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

MARK ANDREW HIESTERMAN,

Appellant/Cross-Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH,

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT'S BRIEF

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I. INTRODUCTION

Washington law expressly provides immunity for official acts done related to the disciplinary proceedings. Because Dr. Hiesterman seeks to hold the State liable for the legally required reporting of a disciplinary proceeding, the trial court correctly concluded the State is immune and granted the State's motion for summary judgment.

For the first time on appeal, Dr. Hiesterman challenges the summary judgment order by raising new issues under article I, section 8, and article II, section 26 of the Washington Constitution. Neither unpreserved claim of constitutional error is "manifest" and this Court should refuse to consider them under RAP 2.5(a)(3). Notwithstanding, this Court should also affirm the trial court's order because, contrary to Dr. Hiesterman's contentions, RCW 18.130.300(1) neither creates an irrevocable immunity in violation of article I, section 8, nor does its application to the Department violate article II, section 26. Moreover, the trial court did not err in following *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013), because that opinion was correctly decided and is consistent with Washington law.

In addition, Dr. Hiesterman wrongly contends that RCW 18.130.300(1) does not protect the Department's reporting actions. That argument is unsupported by the plain language of the statute, which immunizes "other official acts performed in the course of their duties," and

should be rejected by this Court. Further, the order granting summary judgment may be affirmed for the alternative reason that the Department's conduct is protected by the doctrine of quasi-judicial immunity.

Finally, the Department has also cross-appealed from the trial court's consideration, over the Department's objections, of certain inadmissible evidence contained in Dr. Hiesterman's declaration. To the extent Dr. Hiesterman invites this Court to consider that inadmissible evidence on appeal, it should decline that invitation and hold that the trial court abused its discretion in not disregarding that evidence.

II. COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Should this Court refuse to consider Dr. Hiesterman's new arguments on appeal under article I, section 8, and article II, section 26, of the Washington Constitution, when he failed to raise and preserve those arguments before the trial court and neither purported constitutional violation is "manifest" so as to allow review under RAP 2.5(a)(3)?

2. Should this Court refuse to consider Dr. Hiesterman's new argument on appeal that *Janaszak*, 173 Wn. App. 703, was wrongly decided when he failed to raise and preserve that argument before the trial court and that argument relates to statutory interpretation and not to any "manifest" constitutional error so as to allow review under RAP 2.5(a)(3)?

3. RCW 18.130.300(1) provides, “The secretary [of the Department], 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.”¹ Should summary judgment for the Department be affirmed when RCW 18.130.300(1) does not create any irrevocable immunity so as to violate article I, section 8 of the Washington Constitution?

4. Should summary judgment for the Department be affirmed when this Court’s recent precedent in *Janaszak* concluded that the immunity in RCW 18.130.300(1) applies to the Department, when the *Janaszak* decision does not violate article II, section 26, of the Washington Constitution, and when *Janaszak* was correctly decided?

5. Should summary judgment for the Department be affirmed when the immunity under RCW 18.130.300(1) broadly applies to “other official acts performed in the course of their duties” so as to include acts taken pursuant to the Department’s reporting obligations?

¹ The full text of RCW 18.130.300 is set forth at Appendix at 1.

6. Should summary judgment for the Department be affirmed for the alternative reason that the Department's reporting of Dr. Hiesterman's discipline is entitled to quasi-judicial immunity?

III. ASSIGNMENT OF ERROR AND ISSUE ON CROSS APPEAL

Did the trial court err in considering certain inadmissible evidence contained in Dr. Hiesterman's declaration and supporting exhibits, including speculative and conclusory statements within the declaration and an unauthenticated exhibit?

IV. COUNTERSTATEMENT OF THE CASE

A. The Department Oversees and Regulates the Quality of Health Care in Washington

The Department, through various regulatory boards, oversees the licensing, competency, and quality of health care delivered by healthcare professionals in order to protect the public health and safety. CP 148;² RCW 18.57.005 (powers and duties of the Board of Osteopathic Medicine and Surgery). The Department provides staff who work on behalf of the various boards and commissions that are authorized to oversee medical professional

² As used herein, "CP" refers to the Clerk's Papers from the Thurston County Superior Court. "SCP" refers to the Clerk's Papers from the Spokane County Superior Court, as the combined Clerk's Papers are not consecutively numbered between the counties.

licensing. CP 149; *see, e.g.*, RCW 18.57 (Osteopathy—Osteopathic medicine and surgery).

The Board of Osteopathic Medicine and Surgery (the Board) oversees the licensing and discipline of osteopathic physicians, such as Dr. Hiesterman. RCW 18.57.003, .005, .011, and .020. It receives complaints, authorizes investigations, and decides how to protect the public when investigations reveal apparent unprofessional conduct or impaired practice. CP 149-50. Its licensing proceedings are governed by RCW 34.05, the state Administrative Procedures Act (APA), and RCW 18.130, the Uniform Disciplinary Act (UDA). RCW 18.57.011 (adopting the UDA), RCW 18.130.100 (adopting the APA). The Board's operations, including the Board's notification obligations to the news media, are coordinated through the Department's staff. CP 150.

When a complaint is submitted to the Board, it is presented to the Case Management Team (the Team). CP 149. The Team determines whether the complaint merits additional investigation and may authorize investigation. *Id.* After the investigation is complete, a member of the Board reviews the investigative file with assistance from an assigned staff attorney, who is a Department employee. *Id.* Following an investigation, the Board hears recommendations on possible actions from the Reviewing Board Member

assigned to the case. *Id.* The Board then selects a course of action, which may include pursuing discipline through a formal Statement of Charges. *Id.*

After a Statement of Charges is issued, the Board is required by law to notify the public through news releases. RCW 18.130.110(2)(c). An assistant attorney general is assigned to oversee the charges and prosecute the case in a disciplinary hearing. CP 150. Depending on the nature of the allegations, hearings are held either before a panel of the Board or before a Presiding Officer acting with the Board's delegated authority. CP 149. Allegations that a licensee cannot practice with reasonable skill and safety to protect to public may be heard before an authorized Presiding Officer. CP 149-50.

