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SUPREME COURT
STATE OF WASHINGTON

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No. 80787-6

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL S. JONES R.Ph.,

Petitioner,

v.

STATE OF WASHINGTON AND ITS DEPARTMENT OF HEALTH,
WASHINGTON STATE BOARD OF PHARMACY; PHYLLIS WENE;
and STAN JEPPESEN, individually and as investigators for the
Washington State Board of Pharmacy, and DONALD WILLIAMS,
individually and as executive director of the Board of Pharmacy,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

On August 16, 1999, Respondent Donald Williams filed an Ex Parte Motion for Summary Action with the Washington State Board of Pharmacy. At the time, Williams was the executive director of the Board of Pharmacy. His motion sought the summary suspensions of Petitioner Michael Jones' pharmacy license and professional license.

Williams based his motion on two inspection reports on Jones' pharmacy that followed inspections performed on July 12, 1999, and on August 10, 1999, by Respondent Phyllis Wene and Respondent Stan Jeppesen, investigators for the Board of Pharmacy. *See Declaration of Donald Williams, Appendix F to Respondents' Motion for Discretionary Review.* Wene and Jeppesen gave Jones' pharmacy a failing score of 48 for the July 12 inspection and a failing score of 56 for the August 10 inspection.

Jones takes strong exception both to the findings of those inspection reports and to Wene's and Jeppesen's scoring of his pharmacy's deficiencies. Jones' pharmacy had received a passing score of 96 after an inspection by Wene on February 3, 1999 – five months earlier. The condition of Jones' pharmacy did not change between February 3 and July 12. CP 213-215. The only thing that changed was the manner in which the Board of Pharmacy conducted its investigation and scored his

deficiencies. Jones believes that the change was caused in part by reports by a disgruntled former employee who, unbeknownst to Jones, was a confidential informant for the state. Jones also believes that the change was motivated in part by bad feelings among Board of Pharmacy personnel stemming from his past run-ins with the Board. CP 211-216.

On August 16, 1999, Respondent Williams could have filed a Statement of Charges and notified Jones of a hearing before the state Board of Pharmacy to determine how Jones should be disciplined for the deficiencies described in the two inspection reports. At that hearing, Jones would have had the right to be represented by counsel, to call witnesses in his defense, and to cross-examine the state's witnesses. Among the possible sanctions at that hearing would have been the suspension of his licenses. Instead, Williams, along with David Hankins, an assistant attorney general, filed the ex parte motion and sought the immediate suspensions of Jones' licenses and an order closing his pharmacy based on an alleged emergency. Jones strongly disputes that any emergency existed. If, in fact, an emergency existed, Williams should have sought the summary suspension of his licenses and an order closing his pharmacy after the July 12 inspection.

On August 17, a panel of the Board of Pharmacy held the ex parte hearing, granted the motion, and summarily suspended Jones' licenses.

Jones' pharmacy was ordered closed later that same day. On August 31 – two weeks later – Jones' pharmacy franchise was terminated because of the suspension of his licenses. CP 217-20. Jones moved to modify the summary order; the state opposed his motion. Jones petitioned for an expedited hearing on the merits; the state opposed the petition. Jones requested a settlement conference; the state refused to hold a settlement conference. Three days before a hearing was finally to occur on October 21, 1999, the state moved for a continuance. The state's motion for a continuance was granted, and the hearing was reset to December 2, 1999. *See Appendix A, Exhs. 7 through 16.* By then, Jones had lost everything: his franchise, his lease, his customers, his business, and the financial resources to fight the state's charges. CP 217. On January 11, 2000, Jones signed the Stipulated Findings of Fact, Conclusions of Law and Agreed Order, which resulted in the loss of his pharmacy license and a suspension with stay of his professional license for a period of five years.

Jones alleges that Wene and Jeppesen, along with Williams, fabricated an emergency in order to justify the summary suspension of his licenses. Had Jones been given notice and an opportunity to be heard on the false allegations contained in the inspection reports, he would not have lost his franchise, and he would have been able to keep his business open while he fought the false charges. Because there was no emergency, the

summary suspension of Jones' licenses violated his constitutional right to procedural due process. Because Wene and Jeppesen fabricated the emergency, they cannot establish that they are entitled to qualified immunity because they reasonably believed their conduct was lawful.

