

FILED
Court of Appeals
Division II
State of Washington
9/25/2020 1:44 PM

No. 54171-8-II

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

MARK ANDREW HIESTERMAN,

Petitioner/Cross-Respondent,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent/Cross-Appellant.

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

**REPLY BRIEF OF PETITIONER AND
RESPONSE BRIEF OF CROSS-RESPONDENT**

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I. QUESTIONS PRESENTED

1. Whether this Court should consider the new constitutional claims of error asserted on appeal by Dr. Hiesterman and reverse the trial court's summary judgment ruling.
2. Whether summary judgment should be reversed because immunity under RCW 18.130.300(1) should not apply to administrative functions performed outside of quasi-judicial proceedings.
3. Whether the Department is entitled to quasi-judicial immunity.
4. Whether statements in Dr. Hiesterman's declaration were inadmissible.

II. 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.”

III. SUMMARY OF ARGUMENT

This Court should consider Dr. Hiesterman’s new claims of error because they present manifest errors affecting rights under the Washington State Constitution. Furthermore, the constitutional right to seek relief against the state is a matter of important public policy that warrants consideration on appeal.

This Court should reverse the trial court’s summary judgment order because Janaszak DDS v. State of Washington, et. al., on which the trial court relied, is an unconstitutional extension of state immunity and this Court is not bound by another appellate division’s ruling. This Court should also find that the individual immunity of RCW 18.130.300(1) should be limited to only quasi-judicial functions and not extended to administrative functions such as negligent reporting. The Department is not entitled to quasi-judicial immunity because the Department’s negligent reporting was outside of any quasi-judicial decision-making proceeding. Lastly, this Court should find that there was no inadmissible evidence in

Dr. Hiesterman's declaration because all his statements and exhibits were supported by personal knowledge.

IV. ARGUMENT

The Department contends that this Court should deny consideration of Dr. Hiesterman's new claims of error because of judicial efficiency. See Respondent's Br. at 19. However, when a citizen's ability to practice his chosen profession is at stake, judicial efficiency should not be the overriding consideration where constitutional rights and important public policy are central issues. Here, Dr. Hiesterman's new claims of error are inextricably linked to the Washington State Constitution. Furthermore, state immunity to claims of negligence is an important matter of public policy, especially at this moment in American history when citizens around the nation are demanding accountability to the negligent acts of state agents.

A. This Court Should Consider Dr. Hiesterman's New Claims of Error Because the Claims Address Manifest Errors Affecting His Constitutional Rights

RAP 2.5(a) provides, in part: "*a party may raise the following claimed errors for the first time in the appellate court: ... manifest error affecting a constitutional right.*" In State v. Lynn, 67 Wash. App. 339, 345, 835 P.2d 251, 254 (1992), the court provided a four-part approach to determine whether a new constitutional claim of error should be reviewed:

In reviewing RAP 2.5 and *Scott*, we conclude that the proper approach in analyzing alleged constitutional error raised for the first time on appeal involves four steps. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Here, under the first element, Dr. Hiesterman's new claims of error suggest constitutional issues under article I, section 8, and article II, section 26, of the Washington Constitution. Both constitutional sections address the issue of state immunity from the acts of state agents.

Wash. Const. Art. I, § 8 states, “[n]o law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.”

Wash. Const. Art. II, § 26 states, “[t]he 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, “[t]he 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, the constitutional right to seek relief

against the state for the actions of its agents is implicated by the trial court's ruling on summary judgment which extended immunity to the Department.

Under the second element of whether an error is manifest, here the trial court's application of RCW 18.130.300(1), as interpreted by Janaszak, had practical and identifiable consequences. If not but for the trial court's granting of summary judgment to the Department on the basis of immunity, Dr. Hiesterman could have continued to pursue his case on the merits of its claims and the strength of the evidence therein.

Regarding the third element from Lynn that addresses the merits of the constitutional issues, Dr. Hiesterman incorporates herein the facts and arguments set forth in his Opening Brief of Petitioner.

Regarding the fourth element of harmless error, “[a] constitutional error is harmless if ‘it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” State v. A.M., 194 Wash. 2d 33, 41, 448 P.3d 35, 40 (2019) (internal quotations omitted). The constitutional errors regarding state immunity here were not harmless because they were the basis on which the trial court returned its verdict, denying Dr. Hiesterman any and all relief for his claims. This Court should consider Dr. Hiesterman's new constitutional claims of error and reverse the trial court's summary judgment ruling.

B. This Court is Not Bound by Horizontal Stare Decisis, But It is Bound by Vertical Stare Decisis; Therefore, the Court Should Reject the Holding of Janaszak and Follow Savage

The Washington Supreme Court has rejected the notion that one division of the Washington Court of Appeals should be necessarily bound by the decisions of a different division. See Matter of Arnold, 190 Wash. 2d 136, 138, 410 P.3d 1133, 1134 (2018) (finding that horizontal stare decisis “*would tend to diminish the robust, adversarial development of the law that is the gem of our current approach.*”).

Here, the Department rests its entire case on the holding in Janaszak that unconstitutionally extended RCW 18.130.300(1) to provide state immunity even where the plain language of the statute limited immunity to individual actors. See RCW 18.130.300(1) (“*The secretary, members of the boards or commissions, or **individuals** acting on their behalf are immune from suit in any action ...*”) (emphasis added).

However, Janaszak was decided by Division I of the Washington Court of Appeals. Dr. Hiesterman’s claims are before this Court, being Division II. Therefore, this Court is not bound to follow the unconstitutional extension of state immunity made by Division I.

Rather, this Court has the opportunity to decide for itself an important policy issue regarding state immunity, and by doing so, this Court will set a precedent affecting the rights of citizens in its jurisdiction.

