoun v. State*, 146 Wn. App. 877, 890, 193 P.3d 188 (2008) (where the appellant failed to assign error to the other grounds on which the trial court granted summary judgment and did not address those issues in his briefing, the court held, "we need not review these issues and affirm the trial court's dismissal on these grounds"); *see also Andersen v. Prof'l Escrow Servs., Inc.*, 141 Idaho 743, 746, 118 P.3d 75, 78 (2005) ("Because the [appellants] have failed to challenge on appeal the district court's alternative grounds for granting summary judgment against them, the dismissal of their case must be affirmed."). Summary judgment should be affirmed.

**B. Because the State Defendants Are Immune from Suit and Farzad Failed to Present Evidence Creating Any Question of Material Fact, Summary Judgment Must Be Affirmed**

**1. Standard of Review on Summary Judgment**

On appeal, this Court reviews summary judgment orders de novo, applying the same standard, and engaging in the same inquiry as the trial court. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). “Summary judgment is proper if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.” *Janaszak v. State*, 173 Wn. App. at 711. The Court should consider the facts, evidence, and the *reasonable* inferences therefrom in a light most favorable to the nonmoving party. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). A genuine issue of material fact exists only if *reasonable* minds could differ regarding the facts controlling the outcome of the litigation. *Hulbert v. Port of Everett*, 159 Wn. App. 389, 398, 245 P.3d 779 (2011); *see also Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963) (“When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant’s evidence is impeached, an issue of credibility is present, *provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds.*” (Emphasis added.)).

A defendant may meet its burden on summary judgment by showing an absence of evidence to support the plaintiff's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "Mere allegations, argumentative assertions, conclusory statements, and speculation" are not sufficient to defeat summary judgment. *See Greenhalgh v. Dep't of Corrections*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011). Instead, the plaintiff, "must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue as to a material fact exists." *Id.* A mere claim is not sufficient to defeat summary judgment. *See, e.g., Elcon Constr., Inc. v. Eastern Washington Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012). And, the court is not required to accept the non-moving party's affidavits and assertions at face value. *Heath v. Uraga*, 106 Wn. App. 506, 512-13, 24 P.3d 413 (2001).

## **2. State Defendants Are Immune from Suit**

The trial court properly dismissed Farzad's claims against the State Defendants because the State Defendants are immune from suit under both a statutory grant of absolute immunity and under the doctrine of quasi-judicial immunity. *See* RCW 18.130.300(1); *Janaszak*, 173 Wn. App. 703; *Taggart v. State*, 118 Wn.2d 195, 203-07, 822 P.2d 243 (1992). Each immunity is discussed in turn below.

**a. State Defendants are absolutely immune from suit under RCW 18.130.300(1)**

MQAC's authority to investigate and discipline licensed physicians is set forth in the Uniform Disciplinary Act (UDA), RCW 18.130. MQAC investigated Farzad and suspended his license pursuant to the UDA. *See* CP 607-22 (Stipulation), 635-45 (Final Order); *see also* RCW 18.130.050, .080, .160, .170(1). Defendant Berg, a staff attorney for MQAC, discharged his various responsibilities on behalf of MQAC under the UDA. *See* CP 598-605; *see also* RCW 18.130.060(1). And, under the UDA, MQAC and Berg, who worked on its behalf, are absolutely 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. *See* RCW 18.130.300(1).

This case, which concerns the application of RCW 18.130.300(1), asks whether the State Defendants are entitled to that absolute statutory immunity based on the evidence presented at summary judgment. They are.

**(1) RCW 18.130.300(1) broadly immunizes State Defendants from all civil or criminal prosecutions for all official acts performed by them in the course of their duties**

RCW 18.130.300(1) grants immunity to the secretary of health, members of MQAC, and those individuals acting on their behalf, such as Berg. *See* RCW 18.130.020(11) (defining “[s]ecretary as the secretary of health or the secretary’s designee”); RCW 18.130.020(3) (defining

“[c]ommission” as “any commission specified in RCW 18.130.040”); RCW 18.130.040(2)(b)(ix) (specifying MQAC). In addition, “the absolute immunity of RCW 18.130.300 extends to the State and the Department [of Health].” *Janaszak*, 173 Wn. App. at 719.<sup>7</sup> Specifically, RCW 18.130.300 provides in full:

(1) 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.

(2) A voluntary substance abuse monitoring program or an impaired practitioner program approved by a disciplining authority, or individuals acting on their behalf, are immune from suit in a civil action based on any disciplinary proceedings or other official acts performed in the course of their duties.

By its plain text, the immunity granted in RCW 18.130.300(1) is broad. It encompasses immunity 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) (emphases added). The modifier “any” means “every” and “all” and must be read in the context of the rest of the relevant statutory language. *State v. Westling*, 145 Wn.2d 607,

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<sup>7</sup> On appeal, Farzad does not appear to challenge this extension of statutory immunity to the State and Department. *See generally*, App. Br. Further, this Court should reject any such challenge because the immunity afforded by RCW 18.130.300(1), like the immunity afforded to prosecutors and judges, exists not to protect individuals but to protect the integrity of the uniform disciplinary process. *See Janaszak*, 173 Wn. App. at 719.