The Trial Court was correct in denying Respondents' Motion for Summary Judgment on the issues of qualified immunity and exhaustion of administrative remedies. The Court of Appeals was incorrect in its holdings related to those issues. The Court of Appeals decision should be reversed, and the case remanded to the Superior Court for trial on Jones' 42 U.S.C. claims against Wene and Jeppesen, and his state law claim of tortious interference with a business expectancy against Respondents.

II. ARGUMENT

1. **Wene and Jeppesen are not entitled to qualified immunity as a matter of law.**

Government officials are entitled to qualified immunity from liability under § 1983 only if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Courts have developed a two-part test to determine the application of qualified immunity in a particular case.

This standard requires a two-part analysis: (1) whether the law prohibiting the official conduct was clearly

established; and (2) whether a reasonable official could have believed that his conduct complied with the law. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir.1993). If the law prohibiting the conduct was clearly established and a reasonable official could not have believed his conduct lawful, then the official is not immune.

Stivers v. Pierce, 71 F.3d 732, 749 (9th Cir. 1995).

At the time of the incident, Jones had a clearly established constitutional right to a hearing before the state suspended his licenses – absent a public emergency. In the Trial Court Jones presented evidence that Wene, Jeppesen, and Williams fabricated an emergency so as to justify the summary suspension of his licenses. Because Jones presented evidence that the Respondents falsified the inspection reports, manipulated the inspection scoring, and fabricated an emergency, it cannot be said that the Respondents reasonably believed their conduct was lawful.

The Trial Court was correct when it denied Respondents’ Motion for Summary Judgment on the basis of qualified immunity. The Court of Appeals erred when it reversed the Trial Court and granted the Respondents summary judgment on the same basis.

- A. The Court of Appeals clearly erred by suggesting that there could be no procedural due process violation because Jones was afforded post-deprivation process.**

Where the deprivation of rights is the “random and unauthorized act” of a state actor, the due process clause is satisfied by adequate post-

deprivation remedies. *Parratt v. Taylor*, 451 U.S. 527, 541 & 543, 101 S.Ct. 1908, 1916 & 1917, 68 L.Ed.2d 420 (1981). But when the deprivation of rights is the result of a deliberate act or policy of a state actor, a pre-deprivation hearing is required. *Zinerman v. Burch*, 494 U.S. 113, 135-138, 110 S.Ct. 975, 988-90, 108 L.Ed.2d 100 (1990).

We also require no pre-deprivation process where the loss is the result of 'a random and unauthorized act by a state employee,' and there is no showing that post-deprivation procedures for obtaining compensation are inadequate or 'that it was practicable for the State to provide a pre-deprivation hearing.' *Parratt v. Taylor*, 451 U.S. 527, 541 & 543, 101 S.Ct. 1908, 1916 & 1917, 68 L.Ed.2d 420 (1981). It is irrelevant whether the state employee's actions were intentional or reckless. The important question is 'whether the state is in a position to provide for pre-deprivation process.' *Hudson v. Palmer*, 468 U.S. 517, 533-34, 104 S.Ct. 3194, 3203-04, 82 L.Ed.2d 393 (1984).

Parratt does not apply where 'the state has procedures, regulations or statutes designed to control the actions of state officials, and those officials charged with carrying out state policy act under the apparent authority of those directives.' *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir.1985) (en banc). In addition, *Parratt* does not apply where deprivation is predictable, pre-deprivation process is not impossible, and the defendants are specifically charged with the authority to effect the deprivation charged. *Zinerman v. Burch*, 494 U.S. 113, 135-138, 110 S.Ct. 975, 988-90, 108 L.Ed.2d 100 (1990); *Sierra Lake Reserve v. Rocklin*, 938 F.2d 951, 957 (9th Cir.1991), *vacated* 506 U.S. 802, 113 S.Ct. 31, 121 L.Ed.2d 4 (1992), *on remand*, 987 F.2d 662 (9th Cir.1993).

Armendariz v. Penman, 31 F.3d 860, 866 (9th Cir. 1994) (*rev'd on other grounds*, 75 F.3d 1311 (9th Cir. 1996)).