After a hearing, the panel or Presiding Officer issues a final order, which imposes whatever sanctions and conditions are deemed appropriate. CP 150; RCW 18.130. Once discipline has been imposed and a final order issued, the Board is again required by law to notify the public by issuing a news release to the media providing information about the discipline. CP 150; RCW 18.130.110(2)(c).

B. The Board Received Complaints Related to Dr. Hiesterman's Ability to Practice With Reasonable Skill and Safety for Patients

In 2013 and 2014, the Board received two complaints regarding Dr. Hiesterman's ability to safely practice medicine. CP 107, 113, 121-22. The complaints related to Dr. Hiesterman's use of alcohol and related driving

offenses in Michigan and Idaho. CP 113, 121. As detailed below, the Board received the second complaint while it undertook a thorough and objective investigation of the first complaint. CP 113-114, 121-22.

1. Dr. Hiesterman was arrested for his second DUI in 2013

In June 2013, Dr. Hiesterman was arrested in Idaho for driving under the influence (DUI). CP 57. It was his second DUI arrest; his first had occurred in Michigan in 2006. *Id.* After his arrest in Idaho, Dr. Hiesterman refused to submit to the breathalyzer test. CP 58. He then pled guilty to DUI in exchange for a withheld judgment with the condition that the charges would be dropped if he met certain community service and alcohol evaluation conditions. CP 58, 118-19.

2. Dr. Hiesterman self-referred to the Washington Physician's Health Program and underwent an evaluation for alcohol dependence

Later, in 2013, a medical staff committee at Dr. Hiesterman's hospital recommended he self-refer to the Washington Physician's Health Program (WPHP). CP 60. WPHP is a voluntary substance abuse and support program, which is under contract with the Department to provide services to at-risk medical professionals. CP 59-60. At WPHP's direction, Dr. Hiesterman underwent lengthy alcohol dependency evaluations through the Betty Ford Center in December 2013. CP 61. The Betty Ford Center recommended Dr. Hiesterman participate in a residential chemical

dependency treatment program designed to address the therapeutic needs of licensed health professionals and concluded that Dr. Hiesterman should not practice medicine until he successfully completed treatment. CP 64-65. Dr. Hiesterman did not agree with this assessment. CP 65.

3. The Board received the first complaint about Dr. Hiesterman

At approximately the same time that Dr. Hiesterman contacted WPHP, the Board received an independent complaint about him. CP 107. That first complaint alleged that Dr. Hiesterman had been arrested and convicted of DUI in both Idaho and Michigan. CP 113. In response to the complaint, the Board requested Dr. Hiesterman provide it with certain information as part of its investigation. CP 113-14. Dr. Hiesterman eventually responded to the Board; he acknowledged that he had twice been arrested for DUI but incorrectly asserted that the Betty Ford Center had determined that he did not meet the criteria for either alcohol dependence or alcohol abuse. CP 118-19.

4. The Board received a second complaint about Dr. Hiesterman

Meanwhile, based on the evaluation from the Betty Ford Center, WPHP imposed a deadline for Dr. Hiesterman to either “make arrangements to enter treatment or complete a reevaluation at an approved facility with expertise in assessing and treating health care providers with

substance use disorders.” CP 109. The day after that deadline passed, Dr. Hiesterman informed WPHP that he was refusing to follow their requirements to stay in compliance with WPHP. *Id.* WPHP notified Dr. Hiesterman several times that if he did not enter treatment or seek a re-evaluation, it would report him to the Board. CP 109, 111. Dr. Hiesterman did not pursue either option. CP 65.

Thereafter, WPHP made its report about Dr. Hiesterman to the Board; this was the second complaint the Board received about Dr. Hiesterman. CP 121-22. In its report, WPHP noted that Dr. Hiesterman had been diagnosed with untreated alcohol dependence and was out of compliance with WPHP’s treatment recommendations. *Id.* Thus, WPHP could not endorse Dr. Hiesterman as fit to practice with appropriate safety to patients. *Id.*

C. The Board Issued a Statement of Charges and Related News Release Concerning Dr. Hiesterman

After conducting a lengthy investigation into the complaints it had received, in May 2014, the Board mailed Dr. Hiesterman a Statement of Allegations and Summary of Evidence against him. CP 125-127. In December 2014, the Board next mailed Dr. Hiesterman a formal Statement of Charges against his license. CP 129-33. In response, Dr. Hiesterman denied a number of the charges and requested a hearing. CP 135-36.

In February 2015, the Department issued a news release as required by RCW 18.130.110(2)(c) announcing the charges against Dr. Hiesterman. CP 144. That news release stated:

In December 2014 the Osteopathic Board charged osteopathic physician **Mark Andrew Hiesterman** (OP60226290) with unprofessional conduct. Hiesterman was convicted of driving while intoxicated in 2006 in Michigan and in 2013 in Idaho. Charges say an alcohol and substance abuse evaluation raised concerns about his ability to practice safely without treatment, abstinence, and recovery. Hiesterman allegedly didn't agree with the assessment and didn't comply with a substance abuse monitoring program's directive to undergo a second evaluation. The substance abuse monitoring program doesn't endorse Hiesterman's ability to practice with appropriate safety to his patients.

Id. (bold in original).

D. After an Administrative Hearing, the Board Suspended Dr. Hiesterman's License and Issued Another Press Release

The administrative hearing requested by Dr. Hiesterman was ultimately held before Health Law Judge Roman Dixon, Jr., on June 5, 2015. CP 54-55. Both the Department and Dr. Hiesterman presented evidence and witness testimony. CP 55-57, 73. Following the hearing, the Board issued an Amended Final Order on December 11, 2015. CP 54-73. In that order, the Board entered the following findings of fact, among others:

- 1.4 In June 2013, [Dr. Hiesterman] was arrested for DUI in the state of Idaho after colliding with a parked car. On this occasion [Dr. Hiesterman] refused to submit to the breathalyzer when requested by law

enforcement. On September 20, 2013, the Respondent pled guilty to DUI in the Second Judicial District of the state of Idaho, Case No. CR 2013-03967. . . .