611-12 & n.2, 40 P.3d 669 (2002). Thus, under RCW 18.130.300(1), the State Defendants are immune from all civil or criminal prosecutions for all official acts performed by them in the course of their duties.

The legislature's intent to broadly immunize the State Defendants in RCW 18.130.300(1) is further illuminated by that provision's context. In RCW 18.130.300(2), the legislature also provided an immunity to voluntary substance abuse monitoring programs or impaired practitioner programs and individuals acting on their behalf. Subsection (2) encompasses immunity from suit in "a civil action," but not also in a criminal one. *See* RCW 18.130.300(2). By comparison, subsection (1) is not limited solely to civil immunity but also explicitly includes immunity from criminal actions. *See* RCW 18.130.300(1). Carrying out the legislature's intent in granting a broad immunity in subsection (1) necessarily means immunizing official acts that are allegedly tortious or criminal.

Further, in ascertaining the scope of the statutory immunity afforded to the State Defendants in this case, the analysis in *Janaszak v. State* is instructive. *See Janaszak*, 173 Wn. App. 703. There, the Dental Quality Assurance Commission (DQAC) investigated complaints against a dentist, who allegedly pursued sexual relationships with his patients, imposed summary practice restrictions on the dentist, and published notice of the disciplinary action on the Department's website. *Id.* at 709-10. Eventually,

DQAC withdrew the restrictions and charges against the dentist. *Id.* The dentist then sued the State, the Department, DQAC, and the Department’s investigator, among others, and asserted multiple claims, including violation of the UDA and negligence. *Id.* at 710-12. In particular, he alleged that the Department’s investigator colluded with the complainants to falsely accuse him of misconduct. *Id.* at 715. The trial court dismissed the suit on summary judgment. *Id.* at 710.

On appeal, the court recognized that, “[o]n its face, this statute [RCW 18.130.300(1)] grants absolute immunity for acts performed in the course of a covered individual’s duties.” *Id.* at 714. In addition, the court determined that the dentist presented no genuine issue that the investigator’s actions exceeded the scope of her duties for the Department. *Id.* at 715. Because the investigator acted within the scope of her duties under the UDA, RCW 18.130.300 protected the defendants from the dentist’s UDA and negligence claims.<sup>8</sup> *Id.* at 715, 717, 726. In affirming summary judgment, the Court of Appeals effectuated the broad grant of immunity in RCW 18.130.300(1). *See also Dutton* 87 Wn. App. at 616-20 (affirming summary judgment in favor of the Medical Disciplinary Board and its

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<sup>8</sup> The court disposed of the dentist’s other claims on other grounds. *See Janaszak*, 173 Wn. App. at 720-27.

members based on RCW 18.130.300 where a physician sued the Board after it suspended his medical license based on his claimed impairment).

Finally, the immunity afforded by RCW 18.130.300 is similar to the immunity afforded to prosecutors and judges. As explained in *Janaszak*, it exists to protect the integrity of a uniform disciplinary process for health care professionals by guaranteeing the independence of those engaged in that process by allowing them to conduct their duties without fear of suit:

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*, 173 Wn. App. at 719; see also *Bruce v. Byrne-Stevens & Assocs. Engineers, Inc.*, 113 Wn.2d 123, 126, 776 P.2d 666 (1989) (discussing the purpose and benefits of witness immunity).

The scope of prosecutorial and judicial immunity is broad. In *Imbler v. Pachtman*, 424 U.S. 409, 427-28, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), the United States Supreme Court held prosecutorial immunity was absolute and barred claims under 42 U.S.C. § 1983, explaining:

To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the

vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

And in *Dennis v. Sparks*, 449 U.S. 24, 27, 31, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980), the Court acknowledged it had consistently held that judges enjoy absolute immunity from § 1983 actions for acts performed in their judicial capacities, explaining:

Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption.

Similarly, the Ninth Circuit has broadly construed the scope of the prosecutorial and judicial immunity:

The primary policy of extending immunity to judges and to prosecutors is to ensure independent and disinterested judicial and prosecutorial decisionmaking. To effectuate this policy, we will broadly construe the scope of immunity. To foreclose immunity upon allegations that judicial and prosecutorial decisions were conditioned upon a conspiracy or bribery serves to defeat these policies.

*Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (internal citations omitted).

Likewise, here, the broad and absolute immunity in RCW 18.130.300(1) cannot be foreclosed by Farzad's unsupported allegations that the State Defendants' decisions were conditioned on conspiracy or

bribery, because doing so would defeat the policies expressed in that statutory immunity.

**(2) Based on the evidence presented at summary judgment, State Defendants are protected by the absolute immunity of RCW 18.130.300(1)**

The broad grant of statutory immunity the State Defendants enjoy under RCW 18.130.300(1) requires dismissal of Farzad's claims. Those claims concerned the official acts taken by MQAC and its staff in investigating complaints about Farzad's behavior as a licensed physician, MQAC's decision to suspend his license, and its staff's attempts to help Farzad with understanding and complying with MQAC's order. CP 14-21. It is exactly those official activities the legislature intended to protect.