Respondent Williams could have scheduled a hearing on the issue of whether Jones' licenses should be suspended. Had he done so, Jones would have been given an opportunity to be heard before the Board of Pharmacy took action on the matter. Instead, Williams exercised his discretion, as provided by the law and policy, and sought the summary suspension of Jones' licenses. Therefore, this case clearly presents a due process claim governed by *Zinermon v. Burch*, 494 U.S. 113 (1990) – not a problem governed by *Parratt v. Taylor*, 451 U.S. 527 (1981). *See, e.g. Weinberg v. Whatcom County*, 241 F.3d 746, 754 (9th Cir. 2001).¹ The Court of Appeals erred by denying Jones' due process claim based on the fact that post-deprivation remedies were provided. *Jones v. State*, 140 Wn.App. 476, 492-494 (2007).

¹ “When the deprivation of property results from an individual's exercise of duly authorized discretion in the context of an established State procedure, both the foreseeability and the practicability criteria will generally be satisfied. In such circumstances, as the *Zinermon* Court acknowledged, “[a]ny erroneous deprivation” will be foreseeable, because it “will occur, if at all, at a specific, predictable point in the [decision-making] process.” *Id.* at 136-37, 110 S.Ct. 975; *see also Honey v. Distelrath*, 195 F.3d 531, 534 (9th Cir. 1999); *Armendariz v. Penman*, 31 F.3d 860, 866 (9th Cir.1994), *rev'd in part on other grounds en banc*, 75 F.3d 1311, 1318 (9th Cir.1996). A pre-deprivation hearing will also be practicable because the state can alter its established procedure to provide a hearing. *Zinermon*, 494 U.S. at 137, 110 S.Ct. 975.”

B. A fact question about the existence of an emergency precluded the grant of summary judgment on the issue of whether Jones' procedural due process rights were violated.

The relevant exception to the *Zinermon* requirement of a pre-deprivation hearing is the existence of a public emergency. In extraordinary circumstances involving "the necessity of quick action by the State or impracticality of providing any [meaningful] predeprivation process," the government may dispense with the requirement of a hearing prior to the deprivation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436, (1982). In such circumstances, the summary deprivation of rights might not violate due process.

The Court of Appeals held, "Jones failed to raise a material issue of fact or to establish that he was entitled to more process than he received." *Jones, supra*, at 494. This holding was in error. In response to the state's Motion for Summary Judgment, Jones presented ample evidence that, in fact, no emergency existed to justify the summary suspension; by way of example:

- He disputed specific findings of the inspection reports.
- He disputed the scoring of the inspection reports.
- He presented evidence that his pharmacy had passed inspection with a score of 96 on February 3, 1999, and that the condition of his pharmacy had not changed in the intervening five months.
- He presented evidence that his pharmacy was allowed to stay open for five weeks and a day after receiving an initial failing score of 48 on July 12. If an emergency had existed, the Board of

Pharmacy would have sought to close his pharmacy on July 12 – not August 16.

If, as Jones alleges, no emergency existed, then clearly Jones' due process rights were violated by the summary action. The issue of whether an emergency of sufficient magnitude existed so as to justify the summary suspension of Jones' licenses is a fact question. *Weinberg, supra*, at 754². Because the evidence, when viewed in the light most favorable to Jones, raised a fact question about the existence of a public emergency, the Court of Appeals erred when it held that Jones failed to raise a material issue of fact with respect to whether his due process rights were violated.

C. Evidence that Wene, Jeppesen and Williams fabricated the emergency prevented a determination on summary judgment that they were entitled to qualified immunity because they reasonably believed their conduct was lawful.

Jones alleged that Williams, Wene, and Jeppesen fabricated an emergency so as to justify the summary suspension and shut down Jones' pharmacy. In support of this allegation, Jones offered the following evidence in opposition to the Respondents' Motion for Summary Judgment:

² "The County contends that it was not practicable to hold a hearing prior to Bill Florea's issuance of the stop work order and Nathan Brown's expansion of it because swift action was needed due to Weinberg's alleged creation of a soil erosion and water contamination emergency. We agree with the district court that questions of fact remain as to whether a pre-deprivation hearing was required in these circumstances."