- 1.18 At the conclusion of its multiple day chemical dependency evaluation, the Betty Ford Center CDE Team met and unanimously concluded that [Dr. Hiesterman] requires 90 days of residential chemical dependency treatment in a program designed to address the therapeutic needs of licensed health professionals. In addition, it was the opinion of the Betty Ford [Center]CDE Team that [Dr. Hiesterman] should refrain from the practice of medicine until he has completed treatment successfully in a WPHP-approved facility and has enrolled in a minimum of five years of therapeutic monitoring program directed by WPHP. . . .
- 1.19 . . . WPHP’s Clinical staff gave [Dr. Hiesterman] an opportunity to seek a second opinion at another WPHP approved evaluation center, to conclusively rule out an active diagnosis of alcohol dependence.
- 1.20 To date, [Dr. Hiesterman] has not provided proof that he has undergone a re-evaluation at a WPHP approved facility.

CP 57, 64-65.

Based on the factual findings, the Board agreed with the Department that Dr. Hiesterman was “unable to practice with reasonable skill and safety as defined in RCW 18.130.170(1).” CP 70. Accordingly, the Board suspended Dr. Hiesterman’s medical license. CP 71. The Board further ordered that Dr. Hiesterman undergo a substance abuse monitoring program prior to filing a petition for reinstatement. CP 71. The order also noted that

it was “subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken it must be reported to the healthcare integrity protection data bank.” CP 74. While Dr. Hiesterman was entitled to appeal the Amended Final Order, he did not. CP 242.

Thereafter, in March 2016, following the requirements of RCW 18.130.110(2)(c), the Department issued a second news release, which reported the disciplinary action taken against Dr. Hiesterman’s license arising out of the two alcohol related offenses and concerns about his ability to safely practice medicine. CP 184-86.³ The release stated:

In October 2015 the Osteopathic Board suspended the osteopathic physician credential of **Mark Andrew Hiesterman** (OP60226290) and ordered him to undergo an evaluation for a substance abuse monitoring program prior to seeking reinstatement. Hiesterman was convicted of driving while intoxicated in 2006 in Michigan and again in 2013 in Idaho. Hiesterman didn’t comply with a directive to undergo an evaluation.

CP 186 (bold in original).

³ In addition, consistent with requirements under federal law, the Department reported the actions taken regarding Dr. Hiesterman’s license to the National Practitioner Data Bank (NPDB). CP 30-32, 264-65. In his Opening Brief, Dr. Hiesterman makes no mention of the Department’s reports to the NPDB and no argument related to those reports; he has thus abandoned his claims based on those reporting activities by the Department. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808-09, 828 P.2d 549 (1992).

E. The Board Reinstated Dr. Hiesterman's License With Conditions, Which Were Ultimately Removed by the Board

After undergoing an additional evaluation agreed to by WPHP, Dr. Hiesterman agreed to the reinstatement of his license, subject to conditions imposed by the Board. CP 97-101. In the Stipulated Findings of Fact, Conclusions of Law, and Agreed Order on Reinstatement, which Dr. Hiesterman *and* his attorney signed, the Department articulated the conditions Dr. Hiesterman would face. *Id.* Most pertinently, Dr. Hiesterman agreed that:

1.5 If the Board accepts this Agreed Order on Reinstatement, it is subject to the federal reporting requirements pursuant to Section 1128E of the Social Security Act and 45 CFR Part 60, RCW 18.130.110, and any other applicable interstate/national reporting requirements. It is a public document and will be available on the Department of Health web site.

CP 97.

An Order issued by the Board on March 22, 2017, removed the conditions on Dr. Hiesterman's license. CP 103-05. The Department then reported the removal of conditions from Dr. Hiesterman's license. CP 31.

F. Procedural History

In September 2017, Dr. Hiesterman filed a Complaint for Damages against the Department in Spokane County Superior Court. SCP 3-9. The next month, Dr. Hiesterman filed an Amended Complaint for Damages. SCP 12-18. Dr. Hiesterman asserted claims of Negligence; Defamation;

Tortious Interference with Business Expectancy; and Invasion of Privacy. SCP 16-17. These claims were premised on, among other things, Dr. Hiesterman's allegations that the Department relayed false information about his alcohol offenses through its issuance of news releases. *See, e.g.*, SCP 15. The Department denied liability and asserted that it was entitled to statutory and common law immunities. SCP 25. The trial court granted the Department's motion to change venue, transferring the case to Thurston County. SCP 28-29.

In May 2019, the Department moved for summary judgment seeking dismissal of all claims. CP 4-28. Among other things, the Department argued that it was absolutely immune from Dr. Hiesterman's lawsuit under RCW 18.130.300(1), and it was also immune from Dr. Hiesterman's lawsuit under the doctrine of quasi-judicial immunity. CP 14-23.

Dr. Hiesterman opposed the motion and argued that, as a matter of statutory interpretation, the Department is not afforded immunity under RCW 18.130.100(1) for administrative acts taken after the licensing suspension decision. *See, e.g.*, CP 241-243. Dr. Hiesterman did not argue that RCW 18.130.300 was unconstitutional. CP 241-243. He was not critical of the *Janaszak* decision in any way; he did not argue that it was unconstitutional. CP 241-243.

In reply, the Department moved to strike paragraphs 25, 26, and 31 of Dr. Hiesterman's declaration, which concerned Dr. Hiesterman's ability to gain employment after the suspension of his license, along with an undated email attached as an exhibit. CP 254-55. The Department argued that (1) those portions of Dr. Hiesterman's declaration were inadmissible due to their speculative and conclusory nature and because they were not made based on Dr. Hiesterman's knowledge, and (2) the email was inadmissible because it was not authenticated. CP 254-55.