For instance, Farzad's retaliation claim appears based on his assertion that "he was treated unreasonably as it came to the disciplinary process and his ability to maintain and/or seek reinstatement of his license," and on MQAC's purported "involvement" in Farzad's criminal prosecution by Snohomish County. CP 87. That claim is indisputably a byproduct of the disciplinary process, and State Defendants are immune under the statute.

Similarly, it appears Farzad's claim of discrimination is based on MQAC's disciplinary process. CP 85. Again, State Defendants are immune under RCW 18.130.300(1).

The same immunity applies to Farzad's claims for defamation and false light. Those claims against State Defendants apparently rest on a request from MQAC to the Bothell Police Department seeking information about Farzad's arrest, a draft news release about the suspension of Farzad's license and its investigation, and an inquiry from MQAC to the Snohomish County Prosecutor's Office regarding any potential charges against Farzad. CP 87-89, 303-05, 331. Each of those communications is related to the disciplinary proceeding against Farzad and is an official act of State Defendants. Indeed, the law requires MQAC to notify the news media of any actions taken against licensees. *See* RCW 18.130.110(2)(c). State Defendants are immune from these claims.

The basis of Farzad's civil conspiracy claim is less clear. Best understood, his claim appears to be that Berg directed Farzad to deal with WPHP before applying for reinstatement, "despite the fact that its personnel refused to meet with Dr. Farzad," and that Berg planned to share a portion of a purported "bribe" with Bundy or WPHP. CP 83; App. Br. at 25. Berg's communications with Farzad and WPHP, however, were performed in the course of Berg's official duties, pursuant to the order entered by MQAC. *See* CP 635-45. The terms of that order required Farzad to obtain the endorsement of WPHP before applying for reinstatement. CP 601, 642-45. When Berg told Farzad to contact WPHP, he was following the

requirements of the order issued by MQAC. CP 601, 642-45. And any allegation that Berg planned to share a “bribe” with Bundy or WPHP is unsupported by any evidence, amounting to pure speculation. Further, as with judicial and prosecutorial immunity, allegations that the performance of Berg’s duties was conditioned upon some vague conspiracy does not foreclose application of the statutory immunity. *See Dennis*, 449 U.S. at 27, 31; *Imbler*, 424 U.S. at 427-28; *Ashelman*, 793 F.2d at 1078. State Defendants are immune from any claim for civil conspiracy.

Farzad’s claim of intentional infliction of emotional distress or outrage is similarly unclear. However, it too appears predicated on MQAC’s disciplinary process and official acts. Farzad speciously asserts that he was prevented from participating in disciplinary proceedings to have his license reinstated because Berg requested a “bribe.” CP 89. Farzad alleges a request for \$1,000 initially appeared in a letter Berg sent to Farzad in January 2014, which accompanied the accusations made against him, and that Berg later orally increased that request to \$50,000 in a face-to-face meeting. *See App. Br.* at 23. No such request occurred. CP 603.

The record includes the January 2014 communication: the proposed Stipulation, which was enclosed with a letter and a Statement of Allegations and Summary of Evidence and mailed to Farzad on January 28, 2014. CP 607-22. The proposed Stipulation, which Farzad did not accept, contained

a provision under which Farzad would have agreed to reimburse \$1,000 in costs to MQAC. CP 620 (Stipulation, ¶ 3.6). MQAC's request to reimburse costs as part of a proposed settlement is not a request for a bribe by Berg.

The record also contains a declaration by Berg stating that he met Farzad in person only once, in April 2016, at which time he did not ask for any money or state or imply that he could protect Farzad's license or have it reinstated. CP 603. In fact, he thereafter sent Farzad's records to WPHP and to the members of the Panel. CP 603, 663, 665-66. Farzad's only contradicting evidence was his personal declaration in which he alleged that, after receiving the allegations in January 2014, he met with Berg and Berg asked for a \$50,000 bribe to ensure Farzad's license would not be jeopardized. CP 71, 124.

Taking the record as a whole, there is no question of material fact and no reasonable juror would conclude that Berg sought a "bribe" from Farzad at any time. *See Balise*, 62 Wn.2d at 200 (an issue of credibility is not presented where contradicting or impeaching evidence is too incredible to be believed by reasonable minds); *Hulbert*, 159 Wn. App. at 398 (a genuine issue of material fact exists only if reasonable minds could differ regarding the facts controlling the outcome of the litigation).

In addition, as with judicial and prosecutorial immunity, allegations that Berg conditioned the performance of his duties for MQAC on receipt

of a purported “bribe” does not foreclose application of the immunity. *See Dennis*, 449 U.S. at 27, 31; *Imbler*, 424 U.S. at 427-28; *Ashelman*, 793 F.2d at 1078. The scope of the statutory immunity turns on the function being performed—*i.e.*, “any disciplinary proceedings or other official acts performed in the course of their duties.” *See* RCW 18.130.300(1). In this case, that was the discipline by MQAC. Since that is what the purported bribe pertained to, immunity applies. Further, the legislature specifically and explicitly extended the immunity to cover even allegedly tortious and criminal conduct when it immunized “any action, civil or criminal.” *See* RCW 18.130.300(1). Farzad’s specious allegations of bribery do not negate the application of the immunity in RCW 18.130.300(1).