Supporting the point that Savage, not Janaszak, should control this appeal, Dr. Hiesterman incorporates herein the argument set forth in his Opening Brief of Petitioner at 8-11.

C. The Immunity of RCW 18.130.300(1) Should Not Apply to Administrative Actions Taken Outside of Quasi-Judicial Functions

Dr. Hiesterman incorporates herein the argument set forth in his Opening Brief of Petitioner at 11-14. Furthermore, the Department is incorrect when it asserts that “*Dr. Hiesterman’s reliance on Taggart is misplaced.*” See Respondent’s Br. at 32. While it is true that Taggart does not address RCW 18.130.300, it should be noted that this RCW currently only has two reported Washington cases that cite to it, neither of which are Washington Supreme Court cases. See Janaszak DDS v. State of Washington, et. al., 173 Wash. App. 703, 297 P.3d 723 (2013); Dutton v. Washington Physicians Health Program, 87 Wash. App. 614, 943 P.2d 298 (1997). Therefore, an interpretation of RCW 18.130.300 is far from being well established, settled law. Despite the Janaszak court’s unconstitutional holding, the court’s analogy to quasi-judicial immunity was a reasonable place to start an analysis of RCW 18.130.300, given the similar policy considerations involved. See *id.* at 719, 297 P.3d at 732. Therefore, the Taggart analysis in Opening Brief of Petitioner is on point because the central policy consideration in Taggart is that where an

immunity exists to preserve the integrity of a decision-making process, such immunity should not extend to actions taken after the conclusion of the decision. See Taggart v. State, 118 Wash. 2d 195, 212–13, 822 P.2d 243, 251–52 (1992). Here, because the Department’s false reports occurred outside the decision-making process regarding Dr. Hiesterman, the immunity of RCW 18.130.300 should not be extended to making those reports, regardless of whether they are “official acts.” Therefore, this Court should reverse the trial court’s summary judgment ruling.

D. The Department is Not Entitled to Quasi-Judicial Immunity for Administrative Actions Taken Outside of a Decision-Making Proceeding

For the reasons stated above in Section C of this brief, as well as the argument set forth in Opening Brief of Petitioner at 11-14, the Department is not entitled to quasi-judicial immunity for negligent reporting practices occurring outside a quasi-judicial decision-making proceeding.

E. The Statements in Doctor Hiesterman’s Declaration Were Admissible

None of the statements in Dr. Hiesterman’s Declaration in Opposition to the Department’s Motion for Summary Judgment were inadmissible for being speculative or conclusory. See CP 200-201.

Furthermore, the email in Exhibit I of that Declaration is properly authenticated. See CP 234.

First, the statements in question in the Declaration are based on personal knowledge. The Department argues that paragraphs 25, 26, and 31 of the Declaration lack personal knowledge and are therefore speculative and conclusory in violation of CR 56(e) and ER 602. Respondent's Br. at 38-40. However, CR 56(e) provides in relevant part: "*[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.*" ER 602 provides in relevant part: "*[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.*" Here, Dr. Hiesterman made testimony under oath in his Declaration as to the truth of the records attached therein. CP 197-201. That is all that CR 56(e) and ER 602 require.

Furthermore, Dr. Hiesterman had personal knowledge regarding the emails of Mr. Coffell and Ms. Patzak which demonstrated how the Department's negligent reporting directly affected his career. Contrary to how the Department characterizes the substance of these emails, see

Respondent's Br. at 38-40, the facts are plain that both Mr. Coffell and Ms. Patzak told Dr. Hiesterman that the reason they would not hire him was the (false) reporting of DUI convictions on the Department website, see CP 232, 234. Specifically, Mr. Coffell stated, "*I did remove you from active status as of October 2015. I reviewed the DOH public website ... and as of now we are not willing to offer you a[n] employed locum assignment.*" CP 232. Mr. Coffell could not have been clearer as to why he would no longer employ Dr. Hiesterman. Therefore, this Court should find that Dr. Hiesterman had personal knowledge and that the statements in his Declaration are not speculative or conclusory.

Lastly, Exhibit I is properly authenticated. The Department asserts that Exhibit I "*lacks proper authenticity because it is an undated email and therefore is not admissible. See ER 901.*" Respondent's Br. at 40. However, nowhere in ER 901 does the rule require an email to be dated. Rather, ER 901(b)(1) provides that a record may be authenticated by "*[t]estimony that a matter is what it is claimed to be.*" Dr. Hiesterman provided such testimony in his declaration. See CP 197-201. Furthermore, ER 901(b)(10) provides:

Electronic Mail (E-mail). Testimony by a person with knowledge that (i) the email purports to be authored or created by the particular sender or the sender's agent; (ii) the email purports to be sent from an e-mail address associated with the particular sender or the sender's agent;

and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

All of the foregoing conditions are satisfied by Dr. Hiesterman's Declaration. Not only did Dr. Hiesterman authenticate the email by testimony, but the appearance, contents, and substance of the email leave no doubt as to the identity of the sender and the truth of the contents therein. Therefore, this Court should find that the email does not lack authentication under ER 901.

V. CONCLUSION

Considering the facts and law stated herein, this Court should reverse the lower court's granting of summary judgment to the Department 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 25th day of September, 2020,

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CERTIFICATE OF SERVICE

I HEREBY certify that on the 25th day of September, 2020, I caused to be served a true and correct copy of the foregoing document to the following on the Respondents/Cross-Appellants via counsel of record using the Washington State Appellate Courts' Portal:

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September 25, 2020 - 1:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54171-8
Appellate Court Case Title: Mark A. Hiesterman, Appellant/Cross-Res v. WA State Dept. of Health,
Respondent/Cross-App
Superior Court Case Number: 18-2-03884-4

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