- In Jones' twenty years of experience, pharmacies are inspected on average once every two or three years. Such inspections take about an hour to complete and result in minimum disruption to the operation of the pharmacy. CP 213.
- On February 3, 1999, Jones' pharmacy was inspected by Respondent Wene and received a passing score of 96.
- On July 12, 1999, Respondents Wene and Jeppesen arrived at Jones' pharmacy and told Jones they were there to train Jeppesen about inspections – not to inspect the pharmacy. They spent seven hours in the pharmacy, disrupting, harassing, and intimidating Jones. The inspection gave the pharmacy a failing score of 48. Jones testified to numerous errors in the inspection and the scoring. Jones testified that his pharmacy was in better shape on July 12 than it had been on February 3, when it received a passing score of 96. CP 213-214.
- Despite the failing score of 48, Jones' pharmacy was allowed to remain open.
- On August 10, Wene and Jeppesen reinspected the pharmacy and gave Jones a failing score of 56. Jones testified to numerous errors in the second inspection and its scoring. Jones testified that his pharmacy was in greater compliance than other pharmacies he had worked which had received passing scores. CP 214-15.
- Later, Jones would learn that at the time of the inspections, a former employee, Mary Berlin, whom Jones had fired for misconduct, was a state informant. CP 215.
- Jones testified to a prior run in with a Board of Pharmacy investigator that he believed had led to retaliatory disciplinary action by the Board of Pharmacy. CP 215-16.
- Despite the failing score of 56, Jones' pharmacy was allowed to remain open.
- Jones was not told that the condition of his pharmacy constituted an emergency. Instead, Wene told him to answer the written interrogatories which she provided to him.
- On August 16, Williams filed the motion for summary suspension. The summary suspension was based on the inspection reports of Wene and Jeppesen. The hearing on the motion was set for August 17.
- On August 16, Jones' attorney, Bernie Bauman, spoke to Wene about Jones' answers to the interrogatories. Wene agreed to give Jones more time to submit his answers. Wene did not express any sense of urgency or emergency. Wene did not tell Bauman about

the motion for summary suspension. Had Bauman been told about the pending motion, he would have been available to appear in person or by phone. CP 145.

- On August 17, the Board of Pharmacy granted the motion. Jones' licenses were suspended that day. His pharmacy was ordered closed on that day.
- The closure came five weeks and one day after his pharmacy initially received the failing score of 48.
- On August 27, 1999, Jones filed a motion to modify the Ex Parte Order of Summary Action and to stay the summary suspensions pending a hearing on the merits of the allegations contained in the Statement of Charges. *See Petition for Review, Appendix A, Exhs. 7, 8 and 9.* On September 1, 1999, the Department of Health, Board of Pharmacy filed its opposition to Jones's motion for a stay of the summary suspensions. The Department of Health argued, in part, that Jones's motion to modify should be denied because it was moot. The Department's mootness argument was based on the fact that Jones's franchise had been terminated. *Appendix A, Exh. 10.* On September 7, 1999, the Board of Pharmacy denied Jones's motion to modify the summary suspensions of his licenses. *Appendix A, Exh. 11.*
- On September 13, 1999, Jones requested a Petition for Expedited Hearing on the merits of the charges contained in the Statement of Charges. The petition made clear that unless Jones was given an immediate opportunity to have the summary suspensions overturned at a hearing on the merits, he would suffer almost certain financial ruin. *Appendix A, Exh. 12.* On September 21, the Board of Pharmacy opposed Jones' petition for an expedited hearing and proposed instead that the matter be heard on the Board's next regularly scheduled hearing date. *Appendix A, Exh. 13.*
- On September 22, 1999, Jones, through counsel, contacted the Board of Pharmacy and requested an immediate settlement conference on an emergency basis. The reason for this request was that unless Jones could have his professional and pharmacy licenses reinstated immediately through a settlement conference, he faced almost certain financial ruin. *Appendix A, Exh. 14.* The state refused to hold a settlement conference. CP 217.
- On September 29, 1999, the Board of Pharmacy ostensibly granted Jones' motion for an expedited hearing. However, it refused to set a special hearing and instead scheduled the expedited hearing for

the Board's next regularly scheduled hearing date, October 21, 1999. *Appendix A, Exh. 15.*