Farzad’s claims necessarily implicate MQAC’s investigation, discipline, and reinstatement processes. Those processes are the core of its functions as a regulatory body. All of MQAC’s official acts are protected by the broad statutory immunity provided by RCW 18.130.300(1), as are those of its staff attorney Berg. That immunity was intended to protect MQAC and its staff from situations exactly like this, where a licensee disagrees with and refuses to comply with the disciplinary action taken and pursues a collateral suit seeking to impose civil liability. The dismissal of all of Farzad’s claims against the State Defendants should be affirmed.

**b. State Defendants are also immune under the doctrine of quasi-judicial immunity**

In addition to the statutory grant of absolute immunity, the State Defendants are absolutely immune from suit under the doctrine of quasi-judicial immunity. Washington courts have consistently ruled that officials who perform functions similar to those performed by judges, including prosecutors, are entitled to absolute immunity, as are individuals acting on their behalf. *See, e.g., Lutheran Day Care v. Snohomish Cnty.*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992) (“Quasi-judicial immunity attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge’s absolute immunity while carrying out those functions.”).

Quasi-judicial immunity is designed to protect the government, not the individual, from suit. *Reddy v. Karr*, 102 Wn. App. 742, 748, 9 P.3d 927 (2000). It is founded upon “a sound public policy, not for the protection of the officers, but for the protection of the public, and to ensure active and independent action by individuals charged with fashioning judicial determinations.” *Id.* As was explained in *Creelman v. Svenning*:

[t]he public policy which requires immunity for the prosecuting attorney, also requires immunity for both the state and the county for acts of judicial and quasi-judicial officers in the performance of the duties which rest upon them; otherwise, the objectives sought by immunity to the individual officers would be seriously impaired or

destroyed. If the prosecutor must weigh the possibilities of precipitating tort litigation involving the county and the state against his action in any criminal case, his freedom and independence in proceeding with criminal prosecutions will be at an end.

67 Wn.2d 882, 885, 410 P.2d 606 (1966); *see also Savage v. State*, 127 Wn.2d 434, 441-47, 899 P.2d 1270 (1995) (discussing the difference between quasi-judicial immunity of officials, which extends to the State, and personal qualified immunity of individual state actors, which does not). Thus, in *Dutton*, the quasi-judicial immunity of the Medical Disciplinary Board was extended to the Department and the State. 87 Wn. App. at 619 & n.3 (citing *Lutheran Day Care*, 119 Wn.2d at 126-27, and *Savage*, 127 Wn.2d at 442).

In Washington, quasi-judicial immunity applies to a variety of officials and administrative agencies that exercise judicial-like functions. *See Barr v. Day*, 124 Wn.2d 318, 319, 879 P.2d 912 (1994) (guardians ad litem); *Taggart v. State*, 118 Wn.2d 195, 204, 822 P.2d 243 (1992) (parole officers and the Board of Prison Terms and Paroles); *Reddy*, 102 Wn. App. at 751 (family court investigators); *Rayburn v. City of Seattle*, 42 Wn. App. 163, 709 P.2d 399 (1985) (Police Pension and Disability Board); *see also Dutton*, 87 Wn. App. 618-19 (trial court's conclusion that Medical Disciplinary Board had quasi-judicial immunity left unchallenged and undisturbed on appeal). The determination as to whether an administrative

body is entitled to quasi-judicial immunity is made by comparing the adjudicative process of the administrative body to traditional judicial functions. *Taggart*, 118 Wn.2d at 204-05. Courts analyze several factors in making that comparison:

whether a hearing was held to resolve an issue or controversy, whether objective standards were applied, whether a binding determination of individual rights was made, whether the action is one that historically the courts have performed, and whether safeguards exist to protect against errors.

*Id.* at 205.

Here, the State Defendants are entitled to quasi-judicial immunity because of the judicial nature of the functions they performed related to disciplining Farzad. *See* RCW 18.130. By statute, the UDA applies to disciplinary proceedings involving physicians. RCW 18.71.019. In proceedings under the UDA, the APA, RCW 34.05, governs all hearings before the disciplining authority—here, MQAC—and provides procedural safeguards, including the administration of oaths, the receipt of evidence, the issuance and enforcement of subpoenas, and the taking of depositions. *See* RCW 18.130.100. In cases where unprofessional conduct is found, MQAC must issue written findings of fact. *See* RCW 18.130.110(1). MQAC is also vested with a broad array of enforcement authority, including suspension of a license for a fixed or indefinite term and requiring the

satisfactory completion of a specific program of treatment. *See* RCW 18.130.160(2), (4). And, MQAC is responsible for determining whether a licensee has complied with the requirements of a disciplinary order. *See* RCW 18.130.150 (regarding reinstatement).