Although the trial court disagreed that quasi-judicial immunity applied, it agreed that the Department was immune under RCW 18.130.300(1). RP 13-14. Although the court made no specific oral rulings regarding the Department's motion to strike, the written order indicated that the objectionable evidence had been considered by the court. CP 278-80. The trial court granted the Department's motion for summary judgment and dismissed Dr. Hiesterman's claims with prejudice. CP 280.

Dr. Hiesterman now appeals from the dismissal of his claims. CP 281-86. The Department cross-appeals from the trial court's consideration of inadmissible evidence. CP 289-95.

V. STANDARDS OF REVIEW

A. The Trial Court's Decision to Grant the Department's Motion for Summary Judgment is Reviewed De Novo

Summary judgment is appropriate when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014); CR 56(c). “The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party.” *Christensen v. Grant Cty. Hosp. Dist. 1*, 152 Wn.2d 299, 96 P.3d 957 (2004). This Court may affirm for any reason supported by the record. RAP 2.5(a).

B. The Trial Court's Evidentiary Decisions Are Reviewed for Abuse of Discretion

Appellate courts review evidentiary rulings by the superior court for abuse of discretion. *Univ. of Wash. Med. Ctr. v. Wash. Dep't of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008). A trial court abuses its discretion when the ruling is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A decision is based on untenable grounds or reasons if the trial court applied the wrong legal standard or relied on unsupported facts; it is manifestly

unreasonable if it adopts a view no reasonable person would take. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

VI. ARGUMENT ON APPEAL

This Court should affirm the trial court's order granting the Department's summary judgment motion. The Department's reporting activities are entitled to immunity under RCW 18.130.300(1) and the doctrine of quasi-judicial immunity. Dr. Hiesterman's arguments to the contrary in his opening brief are either procedurally deficient, as they were not preserved in the court below, or substantively fail to establish any errors sufficient to overturn the order.

The first two issues raised by Dr. Hiesterman, that RCW 18.130.300(1) is unconstitutional on its face or as applied to the Department under *Janaszak*, were not appropriately preserved for review because they were never raised to the trial court. Moreover, neither alleged constitutional error is "manifest" and thus Dr. Hiesterman cannot meet the narrow exception under RAP 2.5(a)(3) so as to raise the issues for the first time in this appeal. This Court should refuse to consider them. *See* RAP 2.5(a).

Even if the Court does substantively consider the first two issues, Dr. Hiesterman's arguments fail to establish that the trial court committed any error. First, Dr. Hiesterman has no support for his argument that RCW 18.130.300 is unconstitutional on its face. The constitutional provision he

relies upon, Wash. Const. Art. I, § 8, has no application to the statute because its immunity is not irrevocable by the legislature. Second, this Court's recent holding in *Janaszak*, which recognized the immunity in RCW 18.130.300(1) applies to the Department and State, is consistent with the Washington Constitution, the statute abrogating sovereign immunity, and Washington case law.

Further, Dr. Hiesterman's argument that the immunity in RCW 18.130.300(1) does not apply to the reporting actions of the Department is contrary to a plain reading of the statute and unsupported by the applicable case law. Alternatively, the Department is entitled to quasi-judicial immunity because of the judicial nature of the functions its staff performed related to disciplining Dr. Hiesterman.

A. This Court Should Refuse to Consider Dr. Hiesterman's New and Unpreserved Claims of Error

In his opening brief, Dr. Hiesterman raises two new issues related to article I, section 8, and article II, section 26, of the Washington Constitution that he never raised to the trial court. *Compare* Appellant's Br. at 5-11 with CP 241-43. Under RAP 2.5(a), this Court should refuse to review these new issues on appeal.

RAP 2.5(a) provides, in part:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may

raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

Thus, the general rule under RAP 2.5(a) is that an appellate court may refuse to entertain a claim of error not raised before the trial court. *State v. Grimes*, 165 Wn. App. 172, 267 P.3d 454 (2011).

The underlying policy of the preservation rule is to promote “efficient use of judicial resources.” *Grimes*, 165 Wn. App. at 179. Therefore, “[this] court will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *Id.* (quoting *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988)). The rule derives from the principle that trial counsel and the parties are obligated to seek a remedy to errors as they occur, or shortly thereafter. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

As discussed below, Dr. Hiesterman’s failure to raise his new alleged claims of error to the trial court frustrates the efficient use of judicial resources. This is so because his claims of constitutional error are novel, not “manifest,” the parties had no opportunity to develop a record or briefing on these issues below, and the trial court did not have the opportunity to

avoid the asserted errors. Dr. Hiesterman should not be allowed to raise them at this juncture.

1. Dr. Hiesterman never argued to the trial court that RCW 18.130.300(1) is unconstitutional on its face under article I, section 8

In addressing the absolute immunity argument under RCW 18.130.300(1) to the trial court, it is undisputed that Dr. Hiesterman never argued that that statute is unconstitutional on its face under article I, section 8. Instead, in his response, Dr. Hiesterman argued that RCW 18.130.300(1) only serves to immunize judicial actions such as, in this case, the decision to suspend Dr. Hiesterman's license. CP 242-43. He argued it did not extend to protect the reporting actions and the alleged misrepresentation that Dr. Hiesterman had been convicted of a DUI. CP 242-43. Simply stated, Dr. Hiesterman had an opportunity to raise the constitutional issue under article I, section 8, to the trial court but failed to do so. As such, neither the parties nor the trial court ever had an opportunity to address the issue. Therefore, unless an exception under RAP 2.5(a) applies, this Court should act within its discretionary authority and refuse to address the argument that RCW 18.130.300(1) is unconstitutional on its face.

2. Dr. Hiesterman never argued to the trial court that *Janaszak* violates article II, section 26, or was wrongly decided

This second issue raised by Dr. Hiesterman actually raises two sub-arguments, neither of which were raised to the trial court. First, Dr. Hiesterman never argued that *Janaszak* was unconstitutional for any reason, let alone under article II, section 26, because it recognized that the immunity in RCW 18.130.300(1) applied the Department. Second, Dr. Hiesterman never argued that *Janaszak* violated the abrogation of sovereign immunity in RCW 4.92.090 or was otherwise wrongly decided in any way. Rather, Dr. Hiesterman attempted to distinguish *Janaszak* and argued it did not control in this case. CP 241-43.