- On October 18, 1999 – three days before the scheduled hearing – the Board of Pharmacy moved for a continuance of the October 21, 1999, hearing. The Department argued that a continuance was necessary because it intended to file an amendment to the Statement of Charges in order to add additional charges against Jones. Jones opposed the continuance and asked that the hearing go forward as scheduled. The administrative law judge granted the Board's motion and reset the *expedited* hearing for the Board of Pharmacy's next regularly scheduled meeting on December 2, 1999. *Appendix A, Exh. 16.*
- By November 1999, Jones had lost everything. Because of the summary suspensions, the Medicine Shoppe International had terminated his franchise effective immediately on August 31, 1999. CP 217-20. But for the summary suspensions, Jones could have saved his franchise. Because of the summary suspensions, he lost his franchise, lost his commercial lease, and lost his business. CP 217.
- On January 11, 2000, Jones signed the Stipulated Findings of Fact, Conclusions of Law and Agreed Order. Pursuant to the Agreed Order, Jones' pharmacy license was revoked, and Jones' professional license was Suspended with Stay for five years from the date of February 17, 2000. Jones signed the stipulated order because he had already lost his business, and he no longer had the financial wherewithal to fight the Board of Pharmacy's charges.

Had Jones's pharmacy been allowed to stay open while Jones defended himself against the statement of charges, he would not have lost his franchise, he would not have lost his lease, he would not have lost his business, and he would have been able to generate the income necessary to mount a defense against the false charges. In short, the summary suspension effectively destroyed Jones' ability to defend himself.

Wene, Jeppesen and Williams were the officials charged with enforcing the pharmacy rules and regulations. Their inspection reports formed the basis for Williams' motion for summary action. When viewed in the light most favorable to Jones, Jones' allegations clearly raise a fact issue about whether an emergency existed and whether the Respondents fabricated an emergency to drive him out of business. Because of that fact issue on fabrication, it cannot be said that Respondents reasonably believed their conduct was lawful.

Summary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300, 101 S.Ct. 2352, 2372-73, 69 L.Ed.2d 1 (1981); *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 319-20, 29 S.Ct. 101, 105-06, 53 L.Ed. 195 (1908). Government officials need to act promptly and decisively when they perceive an emergency, and therefore, no pre-deprivation process is due. However, the rationale for permitting government officials to act summarily in emergency situations does not apply where the officials know no emergency exists, or where they act with reckless disregard of the actual circumstances. *Sinaloa Lake Owners Ass'n v. Simi Valley*, 882 F.2d 1398, 1406 (9th Cir.1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990).

Armendariz supra, at 866 (emphasis added).

D. The holding of *Hannum* does not provide a shield for Wene and Jeppesen.

Respondents assert that *Hannum v. Friedt.*, 88 Wn.App 881 (1997), stands for the proposition that an investigator's participation in an

investigation cannot give rise to liability under 42 U.S.C. §1983 for violation of procedural due process. This assertion ignores the facts of *Hannum* and overstates its holding.

In *Hannum*, there was no allegation that the charges of wrongdoing brought against Hannum were false or manufactured. Indeed, the charges were apparently initiated after Hannum testified before a federal grand jury investigating odometer tampering. *Id.* at 882. In this case, Jones alleges that numerous statements contained in Wene's and Jeppesen's investigative reports were false, that the scoring of his deficiencies was arbitrary and capricious, and that their investigation was part of a calculated effort to drive him out of business. CP 214-17.

In *Hannum*, the only acts taken by the investigator, Gerrish, in support of the DOL disciplinary action was procuring certified title records for automobiles and interviewing Hannum as part of the federal grand jury investigation.³ There was no allegation that Gerrish himself did anything wrong or that there was anything out of the ordinary about his investigation; Hannum simply objected to the prosecution to which

³ Gerrish, an investigator with the Dealer and Manufacturer Services Division of DOL, was assigned to investigate Hannum's odometer tampering case. Gerrish obtained 152 certified title records from the state of California and obtained the purchasing dealers' wholesale purchase and sale agreements admitted in the administrative hearing. Gerrish also interviewed Hannum in September 1993, on behalf of the Department of Justice, as part of the federal investigation of James Kosta and Jerry Case for odometer tampering.
Hannum, supra, at 889.

Gerrish had contributed. In this case, Jones testified that Wene's and Jeppesen's investigation was extraordinary and that they were guilty of numerous incidents of wrongdoing.

E. Jones' § 1983 claims against Wene and Jeppesen remain viable even though Williams enjoys absolute immunity for filing the Ex Parte Motion for Summary Action.