MQAC's investigation of Farzad's behavior as a licensed physician and its actions in suspending his license and enforcing that decision qualify it as a quasi-judicial body that is absolutely immune from suit. *See* CP 600-01, 633-45, 722-36; *Taggart*, 118 Wn.2d at 204-05. That immunity extends to the Department and the State. *See Dutton*, 87 Wn. App. at 619. Further, Berg is entitled to the same protections for acting on MQAC's behalf. CP 598-605, 653, 655, 657; *Taggart*, 118 Wn.2d. at 204

Indeed, Farzad apparently concedes that MQAC is immune for its decision making. *See* App. Br. at 25, 28. He appears, however, to argue that Berg should not be immune, alleging Berg acted apart from and unrelated to his job performance, and committed a "crime." *See id.* For instance, Farzad complains about Berg's purported requests for money (an alleged "bribe"), Berg's purported handling of records Farzad submitted to MQAC, and various of Berg's purported communications with MQAC members and with WPHP. *See id.* at 23-29. The record, however, does not support these allegations that Berg acted outside the scope of his duties.

First, as to Berg's handling of records and communications with MQAC and WPHP, the only evidence in the record that those actions were somehow improper are Farzad's own statements in his declaration about that conduct, for which Farzad lacks the requisite personal knowledge. *See* CP 129-35. Speculation by Farzad about Berg's conduct is insufficient to establish the acts he alleges occurred. Further, that alleged conduct consists entirely of actions Berg allegedly took while working on behalf of MQAC as a staff attorney. *See* CP 598-605. As such, because it falls within Berg's quasi-judicial function in supporting MQAC and its disciplinary proceedings, the alleged conduct is entitled to immunity. Further, as with the statutory immunity under RCW 18.130.300(1), allegations of a vague conspiracy do not negate quasi-judicial immunity. *See Ashelman*, 793 F.2d at 1078; *supra* at p. 29.

Second, regarding the purported "bribe," as discussed above, taking the record as a whole, Farzad has failed to raise a question of material fact: no reasonable juror would conclude that Berg sought a "bribe" from Farzad at any time. *See* CP 71, 124, 603, 607-22; *see also Balise*, 62 Wn.2d at 200; *Hulbert*, 159 Wn. App. at 398. Further, allegations of bribery do not foreclose application of the quasi-judicial immunity. *See Ashelman*, 793 F.2d at 1078; *supra* at p. 31.

For all the foregoing reasons, State Defendants are immune from suit, and the trial court properly dismissed Farzad's claims against them.

**3. Farzad Has Not and Cannot Create Any Question of Material Fact on Any of His Claims**

This suit was not Farzad's first litigation of the facts underlying the suspension of his license. His APA judicial review was. And the facts and findings of that litigation foreclose Farzad's claims here, as he is collaterally estopped from attacking those findings. Additionally, Farzad was required to produce admissible evidence of each element of each of his claims in order to survive summary judgment. He did not do so.

**a. Farzad cannot collaterally attack MQAC's Final Order**

At the root of this lawsuit is MQAC's Final Order suspending Farzad's license. *See, e.g.*, App. Br. at 15, 21, 29; CP 4-11, 67-93. It is clear from both his brief before this Court and his pleadings below that Farzad wishes to contest and relitigate the factual basis for that order. *See id.*

But Farzad is not permitted to collaterally attack those findings here. *See Duffy v. Dep't of Social & Health Svcs.*, 90 Wn.2d 673, 680, 585 P.2d 470 (1975) ("Once final, the administrative determination is not subject to collateral attack in an enforcement action."). MQAC's order may only be reviewed "as provided in chapter 34.05 RCW [the APA]." *See RCW 18.130.140.* The APA "establishes the exclusive means of judicial review

of agency action.” RCW 34.05.510. Farzad already sought judicial review of MQAC’s decision—and lost. *See* CP 743-44.

“When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel.” *Hilltop Terrace Homeowner’s Ass’n v. Island Cnty.*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995) (internal citations omitted). The doctrine of collateral estoppel will support a motion for summary judgment by establishing that there are no genuine issues of material fact. *Christensen v. Grant Cnty. Hosp. Dist. 1*, 152 Wn.2d 299, 305-06, 96 P.3d 957 (2004).

Collateral estoppel applies after the party to be estopped has already had a full and fair opportunity to present its case. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 595 (1993). Four requirements must be met: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice. *Id.* To apply collateral estoppel based on an agency decision, the court must also consider (1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures,

and (3) public policy considerations. *Carver v. State*, 147 Wn. App. 567, 572, 197 P.3d 678, 680 (2008).