Dr. Hiesterman had an opportunity before the trial court to argue that *Janaszak*'s interpretation of RCW 18.130.300(1) was unconstitutional and wrongly decided. He did not do so. Therefore, neither the parties nor the trial court was ever presented with the opportunity to consider whether *Janaszak* was unconstitutional or whether its' holding applying immunity to the Department should be questioned. Thus, unless an exception under RAP 2.5(a) applies, this Court should act within its discretionary authority and refuse to address Dr. Hiesterman's new arguments that *Janaszak* was unconstitutional and wrongly decided.

3. Because Dr. Hiesterman fails to raise a “manifest” constitutional error, this Court should refuse to review his new claims of error on appeal

To the extent that Dr. Hiesterman may argue that the exception under RAP 2.5(a)(3) applies so as to allow this Court to review his unpreserved claims of error, he is mistaken. To raise an error for the first time on appeal under RAP 2.5(a)(3), an appellant must demonstrate that (1) the error is “manifest,” and (2) the error is truly of constitutional dimension. *O’Hara*, 167 Wn.2d at 98.

An error is “manifest” when it is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” *State v. Lynn*, 67 Wn. App. 339, 835 P.2d 251 (1992). The manifest error exception does not afford a means for obtaining a new trial whenever the party asserting it can identify a constitutional issue not preserved below. *Grimes*, 165 Wn. App. at 180. Dr. Hiesterman has not demonstrated a manifest error truly of constitutional dimension here.

First, Dr. Hiesterman points to no authority and engages in no textual analysis to demonstrate any error under article I, section 8, let alone an unmistakable error. Indeed, his claim of error raises an issue of first impression under an obscure and seldom cited constitutional provision. Thus, the asserted error is not “manifest.”

Second, Dr. Hiesterman’s complaints related to this Court’s holding in *Janaszak* relate to issues of statutory interpretation, such as the interplay between RCW 18.130.300(1) and RCW 4.92.090, and are not truly constitutional in dimension. Further, because Dr. Hiesterman essentially reargues contentions previously rejected by the court in *Janaszak*, he fails to demonstrate any indisputable constitutional error by this court when it recognized that the immunity in RCW 18.130.300(1) applies to the Department. *Compare* Appellant’s Br. at 9-10 with 173 Wn. App. at 717-19. Thus, the asserted error under article II, section 26, is not “manifest.” Because the exception to RAP 2.5(a) has not been triggered, this Court should refuse to consider the new claims of error raised by Dr. Hiesterman on appeal.

B. Even If This Court Considers the Newly Alleged Constitutional Errors, Neither Supports Reversing Summary Judgment

Notwithstanding that Dr. Hiesterman failed to preserve the first two issues, the Court should still uphold the order granting summary judgment if it substantively considers these issues.

1. RCW 18.130.300(1) does not violate article I, section 8, of the Washington Constitution

RCW 18.130.300(1) is consistent with article I, section 8. In order to satisfy the heavy burden of establishing that a statute is unconstitutional, Dr. Hiesterman must, “by argument and research, convince the court that

there is no reasonable doubt that the statute violates the constitution.” *Island Cty. v. State*, 13 Wn.2d 141, 147, 955 P.2d 377 (1998). Dr. Hiesterman’s conclusory argument falls far short of meeting this burden.

RCW 18.130.300, in its entirety, states:

(1) The secretary [of the Department], 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 disciplinary 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.

App. at 1. Article I, section 8, of the Washington Constitution provides that “[n]o law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.” App. at 2.

Here, without any authority, Dr. Hiesterman baldly states that RCW 18.130.300 “grants irrevocable immunity to state actors, which denies wronged plaintiffs any recourse for negligent acts committed under color of state law.” Appellant’s Br. at 6. Dr. Hiesterman refers to no case law or other authority addressing the application of article I, section 8. *Id.* Indeed, the Department is aware of few decisions in which Washington appellate courts have addressed article I, section 8. *See Pub. Util. Dist. 1 of Snohomish Cty. v. Taxpayers & Ratepayers of Snohomish Cty.*, 78 Wn.2d

724, 756, 479 P.2d 61 (1971) (Hale, J., dissenting); *State v. Inland Forwarding Corp.*, 164 Wash. 412, 425-26, 2 P.2d 888 (1931).

When interpreting constitutional provisions, this Court looks to the plain language of the text, giving the words of the text their common and ordinary meaning as understood at the time of drafting. *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). Based on its plain language, article I, section 8, unambiguously applies to laws “passed by the legislature” that provide “irrevocably” “any . . . immunity.” There is no dispute that RCW 18.130.300 was passed by the legislature. *See* Laws of 1998, ch. 132 § 11. Assuming that this is an “immunity” within the meaning of article I, section 8, the question is whether that immunity is irrevocable, as contemplated by article I, section 8. It is not.

Nothing about the text of RCW 18.130.300 suggests that the immunity it provides in subsection (1) is irrevocable. To the contrary, the legislature is free to amend, revoke, or repeal RCW 18.130.300(1). Dr. Hiesterman asserts no argument to the contrary.

The authority relied on by Dr. Hiesterman does not support his argument. Rather, Dr. Hiesterman conflates an immunity that is absolute with one that is irrevocable and therefore unconstitutional. *See* Appellant’s Br. at 8. To support his argument, Dr. Hiesterman cites to the *Lutheran Day Care* and *Butz* cases. *See Id.* However, neither case addresses whether RCW

18.130.300(1), let alone any other immunity statute, is irrevocable or unconstitutional under article I, section 8. Rather, both decisions conclude that absolute immunity may be appropriate in limited circumstances. *See Lutheran Day Care v. Snohomish Cty.*, 119 Wn.2d 91, 105-06, 829 P.2d 746 (1992) (holding courts will impose absolute immunity “only when a person claiming absolute immunity can prove that such immunity is justified”); *Butz v. Economou*, 438 U.S. 478, 506 (1978) (holding “federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope”).

