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Division II
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No. 54171-8-II

IN THE COURT OF APPEALS DIVISION II OF THE STATE OF
WASHINGTON

MARK ANDREW HIESTERMAN,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

On Appeal from the Superior Court of the State of
Washington in and for the County of Thurston

OPENING BRIEF OF PETITIONER

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I. QUESTION PRESENTED

1. Whether the Washington State Department of Health has absolute immunity under RCW 18.130.300 where it knowingly published false statements about Dr. Mark Hiesterman, resulting in Dr. Hiesterman's loss of employment opportunities in the U.S. and relocation to Saipan where he earns significantly less as an osteopathic physician.

II. PARTIES

Petitioner Dr. Mark Hiesterman is an osteopathic physician who once practiced in Washington. Respondent is Washington State Department of Health, responsible for regulation of physicians.

III. JURISDICTIONAL STATEMENT

On September 27, 2019, the Superior Court of the State of Washington in Thurston County entered a final decision granting State Department of Health's motion for summary judgment and dismissing Dr. Hiesterman's claims. The Superior Court had original jurisdiction pursuant to RCW 2.08.010. Dr. Hiesterman timely appealed to the Court of Appeals Division II of the State of Washington with jurisdiction pursuant to RCW 2.06.030.

IV. RELEVANT LAWS

1. Article I, Section 8 of the Washington State Constitution provides: *"No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature."*

2. Article II, Section 26 of the Washington State

Constitution provides, *“The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.”*

3. The Revised Code of Washington Section 4.92.090 provides: *“The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.”*

4. The Revised Code of Washington Section 18.130.300 provides: *“The secretary, members of the boards or commissions, or individuals acting on their behalf are immune from suit in any action, civil or criminal, based on any disciplinary proceedings or other official acts performed in the course of their duties.”*

V. STATEMENT OF THE CASE

A. Facts

Dr. Mark Hiesterman was employed as an osteopathic physician in Washington from 2011 until 2015 when the State Department of Health (“DOH”) falsely reported that he was convicted of driving under the influence (“DUI”) in Idaho and was not compliant with Washington Physicians Health Program (“WPHP”) recommendations. CP 155-56, 182, 186.

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

The DOH released false news reports in February 2015 and again in March 2016. CR 156, 182, 186. Shortly after the first news release, but prior to having his license temporarily suspended, Hiesterman was terminated from the job he had in March 2015. CP 156. Even after having his license reinstated and undergoing evaluations showing he had no abuse problem, Hiesterman could not obtain employment in Washington because of the stigma arising from DOH's news release. CP 157, 189, 191.

The DOH's second false news report was in March 2016. CP 184-87. Shortly thereafter, in April 2016, Hiesterman's license was reinstated. CP 157. Then just two months later, on June 2, 2016, Hiesterman was denied employment at Mid-Valley hospital and removed from the

hospital's roster of active-status doctors because of the news reports the hiring manager read on the DOH's website. CP 157, 189. This occurred regardless of Hiesterman's license being reinstated. See CP 157.

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

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

B. Procedural History

Hiesterman filed a complaint against DOH in the Superior Court of the State of Washington in Thurston County, alleging that DOH was negligent in its reporting practices and seeking damages for loss of income. DOH filed a motion for summary judgment in the Superior Court to dismiss Hiesterman's claim on the basis of quasi-judicial immunity and

absolute immunity pursuant to RCW 18.130.300. CP 15-22. On September 27, 2019, Honorable Judge Chris Lanese of the Thurston County Superior Court granted DOH's motion for summary judgment. Transcript of Reported Proceedings ("Transcript"), 13:14. In his oral ruling, Judge Lanese noted that no quasi-judicial immunity applied in this case. Tr., 4:22-25. Judge Lanese ruled on a narrow issue, finding that RCW 18.130.300 granted DOH absolute immunity from suit in this case. Tr., 13:19-21.

VI. SUMMARY OF ARGUMENT

This case is about how the negligent reporting practices of a state department robbed a highly trained medical professional of his ability to practice medicine and earn a living in his home state. This appeal focuses on the narrow issue of whether RCW 18.130.300 should be interpreted so broadly as to shield a state department from any liability, even for tortious conduct committed during an administrative function. The purpose of statutory immunity is to protect the independent decision-making authority of state actors. However, when torts are committed outside of a decision-making function, statutory immunity should not relieve the state from liability to people who have been injured by state conduct.

First, RCW 18.130.300 is unconstitutional on its face. Wash. Const. Art. I, § 8 states, "*No law granting irrevocably any privilege,*

franchise or immunity, shall be passed by the legislature.” Here, RCW 18.130.300 grants irrevocable immunity to state actors, which denies wronged plaintiffs any recourse for negligent acts committed under the color of state law.

Second, the Superior Court here relied on Janaszak DDS v. State of Washington, et. al., 173 Wash. App. 703, 297 P.3d 723 (2013), which held that the immunity granted to individuals under RCW 18.130.300 should be extended to the state and its departments. This broad extension of the statute’s scope in Janaszak violates Wash. Const. Art. II, § 26 which provides, “*The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.*” The Washington legislature abolished sovereign immunity by enacting RCW 4.92.090, providing, “*The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.*” Therefore, RCW 18.130.300 - which by its plain language only provides immunity to certain individuals performing official acts – should not be interpreted to provide absolute immunity to the state’s DOH as a separate entity.