MQAC's order disciplining Farzad's license issued after a full hearing and was reviewed by the superior court in the course of an administrative law review. CP 635-45, 743-44. In affirming MQAC's order, the superior court confirmed that the discipline imposed was within the lawful discretion of MQAC and that it did not violate any constitutional provisions. *See* RCW 34.05.570.<sup>9</sup>

Collateral estoppel bars Farzad's claims to the extent they would require relitigation of findings in MQAC's Final Order. MQAC's Final Order explicitly found that Farzad made numerous aggressive phone calls to Molina, including five calls on May 5, 2014, in which he threatened to bomb Molina and kill Molina's employees. CP 638. It also found that Farzad "violated the proper boundaries of a psychiatric physician-patient relationship." CP 639. MQAC further determined that Farzad's behavior indicated an inability to practice with reasonable skill and safety, and it suspended his license. CP 640-42. That order, and thus those findings, were affirmed by the Pierce County Superior Court, *see* CP 743-44, and cannot

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<sup>9</sup> RCW 34.05.570(3)(a)-(i) includes the full list of grounds on which an agency adjudicative decision may be overturned. Those grounds include: reversed if it is in violation of constitutional provisions, is not supported by substantial evidence in the record, is outside the statutory authority or jurisdiction of the agency, is imposed arbitrarily and capriciously, or is the result of an unlawful procedure or decision-making process. *Id.*

be contradicted here. The finality of the order precludes relitigation of MQAC's reason for suspending Farzad's license, including whether its reason was retaliatory or discriminatory. To the extent that any of Farzad's claims would rely on a factual finding contrary to the order, such as his discrimination, retaliation, or defamation claims, those claims are barred.

**b. Farzad failed to produce evidence to support his claims**

Even if collateral estoppel did not bar Farzad's claims, he still failed to produce evidence to support each element of his claims. Having failed to create any question of material fact, summary judgment must be affirmed. The State Defendants discuss each claim in turn below.

**(1) Retaliation claim**

Farzad brought a retaliation claim based on an alleged violation of the statute prohibiting retaliation against whistleblowers, RCW 49.60.210. CP 19. However, Farzad produced no evidence that would allow him to survive summary judgment by raising a prima facie case of retaliation.

To defeat summary judgment, Farzad was required to provide admissible evidence to demonstrate that (1) he engaged in statutorily protected activity; (2) he suffered an adverse action; and (3) that there was a causal link between his activity and the other person's adverse action. *Currier v. Northland*, 182 Wn. App. 733, 742, 332 P.3d 1006 (2014). In

Washington, while protected activity may include challenging an unlawfully discriminatory practice, the challenged conduct must at least arguably violate an anti-discrimination law. *Kahn v. Salerno*, 90 Wn. App. 110, 130, 951 P.2d 321, 332 (1998); *Coville v. Cobarac Servs., Inc.*, 73 Wn. App. 433, 440, 869 P.2d 1103 (1994).

Here, Farzad failed to produce evidence that he engaged in any statutorily protected activity. Nor did he identify any adverse action that he suffered. And, he produced no evidence that there was a causal connection between a protected activity that he engaged in and his discipline, assuming that the suspension of his license was the subject of this claim. Further, as discussed above, Farzad is estopped from arguing either: (1) that MQAC's discipline was unlawful, or (2) that there was a causal link between any statutorily protected activity he might have pursued and the final order suspending his license and imposing conditions on his reinstatement. Summary judgment was appropriate.

## **(2) Discrimination claim**

Farzad's claim for discrimination on the basis of race or national origin is similarly devoid of evidentiary support. Farzad couched his discrimination claim under RCW 49.60.215, which prohibits discrimination in places of public accommodation. CP 84-85.

When asserting a claim of discrimination on the basis of race or national origin, the plaintiff bears the initial burden of setting forth a prima facie case of unlawful discrimination. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). Only if the plaintiff establishes a prima facie case of discrimination does the burden shift to the defendant to “produce a legitimate nondiscriminatory reason for the challenged act.” *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 634, 911 P.2d 1319 (1996). “Unless a prima facie case of discrimination is set forth, the defendant is entitled to prompt judgment as a matter of law.” *Hill*, 144 Wn.2d at 181. If the defendant produces a nondiscriminatory reason for the challenged act, the burden shifts back to the plaintiff to prove that the claimed nondiscriminatory reason is pretextual. *Id.* at 181-82.

Assuming that Farzad is a member of a protected class or classes, he was still required to produce sufficient prima facie evidence that:

- [1] the defendant’s establishment is a place of public accommodation;
- [2] the defendant discriminated against plaintiff by not treating him in a manner comparable to the treatment it provides to persons outside that class; and
- [3] his protected status was a substantial factor causing the discrimination.

*See Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 525, 20 P.3d 447 (2001). Farzad failed to do so. He produced no evidence to establish that any of the State Defendants met the definition of a place of public accommodation, *see* RCW 49.60.040(2), that he was treated differently than persons outside his class, or that his protected status was a substantial factor of the alleged discrimination.

Of note, after law enforcement arrested Farzad for threatening to kill employees of Molina, MQAC provided him with all due process to consider what action, if any, should be taken against his license. CP 633-45. Rather than revoking Farzad's license, MQAC instead provided him the opportunity to seek treatment for the underlying causes of his behavior. CP 639-42. Indeed, MQAC helped pay for Farzad's evaluation so that he could seek appropriate treatment. CP 642. In order for Farzad to show that he was treated less favorably than a similar licensee, he would have to identify a member outside his class who was treated more favorably when facing discipline for boundary violations with multiple patients and death threats against multiple people (or a similar allegations). He did not.