This Court should conclude that RCW 18.130.300 is not unconstitutional on its face and, more specifically, that it does not violate article I, section 8. The immunity afforded by the statute is absolute, not irrevocable by the legislature.

2. By recognizing that the immunity in RCW 18.130.300(1) applies to the Department, *Janaszak* did not violate article II, section 26, and was correctly decided

The trial court did not err in following *Janaszak* and applying the absolute immunity in RCW 18.130.300(1) to the Department. *Janaszak* was correctly decided and its interpretation of RCW 18.130.300(1) does not violate article II, section 26.

Article II, section 26, of the Washington Constitution states: “The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” App. at 3. Pursuant to that authority, the legislature enacted RCW 4.92.090, which served to abolish sovereign immunity in Washington. That statute provides that “[t]he state of Washington, whether acting in its government 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.” RCW 4.92.090.

In *Janaszak*, the court interpreted RCW 18.130.300(1), and determined that “the absolute immunity of RCW 18.130.300 extends to the State and the Department.” *Janaszak*, 173 Wn. App. at 719.

Dr. Hiesterman contends that the *Janaszak* court “ignored” article II, section 26, and RCW 4.92.090 when it reached that holding. Appellant’s Br. at 9. He is mistaken as the court specifically discussed both provisions when embarking on its task of interpreting RCW 18.130.300(1). *See Janaszak*, 173 Wn. App. at 712-14.

There was nothing unusual, or unconstitutional, about the court’s statutory interpretation of RCW 18.130.300(1) in *Janaszak*. The court sought to give effect to the legislature’s intent by considering the greater statutory context and the public policy supporting the immunity. *Id.* at 717-19. Moreover, the *Janaszak* decision interpretation of RCW 18.130.300(1)

is consistent with RCW 4.92.090. While the Legislature abolished sovereign immunity through enactment of RCW 4.92.090, Washington courts have held that the State can still place limitations on the right to sue the State. *Eugster v. City of Spokane*, 115 Wn. App. 740, 750, 63 P.3d 841 (2003).

To support his position that the absolute immunity in RCW 18.130.300(1) does not apply to the State and the Department, Dr. Hiesterman, like the plaintiff in *Janaszak*, relies on *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995). See Appellant's Br. at 9-10; *Janaszak*, 173 Wn. App. at 717. *Savage* is inapposite and does not apply here.

The Court in *Savage* concluded that the personal qualified immunity of a parole officer announced in *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), should not be extended to the State. *Savage*, 127 Wn.2d at 447. However, the *Savage* decision was narrow; it applied to a qualified immunity announced at common law, not an absolute immunity under a statute.

Notably, the *Janaszak* case, which was published 17 years after *Savage*, explicitly addressed *Savage* and distinguished it:

Janaszak argues that even if the individual actors are entitled to immunity, because neither RCW 18.130.300 nor RCW 18.32.0357 expressly grants immunity to the State or the Department, both should still be liable. He claims that our Supreme Court's decision in *Savage v. State* indicates that a

government official's personal immunity cannot transfer to the State. Janaszak reads *Savage* too broadly. In *Savage*, the court expressly cautioned against the application of an immunity decision in one context to another without an analysis of the policies implicated in each context. An analysis of the circumstances in which the immunities provided by RCW 18.130.300 and RCW 18.32.0357 operate demonstrates that these immunities should extend to the State and the Department.

Janaszak, 173 Wn. App. at 717 (footnotes omitted).

The Court then looked to public policy and cases addressing the extension of prosecutorial and judicial immunity for guidance. *Id.* at 718-19. In looking to this authority, the Court concluded that prosecutorial immunity is not provided to protect the individual official “but for the protection of the public and to insure active and independent action of the officers charged with the prosecution of crime, for the protection of life and property.” *Id.* at 718 (quoting *Creelman v. Svenning*, 67 Wn.2d 882, 884, 410 P.2d 606 (1966) (quoting *Anderson v. Manley*, 181 Wash. 327, 331, 43 P.2d 39 (1935))). Similarly, the Court recognized that judicial immunity “does not exist for the benefit of the individual judge “but exists to protect the administration of justice by ensuring that judges can decide cases without fear of personal lawsuits.”” *Id.* at 719 (quoting *Lallas v. Skagit Cty*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009)). Both types of immunities extend to the State and the entities employing the prosecutor or judicial officer. *Id.* Thus, the *Janaszak* court concluded that the absolute immunity

of RCW 18.130.300(1) applies to protect the State and the Department because, “analogous to the immunity afforded to prosecutors and judges,” immunity under RCW 18.130.300 exists to protect, not individuals, but the integrity of a uniform disciplinary process for health care professions. *Id.*

Finally, one of the cases relied on by the court in *Janaszak* is instructive here. In *Creelman*, the plaintiff, like Dr. Hiesterman, argued that quasi-judicial immunity for prosecutors did not extend to the State and the county in light of the abrogation of sovereign immunity. *Id.* at 885. The Supreme Court rejected that argument because “the 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.” *Id.*

In sum, the *Janaszak* decision does not violate the Washington Constitution and RCW 4.92.090 as Dr. Hiesterman contends.

C. Summary Judgment Should be Affirmed Because RCW 18.130.300(1) Applies to the Department’s Official Reporting Actions Taken During and After Disciplinary Proceedings

The immunity in RCW 18.130.300 broadly applies to “any disciplinary proceedings or other official acts” conducted by the Board or the Department acting on its behalf “in the course of their duties.” Such “official acts” include the Board’s legally required reporting to the public of the disciplinary actions taken against a physician’s license.