Jones' First Amended Complaint alleged that Wene, Jeppesen, and Williams participated in a conspiracy to fabricate an emergency to justify the summary suspension of his licenses. In the Trial Court, he offered ample evidence of the conspiracy. Jones does not challenge the Court of Appeals' holding that Respondent Williams is entitled to absolute immunity. However, the fact that Williams is immune does not shield Wene and Jeppesen from liability under § 1983.

Wene and Jeppesen knew that their inspection reports would be used to determine any disciplinary action against Jones' license, including summary suspension. WAC 246-869-190; RCW 34.05.479. Williams, in fact, based the Ex Parte Motion for Summary Action on their inspection reports. Wene and Jeppesen bear responsibility for William's motion because their inspection reports -- which Jones alleged were falsified to fabricate an emergency -- were necessary links in the causal chain of events that led to the summary suspension of Jones' licenses.

Wene and Jeppesen's conspiracy necessarily involved Williams, who was responsible for filing the ex parte motion. Although Williams has absolute immunity from liability for his decision to seek the summary suspension, Williams' absolute immunity does not, in turn, shield Wene and Jeppesen. Under § 1983, the immunity of one co-conspirator (like a prosecutor) does not shield fellow co-conspirators. In other words, there is no derivative immunity under § 1983.

The contention that a conspiracy existed which deprived the petitioner of rights guaranteed by federal law makes each member of the conspiracy potentially liable for the effects of that deprivation. Liability arises from membership in the conspiracy and from traditional notions that a conspirator is vicariously liable for the acts of his co-conspirators. Liability does not arise solely because of the individual's own conduct. Some personal conduct may serve as evidence of membership in the conspiracy, but the individual's actions do not always serve as the exclusive basis for liability. It is therefore not sufficient justification to say that a claim against a particular defendant must be dismissed because that defendant would be immune from liability for his own conduct. Additional inquiry is required to determine whether the immunity extends also to participation in a conspiracy. For example, private individuals may not be held liable under section 1983 for their conduct. See, e. g., *Greco v. Orange Memorial Hospital Corporation*, 513 F.2d 873, 877-78 (5th Cir.), cert. denied, 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975); *Hill v. McClellan*, 490 F.2d 859, 860 (5th Cir. 1974). They may nevertheless be held liable if they conspired with a person who acted under color of state law. *Taylor v. Gibson*, supra, 529 F.2d at 715.

Slavin v. Curry, 574 F.2d 1256, 1263 (5th Cir.1978), *overruled on other grounds*, *Sparks v. Duval County Ran Co., Inc.*, 604 F.2d 976, 978 (5th Cir. 1979) (action for conspiracy may be maintained under 42 U.S. C. § 1983); *see also*, *Richardson v. Fleming*, 651 F.2d 366, 371 (5th Cir.1981); *Williams v. Rhoden*, 629 F.2d 1099, 1102 (5th Cir. 1980); *Turner v. Upton County, Texas*, 915 F.2d 133, 137 (fn.6) (5th Cir. 1990). Wene and Jeppesen bear responsibility for Williams' decision to seek a summary suspension when no emergency existed. Their only possible shield is their own claims of qualified immunity, which, as discussed above, fail because they could not reasonably have believed an emergency existed.

2. Jones did exhaust his administrative remedies.

In addition to the reasons stated in Jones' Petition for Review, the Court of Appeals' ruling on exhaustion was incorrect because Jones did exhaust his administrative remedies. He agreed to a stipulated order that resulted in the loss of his pharmacy license and the probation of his professional license for five years. The stipulated order resolved – and exhausted -- the administrative proceedings.

Respondents allege that allowing Jones to pursue his state law claims “would reward duplicity.” *Answer to Petition for Review*, p. 19. That is nonsense. Nothing in the stipulated order prevented Jones from bringing this lawsuit. Mr. Jones certainly did not think he was releasing

his claims. If the state in fact wanted a release, it should have made that a condition of the stipulated order. To imply such a condition now (through an expansive and ill-conceived interpretation of the exhaustion of remedies doctrine) "would reward incompetency."

III. CONCLUSION

For the reasons stated, the Court of Appeals should be reversed, and the case remanded to the Superior Court for trial on Jones' 42 U.S.C. claims against Wene and Jeppesen and his state law claim of tortious interference with a business expectancy against Respondents.

RESPECTFULLY SUBMITTED this 27th day of October, 2008.

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