Even if Farzad had established a prima facie case of discrimination, State Defendants still would have been entitled to judgment because they had a lawful, non-pretextual, non-discriminatory reason for their conduct

related to Farzad, as established by MQAC’s order. CP 743-44. Summary judgment was thus appropriate.

### (3) Defamation claim

When a defendant files a motion for summary judgment on a claim for defamation, it is the plaintiff’s burden to “establish a prima facie case of convincing clarity.” *Dunlap v. Wayne*, 105 Wn.2d 529, 533-34, 716 P.2d 842 (1986). The elements of a prima facie case are: a false statement; an unprivileged communication; fault; and damages. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981).<sup>10</sup> An allegedly defamatory statement must be “provably false” and not merely inaccurate. *Schmalenberg v. Tacoma News*, 87 Wn. App. 579, 590-91, 943 P.2d 350 (1997). A defendant is not required to prove “the literal truth of every claimed defamatory statement . . . . A defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the “sting,” is true.” *Sisley v. Seattle Pub. Sch.*, 180 Wn. App. 83, 88, 321 P.3d 276 (2014) (quoting *Mohr v. Grant*, 153 Wn.2d 812, 825, 108 P.3d 768 (2005)). The plaintiff must include “specific, material facts, rather than conclusory statements, that would allow a jury to find that each element

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<sup>10</sup> It is axiomatic that a claim for defamation requires publication of the allegedly defamatory statement—that is, that the defamatory statement is communicated to a third party other than the plaintiff. See *Restatement of Torts (Second)* § 577(a), (b) (1977).

of defamation exists.” *Eubanks v. North Cascades Broad.*, 115 Wn. App. 113, 119-20, 61 P.3d 368 (2003).

Here, Farzad has not shown “specific, material facts” that support a finding that any of the State Defendants made a “statement” that was provably false. Before the trial court, Farzad alleged that unspecified “Defendants” referred to “plaintiff as an Arab, a terrorist, an Arab terrorist, and a child molester and stat[ed] publically that plaintiff made a bomb threat or personally threatened violence against human beings while making reference to plaintiff being an Arab.” CP 18-19. On appeal, Farzad alleges generally that Berg “invented stories,” made reports to the media “without any proof,” posted false materials on the internet, and fabricated that Farzad made a bomb threat and patient boundary violations. App. Br. at 20, 22, 27-28. Farzad, however, does not specifically identify any *statements* by anyone containing the allegedly defamatory language.

At best, Farzad pointed to a draft press release prepared by the Department, which stated, in part, “The Medical Commisison *was informed* earlier this week that Farzad had made numerous phone calls to Molina Healthcare threatening to kill employees and blow up their building, because the insurance company rejected some of his patient’s medical authorizations.” CP 87-88, 304 (emphasis added). That draft press release contains none of the defamatory phrases Farzad alleges: that he was “Arab,

a terrorist, an Arab terrorist, and a child molester and stating publically that plaintiff made a bomb threat or personally threatened violence against human beings while making reference to plaintiff being an Arab.” CP 304-05. Rather, it stated that “The Medical Commission *was informed . . .*” that Farzad made threats. CP 304 (emphasis added). And that was undoubtedly true. CP 600-01, 627.

Further, MQAC’s determination in its order that Farzad made the alleged telephone calls to Molina collaterally estops Farzad from arguing whether the statements in the draft press release that he made threats of personal violence are “provably false.” *See Sisley*, 180 Wn. App. at 88-89. Farzad’s claim for defamation was appropriately dismissed.

**(4) Intentional infliction of emotional distress or outrage claims**

The tort of intentional infliction of emotional distress requires proof of: (1) extreme and outrageous conduct; (2) intentionally or recklessly inflicted; (3) that actually results in severe emotional distress to the plaintiff. *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987). Given the statutory process under which MQAC is required to operate, Farzad cannot establish those necessary elements.

For conduct to be “extreme and outrageous,” it must be so outrageous in character, and so extreme in degree, as to go beyond all

possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Grimsby v. Sampson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). The Court may initially determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Phillips v. Hardwick*, 29 Wn. App. 382, 387, 628 P.2d 506 (1981). Summary judgment for the defendant is appropriate if reasonable minds could not differ on the issue. *Springer v. Rosauer*, 31 Wn. App. 418, 426, 641 P.2d 1216, *review denied*, 97 Wn.2d 1024 (1982). And, the Court is not required to accept Farzad's fantastical allegations at face value. *See Heath*, 106 Wn. App. at 512-13.