Specifically, RCW 18.130.110(2)(c) provides that the disciplining authority, here the Board, “*shall* report the issuance of statements of charges and final orders in cases processed by the disciplining authority to . . . the public.” (Emphasis added.) Further, “notification of the public *shall* include press releases to appropriate local news media and the major news wire services.” *Id.* (emphasis added).

The news releases issued by the Department on behalf of the Board related to the Statement of Charges against Dr. Hiesterman and the order suspending his license were thus “official acts” performed in the course of the Board’s required duties under RCW 18.130.110(2)(c). *See* CP 144, 186. The same is true for the information about Dr. Hiesterman’s suspension and the reinstatement of his license with conditions that the Department made publically available through its web site. The trial court correctly determined the Department was immune from suit related to those reports.

Ironically, Dr. Hiesterman relies on *Janaszak* for his argument that the immunity in RCW 18.130.300 should not apply to the Department’s reporting actions that followed the disciplinary decision. Appellant’s Br. at 11-13. Specifically, Dr. Hiesterman alleges that, “immunity should not apply to administrative actions at the conclusion of judicial action” because the purpose of immunity afforded by RCW 18.130.300 is for the protection of the administration of justice without fear of lawsuits. *Id.* at 13. Dr.

Hiesterman misconstrues *Janaszak* in an attempt to limit its application to this case.

Janaszak is actually directly on point and instructive, for it involved reporting actions by the Dental Quality Assurance Commission (DQAC), including a published notice on the Department's web site, following the investigation and disciplinary decision of a dentist. 173 Wn. App. at 709-10. Among other things, the plaintiff alleged the Department's investigator colluded with the complainants to falsely accuse him of misconduct. 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. RCW 18.130.300 therefore protected the defendants from the dentist's UDA and negligence claims. *Id.* at 715, 717, 726. This Court should reach the same conclusion in this case related to the reporting activities of the Department.

Finally, Dr. Hiesterman's reliance on *Taggart* is misplaced. *Taggart* held that supervisory or administrative acts of a parole officer are not protected by quasi-judicial immunity but that acts enforcing the conditions of parole or providing the Board with a report to assist the Board in

determining whether to grant parole are protected. 118 Wn.2d at 213. First, *Taggart* did not address RCW 18.130.300, which does not distinguish between administrative or other types of official acts. Second, the administrative acts of the parole officers in *Taggart* which were not protected – i.e., those related to their supervisory function – are not analogous to the acts of the Board or the Department in fulfilling their reporting and enforcement duties.

In sum, Dr. Hiesterman wrongly contends that the reporting actions by the Department related to Dr. Hiesterman’s discipline are not covered by RCW 18.130.300. The plain language of that statute broadly applies its immunity to all “officials acts” conducted by the Department acting on behalf of the Board, which encompasses the statutorily-required reporting actions at issue in this case. The trial court did not err in granting the Department summary judgment and its holding was consistent with *Janaszak* and other authority. Summary judgment should be affirmed.

D. In the Alternative, This Court Should Affirm Summary Judgment Because the Department Is Entitled to Quasi-Judicial Immunity

In the alternative, if this Court determines that RCW 18.130.300(1) does not immunize the Department, then it should nonetheless affirm summary judgment based on the Department’s quasi-judicial immunity. Dr. Hiesterman does not address this issue because he claims the trial court

orally concluded that quasi-judicial immunity does not apply. App. Br. at 5. The written order, however, simply states that the Motion for Summary Judgment was granted and the claims against the Department were dismissed with prejudice. CP 295.

A trial court's written order controls over its earlier oral rulings. *State v. Sims*, 193 Wn.2d 86, 99, 441 P.3d 262 (2019). In addition, this Court may affirm for any reason supported by the record. RAP 2.5(a). "A determination of a trial court will be sustained on any proper basis within the record; it will not be reversed merely because the trial court gave wrong or insufficient reason for its rendition." *State v. Henderson*, 34 Wn. App. 865, 870-71, 664 P.2d 1291 (1983). As such, this Court should also affirm the summary judgment order because the Department's reporting of the disciplinary action taken against Dr. Hiesterman is protected by quasi-judicial immunity.

Washington courts have consistently ruled that officials who perform functions similar to those performed by judges are entitled to immunity, as are individuals acting on their behalf. *See, e.g., Lutheran Day Care v. Snohomish Cty.*, 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.” As such, quasi-judicial immunity extends to the State and its departments. *Creelman*, 67 Wn.2d at 188.

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*, 118 Wn.2d at 204 (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 v. WA Physicians Health Program*, 87 Wn. App. 614, 618-19, 943 P.2d 298 (1997) (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 acts of the administrative body to traditional judicial functions. *Taggart*, 118 Wn.2d at 204-05. Courts analyze several factors in making that comparison: “[W]hether 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.

As noted in *Taggart*, acts taken to enforce conditions imposed by the adjudicative body are protected by quasi-judicial immunity: “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.” *Id.* at 213. Similarly, in *Barr*, the court granted quasi-judicial immunity to a guardian ad litem (GAL) who recommended approval of a settlement while acting on behalf of an incompetent claimant. 124 Wn.2d at 321. The Court looked to the statutory duties placed on GALs and determined that GALs act as “surrogates of the court” when performing those duties. *Id.* at 332.

Here, the Department is entitled to quasi-judicial immunity because of the judicial nature of the functions its staff performed related to disciplining Dr. Hiesterman and then enforcing that discipline by fulfilling the Board’s reporting obligations. *See* RCW 18.130. By statute, the UDA applies to disciplinary proceedings involving osteopaths. RCW 18.57.011. In proceedings under the UDA and the APA, RCW 34.05 governs all

hearings before the disciplining authority—here, the Board—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, such as here, the Board must issue written findings of fact, which it did. *See* RCW 18.130.110(1); CP 54-73. The Board 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, the Board is responsible for determining whether a licensee has complied with the requirements of a disciplinary order. *See* RCW 18.130.150 (regarding reinstatement).