Third, Washington courts find that the policy behind RCW 18.13.300 is analogous to the policy of quasi-judicial immunity; that

immunity exists only to protect the administration of justice. In quasi-judicial immunity, the immunity only applies to the decision-making process and not any administrative functions. Therefore, immunity under RCW 18.130.300 should be limited in scope to the function being performed.

VII. ARGUMENT

A. Standard of Review

The only issue on appeal is interpretation of a statute. Where interpretation of a statute is at issue, Washington appellate courts' standard of review is de novo. City of Tukwila v. Garrett, 165 Wash. 2d 152, 158, 196 P.3d 681, 684 (2008). De novo review requires a court in appellate jurisdiction to make an "independent judgment" when applying the law to the facts, without deference to the lower courts' findings. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984).

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

Wash. Const. Art. I, § 8 states, "*No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.*" RCW 18.130.300 grants irrevocable immunity to state actors which denies wronged plaintiffs any remedy for negligent acts committed under the color of state law.

Since absolute immunity leaves a wronged party without a remedy, “it runs contrary to the most fundamental precepts of our legal system.” Lutheran Day Care v. Snohomish County, 119 Wash.2d 91, 105, 829 P.2d 746 (1992). When “determining whether a particular act entitles the actor to absolute immunity, we must start from the proposition that there is no such immunity.” Id., (citing Butz v. Economou, 438 U.S. 478, 506, 98 S. Ct. 2894, 2910 (1978) (“No man in this country is so high that his is above the law. No officer of the law may set the law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.”))). In light of these policy considerations on absolute immunity, and given the clear mandate of the Washington Constitution, RCW 18.130.300 is unconstitutional on its face. Hiesterman should have the right to pursue his claim on its merits.

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

RCW 18.130.300 provides: “*The secretary, members of the boards or commissions, or individuals acting on their behalf are immune from suit in any action, civil or criminal, based on any disciplinary proceedings or other official acts performed in the course of their duties.*”

Conspicuously absent from this statute is any mention of this immunity being extended to the State of Washington or its various departments. See

Id. That is because the legislature already addressed the issue of sovereign immunity and enacted a statute against that immunity. See RCW 4.92.090. *“The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.”*

Id.

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

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

from the Restatement (Second) of Agency § 217 (1958), the court in Savage noted, “[a]n agent's immunity from civil liability generally does not establish a defense for the principal.”

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

The same policy considerations that control the extension of absolute immunity to governmental entities for the official acts of their prosecutors and judges are present in this case. Analogous to the immunity afforded prosecutors and judges, the immunity afforded by RCW 18.130.300 exists not to protect individuals but to protect the integrity of a uniform disciplinary process for health care professionals. It guarantees the independence of these individuals and allows them to protect the adequacy of professional competence and conduct without fear of suit.

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

If the important policy of RCW 18.130.300 is to protect the independent disciplinary process of health care professionals, then

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

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

When examining immunity, Washington “[c]ourts look to the function being performed, instead of the person who performed it, to determine if immunity applies.” Janaszak, 173 Wash. App. at 713, 297 P.3d at 723. DOH is seeking immunity based on its reporting functions pursuant to RCW 18.130.300. Washington courts find that the immunity provided by RCW 18.130.300 is analogous to quasi-judicial immunity given to state employees for acts in the administration of justice. Janaszak, 173 Wash. App. at 713, 718-719. In this regard, Washington courts have

stated, “*this immunity does not exist for the benefit of the judge; rather, it protects the administration of justice by ensuring that judges can decide cases without fear of personal lawsuit.*” *Id.* at 713; citing, Taggart v. State of Washington, 118 Wash.2d 195, 203, 822 P.2d 243 (1992). “*Analogous to the immunity afforded prosecutors and judges, the immunity afforded by RCW 18.130.300 exists not to protect individuals but to protect the integrity of a uniform disciplinary process for healthcare professionals.*” Janaszak, 118 Wash. App. at 719.

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

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

when the officer takes purely supervisory or administrative actions, no such protection arises.

Taggart, 118 Wash.2d at 213.

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

Falsely reporting that Dr. Hiesterman was convicted of a DUI in Idaho and was not compliant with treatment, after the completion of the disciplinary proceedings to suspend his medical license, has no relation to the administration of justice. The DOH's misrepresentations in its reporting is simple negligence, and DOH is not immune from the resulting damages. See Supra at 6-7; see also RCW 4.92.090.

VIII. CONCLUSION

Considering the facts and law stated above, this Court should reverse the lower court's granting of summary judgment to DOH and remand this case for a determination on the merits. Dr. Hiesterman should

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

DATED this 19th day of May, 2020,

ROBERTS FREEBOURN, PLLC

/s/ Chad Freebourn
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CERTIFICATE OF SERVICE

I HEREBY certify that on the 19th day of May, 2020, I caused to be served a true and correct copy of the foregoing document to the following on the Respondents via counsel of record using the Washington State Appellate Courts' Portal:

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