It appears Farzad bases this claim on his allegation that Berg attempted to solicit a "bribe" from him. App.'s Br. at 23; CP 89. Instead of specific facts which may be admitted into evidence, Farzad sets implausible assertions of improper behavior, which are contradicted by the totality of evidence in the record. CP 14, 17, 124-27. Even the allegations in his complaint are self-contradictory: Farzad initially claims that Berg first solicited a bribe in January 2014, claiming that he could ensure "Plaintiff's license would not be jeopardized." CP 14. However, he also asserts that the exact same scenario, in which Berg used the exact same wording, occurred *after* Farzad's license was suspended. CP 17. It is unexplained how Berg could (allegedly) promise to prevent an action that had already occurred.

Farzad continues to misrepresent the basic events underlying this suit. As discussed above, Farzad alleges that, in January 2014, Berg sent him, along with the accusations against him, a letter requesting \$1,000, and that Berg later orally increased that request to \$50,000 in a face-to-face meeting. App. Br. at 23. Again, Farzad appears to be referencing the proposed Stipulation, which would have required Farzad to reimburse MQAC \$1,000 for discipline related costs. CP 620 (Stipulation, ¶ 3.6). Thus, Farzad converts an offer of agreed settlement into a solicited bribe.

In addition, according to Berg, not only did he never solicit a bribe, he met Farzad only one time, in April 2016. CP 603. That meeting occurred when Berg asked Farzad to come to the MQAC office and provide replacement copies of medical evaluations he had previously submitted, after multiple attempts to seek those records from Farzad and his attorney. CP 603, 655, 657. After that meeting, Berg emailed Dr. Bundy at WPHP and attached the evaluations provided by Farzad. CP 603, 665-66. In that email, Berg wrote approvingly of his conversation with Farzad and discussed Farzad's "extenuated financial situation" which drove him to request a limited license for practice. CP 603, 665-66, 668.

Farzad's self-serving assertion that Berg requested a bribe is unsupported by any other admissible evidence and is, in fact, contravened by the record evidence. Because no reasonable juror would conclude that

Berg sought a “bribe” from Farzad at any time, summary judgment was appropriate. *See Balise*, 62 Wn.2d at 200; *Hulbert*, 159 Wn. App. at 398.

**(5) Civil conspiracy claim**

Finally, a claim for civil conspiracy requires proof by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose or combined to accomplish a lawful purpose by unlawful means, and (2) the conspirators entered into an agreement to accomplish the object of the conspiracy. *Wilson v. State*, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996), *review denied*, 131 Wn.2d 1022, *cert. denied*, 522 U.S. 949 (1997). Mere suspicion is insufficient. *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 529, 424 P.2d 290 (1967). On summary judgment in “a civil case in which the standard of proof is clear, cogent, and convincing evidence,” this Court “must view the evidence presented through the prism of the substantive evidentiary burden.” *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008). Farzad was required to support his claim with clear, cogent, and convincing evidence to support his prima facie case of conspiracy. He did not.

Rather, Farzad simply asserts that Berg “did not accept any of the 15 evaluations and Dr. Farzad mailed them to him, he destroyed them and never forwarded them to MQAC.” App. Br. at 28. Of course, Farzad cites no *evidence* to support this claim. In fact, all of the evidence indicates Berg

went out of his way to obtain those records from Farzad and then send them to the members of MQAC. CP 601, 665-66. Similarly, Farzad provides nothing but his own unsupported statements that “Berg and Chris Bundy have been bouncing him between themselves,” and that Berg prevailed upon Bundy to prevent Farzad from receiving an appointment with WPHP. App. Br. at 29. The truth is more mundane: Farzad was abusive in working with WPHP staff and they thus refused to work with him. CP 647-48. Finally, as noted above, any allegation that Berg planned to share a “bribe” with Bundy or WPHP is unsupported by any evidence, amounting to pure speculation. *See* App. Br. at 25.

Farzad’s license was suspended by a Final Order of MQAC. CP 633-45. That order was affirmed on judicial review as a lawful exercise of MQAC’s authority. CP 743-44. Farzad admits that the Order required WPHP certify he was safe to practice before he applied for reinstatement of his license. CP 15-16. And, he admits that has not happened. CP 16. State Defendants required Farzad to comply with the lawful order suspending his license. That is neither an illegal means nor an illegal ends. Farzad’s civil conspiracy claim was appropriately dismissed.

**V. CONCLUSION**

For all the above reasons, this Court should affirm the order granting summary judgment in favor of the State Defendants. The superior court did not err when it dismissed Farzad's claims against them.

RESPECTFULLY SUBMITTED this 22nd day of March, 2019.

*s/ Jonathan Pitel*

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## DECLARATION OF SERVICE

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that on the date below, the preceding “RESPONDENTS STATE OF WASHINGTON, DEPARTMENT OF HEALTH-MEDICAL QUALITY ASSURANCE COMMISSION, AND LARRY AND ‘JANE DOE’ BERG’S BRIEF” was electronically filed in the Washington State Court of Appeals, Division II, and electronically served on the following parties, according to the Court’s protocols for electronic filing and service.

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DATED this 22nd day of March, 2019, at Tumwater, Washington.

*s/ Tina M. Sroor*  
TINA M. SROOR, Legal Assistant

**ATTORNEY GENERAL'S OFFICE, TORTS DIVISION**

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