More specifically, the Department’s reporting functions are also quasi-judicial functions. Similar to the GALs in *Barr*, the Department acted according to a statutory mandate when it reported the disciplinary actions taken against Dr. Hiesterman to the public. *See* RCW 18.130.110(2)(c). Further, the order suspending Dr. Hiesterman’s license also stated that it was “subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken it must be reported to the healthcare integrity protection data bank.” CP 74. By issuing the news

release of his license's suspension, the Department was acting to enforce that order. *See Taggart*, 118 Wn.2d at 213. The same is true related to reporting the subsequent reinstatement of his license with conditions, as that order also stated that it was subject to reporting requirements and would be made publically available on the Department's web site. *See CP 97*.

In sum, the Board's investigation of Dr. Hiesterman's behavior as a licensed physician, its actions in suspending his license and then reinstating it with conditions, and the Department's conduct in reporting those events, are all entitled to quasi-judicial immunity. Summary judgment in favor of the Department should be affirmed for this alternative reason.

VII. ARGUMENT ON CROSS-APPEAL

If this Court affirms summary judgment on any of the prior bases, it is unnecessary to address this argument on cross-appeal.

As this Court is well-aware aware, only admissible evidence may be considered on summary judgment. *King Cty. Fire Prot. Dist. 16, 36, & 40 v. Hous. Auth. of King Cty.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Here, however, Dr. Hiesterman submitted a declaration in support of his opposition to the Department's Motion for Summary Judgment that contained inadmissible speculative and conclusory statements related to his alleged inability to gain employment in the United States after the disciplinary action taken and reported by the Board. CP 254-55 ¶¶ 25-26,

31. In addition, Exhibit I to the declaration lacked proper authenticity. CP 234. Accordingly, the trial court should not have considered this evidence at summary judgment and abused its discretion in doing so.

With respect to Dr. Hiesterman's declaration, the Department moved to strike paragraphs 25, 26, and 31. CP 200-201. Each of these paragraphs contains speculative and purely conclusory statements, not made on the basis of Dr. Hiesterman's personal knowledge in violation of CR 56(e). For example, paragraph 25 references an attached email from Randy Coffell at Mid-Valley Hospital, and Dr. Hiesterman states that, "Mr. Coffell indicated the [news] releases on the DOH website as a reason for not offering me employment." CP 200. However, a plain reading of the attached email indicates that Mr. Coffell never specified that the information contained in the news releases was the reason for not extending the offer. *See* CP 232. As such, this statement is speculative, conclusory and not based on Dr. Hiesterman's personal knowledge in violation of ER 602.

Paragraph 26 references Exhibit I, an undated email from Jessica Patzak, and Dr. Hiesterman surmises that Ms. Patzak informed him "that I could not work due to the 'hit'" I had on the NPDB." CP 200. Again, a plain reading of Exhibit I indicates that Ms. Patzak never made such a statement. *See* CP 234. Accordingly, this statement is also speculative, conclusory and not based on Dr. Hiesterman's personal knowledge in

violation of ER 602. Exhibit I also lacks proper authenticity because it is an undated email and therefore is not admissible. *See* ER 901.

Finally, in paragraph 31 Dr. Hiesterman concludes that, “[t]he incorrect information reported by the Defendant has prevented me from obtaining employment and has caused me to be terminated from employment.” CP 201. This statement is entirely speculative, not based on Dr. Hiesterman’s personal knowledge, and conclusory. *See* ER 602.

For these reasons, this Court should determine that the trial court abused its discretion to the extent it considered this inadmissible evidence.

VIII. CONCLUSION

This Court should affirm the order granting the Department summary judgment and dismissing Dr. Hiesterman’s complaint. Dr. Hiesterman’s appeal is largely procedurally deficient because it raises arguments that were never raised to the trial court and thus not properly preserved in violation of RAP 2.5. Moreover, Dr. Hiesterman has failed to articulate any manifest error affecting his constitutional rights entitling him to the exception under RAP 2.5(a)(3). Even if this Court substantively considers Dr. Hiesterman’s new arguments on appeal, it should conclude that neither requires reversal of the summary judgment order. RCW 18.130.300(1) is constitutional and appropriately applies to the Department. Moreover, the *Janaszak* decision is constitutional and consistent with other

applicable authority. Further, based on its plain language, RCW 18.130.300(1) applies to all official actions of the Board, including its reporting activities. Those activities are also entitled to quasi-judicial immunity.

RESPECTFULLY SUBMITTED this 20th day of July, 2020.

ROBERT W. FERGUSON
Attorney General

s/ Timothy E. Allen

TIMOTHY E. ALLEN
Assistant Attorney General
WSBA #29415

CERTIFICATE OF SERVICE

I hereby certify that I caused service of the foregoing Respondents/Cross-Appellants' Brief, that has been electronically filed with the Court of Appeals Division II, and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

Chad H. Freebourn
Roberts Freebourn
Attorneys for Petitioner

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of July, 2020.

s/ Timothy E. Allen

TIMOTHY E. ALLEN
Assistant Attorney General

APPENDIX

Hiesterman v. State of Washington

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APPENDIX

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RCW 18.130.300

Immunity from liability.

(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.

[**1998 c 132 § 11; 1994 sp.s. c 9 § 605; 1993 c 367 § 10; 1984 c 279 § 21.**]

NOTES:

Finding—Intent—Severability—1998 c 132: See notes following RCW **18.71.0195**.

Severability—Headings and captions not law—Effective date—1994 sp.s. c 9: See RCW **18.79.900** through **18.79.902**.

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 8

§ 8. Irrevocable Privilege, Franchise or Immunity Prohibited

[Currentness](#)

No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

Credits

Adopted 1889.

West's RCWA Const. Art. 1, § 8, WA CONST Art. 1, § 8

Current through amendments approved 11-5-2019

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 2. Legislative Department (Refs & Annos)

West's RCWA Const. Art. 2, § 26

§ 26. Suits Against the State

[Currentness](#)

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

Credits

Adopted 1889.

West's RCWA Const. Art. 2, § 26, WA CONST Art. 2, § 26

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